Toby’s Law: Ontario Bans Gender Identity Discrimination



By Glenn Demby

The most significant trend in human rights law is the emergence of a new form of employment discrimination: gender identity discrimination. This spring, Ontario became the most recent province to ban this kind of discrimination. Here’s an overview of gender identity discrimination and the state of gender identity discrimination law in Canada right now.

What Is Gender Identity Discrimination?

Gender discrimination means adverse treatment on the basis of being a male or female; sexual preference discrimination is adverse treatment on the basis of the gender individuals prefer to have sex with. Gender identity refers to the individual’s sense of *being* a man or woman, regardless of how they were equipped by nature. There are 2 kinds of individuals in this category:

1. Transgendered individuals are uncomfortable with or have doubts about the gender they were biologically assigned. Transgendered individuals may or may not undergo hormone treatment or gender change surgery.

2. Transsexuals have a strong and enduring feeling that they were born into the wrong sex. The term “transsexual” is typically associated with people who’ve had gender alteration surgery or hormonal transition without the surgery.

The State of Transgender Discrimination Law in Canada

Discriminating against job applicants and employees because of their sex or sexual preferences is expressly banned in all 10 provinces, 3 territories and under federal human rights laws. But protection against gender and sexual preference discrimination doesn’t necessarily extend to this group. That’s why several jurisdictions have moved to change their law.

On June 17, 2012, Ontario became the third jurisdiction in Canada to add gender identity protection to its human rights act—Manitoba and Northwest Territories are the other 2. The new Ontario law, known as “Toby’s Law,” goes farther in protecting not just “gender identity” but “gender expression,” i.e., the clothing, hairstyle, voice, body characteristics and other methods individuals use to express their gender identity.

In addition:

- 2 jurisdictions, Federal (Bill C-389) and BC, have proposed but not yet adopted bills that would outlaw gender identity and gender expression discrimination;
- At least 1 jurisdiction, Saskatchewan, has issued government guidance stating that it interprets *current laws* banning gender discrimination as applying to gender identity;
- In the U.S., the federal Equal Employment Opportunity Commission (EEOC) recently issued a ruling interpreting the ban on sex discrimination as applying to transgendered individuals.

In short, protection against transgender discrimination is the way of the future and don't be surprised to see them adopted in other parts of Canada in the not so distant future.

Adopt Policy Banning Transgender Discrimination

Presumably, your organization already has a written policy to prevent gender, sexual preference and other forms of discrimination. If you're in Ontario, Manitoba, Northwest Territories or Saskatchewan, it's imperative to extend those policies to the transgendered. The same strategy is also advisable even if you're in another jurisdiction that doesn't currently ban gender identity discrimination. More resources to prevent liability for gender identity discrimination:

For More Help Avoiding Liability for Transgender Discrimination

- Model Policy Banning Gender Identity & Sexual Preference Discrimination
- Model Anti-Harassment Policy