

## **EEOC: Title VII Prohibits Employment Discrimination Based On Gender Identity, Sexual Orientation**

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. 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."

### **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.

### **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.

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 be 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.

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