



How gender identity and expression protections support employees

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Executive summary

The concepts of gender identity – a person’s individual experience of gender – and gender expression – a person’s public presentation of gender – can be used as frameworks to think about how people come to work with diverse experiences and needs. Despite anti-discrimination laws that prohibit discrimination on the basis of gender identity and gender expression, transgender and gender nonconforming people face disproportionately high barriers at work simply because of their gender. At the same time, workplaces are increasingly interested in gender-inclusive practices in their organizations. Unfortunately, most employers still struggle with what anti-discrimination protections on the basis of gender identity and gender expression mean for their organizations. Existing research on diversity and inclusion has demonstrated that anti-discrimination laws alone do not lead to greater inclusion.¹ Nevertheless, organizations need knowledge of the legal obligations to not discriminate against and to accommodate employees who are transgender or gender non-conforming. This research brief summarizes: how workplace gender identity and expression protections can be tools to support transgender and gender-nonconforming people in the workplace; the benefits and challenges of using these protections to support transgender inclusion efforts; and the tools needed to move towards greater workplace inclusion of transgender and gender nonconforming people.

What does research tell us about the workplace experiences of transgender people?

Transgender people continue to have negative workplace experiences and face barriers to attaining jobs, despite being highly skilled and educated. Research shows that while 43 percent of transgender-identified people in Ontario have at least a college or university degree, they have disproportionately higher rates of unemployment and underemployment compared to the general population – up to three times that of the national rate.² Transgender people who are employed report workplace discrimination more often than cisgender members of lesbian, gay, bisexual, and queer communities.³ Discrimination plays a central role in how transgender people make career choices and develop harmful coping strategies to survive at work. This includes being silent in hostile work environments, quitting jobs, or trying to ‘pass’ as cisgender to avoid discrimination.⁴

What are gender identity and expression protections in human rights law?

Every provincial and territorial government in Canada has a human rights code that applies to all provincially-regulated organizations and government agencies. The federal government has human rights legislation that applies to federally-regulated companies, the federal government, and First Nations governments. These human rights codes list “prohibited grounds” of discrimination such as sex, age, race, religion, colour, and sexual orientation. Gender identity and gender expression are also protected characteristics. In Ontario, they became prohibited grounds of discrimination in 2012, and have been interpreted to include diverse groups including transgender people, intersex people, cross-dressers, and people whose outward gender presentation is does not conform to binary gender norms.⁵ Federally, gender identity and gender expression became prohibited grounds of discrimination in 2017. These grounds give courts and adjudicators a starting point from which to analyse the link between a human rights claimant’s perceived mistreatment and the factors that caused the mistreatment.

Human rights codes apply to specific social spheres of activity where there are prohibited grounds of discrimination—including in employment, in the provision of goods, services, and facilities, in contracts, in housing and accommodations, and in membership in unions, and trade or professional associations.

Human rights cases are equally important sources of understanding gender identity and gender expression protections. Although legislators added gender identity and gender expression protections to human rights legislation in the past decade, case law demonstrates that discrimination against people because of their gender identity and gender expression has been recognized as unlawful in Canada since at least 1999, when a human rights tribunal found that a nightclub wrongly discriminated against a transgender woman for using a women’s bathroom.⁶ Today, egregious cases of bathroom discrimination still come up in human rights cases. In 2016, for instance, a human rights tribunal awarded a \$15,000 remedy to a transgender man who was humiliated at a club, kicked out, and beat up by its bouncers after using the men’s bathroom.⁷ While bathrooms are a more commonly-reported issue area when it comes to transgender people’s rights, particularly south of the border, other equally important practices are ignored.

How does transgender discrimination happen in the workplace?

The Ontario Human Rights Commission policy and case law provide important guidance on different ways discrimination can happen at work, including:

Discrimination happens because of unfounded stereotypes and uninformed assumptions

Transgender and gender nonconforming people face many negative stereotypes about who they are and what they are worth. Discriminatory stereotypes can include attitudes that transgender people will make other coworkers and clients uncomfortable or have accommodation needs that will be difficult and expensive.⁸ These stereotypes are rooted in judgments about the physical appearance or behaviour of gender nonconforming and transgender people. This makes it difficult for transgender people to feel welcome in the workplace, and leads to isolation.

Assumptions that lead to discrimination may be based on the uninformed idea that all people are cisgender.⁹ This is a common assumption called “cisnormativity.” Cisnormativity can obscure understanding of how inequalities in the workplace do not just occur between two groups – cisgender, heterosexual men and women – but also between gender conforming people and those who are not, because of a perceived “failure” to adhere to gender norms.¹⁰ Further, cisnormativity has led to damaging prejudices that transgender and gender nonconforming people are morally deviant. These prejudices have caused historic stigma, exclusion, and invisibility. Challenging those norms and assumptions puts transgender people in highly vulnerable positions, and leads to further disadvantage. This vulnerable situation is a reason why some trans people feel pressure to conform to gender norms.

Discrimination happens through overt and obvious negative conduct

According to the Ontario Human Rights Commission, overt and obvious discrimination includes explicit statements and harassment such as sexually explicit or other inappropriate comments, questions, jokes, name-calling, images, email and social media, transphobic, homophobic or other bullying, sexual advances, touching and other unwelcome and ongoing behaviour that insults, demeans, harms, or threatens a person because of their gender identity, gender expression, or their sex.¹¹ Discriminatory conduct can be directed at people who are trans or gender nonconforming, and it can also be directed at people who are not transgender but are associated with transgender people – for example, family members, friends, colleagues, or romantic partners.

Discrimination happens through subtle and hidden negative conduct

Subtle and hidden negative treatment might include practices such as passing over a transgender employee for shifts or assignments in order to limit their interaction with clients or colleagues. According to the Ontario Human Rights Commission, an act does not have to be intentional.¹² Subtle and hidden conduct is harder for employees to identify and bring to the attention of employers; it is also harder to prove. Research demonstrates that subtle discrimination against LGBT individuals is widespread despite antidiscrimination protections, and can be just as harmful as overt discrimination to transgender individuals at work.¹³

Discrimination happens through seemingly neutral rules or practices that disadvantage people simply because of their status as a transgender or gender nonconforming person

The Supreme Court of Canada has explained that policies that appear neutral but have the effect of excluding people in a discriminatory way are a form of “adverse effects discrimination.”¹⁴ Discrimination lies in “the arbitrariness of the barriers imposed, whether intentionally or unwittingly” on those who are part of a protected group.¹⁵ For example, a workplace rule that requires everyone to be cleanly shaved may inadvertently discriminate against people who must keep a beard for religious reasons. Relatedly, limiting a person’s right to opportunities that are generally available due to attributed rather than actual characteristics is called “systemic discrimination,” and it can include both overt and adverse effects discrimination.¹⁶

Discrimination happens at different stages of employment

Transgender and gender nonconforming people may be more vulnerable to different kinds of discrimination depending on their employment status. Some employment discrimination is hard to prove, for instance, when discrimination happens during hiring. Many transgender people wait to be hired before disclosing that they are transgender to avoid being passed over for a position due to discriminatory bias. On the other end, individuals who are nearing retirement age may feel pressure to be silent about mistreatment in order to not risk losing their jobs or pensions. This could mean suffering through a toxic work environment. Individuals who are in more precarious jobs can be more vulnerable to discrimination due to weak employment protections, and might be less likely to say anything until they gain job security, whether through passing probation periods or getting a promotion, or securing a more permanent position.

Discrimination happens due to intersectional factors

Discriminatory conduct can be directed at multiple aspects of a person’s identity, such as their race, class, and language, in addition to their gender identity. Intersectional identities put transgender people at significant risk of discrimination.¹⁷

Discrimination impacts trans people differently depending on how they express their gender. For example, someone might be particularly at risk of discrimination after they come out as trans and during their transition if colleagues cannot accept their gender nonconformity. If a trans person has a normative gender presentation and moves to a different department, they may no longer experience hostility (although they may still feel pressure to conform to new gender norms) as previous research has demonstrated.¹⁸ On the other hand, a gender nonconforming person in a similar situation may continue to face hostility if they do not conform to binary gender norms because of the underlying cisnormative workplace culture. Research shows that trans-feminine people are more likely to experience a loss of authority, loss of wages, harassment, and termination after coming out as transgender, while trans-masculine people may experience an increase in workplace respect, authority, and in some cases, earnings after transitioning.¹⁹

What are some examples of discriminatory workplace conduct based upon gender identity and expression?

Gender identity and expression protections do not apply only to bathroom use. Although allowing transgender and gender nonconforming people to use the bathrooms of their choice is important, other workplace practices can lead to discriminatory conduct. As recent case law demonstrates:

Unfounded assumptions about transgender people's lives can lead to overt discrimination during transition

An employer denied a transgender employee's request to be called in a new name because she had not yet legally changed it on her ID, and also denied her request to use the change room of her choice at work because she had not completed surgery. This was found to be discriminatory.²⁰ As the case shows, transgender employees do not need to give an employer proof of a legal name change in order to be called their chosen name at work, and, like bathrooms, are allowed to use the change room of their choice. Importantly, not all transgender people want to change their legal name or get medical surgery.

Negative stereotypes about transgender people can lead to overt discrimination at the start of an employment relationship

Using stereotypes about 'fit', a company said that, in order to not confuse customers, a transgender man must dress according to the company's 'female dress code' because he had not changed the gender marker on his legal ID.²¹ The man was visibly masculine presenting when he had been hired and the employer found out he was trans after he was hired. This underscores the need for workplaces to remove gender-specific dress codes and allow transgender and gender nonconforming people to dress according to a gender expression that feels comfortable for them (while maintaining agreed-upon standards of workplace professionalism).

Negative stereotypes about transgender people can lead to subtle discrimination in hiring decisions

A bank passed over a transgender woman for a position as a customer service representative after she was led to believe she would be hired. The bank then continued to look for applicants with the same qualifications as her. When challenged, the bank said she had an "attitude" during the final interview that was not public-serving and wanted to "use the position to promote the rights of transgendered persons." The Canadian Human Rights Tribunal found these reasons disingenuous and an excuse for bias and prejudice because she was trans.²² This revealed that the bank relied on unfounded assumptions about her conduct and fit at work based on her gender identity.

Assumptions about gender norms can lead to systemic discrimination in hiring processes

'Fit' could also be used to prevent gender nonconforming workers from being considered for jobs because of their gender expression. The Ontario Human Rights Commission gives an example of a company that tells a temp agency not to send transgender workers or workers who don't look like "normal" (stereotypical) men or women. This action relies on stereotypes about the fit of a worker for a job because of their gender expression or how they appear.²³

Assumptions that all people are cisgender can lead to adverse effects discrimination of transgender people and systemic discrimination of non-binary people

The Ontario Human Rights Commission has illustrated an example of a company sports league that is divided into men's and women's teams and interprets the rules as requiring players to join the team that matches their birth-assigned sex. This seemingly neutral rule could have the adverse discriminatory effect of preventing transgender people from joining the team that matches their gender identity.²⁴ Additionally, this may have the systemically discriminatory effect of excluding options for non-binary or genderqueer people all together. It can be difficult for organizations to address these forms of discrimination because the harms are hidden to the people who do not experience the discrimination.²⁵ Cisnormativity plays a role in the division of the league into two gendered teams that does not accommodate all individuals.

What are the benefits and challenges of using workplace policies to support transgender inclusion efforts in the workplace?

Organizations aiming to make their workplaces more inclusive for transgender and gender nonconforming people might rely on anti-discrimination protections to inform their policies. The benefits of this approach include:

Legal protections help inform organizational best practices for inclusion by:

- Providing information for organizations on their legal requirements for non-discrimination on the basis of gender identity and gender expression
- Drawing attention to needs of people of diverse genders and expressions at work
- Guiding organizations in understanding how overt, subtle, and systemic forms of discrimination works
- Drawing attention to how seemingly neutral organizational processes may lead to biased staffing decisions on projects or hiring decisions

Legally-mandated policies can help challenge social stigma and stereotypes about transgender people by:

- Increasing visibility of people of diverse genders and expressions in workplaces
- Give legitimacy to the negative experiences of exclusion and discrimination faced by transgender and gender nonconforming people
- Providing guidelines for workplace conduct that could be inadvertently discriminatory and how to avoid it

Legally-informed policies can help employees feel protected at work

- For some transgender and gender nonconforming employees, workplace policies that reflect gender identity and gender expression protections can be the first source of information to workers that they are legally able to seek a remedy for mistreatment due to their status as gender minorities
- Knowing that an organization takes its antidiscrimination obligations seriously may help transgender employees feel supported

On the other hand, only having anti-discrimination protections at work does not always lead to improved work environments for transgender and gender nonconforming employees. Research has shown that since antidiscrimination policies are controlled by employers, legal responses may give deference to managerial authority on personnel matters, which can re-inscribe existing status hierarchies and inequalities.²⁶ Furthermore, in practice, anti-discrimination policies put the burden on individual employees to not only bring up complaints when they have been discriminated against, but to prove that discrimination happened.

Consequently, eliminating workplace discrimination by solely relying on anti-discrimination policies can be hindered by:

Employee hesitation towards using anti-discrimination protections due to

- Fear of reprisal and job insecurity
- Uncertainty about what someone experienced was discrimination
- Hopelessness and skepticism that the complaint will not be taken seriously or that it will not change anything²⁷

Gaps in information needed to make a decision about making a complaint:

- Lack of knowledge or information available at work about a complaints process and policies explaining rights at work
- Lack of information about whether discrimination complaints have been lodged in the past, and therefore, if they are effective as a tool to encourage change in an organization's culture²⁸

Gaps in workplace practices and procedures despite the presence of anti-discrimination policies:

- Lack of support from managers or human resources for workplace inclusion efforts
- Organizational culture to not complain about colleagues, or tendency of leadership to dismiss bad experiences of workers as being an interpersonal issue rather than one of discrimination²⁹
- No process or ineffective process for recording complaints
- Incomprehensive investigation procedure or lack of knowledge about gender identity and gender expression by investigators

Conclusions: Why gender identity and expression protections are needed

The potential costs of exclusion

The story of Lynn Conway – a now-distinguished engineer and computing pioneer who revolutionized microchip design at Xerox after being fired from IBM in the 1970s for transitioning – is a stark illustration of the cost of exclusion for both gender diverse individuals and workplaces.³⁰ But even when transgender employees are not fired for being trans, they may not be fully included either, due to more subtle, systemic, and structural barriers caused by cisnormative workplace culture. Employees use harmful strategies to cope with work environments that do not actively try to support transgender employees to succeed in the workplace.³¹ In turn, these strategies negatively impact workplaces. Transgender employees may change workplace behaviour to try to 'pass' as cisgender in order to limit discriminatory situations.³² This takes a toll on well-being and workplace productivity. Transgender and gender nonconforming employees might also be silent about negative issues or feel less desire to be involved in workplace socializing in order to

avoid potential discriminatory situations.³³ This could lead to workplace isolation, increase the information gap, and erode trust between employees and employers or other colleagues. Finally, employees might change jobs, resulting in the loss of good employees.

To address these barriers, organizations must be willing to not only review their practices but also be invested in equity-based initiatives to attract and support transgender and gender nonconforming people.

What can organizations do to further transgender inclusion in workplaces?

- **Increase knowledge and accessibility of information:**
 - Ensure human resources and employee complaints processes are transparent and widely accessible
 - Managers make it known that discrimination will not be tolerated
 - Make statistics/reports on complaints against organization publicly available
 - Support connecting trans employees in employee resource groups within organization and providing resources for trans employees
 - Provide training for all staff, including executives, on gender-inclusive workplaces, and ensure training happens regularly and has evaluation and feedback
- **Strengthen processes and develop prevention measures:**
 - Ensure managers and human resource managers are trained to address workers' individual needs
 - Set up processes for dealing with complaints and accommodating trans employees
- **Assess organization's 'temperature' for discrimination:**
 - Review policies and staff's level of knowledge about trans inclusion
 - Provide mechanisms for anonymous feedback on organizational culture and policies through culture surveys
 - Ask what changes organizations can make to remove structural barriers
 - Communicate to workers that org takes discrimination seriously
 - Notice if it is hard to retain trans employees in the workplace, and be willing to ask what role the organizational culture plays in the process

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