



Sexual Orientation and Gender Identity & Expression in the Workplace: Understanding the Law and Creating Meaningful Policies and Practices

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Outline

- Terminology
- Federal Law Update – Transgender
- Federal Law Update – Sexual Orientation
- State Law Update – LGBTQ Issues
 - “Bathroom bills”
 - Anti-Discrimination Laws
 - ID/Birth Certificate Change Laws
- Model Policies
- Commonly Asked Questions
- Questions





Terminology

Ensuring everyone is on the same page

Terminology

- Why is this so important?
 - People's understanding of these terms may be different
 - Level-setting vocabulary ensures everyone is on the same page
 - Allows people to know they are using the right terms



Terminology

- Sexual orientation: the preferred term used when referring to an individual's physical and/or emotional attraction to the same and/or opposite gender.
 - “Gay,” “lesbian,” “bisexual,” “heterosexual” and “straight” are all examples of sexual orientation.
 - A person's sexual orientation is distinct from a person's gender identity and expression.
- Gender identity: a person's innate, deeply felt psychological identification as a man, woman or some other gender, which may or may not correspond to the sex assigned to him/her at birth (e.g., the sex originally listed on their birth certificate)



Terminology

- Transsexual: transgender individuals who, frequently with the support of medical or psychological professionals, are changing or having changed their physical characteristics/anatomy to facilitate personal and public recognition of their sex as different from that which they were assigned at birth. This may or may not include sex reassignment surgery.
- Gender expression: all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, grooming, mannerisms, speech patterns and social interactions.
 - Social or cultural norms can vary widely and some characteristics that may be accepted as masculine, feminine or neutral in one culture may not be assessed similarly in another.



Terminology

- Transgender – refers to the broad range of people who experience and/or express their gender differently from what most people expect – either in terms of expressing a gender that does not match their sex assigned at birth, or physically changing their sex.
 - Not everyone who considers him/herself (or who may be considered by others as) transgender will undergo a gender transition.



Terminology

- Gender transition: Transitioning is the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth.

- This may or may not include hormone therapy, sex reassignment surgery and other medical procedures.
- Not every transition involves medical interventions. Many people cannot pursue these interventions because of cost.
- It is important to recognize that, while public, transitioning is a very personal process and everyone has a right to privacy.
- Transitioning frequently involves affirming one's gender identity in ways other than or beyond medical components.



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Terminology

- Gender dysphoria (GID): a psychological diagnosis recognized by the American Psychiatric Association (APA). This disorder is marked by clinically significant distress and discomfort caused by a marked difference between the individual's expressed/experienced gender and the person's sex assigned at birth.
 - Not all transgender people experience gender dysphoria or diagnosed with GID.
- Cross-dresser: refers to people who wear clothing and/or makeup and accessories that are not traditionally associated with their biological sex. Cross-dressers are sometimes called "transvestites," but that term is considered pejorative.
 - Many people who cross-dress are comfortable with their assigned sex and generally do not wish to change it. Cross-dressing is a form of gender expression that is not necessarily indicative of a person's gender identity or sexual orientation.



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Barriers that impact LGBTQ Individuals

- 27% of LGB respondents experienced at least one form of sexual orientation-based discrimination during the five years prior to the survey
- 44% of transgender respondents reported being unfairly denied employment
- 47% of transgender respondents reported that they had been discriminated against in hiring, promotion, or job retention
- 32% of transgender people report being denied equal treatment in retail stores



Barriers that impact LGBTQ individuals

- In the first national survey of transgender people:
 - Respondents experienced unemployment at twice the rate of the general population
 - 50% of respondents were harassed at work
 - 26% reported losing a job due to being transgender or gender non-conforming



Federal Law Update

Gender Identity/Transgender



History of Title VII as applied to LGBT employees

- In the past, courts often rejected Title VII claims by LGBT employees based on the notion that the statute covers only those who Congress specifically sought to protect.
- Because no explicit inclusion of the terms sexual orientation or gender identity/expression, courts held those classes of persons were excluded from Title VII's coverage

Early Title VII Cases

- Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)
 - “While we do not condone discrimination in any form...Title VII does not protect transsexuals.”
- Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977)
 - “Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII and is certainly not in violation of the doctrines of Due Process and Equal Protection.”



Supreme Court weighs in

- U.S. Supreme court held that gender stereotyping and same-sex harassment constitute prohibited discrimination under Title VII
 - Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)
 - Court holds Title VII is not just about biological sex, but also about all sex-based considerations (e.g. stereotypes regarding men and women)
 - Oncale v. Sundown Offshore Oil Servs., 523 U.S. 75 (1998)
 - Court holds that Title VII prohibits same sex harassment in case involving male who was physically assaulted by his co-workers, who also threatened to rape him
 - “Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately provisions of our laws rather than the principal concerns of our legislators by which we are governed.”



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Sex-stereotyping Cases

- **Smith v. City of Salem (6th Cir. 2004)**

- “It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”
- “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as transsexual, is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”

- **Barnes v. City of Cincinnati (6th Cir. 2005)**

- Failure to promote police officer because not masculine enough
- Mere label like “transsexual” does not exclude plaintiff from sex-stereotyping claim

- **Glenn v. Brumby (11th Cir. 2011)**

- “The question here is whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause...[W]e hold that it does.

- **Schroer v. Billington (D.D.C. 2008)**

- Employer “admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women’s clothing” and thought members of Congress would not take her seriously.



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Gender Identity

- **4 Circuit Courts have held that gender identity discrimination can be actionable under federal law**
 - 1st Cir.- Rosa v. Park West Bank & Trust Co. (2000)
 - 6th Cir. – Smith v. City of Salem (2004)
 - 9th Cir. – Schwenk v. Hartford (2000)
 - 11th Cir. – Glenn v. Brumby (2011)
- **4th Circuit decision holding gender identity discrimination can be actionable under federal law - G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd. - has been vacated**
- **Most district courts have held that transgender discrimination is unlawful sex discrimination**



6th Circuit

- **EEOC v. R.G. & G.R. Harris Funeral Homes Inc., No. 16-2424**

- EEOC alleges that funeral home wrongfully fired a transgender employee, Aimee Stephens, based on her gender identity after she announced her transition from male to female.
- EEOC claims that Stephens was stereotyped based on gender because she did not comply with a sex-specific dress code that requires males to wear a pants-suit with a neck tie and requires females to wear a skirt-suit.
- District Court (E.D. Mich.) dismissed claims on basis that Religious Freedom Restoration Act protected Funeral Home owner's conduct.
 - "The court finds that the funeral home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on its ability to conduct business in accordance with its sincerely held religious beliefs."
- On appeal to Sixth Circuit: EEOC argues that District Court overlooked binding precedent that discrimination based upon failure to conform to gender stereotypes is prohibited by Title VII.
- Court has allowed Stephens to intervene.
- Significant support for EEOC and Stephens has come through the filing of amicus briefs by religious and civil rights organizations.



*Photo Source: Dawn Ennis, *Exclusive: Trans Woman Fired by Michigan Funeral Home Speaks Out*, NBC News, (Aug. 19, 2016), <http://www.nbcnews.com/feature/nbc-out/exclusive-trans-woman-fired-michigan-funeral-home-speaks-out-n634406>.





Bradford v. Prosoft, LLC, No. 3:16-cv-00373 (W.D. Kentucky)

- Transgender male employee requested medical leave to obtain hysterectomy for dysmenorrhea and endometriosis
- Employee had not previously disclosed he was transgender.
- Employer denied the requested leave and terminated him.
- Bradford initiated his lawsuit in June, 2016.
 - He claims discrimination based upon his transgender status pursuant to Title VII, as well as failure to accommodate under the ADA and violations of the FMLA
 - Survived motion to dismiss in June, 2017.



Healthcare for Transgender People

- Coverage exclusions for care associated with transition
- Denial of coverage as “not medically necessary” or “cosmetic”
- Denial of coverage as not appropriate for the insured’s gender (e.g., annual pap smear for transgender male)

Section 1557 of the ACA

- **Prohibits discrimination on the basis of, among other things, sex.**
- **May 13, 2016: Final rule issued**
 - Ban on sex discrimination includes discrimination based on gender identity
 - Also includes discrimination based on sexual orientation where it is “based on gender stereotypes”
- **Franciscan Alliance, Inc. et al v. Burwell (December 2016)**
 - N.D. Texas enjoined the government’s ability to interpret 1557 as prohibiting discrimination based on gender identity and termination of pregnancy per the HHS regulation
- **May 2, 2017: Secretary of HHS filed a motion indicating HHS may itself reconsider the scope of 1557**



Section 1557 Cases

- **Baker v. Aetna Life Ins. Co. (N.D. Tex. 2017)** – lawsuit challenging denial of short-term disability following medically necessary surgery after defendant designated surgery cosmetic
- **Tovar v. Essentia Health (D. Minn. 2017)** – lawsuit alleging employer improperly denied employee’s son’s gender affirming surgery and medically necessary prescriptions
 - 8th Circuit reversed lower court’s dismissal of lawsuit – allowed 1557 claims to go forward against plan and plan administrator; affirmed dismissal of Title VII and MHRA claims against employer
- **Robinson v. Dignity Health (N.D. Cal. 2016)** – lawsuit challenging employer’s health care plan which had exclusions for medically necessary care



FMLA, ADA and Title VII

- **EEOC v. IXL Learning Inc.** – retaliation under Title VII and ADA
- **Duane v. IXL Learning Inc.** – FMLA interference
 - Transgender employee fired after he posted an online message about alleged discrimination in a post on Glassdoor.com
 - “If you’re not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball, then you’re likely to find yourself on the outside...most management do not know what the word ‘discrimination’ means...nor seem to think it matters.”
 - Company placed “stringent requirements” on his telecommuting that it did not impose on heterosexual, non-disabled employees
 - Employee’s FMLA claim survived employer’s MTD
 - EEOC lawsuit filed 5/24/17



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ADA Claim for Gender Dysphoria

- **Blatt v. Cabela's Retail, Inc. (E.D. Pa. May 18, 2017) – Court held that transgender people are not categorically barred from protection by the Americans with Disabilities Act (ADA) if they suffer from gender dysphoria.**

- Being transgender is not in and of itself a disability under the ADA.
- Plain language of the ADA's exclusion of "gender identity disorders" from the definition of "disability" in 42 U.S.C. § 12211(b)(1) ("the GID exclusion") must be read narrowly.
- The court's primary reasoning rested on its view that the term "gender identity disorder" in § 12211(b)(1) must be "read narrowly to refer only to the condition of identity with a different gender, not to encompass...gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling."

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Federal Law Update

Sexual Orientation

7th Circuit

- **Hively v. Ivy Tech Cmty. Coll., No. 3:14-cv-1791 (7th Cir. July 28, 2016). First time issue is decided by a Circuit Court - 7th Circuit en banc holds that Title VII applies to claims of sexual orientation discrimination**

- P/T adjunct professor alleged she was denied promotion to F/T status, and that college eventually decided not to renew her employment contract because she was openly gay.
- District Court – dismissed claim b/c Title VII does not apply to sexual orientation discrimination. Plaintiff appealed.
- EEOC rulings are not binding.
- Congress has unsuccessfully attempted to expand Title VII to include sexual orientation every year (except one) since 1994
- Supreme Court has been silent on the issue.
- Court ultimately concluded that sexual orientation claims are not cognizable under Title VII, but only after an unusually long and painstaking analysis of this issue in which the court opined that its finding "will not hold up under future rigorous analysis" and that "[i]t seems unlikely that our society can continue to condone a legal structure in which employees can be fired...and otherwise discriminated against solely based on how they date, love, or marry."

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7th Circuit

- Approximately 10 weeks later, on Oct. 11, 2016, the 7th Circuit surprisingly vacated its prior ruling in a two-sentence order and granted the plaintiff's motion for an en banc rehearing.
- Heard by full 7th Circuit panel November 30, 2016.
- En banc decision April 4, 2017 – 8-3
- “[A]ctions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex,” and, therefore, violate Title VII’s prohibition of discrimination “because of sex.”
- Key to this determination was the opinion — articulated as early as 1971 in *Sprogis v. United Air Lines, Inc.* — that one of the purposes of Title VII is to “strike[] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”



*Photo Source: Lambda Legal, Indiana (last visited June 14, 2017), <https://www.lambdalegal.org/states-regions/indiana>

11th Circuit

- **Burrows v. Coll. of Cent. Fla., No. 15-14554**

- Lesbian professor alleged that she was not offered contract renewal and that her position was thereafter eliminated because of her sexual orientation
- M.D. Fla. dismissed claim because sexual orientation is not protected by Title VII
- Appealed to Eleventh Circuit on October 9, 2015
- EEOC filed amicus brief
- Case settled on April 1, 2016 – no details available as to terms
- Appeal dismissed on April 21, 2016



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11th Circuit

- **Evans v. Georgia Reg. Hosp., No. 15-15234**
 - Lesbian security officer alleged that she was targeting for termination because of her sexual orientation
 - S.D. Ga dismissed the claim because sexual orientation is not protected by Title VII
 - Appealed to Eleventh Circuit on April 23, 2015
 - Oral argument occurred mid-December, 2016
 - The Court relied on the 1979 holding in *Blum v. Gulf Oil Corp.* – that sexual orientation is not a protected class under Title VII – as binding precedent, and affirmed the lower court’s ruling.
 - The Court remanded to the lower court for further proceedings on a gender stereotyping theory of recovery, which remains a valid Title VII cause of action under *Price Waterhouse v. Hopkins*.



*Photo Source: Lambda Legal, *Jameka Evans Was Forced out of Her Job for Being a Lesbian. We're Asking the Full Eleventh Circuit to Rehear Her Case* (March 31, 2017), https://www.lambdalegal.org/blog/20170331_ll-requests-11th-circuit-review-evans

2d Circuit

• Christiansen v. Omnicom Group, Inc., No. 16-748

- Suit filed by openly homosexual male employee alleging he was subjected to hostile work environment because of his sexual orientation and being perceived as “unmanly”
- District Court dismissed finding claim was one alleging sexual orientation discrimination, not gender stereotyping
- Court held it was bound by prior 2d Circuit law disallowing Title VII sexual orientation claims
- Court heavily critiqued that precedent and that of other Circuits
- "In light of the EEOC's recent [*Baldwin*] decision on Title VII's scope, and the demonstrated impracticality of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask - and, lest there be any doubt, this Court is asking - whether that line should be erased."
- Appeal filed on April 4, 2016
- Amicus brief filed by EEOC on June 28, 2016
- Oral argument occurred in January, 2017
- 2d Circuit majority held (*per curiam*) that it was bound by its precedent *Simonton v. Runyon* and *Dawson v. Bumble & Bumble*, which held that Title VII does not prohibit sexual orientation discrimination. However, the Court remanded Christiansen's gender stereotyping case.



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2d Circuit

- **Carigan v. Breitling USA, Inc., No. 16-3592**

- Openly homosexual male employee alleged, inter alia, that he was terminated from his sales job at watch company because of his sexual orientation in violation of Title VII
- District Court (S.D.N.Y) granted summary judgment. Citing *Christiansen*, court found claim was one alleging sexual orientation, not gender stereotyping, and therefore not protected by Title VII
- Appeal filed on October 24, 2016



2d Circuit

- **Zarda v. Altitude Express, No. 15-3775**

- Zarda was a skydiving instructor. In 2010, he told a female client that he was gay. She told her boyfriend, who complained to Zarda's employer, Altitude Express. Altitude Express terminated Zarda's employment and Zarda sued, claiming he was terminated because of his sexual orientation in violation of, *inter alia*, Title VII.
- EDNY granted summary judgment on Zarda's Title VII claim for Altitude Express. The EDNY held both that Title VII does not prohibit sexual orientation discrimination and that Zarda had failed to establish a gender stereotyping claim under *Price Waterhouse v. Cooper*.
- May 25, 2017 - Second Circuit granted *en banc* review of his appeal on the limited question of whether sexual orientation discrimination is included in Title VII's proscription of discrimination "because of sex."
- Oral argument is set for September 26, 2017.





Federal Law Update

Executive Orders and Legislation



Federal Contractor Regulations Executive Orders

- Executive Order 11246
 - Prohibits discrimination on the basis of sex
- Executive Order 13672
 - Amended EO 11246 to include “sexual orientation” and “gender identity” as protected categories
 - Effective April 8, 2015
 - President Trump issued a press release saying he would continue to support EO 13672

Federal Contractor Regulations New Sex Discrimination Rule

- Final Rule, published June 14, 2016, effective August 15, 2016
 - Updates sex discrimination guidelines from 1970
- Specific guidance regarding gender identity and sexual orientation:
 - “Sex” defined to include gender identity, transgender status, sex stereotyping
 - Disparate treatment discrimination defined to include:
 - Denying transgender employees access to restrooms, etc. consistent with the gender with which they identify; and
 - Treating applicants/employees adversely because they are transitioning.
 - Prohibits discrimination in provision of fringe benefits – including by denying or limiting access to health care benefits based upon an employee’s gender identity or transgender status.





Federal Contractor Regulations New Sex Discrimination Rule

- One key provision involves restroom access – restroom access policies must be based on the employee’s gender identity rather than his or her biological sex.
- Federal contractors must change their restroom policies and may even be required to change the layout of their restrooms to ensure compliance with the Final Rule.

Equality Act

- May 5, 2017 - *The Equality Act* was re-introduced in Congress.
 - Bipartisan legislation
 - Originally introduced in July 23, 2015
 - Seeks to ban sexual orientation and gender identity discrimination in employment and a number of other settings
 - Seeks to prevent the Religious Freedom Restoration Act from being used as a shield against discrimination claims
 - Mirrors Title VII's exemption for religious-affiliated employers





State Law

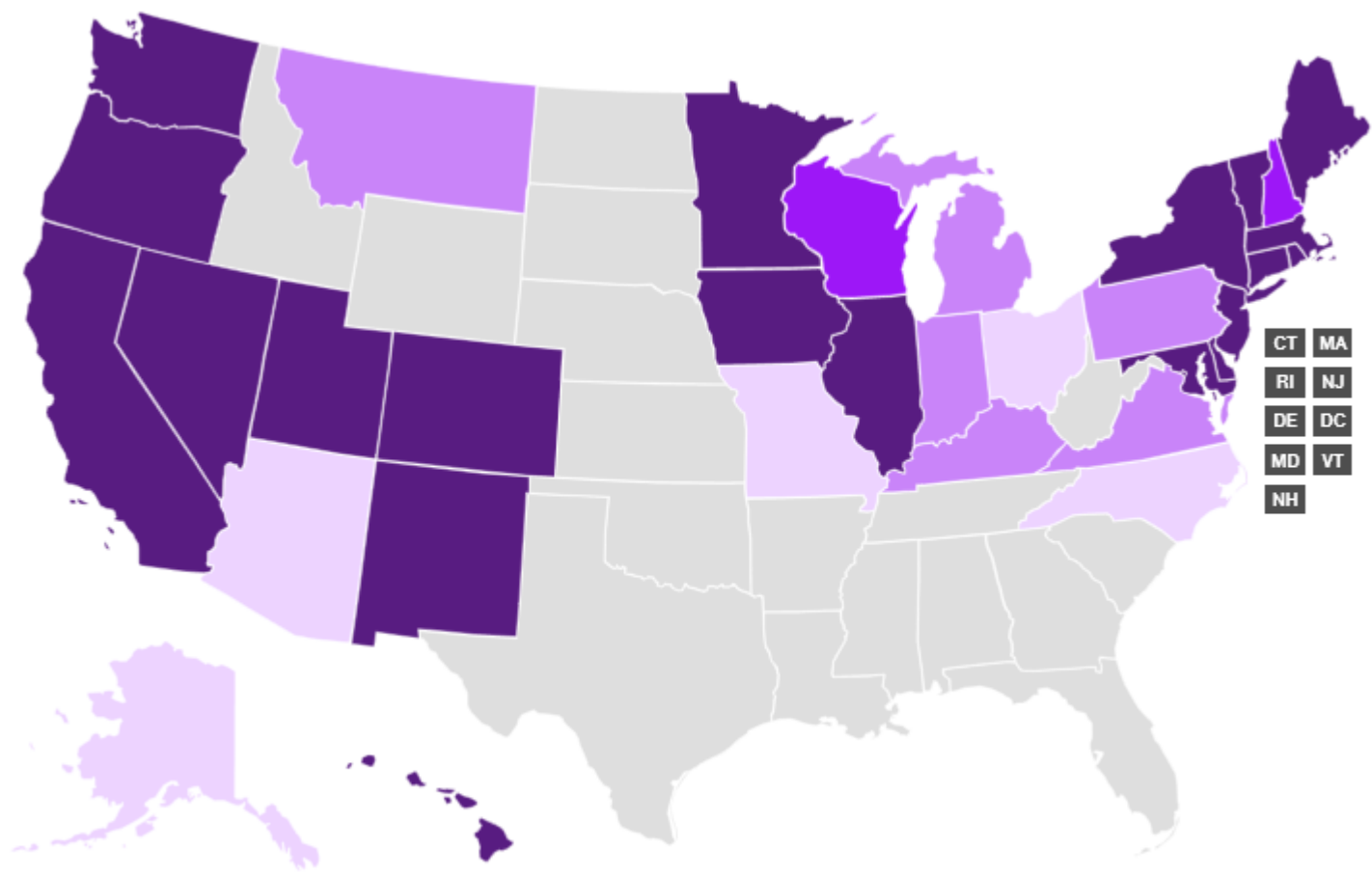
LGBTQ Issues



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State laws



STATEWIDE EMPLOYMENT LAWS & POLICIES

- Prohibit discrimination based on sexual orientation and gender identity
20 STATES AND DC
- Prohibit discrimination based on sexual orientation only
2 STATES
- Prohibit discrimination against public employees based on sexual orientation and gender identity
6 STATES
- Prohibit discrimination against public employees based on sexual orientation only
5 STATES

| | |
|----|----|
| CT | MA |
| RI | NJ |
| DE | DC |
| MD | VT |
| NH | |

The Federal Equal Employment Opportunity Commission is currently accepting complaints of sexual orientation and gender identity discrimination in employment based on Title VII's prohibition against sex discrimination.

*State courts, commissions, agencies, or attorney general have interpreted the existing law to include some protection against discrimination against transgender individuals in Florida and New York.

*North Carolina's executive order enumerates sexual orientation and gender identity. However, this order has a bathroom carve out for transgender employees making the executive order not fully-inclusive.

Updated April 26, 2017

*Photo Source: Human Rights Campaign (last visited June 15, 2017), <http://www.hrc.org/state-maps/employment>

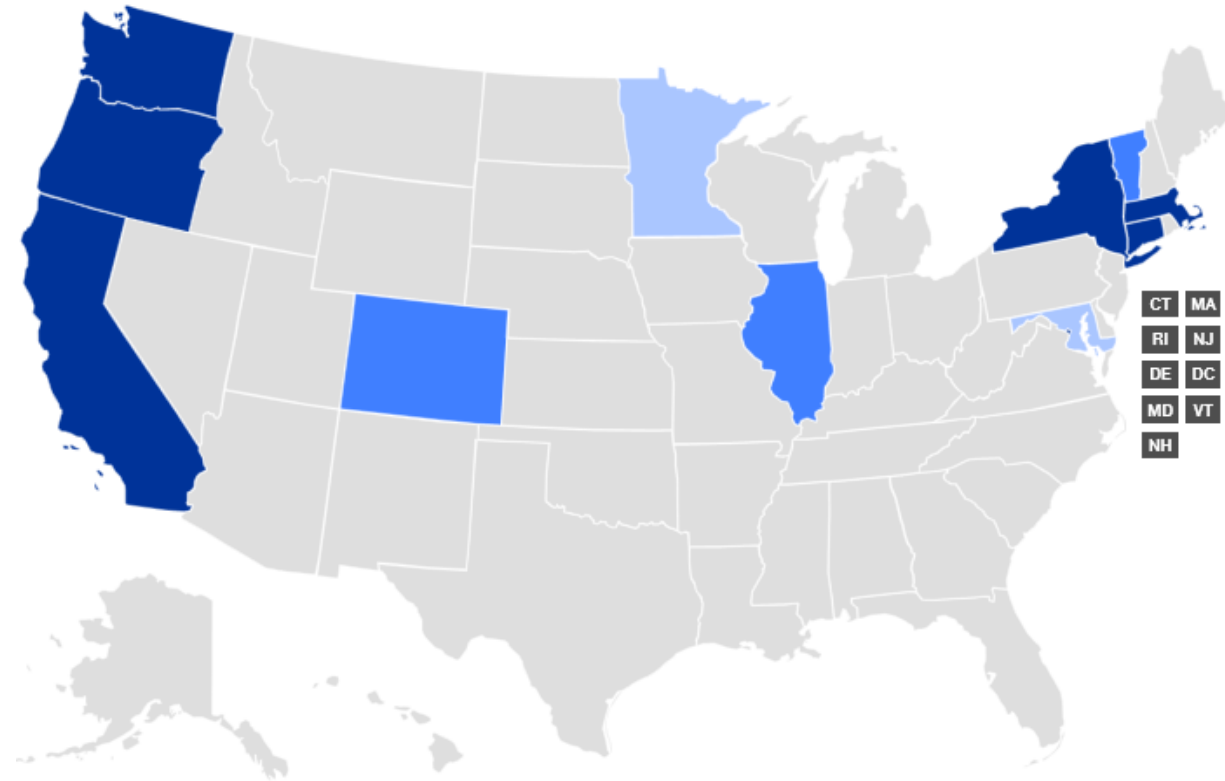
Texas

- House Bill 225 has been introduced that would add sexual orientation and gender identity or expression as protected classes with respect to prohibited discrimination in the workplace.
 - A number of Texas cities have banned discrimination based upon sexual orientation and gender identity in private employment, including Dallas, Austin, Fort Worth and Plano, as well as numerous others with respect to city employment, but no state-wide prohibition at this time
- May 3, 2017 – approved by the House Committee considering the bill in a vote of 4 to 3
 - Dallas Republican Rep. Jason Villalba was the tie-breaking vote.
- Next step: Calendars Committee for a vote as to whether it will be presented to the House for a vote.



State laws - healthcare

TRANSGENDER HEALTHCARE



Updated April 26, 2017

*Photo Source: Human Rights Campaign (last visited June 15, 2017), <http://www.hrc.org/state-maps/transgender-healthcare>



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Model Policies

LGBTQ-related policies to review and/or implement



EEO Policy

- Include gender identity and/or expression
- Sexual orientation

Legal name vs. preferred name

- Application includes ability to note preferred vs. legal name?
- Background check forms require legal name?
- Background check forms require full history of legal names?
- Interviewer has a process to know or allow for preferred name? How?
- Onboarding – preferred name where practicable
 - Legal name required for payroll/insurance forms/licensing/etc.
 - During the hiring process, hiring managers and supervisors should be sensitive to the possibility that applicants have transitioned. The name and gender on the application may correspond with the person's current usage; however, background or suitability checks may disclose a previous name that indicates a gender different from the one the applicant is currently presenting. In such cases, hiring managers should respectfully ask whether the applicant was previously known by a different name, and confirm with the applicant the name and gender that should be used throughout the hiring process. (OPM)



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Legal name vs. preferred name

- Sample Policy: Our company will change an employee's official record to reflect a change in name or gender upon request from the employee. Certain types of records, like those relating to payroll and retirement accounts, may require a legal name change before the person's name can be changed. Most records, however, can be changed to reflect a person's preferred name without proof of a legal name change.
- A transgender employee has the right to be addressed by the name and pronoun corresponding to the employee's gender identity. Official records will also be changed to reflect the employee's new name and gender upon the employee's request.
- As quickly as possible, we will make every effort to update any photographs at the transitioning employee's workplace so the transitioning employee's gender identity and expression are represented accurately.
- Questions should be directed to _____.

(Ernst & Young)



Pronouns

Sample Policy: An employee has the right to be addressed by the name and pronoun that correspond to the employee's gender identity, upon request. A court-ordered name or gender change is not required. The intentional or persistent refusal to respect an employee's gender identity (for example, intentionally referring to the employee by a name or pronoun that does not correspond to the employee's gender identity) can constitute harassment and is a violation of this policy. If you are unsure what pronoun a transitioning co-worker might prefer, you can politely ask your co-worker how they would like to be addressed.

(Ernst & Young)



Confidentiality and Privacy

- An employee's transition should be treated with sensitivity and confidentiality like any other significant life experience, such as hospitalization or marital difficulties.
- Medical information received about individual employees is protected.
- Sample: The transgender status of an individual is considered confidential and should only be disclosed on a need-to-know basis, and only with the consent of the individual. However, transitioning individuals are encouraged to participate in the necessary education of their coworkers at whatever level they are comfortable. (Chevron)



Confidentiality and Privacy

- Sample Policy: Transgender employees have the right to discuss their gender identity or expression openly, or to keep that information private. The transgender employee gets to decide, when, with whom, and how much to share his/her private information. Information about an employee's transgender status (such as the sex they were assigned at birth) can constitute confidential medical information under privacy laws.
- Management, HR staff, or co-workers should not disclose information that may reveal an employee's transgender status or gender non-conforming presentation to others. That kind of personal or confidential information may only be shared with the transgender employee's consent and with co-workers who truly need to know the information to do their jobs.

(Ernst & Young)



Gender Transition Guidelines

- Start a year out
- Before the transition begins
- Create an employee-specific transition plan
- Choose the day the transition will be known to the team
 - Plan ahead – create a timeline of all the changes that need to occur and the lead time needed for each item
 - Who will announce the transition? Include high-level management
 - Answer questions
 - Make clear business as usual going forward
- The first day of the employee's official workplace transition
 - Look at it like a new employee's first day – is everything in order?





Commonly Asked Questions

Most frequently asked questions answered

How to respond to questions

- If other people ask whether a co-worker is transgender or make a negative comment about the person for being transgender, respond professionally.
- Do not disclose an individual's transgender status.
- Focus on the individual's professional skills and qualifications.
- Customer or third party bias as a reason for negative action against an employee is prohibited discrimination.
 - *Schroer v. Billington* (2008).



The bathroom question

- Once an employee begins living and working full-time in the gender that reflects his or her gender identity, employers should allow access to restrooms consistent with his or her gender identity.
- Employees cannot be required to undergo any particular medical procedure (including gender-confirming surgery) in order to have access to facilities designated for use by a particular gender.
- Suggest gender neutral or single-stall restroom for those who are uncomfortable for any reason.



Sample Restroom Policies

- Transitioning employees will be permitted to use the facilities that correspond to their Gender Identity. (Chevron)
- Once the “real life experience” begins, a transitioning individual will not be required to use the restroom of his or her designated sex at birth. A transitioning individual should use the facility based on their current gender presentation; specifically, their reassigned gender following commencement of the “real life experience” and from that point forward. Co-workers who have personal concerns about sharing a restroom or locker room with a transgender individual should be invited to have an honest discussion with an appropriate management team member. (Ernst & Young)



Bathroom Access and Sample Policy

- Co-worker bias and fears about bathrooms do not justify discrimination against transgender employees.
- They do justify a conversation – acknowledge and address the question!
- Sample policy: If individuals have concerns with a transsexual co-worker's usage of a restroom or other sex segregated facility after reviewing Ernst & Young's policies, the individual with the concern may be permitted to use a different or single occupancy facility, if such facilities exist at that work location. (Ernst & Young)



Dress Codes

- Employers are encouraged to evaluate, and consider eliminating, gender-specific dress and appearance rules.
- Once an employee has informed management that he or she is transitioning, dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender.
- Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.





Questions?

Thank you!

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