

Department of Justice Releases Memorandum Restricting Transgender Worker Protection under Title VII

By Michelle E. Phillips

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On October 4, 2017, Attorney General Jeff Sessions reversed the Department of Justice's position that gender identity is protected as part of Title VII of the Civil Rights Act's prohibition against sex discrimination — taking a position that is contrary to current guidance from the Equal Employment Opportunity Commission.

In a memorandum released to all U.S. Attorneys ("Revised Treatment of Transgender Employment Discrimination Claims under Title VII of the Civil Rights Act of 1964"), Sessions stated that "... Title VII does not prohibit discrimination based on gender identity, per se," expressly reversing the position taken by former Attorney General Eric Holder during the Obama Administration. Accordingly, the Department will take the position that gender identity is not covered under Title VII in all pending and future matters, except where controlling lower-court precedent dictates otherwise. In these scenarios, Sessions instructs that the issues should be preserved for potential further review.

The memorandum leaves significant questions regarding how transgender and other gender non-conforming individuals are covered by Title VII. While it acknowledges that Title VII bars sex stereotypes, the memorandum stated, "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of the employee but do not impose different burdens on similarly situated members of each sex." Under this language, it is possible that transgender and gender non-conforming individuals would be protected from discrimination, but an employer would not be obligated to provide accommodations for their gender identity (such as allowing an individual to use the bathroom or locker room consistent with their gender identity).

The EEOC

Moreover, the EEOC is primarily responsible for enforcing Title VII. The Department's position is contrary to the current guidance from the EEOC, which has stated definitively that it interprets, and will enforce accordingly, Title VII's prohibition on sex discrimination as encompassing employment discrimination based on gender identity and sexual orientation. (See our article, [EEOC: Title VII Prohibits Employment Discrimination Based on Gender Identity, Sexual Orientation](#).) At present, this position remains unchanged, although the EEOC has stated that it is reviewing the Department's memorandum.

Best Practices

Claims asserting Title VII violations on the basis of gender identity and sexual orientation have grown exponentially in recent years. According to the EEOC's statistics, the agency received 1,768 charges in 2016 that alleged sex discrimination related to sexual orientation and/or gender identity/transgender status. This represented an increase from 1,412 charges filed in 2015, and 1,100 in 2014.

These numbers are not likely to decrease any time soon. While the EEOC's position remains unchanged on the coverage of gender identity under Title VII, it is important that employers continue to update and maintain policies that include gender identity/expression and sexual orientation as protected groups. It is equally important to train and educate the workforce, particularly Human Resource professionals and front-line supervisors, on how to lead by example and prevent any forms of harassment based on gender identity/expression and sexual orientation.

The Occupational Safety and Health Administration, as well as the EEOC, mandates that employers allow transgender employees to use the bathroom that corresponds to that employee's gender identity.

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Employers may choose to offer a single-stall, separate bathroom facility to all employees, including those individuals who identify as transgender or are in the process of transitioning. However, employers may not mandate that transgender employees use separate bathroom facilities.

Additionally, gender identity is included as a protected class under 19 state and several hundred local anti-discrimination laws. The Department of Justice's position leaves these laws unchanged.

Please contact your Jackson Lewis attorney to discuss these developments and what they mean for your organization.

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