EEOC Issues New Guidance on Title VII's Prohibition of Sexual Orientation and Gender Identity Discrimination

Labor & Employment Law Update

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On June 15, 2021, The U.S. Equal Employment Opportunity Commission (EEOC) issued guidance on "Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity."

This resource reviews the impact of the Supreme Court's Bostock v. Clayton County case and provides the EEOC's position on what constitutes unlawful discrimination based on sexual orientation and gender identity. The EEOC's answers to key questions on this issue are summarized below.

Does Title VII's prohibition against sex discrimination extend to treatment based on sexual orientation or sexual identity?

Yes. In June 2020, the Supreme Court unequivocally held that discrimination based on sexual orientation or gender identity is discrimination based on sex and, therefore, prohibited under Title VII. In Bostock, the Court extended Title VII's legal protections to LGBTQ+ employees after examining three different discrimination claims where employees claimed that they were fired after their employers learned that they were gay or transitioning from one gender to another.

As with all Title VII protections, employers cannot take any adverse employment action –including decisions involving hiring, firing, promoting, disciplining, training, or providing compensation or other benefits – based on the sexual orientation or gender identity of an employee or applicant.

Can an employer's discriminatory action toward an LGBTQ+ employee be justified by customer or client preference?

No. Even if a company's clients or customers have a preference to work with people of certain sexual orientations or gender identities, an employer cannot refuse to hire, fire, or reassign an employee based on their LGBTQ+ status. Similarly, an employer cannot assign LGBTQ+ employees to positions that do not interface with the public based on their protected status.

May an employer make employment decisions based on a belief that the employee acts or appears in ways that do not conform to stereotypes about women or men?

No. Even if an employer does not have knowledge of the employee's gender identity or sexual orientation, employers are not allowed to discriminate based on gender stereotypes. For example, an employer cannot demote a male employee because it perceives him to behave in stereotypically feminine ways.

Relatedly, an employer may not require a transgender employee to dress in accordance with the employee's assigned sex at birth. Employers should not have any gender-specific expectations about appearance.

May an employer host separate, sex-segregated bathrooms, locker rooms, or showers for men and women?

Yes. However, the employer must not prohibit any employee from using the bathroom, locker room, or shower for the gender with which they identify. For example, transgender women should be allowed to use the women's bathroom.

Could it be considered unlawful harassment to use names or pronouns inconsistent with an individual's gender identity?

Yes, possibly. As with all other hostile work environment claims, the harassment must be sufficiently severe or pervasive to be actionable. If an employer accidentally misuses an employee's pronoun or forgets to use an individual's name in isolated incidents, that may not rise to the level of a Title VII violation.

However, an employer that intentionally and consistently refuses to use an employee's correct name or pronouns may be deemed to be unlawfully harassing that employee.

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