

Blog Post

Gender Identity Discrimination – Prohibited or Not?

October 10, 2017

Still confused as to where the Trump administration stands on whether Title VII prohibits discrimination based on gender identity? Attorney General Jeff Sessions' recent announcement should clarify that for you. So what's an employer to do now that the Department of Justice has been instructed to take the position that Title VII does not bar gender identity discrimination but the EEOC still takes the position that it does? That's the real quandary.

Sessions' October 4th **memo** to all United States Attorneys and heads of DOJ components effectively reversed the Obama administration's position on this issue. Sessions firmly announced in his memo that "Title VII does not prohibit discrimination based on gender identity." He added that "[t]his is conclusion of law, not policy." As such, Sessions affirmed that the DOJ will now take the position that Title VII does not encompass discrimination based on gender identity "in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review)." However, Sessions emphasized that the DOJ "must and will continue to affirm the dignity of all people, including transgender individuals," and cautions that his memo should not be "construed to condone mistreatment on the basis of gender identity."

Related Work

Employment
Administrative Claims
Defense
Employment Litigation
Labor and Employment

HR Defense Blog

Akerman Perspectives
on the Latest
Developments in Labor
& Employment Law

[Visit this Akerman blog](#)

Notably, Sessions' announcement was foreshadowed in a **"friend of the court" brief** that the DOJ filed in July in a case involving a skydiving instructor suing his former employer for allegedly being fired after a customer complained about his sexuality. In its brief, the DOJ argued that the issue of whether "Title VII reaches sexual orientation discrimination . . . has been settled for decades" – it does not. The DOJ went on to say that "[a]ny efforts to amend Title VII's scope should be directed to Congress rather than the courts."

As employers are well aware, Sessions' announcement runs contrary to the position taken by the EEOC since 2015, when the **EEOC expressly held** that sexual orientation discrimination is discrimination based on sex and therefore is barred by Title VII. Indeed, **even though all but one of the federal circuit courts** considering this issue have disagreed with the EEOC and have held, consistent with Sessions' announcement, that sexual orientation discrimination is not actionable under Title VII, the EEOC continues to process discrimination charges and bring cases based on that interpretation. Indeed, the agency regularly tracks and maintains **a list of ongoing cases** seeking to protect LGBT workers in the private workforce.

So what happens now? Is Sessions' announcement a harbinger of the pendulum swinging back? Will we see a bill in the next session to amend Title VII? Will the EEOC reverse its position in response to the memo? (EEOC Acting Chair Victoria Lipnic advised that Sessions' memo is "under review" by the agency.) As employers wait for history to unfold, they are wise to proceed with caution. It is important to note that, setting aside federal protections for employees, more than 20 states and dozens of local governments have laws which expressly prohibit discrimination based on gender identity or sexual orientation. In addition, federal contractors and sub-contractors are still covered by a separate, explicit prohibition on transgender or sexual orientation discrimination in employment pursuant to Executive

Order 13672 and implementing regulations issued and enforced by the Department of Labor's Office of Federal Contract Compliance.

Whether gender identity or sexual orientation discrimination is or is not protected by Title VII, cautious employers will:

1. Keep abreast of the ongoing and latest developments and changes in the law at the federal, state, and local levels, and ensure that existing policies comply;
2. Consider including sexual orientation or transgender status as a protected category in equal employment policies and anti-discrimination/anti-harassment policies regardless of the state of the law;
3. Train employees, particularly supervisors and management, in addressing situations and/or responding to complaints involving sexual orientation, gender identity, or transgender identity;
4. When faced with a claim alleging sexual orientation and/or gender identity discrimination, be sure to know which laws apply and consult with legal counsel immediately.

This information is intended to inform clients and friends about legal developments, including recent decisions of various courts and administrative bodies. This should not be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this email without seeking the advice of legal counsel.