Workplace Equity: The State of the Law on Protections against Sex-Based Discrimination

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Published on www.lorman.com - October 2018

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Workplace Equity: The State of the Law on Protections against Sex-Based Discrimination

This publication was written by members of Ballard Spahr's Labor and Employment Group.

Across the country, federal statutes, many state and local laws, court rulings and Equal Employment Opportunity Commission (EEOC) guidance forbid sex discrimination in employment. But these prohibitions are not uniform. There is significant disagreement on the definition of "sex" and whether this term is broad enough to provide protections based on sexual orientation and gender identity. As a result, employers should carefully navigate this legal landscape to ensure compliance with all applicable non-discrimination laws.

Twenty states as well as the District of Columbia have laws that explicitly list sexual orientation and/or gender identity as protected classes. In some states—such as Pennsylvania—state agencies interpret the existing prohibition on sex discrimination to include protections based on sexual orientation and/or gender identity and transition. Municipalities have also stepped in to provide added protections by specifically listing gender identity and sexual orientation as protected classes. In Philadelphia, the Fair Practices Ordinance specifically prohibits discrimination based on gender identity and sexual orientation. From a federal standpoint, the EEOC repeatedly has taken the position that federal prohibitions against sex discrimination, specifically under Title VII, also prohibit discrimination based on sexual orientation and gender identity. Federal courts, however, have not treated this issue in a consistent manner.

Expanded Protection against Sex-Based Discrimination

A number of states and state agencies have taken steps to expand the protections afforded under anti-discrimination laws.

Earlier this month, the Pennsylvania Human Relations Commission (PHRC) issued guidance on its handling of sex discrimination complaints filed under the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act (PFEOA). The guidance does not affect statutory or other regulatory requirements, but, rather, makes policy recommendations to agencies and officers of the Commonwealth. The PHRC will now interpret Pennsylvania's prohibition on sex discrimination in employment, public accommodation, housing, commercial property and education to prohibit discrimination based on sexual orientation or transgender status, in alignment with court decisions that have found that the federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), Title IX of the Education Amendments of 1972 (Title IX), and the Fair Housing Act, cover claims based on sexual orientation and gender identity. As analyzed in the next section however, this directive may not be as straightforward as it seems.

The guidance explains that the term "sex," when used in the PHRA or PFEOA, may refer to the penumbra of protections based on sex—including sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity and/or gender expression—depending on the individual facts of the case. Prohibitions against discrimination on the basis of sex will now be interpreted to prohibit a larger universe of conduct based on the expanded definition of sex.

The PHRC will accept for filing any sex discrimination complaints arising out of all of the categories of sex articulated above, including sexual

orientation and gender identity. Employers should analyze the expanded definition of sex articulated by the PHRC and train managers, supervisors, and employees to ensure that they continue to prohibit illegal discriminatory conduct not only based on traditional protected status as a male or female, but also based on an individual's sexual orientation and gender identity or transition.

The guidance also provides that employers who believe that the enforcement of the PHRA or PFEOA would violate their free exercise of religion, may seek the protections found within the Religious Freedom Protection Act (RFPA), as long as notice requirements and standards of proof are met.

In addition to the PHRC's recent guidance, the Michigan Civil Rights Commission similarly stated that it interprets the state's existing protections against sex discrimination to include protections for both sexual orientation and gender identity, notwithstanding the fact that the anti-discrimination law does not specifically list those classes as protected. Interestingly, the Commission continues to maintain this stance despite a formal letter from the state Attorney General's office contending that this interpretation was invalid.

New York Governor Andrew Cuomo recently became the first executive in the nation to issue statewide regulations prohibiting harassment and discrimination on the basis of gender identity, transgender status or gender dysphoria. On a local level, some New York employees enjoy even greater protections: In May, New York City expanded existing protections under an amendment to the New York City Human Rights Law. For example, the amendment increased the statute of limitations from one year to three years for all claims of gender-based harassment and applied protections to all employees raising such claims, regardless of the size of

their employer. Earlier this month, the New York City Commission on Human Rights issued proposed rules to further define and clarify a number of gender-related terms, as well as further codify certain unlawful discriminatory practices by employers based on gender identity or expression. These include deliberate misuse of an individual's chosen name, refusal to allow the use of facilities or participate in programs based on gender identity, and failing to provide equal benefits or imposing disparate standards based on an individual's chosen gender identity.

Outside the legislative arena, state courts across the country are determining whether the traditional protections against sex discrimination extend to sexual orientation or gender identity under state law. For example, in April, the Missouri Supreme Court heard two cases involving a transgender student and a gay man who worked for the Department of Social Services, looking at the issue of whether the state's prohibition on sex discrimination includes discrimination based on sexual orientation or gender identity. The decisions in these cases are still pending.

Beyond State Law: Federal Developments Regarding Sexual Orientation

States are not alone in considering whether sexual orientation and gender identity are protected under the law. The federal courts and agencies have also grappled with the issue but have split on the correct reading of the law.

As noted above, the EEOC has concluded that Title VII does protect against discrimination based on sexual orientation and gender identity. The EEOC interprets sexual orientation and gender identity discrimination to necessarily be based on the individual's sex, and therefore, covered by Title VII's prohibition against sex discrimination. In furtherance of its

position, the EEOC has issued various guidance documents, available on the agency's website, providing direction on preventing employment discrimination against LGBT employees. The EEOC has had success in arguing this position, including a win last year in its suit against an employer before the U.S. District Court for the Western District of Pennsylvania in which an employee quit as a result of derogatory comments and slurs a supervisor made based on the employee's sexual orientation.

In contrast, the Department of Justice (DOJ) has taken the opposite stance, concluding that Title VII's prohibition on discrimination because of sex does not cover sexual orientation discrimination, and that amending its scope to do so should be left to Congress rather than the courts.

This conflict was vividly illustrated when the U.S. Court of Appeals for the Second Circuit was—in the words of Circuit Judge Rosemary Pooler—put in an "awkward" position this year in *Zarda v. Altitude Express*. In that case, the DOJ filed an amicus brief supporting the defendant employer and contending that sexual orientation discrimination is not prohibited under Title VII, while the EEOC supported the plaintiff and argued the opposite position. The Second Circuit *en banc* agreed with the EEOC and ruled in favor of the skydiving-instructor plaintiff who was fired after a customer complained to management about his reference to being gay. With this decision, the Second Circuit joined the U.S. Court of Appeals for the Seventh Circuit on this issue. In 2017, the Seventh Circuit found in *Hively v. Ivy Tech Community College*, that Title VII includes protection against sexual orientation discrimination, while the U.S. Court of Appeals for the 11th Circuit ruled in *Evans v. Georgia Regional Hospital* that no such protection exists—creating the beginnings of a circuit split.

Given the divergent opinions at the federal level and the variations in state and local laws, employers should be evaluating their policies to ensure compliance with all applicable anti-discrimination laws.

Ballard Spahr's Labor and Employment Group routinely assists employers in navigating complex legal issues, including drafting and reviewing employment policies, as well as training managers on discrimination and harassment prevention. The Labor and Employment Group will continue to monitor local and state law and guidance, the split among federal courts, and the stances taken by governmental agencies with regard to Title VII and similar state and local law protections.

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Originally published October 2018, www.ballardspahr.com