



EEOC:

*Title VII Prohibits Employment Discrimination
Based on Gender Identity, Sexual Orientation*

Prepared by:

Paul Patten and Michelle E. Phillips
Jackson Lewis P.C.



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EEOC: Title VII Prohibits Employment Discrimination Based on Gender Identity, Sexual Orientation

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The Equal Employment Opportunity Commission has stated definitively that it interprets, and will enforce accordingly, the Civil Right Act's Title VII's prohibition on sex discrimination as encompassing employment discrimination based on gender identity and sexual orientation. Employers should review and update their policies and apply them consistently and fairly to all employees regardless of gender identity or sexual orientation.

The Commission bulletin, released on July 15, 2016, confirms the agency's position that protection for members of the LGBT (lesbian, gay, bisexual, and transgender) community against employment discrimination, and retaliation for reporting discrimination, will be available to both federal and private sector employees, regardless of any state and local laws that suggest otherwise.

Local Laws

According to the agency, this directive functions as a floor for protection against discrimination on the basis of sexual orientation or gender identity. In other words, local or state law that already explicitly prohibits discrimination on these bases remains operative. (See our articles, [New York State and New York City Guidance Focus Transgender Discrimination](#) and [Pennsylvania Governor Issues Executive Orders Protecting LGBT Rights](#).) However, according to the EEOC's bulletin, "...if a state or local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will enforce Title VII's discrimination prohibitions against covered employers in that jurisdiction because contrary state law is not a defense under Title VII." (See our article, [North Carolina Legislation Removes LGBT Protections and Possible Wrongful Termination Claims](#).)

Other Agencies

The EEOC bulletin reiterates recent agency decisions on the subject, as well as similar directives from other federal agencies, such as the Office of

Federal Contract Compliance Programs (OFCCP), Department of Education, Department of Justice, Office of Personnel Management, and Occupational Safety and Health Administration. (See our articles, EEOC Stresses Title VII Bars Discrimination against Transgender Workers, Including Regarding Bathroom Access and U.S. Departments of Justice and Education Issue 'Significant Guidance' on Transgender Rights under Title IX.)

EEOC Priority Finds Support in Court Decision

The EEOC's Strategic Enforcement Plan (SEP) for fiscal years 2012-2016 clearly references the "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" in its list of national priorities. Consistent with this priority, the Commission's General Counsel then formed an LGBT working group to advise EEOC's litigators, coordinate internal initiatives and policies, train internal staff, and conduct outreach with external employers and other federal agencies.

Closely following the SEP and the formation of the EEOC's LGBT working group, in April 2012, the agency held for the first time in *Macy v. Holder* that Title VII sex discrimination prohibits discrimination of a job applicant based upon her status as a transgender woman. The opinion relied heavily on the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to affirm that Title VII prohibits discrimination "based on ... sex," which includes a prohibition on sex stereotyping in the workplace. The EEOC's opinion made clear that Title VII sex discrimination inherently encompasses protection of transgender workers by stating that "the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity." Thus, the discrimination faced by transgender employees is based upon a perceived non-conformance to traditional gender-based normative roles, and therefore stems from the same type of discrimination based on sex stereotyping (such as pregnancy, same sex harassment, and other sex stereotyping discrimination) long been prohibited by *Price Waterhouse*.

Macy v. Holder is a landmark in the movement for transgender rights in the workplace, but because the decision was decided by the EEOC in its role enforcing Title VII with respect to the federal workplace, rather than by a federal court, the holding there was not binding precedent. According to the EEOC, since 2000, many federal courts have used similar reasoning to affirm

Title VII's applicability to employment discrimination based on both gender identity and sexual orientation. On protection for transgender employees, decisions by the federal appeals for the Fourth, Sixth, Ninth, and Eleventh Circuits make actionable claims under Title VII, following a Price Waterhouse rationale. Similarly, the EEOC finds the Seventh and Ninth Circuits as well as many district courts have held that sexual orientation also is protected under Title VII because discrimination based upon sexual orientation is based on the same non-conformance of sex and gender stereotypes. The EEOC finds persuasive *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), in which the court stated, "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women." (Emphasis added.) The agency lists decisions affirming this precedent in "Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII." The EEOC concludes that federal court precedent supports the notion that a decision based upon a person's gender identity or sexual orientation is equivalent to acting upon information relating to that individual's sex and therefore runs afoul of Title VII.

Covered Employers

Title VII applies to all private sector and state and local government employers with at least 15 employees.

For federal contractors or federally-assisted construction contractors, much of the EEOC bulletin overlaps with Executive Order 13672, which made employment discrimination based on gender identity or sexual orientation illegal for employers with federal contracts entered into or modified on or after April 9, 2015. (See our article, *DOL Releases Regulations Extending Protections to Lesbian, Gay, Bisexual, and Transgender Employees, Applicants.*)

While religiously-based entities are provided with a "ministerial exemption" that allows them preferentially to hire individuals who comport with their organization's religion, the Executive Order 13672 still prohibits such entities from making hiring decisions based upon an individual's gender identity or sexual orientation. Religious entities who are not federal contractors, but are

recipients of federal grants, are exempt from the Executive Order. However, they likely are covered under the EEOC's guidance.

For federal employees, too, the EEOC's bulletin is a reiteration of guidance published in 2011 by the Office of Personnel Management, which states, "It is the policy of the Federal Government to treat all of its employees with dignity and respect and to provide a workplace that is free from discrimination whether that discrimination is based on race, color, religion, sex (including gender identity or pregnancy), national origin, disability, political affiliation, marital status, membership in an employee organization, age, sexual orientation, or other non-merit factors. Agencies should review their anti-discrimination policies to ensure that they afford a non-discriminatory working environment to employees irrespective of their gender identity or perceived gender non-conformity." (Emphasis added.)

Thus, it is private sector employers who may consider the EEOC's bulletin a new or changed directive.

Best Practices

Claims asserting Title VII violations on the basis of gender identity and sexual orientation have grown exponentially in recent years. According to the agency's statistics, "In FY 2015, [the] EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status. This represents an increase of approximately 28% over the total LGBT charges filed in FY 2014 (1,100)."

These numbers are not likely to decrease any time soon. Therefore, it is important that employers are prepared with updated policies that include gender identity/expression and sexual orientation as protected groups. It is equally important to train and educate the workforce, particularly Human Resource professionals and front-line supervisors, on how to lead by example and prevent any forms of harassment based on gender identity/expression and sexual orientation.

Managers also should be trained on the key LGBTQI (lesbian, gay, bisexual, transgender, queer or questioning, and intersex) terminology, best practices for a gender transition plan, the necessity to provide equal access to

restrooms or locker rooms for transgender employees based on their consistent gender presentation and other key issues on the accommodation process.

The EEOC provides examples for employers as to what constitutes a claim of LGBT-related sex discrimination. The agency cautions employers against terminating, demoting, or failing to hire an individual because of the individual's sexual orientation or gender identity. Additionally, employers are instructed to take precautions against workplace harassment, which may include derogatory terms, sexually orientated comments, and generally disparaging remarks. Harassment of transgender employees may occur when a coworker or supervisor intentionally and persistently fails to use the name and gender pronoun which corresponds with the employee's identified gender (commonly referred to by the EEOC as "misgendering"), and which the employee has previously communicated to management and employees.

Lastly, the EEOC warns that denying fringe or medical benefits to employees (or their legal spouses) because of their gender identity or sexual orientation is prohibited.

Regarding transgender employees, employers should remember that an employee's transition is deeply personal and likely will be different for each individual. HR professionals and supervisors should be trained to respect each individual and his or her choices, without imposing personal judgments. An individual's chosen name and pronoun(s) should be used whenever possible, including in personnel records and in communications, both with the employee and with others concerning the employee. Moreover, HR professionals should ensure hiring processes allow transgender applicants to disclose an alternative name during background screenings, as a previous legal name change may appear problematic without more information.

In addition, individuals who identify as transgender may want to keep that information as private as possible in the workforce. The federal Office of Personnel Management's Office of Diversity and Inclusion recommends that employers treat an employee's transition "with as much sensitivity and confidentiality as any other employee's significant life experiences, such as hospitalization or family difficulties." In a similar vein, employers who receive an employee's request for medical leave due to transition-related

medical care should treat such a request confidentially, as they would any other medical situation. This also includes being careful not to demand excessive medical records from transgender employees.

Finally, OSHA, as well as the EEOC, mandates that employers allow transgender employees to use the bathroom that corresponds to that employee's gender identity. Employers may choose to offer a single-stall, separate bathroom facility to all employees, including those individuals who identify as transgender or are in the process of transitioning. However, employers may not mandate that transgender employees use separate bathroom facilities.

