

How to Support Transgender Employees who are Transitioning

Transgender people and transition

For someone who is transitioning, having an employer that follows good practice in supporting them through the process can make an important difference to their experience. Where the situation arises, employers need to ensure that they comply with the applicable law and deal with it sensitively. Following good practice will also help to make the transition as smooth as possible for the employee's colleagues and clients.

A transgender (or trans) person is someone who does not identify with the gender assigned to them at birth. The term transgender includes people who have transitioned or are transitioning from their assigned gender to the gender that matches their gender identity, but can also include people who do not intend to undergo transition. Some transgender people identify as "non-binary", i.e. they do not regard their gender identity as exclusively male or female.

Transition, gender reassignment or gender affirmation is the process of transitioning from one gender expression to another, so the person lives permanently and publicly in line with their gender identity. This can involve hormone treatment and/or surgery but some transgender people will transition without medical treatment by, for example, changing their name, clothes and other ways in which they present themselves. If a trans person chooses to have gender affirmation surgery, this will normally be available only after a period of at least one year during which they must live in the gender to which they are transitioning, known as the "real life experience".

This guide focuses on the situation where a transgender employee is transitioning.

The Government Equalities Office has published guidance for employers on [The recruitment and retention of transgender staff](#), which includes guidance on the retention of employees who are considering transition, are transitioning or have transitioned.

The law

Equality Act 2010

The Equality Act 2010 protects employees against less favourable treatment because they are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex. The Act uses the term "transsexual person" to refer to such an employee and refers to the protected characteristic as "gender reassignment". Under the Equality Act 2010, a person is not required to be under medical supervision to be protected from discrimination because of gender reassignment.

Section 16 of the Equality Act 2010 provides that it will be unlawful discrimination for an employer to treat an employee less favourably in relation to their absence because of gender reassignment than the employer would treat the employee if: their absence was for sickness or injury; or their absence were for some other reason, and it was not reasonable for the employee to be treated less favourably.

The Act also protects employees against indirect discrimination and harassment relating to gender reassignment, and victimisation because they have complained of discrimination, supported someone to make a complaint or given evidence in relation to a complaint.

It is likely to be unlawful under the Equality Act 2010 to require an employee to move to a different job on transition. A change of job should happen only at the employee's request, with full agreement between the employee and the employer. Only in very limited cases, where an occupational requirement applies to the job, could it be lawful to require the employee to move job, temporarily or permanently, or to dismiss the employee if no other work was available.

Gender Recognition Act 2004

Individuals who have transitioned are able to apply, under the Gender Recognition Act 2004, for a gender recognition certificate. Individuals with a gender recognition certificate are, for all purposes, of the affirmed gender (referred to as the "acquired gender" in the Act).

Not all transgender people who have transitioned will apply for a gender recognition certificate. There may be personal reasons, such as an existing marriage or civil partnership, why a transgender person has not applied for a certificate. Disclosure of information about the gender history of someone with a gender recognition certificate may be a criminal offence.

General Data Protection Regulation

Employers must take particular care to ensure that they comply with the requirements of the UK General Data Protection Regulation (retained from EU Regulation 2016/679 EU) (UK GDPR), due to the sensitive nature of information about an employee's gender transition. Access to the personal data must be strictly limited to staff for whom it is necessary, and the records must be kept secure.

The employer must ensure that it has a legal basis under the UK GDPR for processing personal data relating to the employee's transition. It must process only the minimum data necessary and retain it for no longer than is necessary for the particular purpose.

Health information is one of the special categories of personal data under the UK GDPR (these are broadly the same as sensitive personal data under the previous Data Protection Act 1998 regime), therefore information about gender transition is likely to be special category data, particularly where the transition involves medical supervision.

An employer can process special category data only where one of the conditions set out in the UK GDPR is met. In the employment context, the most relevant condition is that the processing is necessary for the purposes of performing or exercising employment law obligations or rights. The Data Protection Act 2018, which supplements the provisions of the UK GDPR, allows such processing provided that the employer has in place a policy document that explains how it will comply with the principles of the UK GDPR in relation to the special category personal data and that sets out its policies on retention and erasure of the data.

Appointing a contact person

It is good practice for the employer to appoint a person who will be the principal contact for an employee who is transitioning. This contact person should meet with the employee at an early stage and agree the process for managing the transition at work. This should then be recorded as a written action plan.

If there is an occupational health team, it may be useful for the employer to involve them, with the employee's consent. There may be medical issues related to the employee's transition that could temporarily affect their ability to carry out some types of work. The occupational health team may be able to advise on this.

Agreeing an action plan

The contact person and the transgender employee should set out in writing a plan for managing the transition at work. This plan and any notes from the meeting should be kept strictly confidential in the employee's personnel file. Matters to be addressed in the plan may include:

1 Time off

The employer should keep in mind its duty, under s.16 of the Equality Act 2010, not to treat the employee less favourably in relation to an absence that is because of their transition.

The employee and employer should discuss what time off is likely to be required and when, if known.

The employee may require time off for medical or other treatment. Time off for these purposes should be treated no less favourably than time off for illness or other medical appointments.

Some employees may wish to take a period of leave before returning to work in their affirmed gender. The employee and employer will need to agree whether this is to be part of the employee's normal annual leave entitlement or some form of special leave.

2 Communication with colleagues and clients

The employee and employer should discuss when the employee intends to start presenting in the affirmed gender at work and how and when the people who need to know are to be informed.

The employee and employer need to agree who is to do this. It is good practice for the employer to take responsibility for this, unless the individual would prefer to do so.

The employer and employee should discuss what information is appropriate for managers and work colleagues and how this should be communicated, for example by email or through meetings. Briefings should be completed before the employee begins to attend work in the affirmed gender.

If the employee is to inform work colleagues and clients (if appropriate), the employer needs to know when this is to be done and what is to be said, so that it can provide appropriate support.

If the employer is to inform others, the employee and employer should agree what is to be said about the employee, when and to whom. If the employee is taking a period of leave before returning to work in the affirmed gender, this may be an appropriate time for the briefing to take place.

Work colleagues should be asked to refer to the transgender person by their new name and to use the appropriate pronouns. The employer should try to address quickly any concerns that other employees may have.

The employer should remind employees of its dignity at work policy and that any incidents of bullying or harassment will be dealt with under the organisation's disciplinary procedure.

If there are work colleagues who are still unsympathetic after briefings have been given, the employer should discuss with the transgender employee how they would like the situation to be managed. The employer should take action under its disciplinary procedure if required. For example, if a colleague persists in deliberately referring to a trans man as "she", the employer should take action to address this.

3 Dress codes

If the employee wears a uniform at work, they should be given the new uniform early in the process in order to become comfortable with it. If there is a dress code, the employer and employee should discuss whether or not any flexibility is required during the transition process and, if it is, agree what form this should take and over what time period.

4 Use of single-sex facilities

The employer and employee should agree the point at which the employee will start to use any single-sex facilities such as toilets and changing rooms of their affirmed gender.

This may be the point at which the employee starts to present in the affirmed gender at work.

The employee should not be required to use a disabled toilet as an alternative to single sex facilities but should be allowed to do so if this is their preference.

5 Records and confidentiality

The employer and employee should discuss what changes will be required to records and systems. For example, the employer should update IT and payroll systems and the employee's profile on any intranet and work-related social media.

The employee may wish to have photos updated more than once as they transition, for example on internal and external websites and security passes. It is important that a comprehensive list is drawn up of all necessary changes and that one person has responsibility for checking that they are all carried out at the agreed time.

The employer should inform the employee of the steps that it will take to maintain confidentiality.

Where other people in the organisation need to be aware of the employee's transition in order to make a change to a record, the employer must restrict the information to those who need to know.

The employer should keep records relating to the process of transition only for as long as required.

Once the process of transition has been completed, the employer should destroy any records about the process. It would be good practice for the employer to create a new personnel record, rather than amending old records, to ensure confidentiality.

Any records that the employer needs to keep that relate to the employee's previous gender should be kept confidential, with only specified staff having access to them.

6 Insurance

The employer will need to check with any insurance providers whether or not they need to be made aware of a transgender employee's status. An employee who has transitioned but does not have a gender recognition certificate may be required to disclose their gender history if the employer subsequently registers them under a corporate insurance policy.

Failure to provide the information, if required, can invalidate insurance cover.

The employer must inform the employee if it is necessary to pass on information to a third party. It should explain the reason for processing the information in this way and set out the legal basis for doing so. There may be an obligation to inform insurers in confidence of an employee's transition in relation to some types of group policy, these being:

- group life assurance;
- group permanent health or income protection;
- group private medical insurance;
- group personal accident insurance; and
- group motor vehicle insurance.

7 Pensions

7a State pension

If the employee goes on to obtain a gender recognition certificate, they will be treated according to the affirmed gender for state pension purposes.

If the employee does not obtain a gender recognition certificate, state pension rights will remain in accordance with the sex recorded on their birth certificate.

As there are currently different state pension ages for men and women, a transgender woman without a gender recognition certificate who works beyond the applicable state pension age can make separate arrangements for the payment of national insurance contributions so as to retain her privacy in the workplace.

7b Occupational pension

If the scheme was not contracted out, it is for the scheme to decide how to treat any non-contracted out rights accrued before 17 May 1990.

Occupational pension schemes have been required to provide equal overall scheme benefits for men and women since this date.

If the scheme was contracted out, any guaranteed minimum pension rights that a person has built up between 1978 and 1997 will have been worked out on the basis of their birth gender and the amount of accrued guaranteed minimum pension will not be affected by gender transition, whether or not the person obtains a gender recognition certificate. Rights for men and women have built up at the same rate since 1997. It is up to the scheme to decide how to treat any rights over and above the contracted-out rights in respect of pensionable service before 17 May 1990.

One option is for people to be treated as having their birth gender up to the point of transition, i.e. the point when they start to live fully in the affirmed gender, and as having their affirmed gender from the point of transition.

In some cases, it is considered administratively convenient, with the agreement of the transgender person, to treat them as having the affirmed gender for the entire duration of the pension contribution history.

If survivor's benefits are limited under the scheme rules to spouses or registered civil partners, survivor's benefits for a transgender employee will depend on the marriage relationship or civil partnership status of the employee. If trustees have discretion to make provision for other survivors, this discretion must not be operated in a way that discriminates on grounds of gender transition.