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# Ending LGBTQ Discrimination in the Workplace: The Practical Implications for Title VII

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# What Are We Talking About, And How Do We Talk About It?

- LGBTQ+
- Sex/Gender
- Sexual orientation
- Gender identity
- Gender expression
- Transgender
- Cisgender
- Non-binary/gender spectrum
- Queer
- Transition (medical, social, etc.)
- Grammar and people-first language



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# Title VII of the Civil Rights Act of 1964

- Applies to all private sector and state/local government employers with at least 15 employees
- Prohibits employment discrimination based on race, color, religion, **sex** or national origin
- Title VII does not explicitly prohibit discrimination on the basis of sexual orientation or gender identity
  - Does Title VII’s prohibition against “sex” discrimination include prohibition against sexual orientation or gender identity discrimination?



# ***Bostock v. Clayton County, Ga.***

- Background of three consolidated cases
  - Each involved an employee who alleged they were terminated because of their sexual orientation or gender identity
  - Key question: Does a termination on the basis of sexual orientation or gender identity necessarily involve consideration of the employee's sex?
- 6-3 opinion issued June 15, 2020 (Justice Gorsuch for the majority)
  - Yes
  - Impossible to consider an employee's sexual orientation or gender identity without also considering their sex
  - Therefore, if an employee is terminated due to their sexual orientation or gender identity, Title VII protections apply



# ***Bostock v. Clayton County, Ga. (Cont'd.)***

- Title VII applicability
  - Possible knock-on effects for state non-discrimination laws?
- Issues not explicitly decided
  - Facilities usage
    - However, there is already EEOC and OSHA guidance on these points
  - Religious exemptions?
    - Employer or co-worker



# EEOC LGBTQ+ Discrimination Examples

- Failing to hire an applicant because she is a transgender woman
- Firing an employee because he is planning or has made a gender transition
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees
- Denying an employee a promotion because he is gay or straight
- Discriminating in terms, conditions or privileges of employment, such as providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman
- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex
- Discriminating against or harassing an employee because of his or her sexual orientation or gender identity, in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability



# Practical Tips for Employers

- Overall goals:
  - Equity and inclusion for LGBTQ+ employees
- Policies and practices
  - Review and change
  - Role of inertia
- The business case for equity and inclusion



# Workplace Policies

- EEO, non-discrimination and non-harassment policies
- Employee privacy policies
- Use of proper employee names and pronouns
  - Business cards, employee directories, email signatures, ID tags, etc.
  - It's not a “preferred” name or “preferred” pronouns
  - Intentional misuse
- Dress codes and grooming standards
  - Permit employees to dress consistent with their gender identity
  - Are gender-specific requirements the result of business necessity?
  - Accommodations



# Workplace Policies (Cont'd.)

- Are benefits inclusive?
  - Parental leave
    - Is the amount of leave based (explicitly or implicitly) on gender?
    - Inclusive of adoption, foster, surrogacy?
  - Health insurance benefits
  - Prescription benefits
  - Family/medical leaves



# Workplace Practices

- Are forms gender-neutral?
  - Application/intake, other personnel paperwork
- Inclusion in social aspects of the workplace
  - Removal of stereotypes
  - The “old boys’ club”
- How are employees being mentored?
- How are employees considered for advancement?
  - Performance feedback/review and promotion pipeline



# Workplace Training

- Vocabulary
- Train managers and Human Resources to use inclusive language and not to make assumptions
  - These are the “front line” people your employees will be contacting
- Listen and have a dialogue with employees
- Importance of having commitment from top leadership
- Importance of regular and ongoing education/training
  - Not just “check box” training
  - Incorporate into the DNA of the workplace



# Employee Transitions

- Components of transition
  - Social
  - Medical
  - Professional
  - Every transition is unique
- Written policy, flexible plan
  - Collaboration with the employee, not dictating to them
  - Support from leadership
  - Training for other employees
  - Detailed considerations in putting together a plan
- Outside resources
  - Transgender Law Center (<https://transgenderlawcenter.org/>)



# Let's Talk About Restrooms

- Focusing on restrooms can be reductive and offensive
- Employees should be permitted to use restrooms and other facilities consistent with their gender identity
  - EEOC and OSHA guidance
- OSHA has issued Best Practices
  - Do not require medical or legal documentation of gender identity
  - Single-occupancy, gender-neutral facility OR multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls
- Training, education and dialogue for other employees
  - There's no “objector's veto”
  - Potential hostile work environment issues



# Other Considerations for Transgender or Non-binary Employees

- Jurisdictions issuing licenses/IDs with non-binary gender markers
- Issues with recognition of non-binary gender markers (U.S. passport office, airports, TSA, EEOC)
- Professional licensures
- HRIS and other electronic systems



# Other Employee Support Structures

- Include LGBTQ+ employee in statistics, D&I efforts, etc.
  - Voluntary self-identification
- Highlight contributions of LGBTQ+ employees
  - With their consent
- Employee resource groups
- LGBTQ+ philanthropy support issues
- Community partnerships



# Additional Resources

- Transgender Law Center (<https://transgenderlawcenter.org/>) and Lambda Legal (<https://www.lambdalegal.org/>)
- NALP Diversity Best Practices Guide
  - <https://www.nalp.org/uploads/NALPDiversityBestPracticesGuide.pdf>
- Transgender Inclusion in the Workplace: A Toolkit for Employers (Human Rights Campaign Foundation)
  - <https://www.hrc.org/campaigns/trans-toolkit>
- OSHA Best Practices: A Guide to Restroom Access for Transgender Workers
  - <https://www.osha.gov/Publications/OSHA3795.pdf>
- EEOC: What You Should Know About EEOC and the Enforcement Protections for LGBT Workers
  - [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)



**Questions/Comments?**



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