

## Employer Update: Title VII Protection for Transgender Status Up in the Air

McGlinchey Labor & Employment Alert

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Federal government agencies are in conflict among themselves as to whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation, including transgender status. Likewise, federal courts have reached differing conclusions.

Until the issue is finally settled, employers wishing to avoid potential liability should take the precautionary route of treating such employees as if they are protected, and should also be aware of what their specific state and local laws require.

The dispute arises over how to define the term "sex" in Title VII. Under President Obama, both the Equal Employment Opportunity Commission and the Department of Justice took the position that Title VII's prohibition against sex discrimination included discrimination based on an employee's LGBTQ status. The official DOJ position was stated in a December 15, 2014 memorandum from then-Attorney General Eric Holder to U.S. Attorneys, wherein he concluded that the "plain text" of Title VII encompassed "discrimination based on gender identity, including transgender status."

Under President Trump, the DOJ has reversed course and taken the opposite position. On October 4, 2017, Attorney General Jeff Sessions issued a memorandum to U.S. Attorneys rescinding Holder's memorandum and stating that Title VII does not protect against sexual orientation or transgender discrimination per se. This position was based on the reasoning that "sex" is ordinarily defined as "biologically male or female," and that in other statutes, Congress expressly prohibited discrimination based on "gender identity," but has not chosen to amend Title VII to do so. Sessions concluded that "the Department of Justice must interpret Title VII as written by Congress." This revised position puts the DOJ at odds with the EEOC, which continues to stand by its Obama-era position.

Understandably then, Federal Circuit Courts are also reaching inconsistent conclusions. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the United States Supreme Court held that a woman claiming discrimination because she was adjudged less feminine than desired stated a claim for discrimination under Title VII. Following that precedent, some Federal Circuit Courts held that LGBTQ employees may state a claim under Title VII if they are discriminated against for failing to conform to "sexual stereotypes," but stopped short of holding that such individuals are protected under Title VII based on their LGBTQ status alone.

That changed earlier this year, however, when the Seventh Circuit held that Title VII does afford protection based on sexual orientation alone. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir.2017). Other circuits disagree. See, e.g., *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248, 1255 (11th Cir.2017); *Zarda v. Altitude Express*, 855 F.3d 76, 81-83, 2017 WL 1378932, \*3-4 (2d Cir. Apr. 18, 2017). Given the split in federal precedent, this issue is teed up for likely review by the United States Supreme Court.

Until a definitive answer is forthcoming, employers wishing to avoid possible liability should err on the side of caution and treat such employees as protected. Employers should further be aware of their own state and local laws that may already speak to this issue.

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