

Feds take aim at sexual orientation, gender ID bias

By Brian D. Carlson



The federal government is taking aggressive action through various enforcement agencies to ban discrimination based on sexual orientation and gender identity. These efforts affect private employers, public employers and federal contractors.

Accordingly, all employers should review their policies and procedures to determine if changes are warranted and consider training managers and human resources personnel on best practices in this emerging area of the law.

Background

Currently, 21 states and the District of Columbia have statutes prohibiting sexual orientation discrimination in employment, and 17 states and DC have statutes prohibiting gender identity discrimination in employment.

However, there is no corresponding federal law. A proposed federal law, the Employment Non-Discrimination Act, or ENDA, would have amended Title VII of the Civil Rights Act of 1964 to include “sexual orientation” and “gender identity” as protected categories. ENDA, however, has failed in Congress.

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Notwithstanding ENDA's fate, various federal agencies are construing “sex discrimination” broadly to encompass discrimination based on sexual orientation and gender identity. Specifically:

- The U.S. Equal Employment Opportunity Commission has argued in lawsuits, amicus briefs and administrative rulings that adverse employment actions based on sexual orientation and gender identity constitute unlawful sex discrimination.
- The U.S. Department of Justice has expanded its definition of sex discrimination to include discrimination based on gender identity.
- In implementing a presidential executive order, the Office of Federal Contract Compliance Programs of the U.S. Department of Labor has banned federal contractors from discriminating on the basis of sexual orientation and gender identity.
- The U.S. Office of Special Counsel, which investigates and prosecutes complaints by federal employees, has ruled that the Department of the Army committed sex discrimination in its handling of a worker's gender transition.

EEOC

As “coverage of lesbian, bisexual and transgender individuals under Title VII's sex discrimination provisions” is a top “enforcement priority” at the EEOC, the agency filed two lawsuits last fall charging employers (a Michigan funeral home and a Florida eye-and-ear clinic) with unlawfully terminating employees for transitioning from male to female.

In the Michigan case, the EEOC alleges that a funeral home illegally fired its director of 14 years after the employee announced that she was transitioning from male to female and would soon start to “present” (or dress) in women's clothes.

In the Florida case, the EEOC claimed

that an eye-and-ear clinic illegally fired its director of hearing services for wearing feminine clothing and announcing that she had begun transitioning from male to female.

The EEOC recently secured a settlement of the Florida suit, under which the clinic agreed to pay the former employee \$150,000 for back pay and emotional distress, to implement a transgender non-discrimination policy, and to provide appropriate training to all its employees regarding that policy.

The EEOC also has filed amicus briefs in cases involving similar issues. For example, it asked the 7th U.S. Circuit Court of Appeals to reconsider a decision indicating that Title VII does not encompass sexual orientation discrimination. The 7th Circuit, in turn, amended its opinion to remove such statements and supporting citations.

In support of its position that discrimination based on sexual orientation and gender identity is a form of sex discrimination prohibited by Title VII, the EEOC relies on the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*. The court ruled in that case that an adverse employment action based on an employee's failure to conform to gender stereotypes is a form of sex discrimination.

In 2012, the EEOC applied that expansive view of sex discrimination in deciding an administrative appeal within the federal civil service system. In *Macy v. Holder*, the Bureau of Alcohol, Tobacco, Firearms, and Explosives rejected a job applicant based on her transgender status. When the applicant appealed, the EEOC ruled that ATF had committed sex discrimination under Title VII in its handling of the application.

Of the 13 federal appeals courts, two (the 6th and 11th circuits) have adopted the EEOC's broad interpretation of sex discrimination under Title VII, and two more (the

1st and 9th circuits) have suggested that transgender plaintiffs may pursue sex-stereotyping theories under Title VII.

The EEOC is expected to continue with such cases until either all federal circuits adopt its position or a circuit split emerges (which would support a petition for the U.S. Supreme Court to decide the matter).

The EEOC should have ample opportunity to pursue this agenda. In the first three quarters of Fiscal Year 2014 (October 2013 to June 2014), the EEOC received 663 charges alleging sexual orientation discrimination and 140 charges alleging gender identity discrimination. Those numbers are believed to be on the rise.

DOJ

Taking the EEOC's lead, the Department of Justice has expanded its definition of sex discrimination to include discrimination based on gender identity.

Marking a reversal in the DOJ's position, the U.S. attorney general circulated a memo to DOJ components and U.S. attorneys barring the department from arguing that transgender individuals are not covered by Title VII.

The decision also enables the DOJ's Civil Rights Division to file Title VII claims against state and local public employers on behalf of transgender individuals.

OFCCP

As required by President Obama's executive order, the Office of Federal Contract Compliance Programs has added sexual orientation and gender identity to the protected characteristics applicable to federal contractors.

Under the order, covered federal contractors are: (a) prohibited from making

discriminatory employment decisions on the basis of sexual orientation or gender identity, and (b) required "to take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their ... *sexual orientation* and *gender identity*."

The OFCCP's implementing regulations, which took effect April 8, apply to all covered contracts entered into or modified after that date. The regulations require contractors to: (a) update the equal employment opportunity (EEO) clause in new or modified contracts, subcontracts and purchase orders to state that applicants and employees will be treated equally without regard to their "race, color, religion, sex, sexual orientation, gender identity, or national origin"; (b) similarly update the EEO language in job solicitations and posted workplace notices; and (c) ensure that applicants and employees are treated without regard to their sexual orientation and gender identity.

OSC

Even the Army has not been immune from this federal campaign to accord protected status to sexual orientation and gender identity. In this regard, the Office of Special Counsel determined in a landmark decision that the Army discriminated against an employee after she announced a gender transition.

The matter involved a software quality specialist at an Army facility in Alabama. After the employee changed her name and began presenting as a woman, her supervisors said her use of the women's restroom was "making other employees uncomfortable" and asked her to use an individual, sex-neutral restroom. One manager

continued to use male pronouns when referring to her and tried to restrict her conversations with co-workers out of a belief that they were uncomfortable with her transgender status.

The OSC found that, through such actions, the Army committed discrimination in violation of the Civil Service Reform Act. The law protects federal workers from adverse treatment based on conduct unrelated to job performance.

Recommendations for employers

In light of this federal push to protect employees in all sectors from discrimination based on sexual orientation and gender identity, there are a number of steps employers should take.

First, employers should review both applicable law and their EEO policies and procedures with employment counsel to determine whether their policies and procedures adequately address discrimination based on sexual orientation and gender identity.

Second, employers are advised to provide training on sexual orientation and gender identity discrimination to their managers and human resources personnel, in order to reduce risky workplace behavior and the potential for liability.

Additionally, employers that are federal contractors should review and update all anti-discrimination policies, EEO clauses, affirmative action plans, contract provisions, job solicitations, posted workplace notices, and other materials to appropriately incorporate sexual orientation and gender identity as protected categories.

Finally, all employers should closely monitor further developments in this rapidly developing area of the law. **NEH**