



## **The Emerging Competitive Landscape for Transgender Athletes: 5 Steps Sports Federations Need to Take**

**Litigation and Dispute Resolution**



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Sports governing bodies are increasingly facing the emerging and complex issue of transgender athletes competing in sport. Now is the time to prepare, even if this issue has not come up for you yet.

The topic is particularly prevalent in girls' and women's sports, where examples have ranged from weightlifter Laurel Hubbard becoming the first transgender athlete to compete in the 2021 Olympics to Lia Thomas, a swimmer at the University of Pennsylvania, becoming the first transgender athlete to win a Division I national title.

Sports federations vary in their progress toward formulating new regulations for transgender athlete participation, and the legal landscape is unsettled and evolving.

“Sports federations face the great challenge of wanting to be inclusive and to integrate athletes who do not seem to fit into the traditionally binary gender structure in sports,” says Maike Herrlein of Meritas member law firm ASD in Frankfurt, Germany, who has studied this topic in depth. “But sport does not want to lose the excitement, fairness, and safety of competition.”



Challenges present themselves for competitive transgender athletes while being mindful of discrimination and fairness. DCStockPhotography / Shutterstock.com

“On one side, everybody should be able to do sports and to be part of a community such as a sports team,” adds Michelle Wiki of Wenger Vieli Ltd., the Meritas firm in Zürich, Switzerland. “On the other side, is it fair for cisgender women athletes? Do the cisgender women feel comfortable practicing against someone who might be stronger, and is there a bigger risk of injury? It is clear that discrimination should be avoided, but deciding what rules shall be applicable is a challenging task. Whether, at the end, the applicable rules are totally fair for all might always be debatable.”

Here are five tips to ensure that you develop the best possible strategy for your sport and jurisdiction.

## **1. Make policy before potential conflicts arise**

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It should be noted that there will be many differences in requirements from organization to organization, depending on a wide variety of factors, including whether a federation governs professional or amateur sports.

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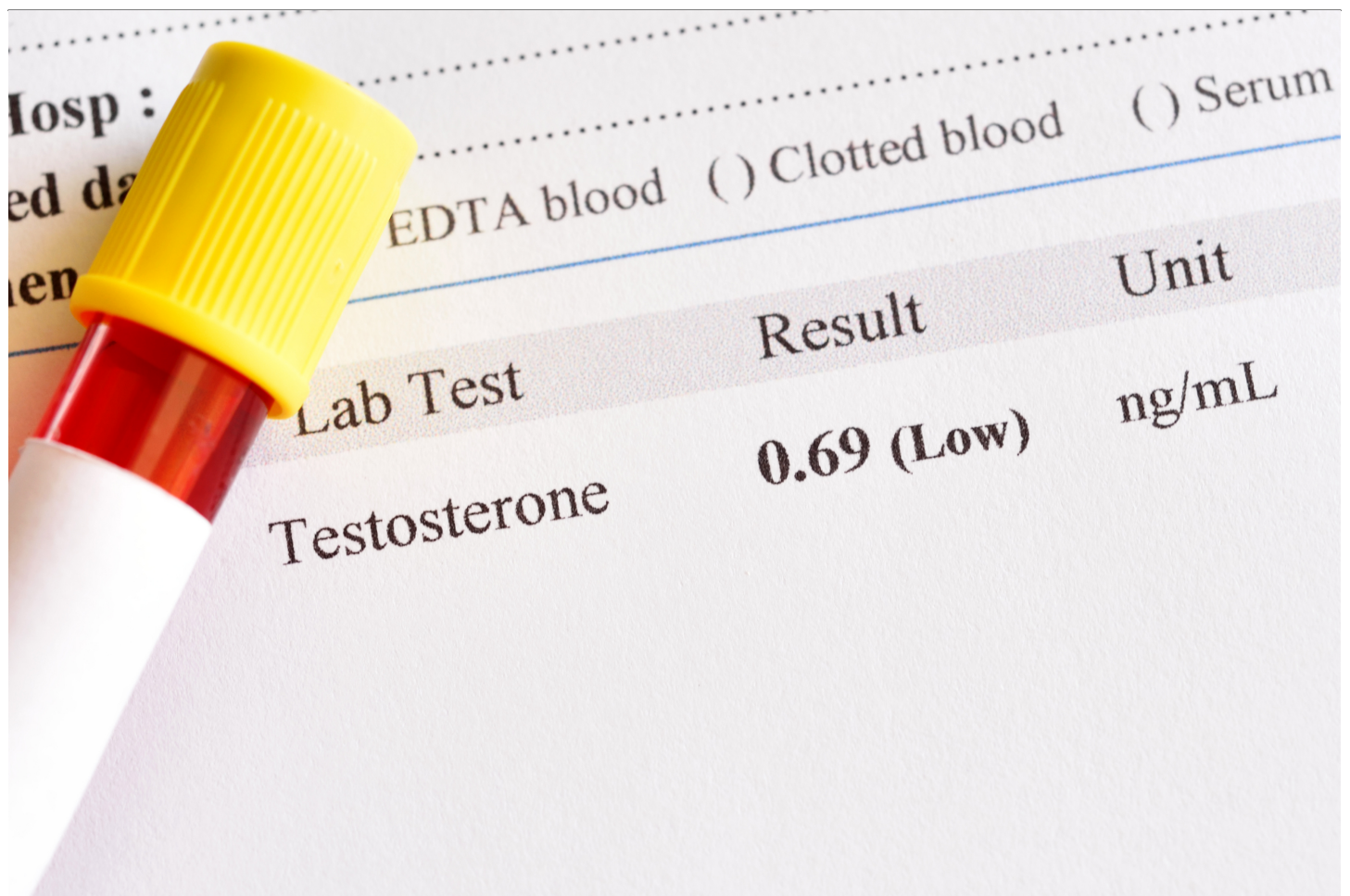
## 2. Consult with governing bodies, including in other sports and regions

Learning from colleagues around the world is essential. While many international and some national sports federations have adopted regulations for the participation of transgender athletes, no consistent or universal approach is apparent. There are also different regulations and laws at the state, national, and international level, meaning that transgender athletes may be subject to different regulations for different competitions, even in the same sport.

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The regulations that have been adopted by different sports federations can be divided into three basic approaches, according to Herrlein:

- Some allow transgender women and transgender men to compete in national competitions in the category of their chosen gender without having to meet any criteria. Examples include England Hockey, USA Gymnastics, and Badminton England.
- Some bar transgender women from competing in women's sports. Examples include World Rugby and World Aquatics. Several US states have also enacted laws or passed statewide regulations barring transgender girls from participating in girls' sports at public schools.
- The majority of national and international sports federations have opted a regulation in women's sports that requires transgender women to be able to prove that their testosterone level is within a defined corridor or below a certain maximum value before each competition throughout their careers.



Regulations have been set forth to inspect trans women testosterone levels before sport competitions. Jarun Ontakrai / Shutterstock.com

In Switzerland, where Wiki practices, there is no universal regulation regarding transgender athletes. Swiss Olympic, the umbrella organization for Swiss sport and the national Olympic committee, has addressed the issue by releasing an informational letter explaining what is meant by transgender identity, providing information regarding civil law requirements in Switzerland related to transgender identity, and informing federations about the International Olympic Committee's position on the subject.

In the United Kingdom, the issue is governed by the Equality Act 2010, according to Elizabeth Morley and Sam Murray-Hinde, members of the sports law team at Meritas member firm in London, England, Howard Kennedy. The Act, they say, prohibits discrimination on the basis of sex or gender reassignment, but it is lawful to restrict the participation of people undergoing gender reassignment, if necessary, to secure fair competition or competitor safety. Governing bodies would need to show that there was no less discriminatory alternative to achieve the desired result, meaning that restrictions need to be backed up by cogent evidence.

### **3. Evaluate the evolving scientific evidence**

Herrlein advises basing regulations, as much as possible, on objective criteria and current scientific knowledge, reviewing new findings regularly and considering whether to incorporate them into existing regulations. In the past, testosterone levels were the standard for evaluating eligibility, based on the premise that transgender women uniformly have a physical advantage over cisgender women. But, as Herrlein explains, "There is no clear, universally valid scientific evidence of that today." As

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the science has evolved, the current trend is for each governing body to look at the evidence specifically related to performance in its sport.

The International Olympic Committee (IOC) has led the way in this approach in its revised Framework on Fairness, Inclusion, and Non-Discrimination on the Basis of Gender Identity and Sex Variations, published in March 2022. “The IOC now recommends that an athlete’s eligibility should be based on actual evidence of a performance advantage,” Herrlein says. “Eligibility criteria should therefore be designed individually by each federation, taking into account fairness, inclusion, and non-discrimination.”

“The landscape for international and national sports federations has become more complicated, as each has to define its own scientifically based eligibility criteria for all sports,” Wiki says. “The absence of uniform guidelines makes it challenging for each sport association to establish rules for dealing with such cases.”

#### **4. Refer to parallel cases in sports**

While the presence of transgender athletes in competition is relatively new, some parallels can be drawn with other more established situations. Keeping apprised of developments in these areas can help inform the thinking on transgender participation as well.

Paralympic sports are one example. Some athletes have disabilities that hamper their performance, while others are assisted by technically advanced prostheses that could give them an advantage over other athletes. The most high-profile example of the latter is former South African Paralympic runner Oscar Pistorius. More recently, a Colorado-University Boulder study published in *Royal Society Open Science* found that there was no advantage from the blades used by amputee athletes such as Pistorius or Blake Leeper, the world’s fastest 400-meter sprinter, who was included in the study.



Some participating athletes show concern that disabled athletes with assisted technical prostheses have a better chance at winning. mezzotint / Shutterstock.com

Weight classes in martial arts, bodybuilding, and weightlifting competitions also provide some parallels.

“Sports federations should be aware that regulations restricting the participation in women’s sports could potentially be subject to competition law,” Herrlein cautions. “Any restriction of competition must be proportionate to the legitimate objectives pursued by a federation.”

The Howard Kennedy sports team note the importance of thinking through broader implications. They point out that sporting bodies need to be sensitive to issues of privacy and the implications for athletes with disorders of sexual development (DSD) as well as trans athletes. Although a system of “hormone grading” akin to the Paralympic disability grading system might appear to be an objective method for achieving fair competition, it would also be highly intrusive. Morley and Murray-Hinde note that the public scrutiny of Castor Semenya, the South African middle-distance runner, at the 2009 World Championships illustrates how a focus on hormone levels and other physical indicators can be invasive and stigmatizing.

## **5. Turn to your outside law firms for insights**

The landscape is constantly evolving. As this article was being written, World Athletics, the governing body for amateur track and field, cross country running, and related sports, updated its eligibility regulations for transgender and DSD athletes to compete in the female category, eliminating the principle of restricted events, among other changes.

Keeping up with the fast pace of change in this space is a challenge for in-house counsel, especially

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in small law departments. External law firms around the globe, who are closely watching developments in their respective regions for multiple clients, can be a big help.

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“Policymaking is a challenging balancing act, especially on such a complex and multifaceted topic that deals with the interests of all athletes and touches on some of the core values of sport, such as inclusiveness, fairness, and respect,” says Julien Tricart of Meritas member firm BCF LLP in Quebec, Canada. “Turning to outside assistance, such as legal counsel, can further ensure the seriousness and justifiability of a regulation and potentially avoid unnecessary litigation.”



External legal firms can offer great assistance to law departments during the midst of rapidly changing policies and regulations. VideoFlow / Shutterstock.com

At Meritas, we have recently formed a Global Sports Law Group to help our firms better serve their local and global clients in this industry, particularly on cross-border matters.

“We are dealing with international legal issues for our sports-industry clients on a regular basis and it is crucial to have a network of highly qualified experts around the globe to handle legal issues, such as those arising in the context of global sporting events, international M&A and investments in sport, international athletes exercising their profession in different countries, or international sports dispute resolution,” says Alexander Engelhard of ASD, co-chair of Meritas’ Global Sports Law Group.

“It’s a great point of connection to lawyers in different jurisdictions with a wealth of experience acting

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for sports-industry clients,” adds Morley.

“We already have 46 lawyers from 28 different global markets in this group,” says Meritas President Sona Pancholy. “That is a real benefit to in-house counsel clients in the sports industry when they need to stay ahead of complex global issues such as balancing non-discrimination and fairness in light of the growing number of transgender athletes wanting to participate in sports.”

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