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Labor & Employment Law Special Briefing

Highlights

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Inside

Evolving trends: LGBTQ+ issues in the workplace

"The Times They Are a-Changing," as Bob Dylan titled his 1964 song. The phrase is apropos given our shifting understanding, attitudes, and inclination to protect our workplace colleagues and coworkers who fall outside a historically binary view of sex and sexuality—men and women who identified solely with the sex stated on their birth certificate and experienced sexual attraction only for the opposite gender. Yet we've always known that this model was not a comfortable fit for everybody.

As our society has shifted and sometimes become entrenched along religious and cultural lines, including the "appropriate" and "acceptable" expression of sex and sexuality, employers have faced evolving manifestations of these shifts in their own workplaces. Even our understanding of the expanding label "LGBTQ+" is evolving. Who are the people who fall under that acronym? How might they be discriminated against in U.S. workplaces? What does that discrimination look like?

And employers are not operating in a vacuum as they try to grapple with LGBTQ+ issues in their own workplaces. They do so in the context of a changing patchwork of state laws and significant conflict between federal court interpretations of existing protections against employment discrimination and harassment that at least potentially shield LGBTQ+ applicants and employees. Legal uncertainty makes it much more difficult for employers to develop effective compliance strategies.

In this special briefing, a panel of experts shares its insights as we walk through some the challenges that employers face in grappling with LGBTQ+ issues in the workplace: Brooke Colaizzi, Member, Sherman & Howard; Eric Meyer, Partner, FisherBroyles, LLP; Michelle E. Phillips, Principal, Jackson Lewis P.C.; and Nonnie Shivers, Shareholder, Ogletree Deakins.

Who are we talking about?

Understanding the applicants and employees we are talking about when we use the term "LGBTQ+" can be challenging. Incorporating a glossary provided by the Human Rights Campaign, Eric Meyer said that generally, the term refers to lesbian, gay (homosexual), and transgender, as well as one's gender identity and one's gender expression.

Just a start

Nonnie Shivers called the LGBTQ+ acronym "a start," though, explaining that the plus at the end "attempts to remind others there are a myriad of other inclusive terms that cannot be encompassed in a catchy or simplified

By Pamela Wolf, J.D.

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acronym." Breaking it down further, Shivers said, "Sexual orientation (the LGB) and gender identity (transgender) all fall within the spectrum of queer." She also noted that "some employers have elected to identify their workplaces as 'queer-friendly' or use 'queer' as an all-inclusive term in policies, thereby using the former pejorative to show their strong stance on inclusivity."

"The acronym varies and is now commonly seen as 'LGBTQIA,' to reflect intersex individuals and allies or asexuals," Shivers continued, noting that the "A" varies depending on who you ask. "The reality is that this inclusive terminology is only the tip of the proverbial iceberg, in that terms like cisgender, gender binary, gender expression, gender non-conformity, and other key terms may not be referenced directly or conveyed adequately," she said.

LGBTQ+ spelled out

"Generally, 'LGBTQ+' refers to 'lesbian, gay, bisexual, transgender, queer (or questioning) and others," according to Sherman and Howard attorney Brooke Colaizzi, who also noted that the precise meanings of the various terms have changed (and continue to change).

In the employment context, Colaizzi said the term can refer to individuals who (not exclusively):

- Do not identify with the sex and gender they were assigned at birth;
- Identify with more than one sex and gender;
- Do not experience sexual attraction;
- Are sexually attracted to individuals of the same sex and gender;
- Are attracted to more than one gender; and
- Have an intersex condition.

Open self-identification

LGBTQ+ employees and job applicants may not be obviously identifiable. In some cases, however, these individuals openly identify themselves in the workplace. Self-identification is not common, according to Colaizzi, but she said it is becoming more so. Certain work environments (universities, for example) are ahead of other environments in terms of the commonality and acceptance of self-identification, Colaizzi said.

Meyer echoed Colaizzi's impression, saying anecdotally that "it's becoming more common for people to self-identify according to their gender identity."

"For forward-thinking companies that are seeking to attract and retain a diverse workforce, there is a growing trend to permit employees to voluntarily self-identify based on their sexual orientation and gender identity," according to Michelle Phillips.

It's complicated. But for employers, encouraging open self-identification can be complicated. "In my experience most private-sector employers are scrambling to understand the issues surrounding the evolving definitions of sex and gender and to incorporate them into effective workplace policies," Colaizzi observed. "Private employers are also discouraged from encouraging self-identification because the lack of knowledge of a protected or possibly protected characteristic is an important defense to discrimination, harassment, and retaliation claims."

Legal risk. Shivers noted that no government regulations require self-identification of LGBTQIA characteristics and that some actually prohibit it, especially as associated with gender. "Many employers have explored collecting some data, usually driven by their LGBT business resource group or other affinity group," she said. "But the questions to consider are why do you want to collect such data and how will you use it without exposing yourself to legal risk?"

Shivers observed that while it may be more common to be "out" at work based on sexual orientation—and coming out is a repeated process, regardless of which part of the alphabet soup with which you identify—it appears that more individuals have elected to transition at work and make their transitions known.

However, tracking such data "is nearly impossible given medical and privacy concerns, as well as the fact that most concerns/knowledge of individuals being in transition and transgender arise in the context of gender-confirming medical procedures, which limits information sharing and possible identification," Shivers explained.

More about those risks ... Pointing to the risks on the employee side of the fence, Meyer observed that "self-identifying employees risk a closed-minded response from coworkers or the company, from mere ignorance to open hostility."

Expressing the conundrum that can result for employers, Colaizzi said: "Self-identification simultaneously makes it easier for employers to identify and remedy sex and gender discrimination—and more likely that sex and gender discrimination creeps into the workplace." She noted that the traditional definition of "sex" within the context of antidiscrimination laws meant that the protected characteristic was obvious on its face—an individual was either male or female, easily known from observation.

In contrast, the expanded definitions of sex and gender "include characteristics that may or may not be known to others via observation," Colaizzi explained. "Self-identification reveals unobservable protected characteristics."

Confidentiality. Expanding on the risks that self-identification poses for employers, Phillips said, "It is critical that the employer take precautions to secure the self-identification data by maintaining this information in a confidential file with limited access to HR professionals." She observed that gender identity discrimination is prohibited in only 20 states and the District of Columbia, and sexual orientation discrimination is prohibited in 22 states and the District of Columbia. Given these facts, "it is essential that this data does not fall in the hands of unsympathetic managers who could *lawfully* use this information in a discriminatory fashion with no legal redress in those jurisdictions in which LGBTQ rights are not protected (other than by filing a claim with the EEOC)."

"In the U.S., self-identification should be completely voluntary and confidential," Shivers suggested. "Given the lack of protections nationally and the patchwork of state and local protections, employees are still at risk of being married on a Saturday and fired on a Monday, as the U.S. Supreme Court put it. Given evolving state and local laws prohibiting collection of gender-specific data without a bona fide occupational qualification underlying the request, the risk of collecting the data may be similar to bans on collecting salary information."

International employers. Employers that operate internationally may have other risks to consider. Shivers said that global HR systems with disclosures in other countries would be "highly problematic" for global organizations given the attendant risks.

In the courts

What's going on in state and federal court informs employers' compliance strategies. But when trends are shifting, and especially where employers operate in more than one state, compliance can become a moving target. Our experts break down some of those shifting currents.

Evolving trends

"State courts, spurred by proactive state legislatures, have long been ahead of federal courts in extending protections beyond the traditional definitions of 'sex' or 'gender,'" according to Colaizzi. "In recent years, however, an increasing number of federal courts have adopted or accepted expanded definitions of 'sex' and 'gender.' Specifically, the federal courts have been willing to consider discrimination based on gender identity and transgender status to be sex stereotyping under *Price Waterhouse*."

> *"Despite the ADA's exclusions, numerous cases in the legal pipeline are beginning to change whether ADA coverage exists for those suffering from 'gender dysphoria,' formerly called 'gender identity disorder.'"*
>
> *— Ogletree Deakins attorney Nonnie Shivers*

However, federal courts overall remain reluctant to endorse a discrimination theory based on sexual orientation or transgender status as protected characteristics in and of themselves, Colaizzi observed.

Shivers said that significant decisions have been made by courts across the country involving the rights of transgender students—particularly K-12 students—to use single-sex facilities such as locker rooms and bathrooms under Title IX.

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Turning to Title VII, she observed that "the case law is fractured and still evolving with a federal circuit split among three circuit courts of appeal as to whether sexual orientation is protected under the rubric of 'gender' as defined by Title VII."

"Despite the ADA's exclusions, numerous cases in the legal pipeline are beginning to change whether ADA coverage exists for those suffering from 'gender dysphoria,' formerly called 'gender identity disorder,'" Shivers noted.

State and local level

Employers that operate in multiple locations must deal with not just federal law, but state and local laws that sometimes do not align. "The patchwork of state and local laws leaves employers grappling with how to be compliant as the law evolves and changes," Shivers said.

Drilling down to particular states, Meyer noted that in one of the states in which he practices law, the Pennsylvania Human Relations Commission recently clarified that it will accept complaints of "LGBT discrimination and consider them as claims of discrimination based on 'sex.'" "In the other states and localities in which I most commonly practice, New Jersey and Philadelphia, for example, there are explicit statutory protections for LGBT workers."

Change in the White House

The transition from the Obama Administration to the Trump Administration also has had an impact on the federal scene. Shivers observed that the new administration has pivoted on Title IX and Title VII, including withdrawing guidance that sexual orientation and transgender individuals are protected under Title VII. "The EEOC and OSHA guidance and strategic enforcement priorities now conflict with the administration's guidance/stance, leading to face-offs between the DOJ and EEOC in recent briefing/oral arguments," she pointed out.

What does discrimination look like?

Given our evolving understanding of who exactly is encompassed by the universe of LGBTQ+ employees and applicants, it's not a big leap to say that employers may not know exactly what discrimination against these individuals looks like. Offensive conduct can run the gamut from overt and obvious to subtle and covert.

Common types

Our experts pointed to some of the more common types of discrimination or harassment that LGBTQ+ employees may experience in the workplace. These include conduct that creates a hostile work environment, sex stereotyping (as a form of disparate treatment), and retaliation, according to Meyer.

Offensive conduct. "Certainly, 'outing' someone in the workplace who is not open about their sexual orientation or gender identity is very problematic and can have far-ranging consequences for that person's career," Phillips said. "Gay-bashing, bullying, and threatening or assaultive behavior are unfortunately still very common in the workplace." Also common are "misgendering someone's gender identity by referring to the person by the incorrect pronoun, name or a slur, such as 'he/she/it,'" Phillips added.

Gender stereotyping. While LGBT employees may face gender-stereotyping claims most often, based on the fact that under *Price Waterhouse* these are viable legal claims, "it may simply be fitting a square peg in a round hole," according to Shivers. "These employees face failure to hire and job loss most commonly, based on studies and surveys including tester studies run by state fair employment agencies," she noted.

Gender transitioning. "Employees transitioning appear to face issues giving rise to claims from bathroom usage, dress code conformance issues, personnel records and systems (e.g., email name, etc.) and customer/coworker relationships, including refusal to use pronouns/new names and other commentary," Shivers continued. "All of these issues tend to relate to or be evidenced by comments and threats, such as refusals to use the same restroom," Shivers explained. "Benefits and leave appear to be a potential hot issue for transitioning employees as well," she added.

Similarly, Colaizzi observed that many of the cases coming through the courts involve discrimination or harassment based on sexual orientation or transgender status, specifically individuals who are going through the sex reassignment/transgender process. "Cases involving bathroom usage and sex stereotypes regarding dress are particularly prevalent in the recent case law," she noted.

More subtle forms

Of course, discrimination against LGBTQ+ workers can take far more subtle forms. "Gender identity issues without observable characteristics are more difficult to recognize and can be far more difficult for employees, and even employer representatives, to understand," Colaizzi said. "The binary view of sex discrimination law that many practitioners have been used to for decades is becoming increasingly more complicated, with no clear boundaries or recognizable categories."

Acting on stereotypes. Meyer said that one type of more subtle discrimination is implicit bias based on sex stereotypes. "For example, a business may avoid situations in which a stereotypically gay employee is in a customer-facing position," he suggested. "Another example is where an employer isolates or fails to include a transgender employee in work-related activities such as going out to lunch with coworkers."

Transgender employees. Some of the more subtle forms of discrimination may be directed toward transgender employees, which may include intrusive questioning about their sexual orientation, medical status/procedures, and genitalia, according to Shivers. Stray comments of a sexual nature or about appearance, like commenting on the attractiveness of the individual as to their identified gender—or on their failure to conform to their identified gender, such as still having an Adam's apple, also fall into this category, Shivers said.

Phillips cited exclusionary behavior, sex stereotyping, and unconscious bias toward transgender people as more subtle forms of discrimination. "Female employees will often object to the transgender female employee's use of the women's restroom based on some preconceived bias about what it means to be a cisgender man or a cisgender woman," she observed. (Cisgender refers to an individual whose gender identity matches the sex assigned at birth.) "Unfortunately, I often hear staff raise concerns that the transperson is not a 'real woman' or that gender identity is solely based on genitals," Phillips said.

Greater understanding

The experts generally agreed that the trend in U.S. workplaces is toward greater understanding of LGBTQ+ colleagues and coworkers, but there remains some confusion about what protections these individuals are actually afforded against discrimination and harassment.

Looking through his "HR-compliance fishbowl," Meyer said that the trend is towards more understanding. He continues to see LGBT-focused seminars at HR and employment law events.

Phillips agreed, saying, "In general, there is a greater trend to be more understanding and have greater acceptance toward LGBTQ staff."

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Restroom fears

Jackson Lewis attorney Michelle Phillips believes that coworkers' refusal to occupy a restroom, locker room, or fitting room along with a transgender employee "is based on fears and stereotypes as to what they think will happen in the restroom." She refers to these stereotypes as the twin restroom fears:

- The fear that they will be sexually attacked or harassed in the restroom; or
- The fear that a straight cisgender male will pose as transgender, just to prey upon cisgender females.

But there is absolutely no support for this biased opinion and fear-driven thinking, according to Phillips. "In fact, it is significantly more likely that the transgender female would most certainly experience violence, ridicule, teasing, ignoring, or shunning in the male restroom than the cisgender female will ever experience in the women's restroom."

Education and authenticity

Employers play an important role in facilitating greater understanding of LGBTQ+ issues in the workplace. Shivers likewise agreed that the current trend is to understand the issues better. "But that starts with educating managers and leaders who have never encountered someone different, and asking leaders to model their authentic selves and support for diversity and inclusion in meaningful ways," she explained. Those "meaningful ways" include bystander intervention, support of business resource groups, and support of LGBTQ+ activities, such as marching with the company's PRIDE parade float, for example, the Ogletree Deakins attorney suggested.

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Delayed by confusion over protections

Colaizzi similarly saw the current trend as "unquestionably toward greater understanding and protection." But she said "these efforts are delayed by court confusion and a lack of consensus over what characteristics are protected, at least at the federal level, which in turn affects employer policies, training, and employee understanding."

By industry and sector

Looking at discrimination against LGBTQ+ workers by industries, geographic location, and employment sectors, there seem to be some identifiable trends. "Industry, geography, and employment sectors certainly differ in terms of the progression in acceptance and broadening of sex and gender definitions," Colaizzi said. "Universities and public sector employers tend to be ahead in terms of acceptance and recognition. More conservative employers, particularly ones with religious affiliations, tend to be less accepting. More conservative parts of the country are similarly slower in making changes as compared to more progressive parts, such as the Northeast and West Coast."

"The prevailing trend, both in HR best practices and court decisions, is that individuals should be allowed to use the facilities that correspond with their gender identity."

— Sherman and Howard attorney Brooke Colaizzi

LGBTQ+ discrimination is prevalent in all industries, according to Phillips. "However, certain professions, such as firefighters, building staff, and manufacturing plants still lag behind other industries," she said.

Shivers found it "very hard to tell" whether there are trends in prevalence of LGBTQ+ discrimination. "Anecdotally, charges in manufacturing and hospitality seem to be the most prevalent in my experience alone, but numerous cases winding their way through the legal pipeline have arisen in hospitals/health care and higher education," she observed. Shivers sees "nothing consistent to be discerned necessarily."

Dealing with gender fluidity

Some employees may express different gender identities at different times, moving from one expression of gender to another. For employers with employees who have expressed "gender fluidity," workplace rules, particularly ones related to grooming, and restroom and locker room use, can be tricky. How should employers handle these issues?

Gender identity as the guide

Employers should handle gender fluidity "very carefully, and with an eye toward the notion that 'separate is not equal,'" according to Colaizzi. "The prevailing trend, both in HR best practices and court decisions, is that individuals should be allowed to use the facilities that correspond with their gender identity," she said. "Similarly, grooming and dress code standards should allow individuals to groom and dress according to their gender identity, without regard to traditional, binary views of sex or sex stereotypes," the Sherman and Howard attorney recommended.

Meyer agreed that employees should use the restroom corresponding to the gender with which the employee identifies. He also added that unisex restrooms can help to mitigate issues related to gender fluidity.

"A best practice is to enter into a dialogue with the employee and agree on restroom usage from the 'go live' date," Phillips suggested. Alternatively, she noted that the EEOC would allow the person to use the restroom/locker room that is consistent with the employee's presentation at any given point in time.

Gender-neutral policies

Shivers observed that gender non-conformity and fluidity appears to make the EEOC toss its hands up and say "We're glad we're not the employer!" Her best advice to employers is to make policies "gender neutral." She noted that some states, New York for example, require it as to dress codes. Employers should enforce these gender-neutral policies consistently and "explain to employees and customers that compliance is key so personal

agendas/belief don't raise the company's legal risk profile," she suggested.

Customer-facing jobs

Does it matter whether the employee's position is customer facing? The experts agreed that this is not a factor that matters—at least for now. "A customer's preference is no defense under federal and state discrimination laws," Phillips pointed out.

Similarly, Colaizzi observed, "Coworker and customer discomfort with gender fluidity issues generally will not support policies that can be viewed as discriminatory."

Employer-sponsored healthcare

The question of how employers should handle LGBTQ+ issues in the workplace extends to employer-sponsored health insurance. Shivers and Colaizzi weighed in on what employers should know in that arena.

"Unless the employer has a strong defense based on religious belief, it likely is at the mercy of whatever prevailing state or federal requirements exist regarding the terms of employer-sponsored health insurance," according to Colaizzi.

"While the dust from *Obergefell* settles, challenges have arisen to providing same-sex married couples with equal benefits and/or whether to continue domestic partner benefits since the ability to marry is available, but discrimination against those who do may still be lawful," Shivers observed.

Notably, in the 2015 *Obergefell v. Hodges* case, the U.S. Supreme Court ruled that marriage is a fundamental right and that denying that right to same-sex couples violates the U.S. Constitution.

EEOC's stance

"Based on litigation and conciliation activity, the EEOC's stance on benefits for transgender employees appears to be that partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex, including transgender status and gender dysphoria, violates Title VII," Shivers noted. However, no written affirmation of this being an agency-wide stance has been located to date, she said.

Shivers pointed to an early 2016 consent decree entered in *EEOC v. Deluxe Financial Services, Inc.*, filed in federal court in the District of Minnesota (No. 0:15-CV-2646), which contained a resolution clearly demonstrating the EEOC's stance. The *Deluxe* case involved allegations of disparate treatment and hostile work environment filed by a transgender employee. None of the allegations in *Deluxe* pertain in any way to the transgender employee's healthcare coverage or lack thereof, Shivers noted. Nevertheless, the Consent Decree contains the following provision in which *Deluxe* agreed to provide such coverage moving forward:

> As of January 1, 2016, Defendant's national health benefits plan does not and will not include partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria. For example, if the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment, the plan cannot exclude exogenous hormone therapy for transgender enrollees or persons diagnosed with gender dysphoria where medical necessity for treatment is also demonstrated. This plan was available to all of Deluxe's United States-based employees during open enrollment for 2016 and will be available for all open enrollment periods during the term of this Decree. In addition, Defendant will notify its national plan third party administrator contracted to provide benefits to covered beneficiaries of these non-discrimination requirements. Defendant will also take steps to ensure that employees can meaningfully report health benefits related discrimination on the basis of sex (including transgender status) and gender dysphoria directly to Defendant in the same manner other complaints of sex and disability discrimination are reported.

This language does not appear to prohibit all exclusions, but the language is not further defined in the consent decree or elsewhere, according to Shivers.

DOJ reverses course

But the EEOC is not the only agency that has weighed in on transgender discrimination. Shivers

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said that it's "important to note that on October 5, 2017, Attorney General Jeff Sessions reversed the federal government's guidance issued by Former Attorney General Eric Holder that gender identity is protected as part of Title VII's prohibition against sex discrimination." The AG's memorandum explains that "'Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status,'" Shivers continued. She also observed that despite the memorandum, test cases are winding their way through the courts, citing for example, *Roberts v. Clark County School District* (D. Nev., Jan. 11, 2016).

"The current legal climate does not support a defense to discrimination that an employer was accommodating other employees' religious practices or beliefs."

— Sherman and Howard attorney Brooke Colaizzi

Threading the needle on religious accommodations

Another emerging issue that some employers may face is navigating the duty to accommodate religious practices and beliefs that may conflict with antidiscrimination protections that extend to LGBTQ+ applicants and employees. This a developing area "with no clearly defined parameters," according to Colaizzi.

"The cases seems to have made a distinction between an employer participating in conduct that violates religious practices or beliefs and putting up with conduct that may violate religious practices or beliefs," Colaizzi explained. "The current legal climate does not support a defense to discrimination that an employer was accommodating other employees' religious practices or beliefs. Whether or not an employer has a defense based on its own religious beliefs and practices will be a highly fact-intensive inquiry and will depend in large part on where the employer is operating," she said.

Old balancing act in new milieu

"Balancing religious freedom, civil liberties, and compliant workplaces free from discrimination and harassment is a tough balance to strike, given the competing interests; however, this is not new," Shivers observed. "Recall that discrimination against an employee due to religion is unlawful under Title VII."

Sixth circuit case. Meyer pointed to *EEOC v. R.G. & G.R. Harris Funeral Homes* (6th Cir. 2018), in which the Sixth Circuit concluded that religious beliefs do not excuse LGBT discrimination. The employer has filed a petition for certiorari in the U.S. Supreme Court. "We'll see what the Supreme Court has to say about *Funeral Homes*, if it grants cert.," Meyer said.

In that case, a transgender woman "assigned male at birth" informed her employer that she had "decided to become the person that [her] mind already is" via sex-reassignment surgery. The first step would be to live and work as a woman for one year. The funeral home fired the employee about two weeks later because she would no longer dress like a man under the funeral home's dress code, which required all public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and jackets.

The Sixth Circuit ruled that discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts showed that the funeral home fired its transgender funeral director because she refused to abide by its stereotypical conception of her sex. The appeals court thus reversed the district court's contrary decision, holding that the EEOC was entitled to summary judgment as to its unlawful termination claim on behalf of the employee.

Nor did the Religious Freedom Restoration Act provide the funeral home owner with any relief, because continuing to employ the funeral director would not, as a matter of law, substantially burden his religious exercise. Even if it did, enforcing Title VII here was the least restrictive means of furthering the compelling government interest in combating and eradicating sex discrimination.

What should employers do?

What are the best practices for employers given the emerging area of LGBTQ+ rights and potential conflicts created by religious beliefs? "Tread carefully," according to Meyer, who said his advice would be consistent with the Sixth Circuit's ruling.

"It is important for an employer to both prevent discrimination toward LGBTQ staff and also to reasonably accommodate the sincerely held religious beliefs of other staff," Phillips said. "At no time should an employee's religious beliefs be a reason to harass or discriminate against an LGBT employee or group, but rather the employer might allow employees to opt out of a social gathering or event based on their religious beliefs."

Religious accommodations. "It is critical to consider all requests for religious accommodations to determine if there is a possible accommodation that does not violate the values of the company and its anti-harassment policies," according Phillips.

Shivers highlighted employers' duties with regard to religious accommodation, first noting that "religion" is a sincere religious observance, belief, or practice. "It does not include personal preference or social, political, or economic philosophies," she explained. The general rule is that an employer must accommodate an employee's religious belief if the accommodation:

- Actually is an accommodation;
- Is reasonable; and
- Is not an undue hardship on the employer.

Shivers explained that often, the religious "accommodation" requested—such as a right to proselytize or to have religious materials/displays—is not an accommodation at all as the law defines it. So the first step " is to determine if the request is seeking an accommodation."

Shivers also noted that "undue hardship under Title VII is not the same as the ADA—it is much lower." She cautioned employers "to remember that, and to deploy, the general process mandated in the federal circuit in which the employer sits (as it does vary a bit) and to balance the rights and business needs carefully."

Err on the side of protection. "Setting aside the issue of an employer's own religious beliefs, an employer's best practice is to err on the side of protecting LGBTQ+ individuals from discrimination," according to Colaizzi. "An employer's obligation to accommodate religious beliefs and practices is, relatively speaking, a minimal one, and will rarely justify any practice or policy that discriminates against other employees. Policies and practices should be gender- and religion-neutral, written carefully to avoid stereotypes of either."

Review EEOC guidance. Shivers also suggested that employers review the EEOC guidance on training and diversity and inclusion versus religious rights, and carefully incorporate it into any response or change to business plans to train or roll-out projects, such as an inclusivity campaign,

Commissioner Feldblum and Justice Kennedy

The intersection of LGBTQ+ rights and religious freedom is fraught with emotion and sometimes deeply entrenched beliefs. As FisherBroyles attorney Eric Meyer noted, EEOC Commissioner Chai Feldblum has also weighed in on this area. Feldblum, who describes herself as a lesbian with a hidden disability, said that respect for religion is a paramount and lifelong value for her. Her father was an Orthodox Jewish Rabbi; on her mother's side, she comes from a long line of Hasidic Rabbis. Although she no longer observes the rules of Orthodox Judaism, "respect for religion remains deeply ingrained in" her being.

Feldblum shared her perspective after the Supreme Court's June 2018 *Masterpiece Cakeshop v. Colorado* decision, which held in a 7-2 split that a Colorado civil rights commission violated a cake shop owner/designer's right to the free exercise of religion by failing to consider, with constitutionally required neutrality, his religious objections to creating a wedding cake for a same-sex wedding. Feldblum wrote:

> … Justice Anthony Kennedy spoke eloquently about the dilemma courts face when they seek to uphold the right of gay people to be treated with "dignity and worth" and the right of individuals to hold "religious and philosophical objections" to gay people. Justice Kennedy did not seek to diminish or belittle either of these rights. He stated simply and clearly that sometimes these rights are in conflict and therefore courts must decide, perhaps differently in different cases, how to resolve that conflict or legislatures may choose to make some of these decisions initially.

Said Commissioner Feldblum: "I believe that the way to remain a strong pluralistic society—one that permits religious groups and individuals to flourish and that permits LGBT individuals (including religious LGBT people) to live lives of dignity—is to see the nuance in difficult choices."

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which have been challenged in the past and will undoubtedly be challenged in the future.

Avoiding discrimination pitfalls

Identifying and avoiding common pitfalls is an important part of any compliance strategy. Our experts discussed some the pitfalls that employers may encounter on the LGBTQ+ discrimination front.

Train, train, train

Colaizzi identified training and education as one of the biggest pitfalls. "Many employers are uncomfortable with the terminology and issues surrounding LGBTQ+," she said. "They do not understand the issues and the terms, much less know enough about them to effectively draft policies and train other employees."

"The uncertain legal landscape also makes it difficult for employers to take a firm stand regarding LGBTQ+ issues in the face of ignorance, confusion, and discomfort within their organizations and the public," Colaizzi added.

What about customer preferences?

Employers are sometimes faced with customers who express preferences that can put the employer in a difficult position—one that may be at odds with federal and state antidiscrimination laws. How should employers handle customer requests that may discriminate against LGBTQ+ workers?

Consider parting ways. "With grace and respect, but ultimately without violating the tenets of Title VII (or state or local law)," according to Meyer. "Ultimately, companies should stop doing business with customers who discriminate based on LGBT status," he suggested.

Phillips agreed: "The company should consider the possibility of no longer working with the customer or assign someone else to the account, bearing in mind that the LGBTQ employee will need to be made whole and not suffer as a result of being taken off an account."

Insufficient justification. "In the current legal environment, customer preferences and coworker complaints (assuming those complaints are not about actual misconduct of some kind) simply will not justify discriminatory conduct toward employees who fall within LGBTQ+ categories," according Colaizzi.

Nonnie Shivers saw it the same way. "Customer preference (including discriminatory preference) has never been a legitimate, nondiscriminatory reason for adverse actions under Title VII," she explained. "Safety and protection of employees may sometimes factor into the staffing or work assigned to an employee in order to maintain compliant workplaces free from discrimination and harassment. The challenge is that not all states/locals/circuits recognize LGBTQIA individuals as falling within Title VII's protections against gender discrimination in all its forms."

Be prepared. Colaizzi said that the first step for employers is to themselves acquire the knowledge and training necessary to fully understand the issues that LGBTQ+ status can present in the workplace.

"Employers need to be prepared to have conversations with customers and consider ahead of time whether there are accommodations or alternatives for these customer complaints that can be implemented without discrimination," Collaizi continued. "Employers should also consider whether it would be useful to have 'scripts' of some sort for employees to use in addressing customer concerns or complaints. Overall, it is critical that employers put thought into addressing customer complaints *before* those complaints are actually raised."

Coworker complaints

Employers are also sometimes faced with complaints from colleagues and coworkers of LGBTQ+ employees. What are the best ways for employers to handle these complaints?

"Forethought is equally important in addressing coworker complaints and concerns," Colaizzi said. "Employers should review their policies and consider their facilities arrangements to make sure they adequately address the issues most likely to arise concerning LGBTQ+ employees."

"Facilities such as bathrooms and locker rooms present some of the thorniest issues in the workplace," according to Colaizzi. "Employers should remember that many courts have taken a 'separate-is-not-equal' approach to facilities issues in the workplace. In other words, providing an employee with a separate or private facility to

avoid coworker discomfort will likely be viewed as discriminatory."

"In many cases an employer's focus will need to be on training and policy enforcement to attempt to change or lessen coworker discomfort, rather than on actions directed at the LGBTQ+ employees," Colaizzi suggested.

Employer best practices

Colaizzi, Meyer, Phillips, and Shivers offered several proactive steps and best practices that employers can take to head off workplace discrimination and/or harassment of LGBTQ+ workers.

Putting knowledge into practice

Colaizzi reiterated that "best practices start with the employer acquiring for itself a thorough education and understanding of terminology and issues surrounding LGBTQ+ employees." She added that employers' policies should include LGBTQ+ categories in all antidiscrimination and anti-harassment verbiage.

"Employers should consider ahead of time what options, if any, they have in terms of facility issues and how they will address the common facility issues should they arise," Colaizzi continued. "Employers should provide training to their employees on LGBTQ+ terminology and issues, just as they would for discrimination and harassment based on other protected characteristics," she suggested.

Colaizzi also urged employers to consider the demographics of their clientele and to conduct a preliminary analysis on what customer issues could arise and how best to respond to them.

Pay attention to culture

Phillips suggested that employers should ensure that LGBTQ employees are welcome, that there are Employee Resource Groups/Diversity and Mission statements that are inclusive, and that Gay Pride events are supported. Where appropriate, a company might choose to support an *amicus* brief concerning a case about LGBTQ+ discrimination," the Jackson Lewis attorney added.

Employer tool chest. Eric Meyer pointed to the following tools that employers can use to help prevent LGBTQ+ discrimination in the workplace:

- Policies;
- Training (including bystander intervention and implicit bias);
- Leadership;
- Accountability;
- Fostering a more accepting company culture by requiring support from supervisors, managers, and other higher-ups;
- Zero tolerance;
- Multiple avenues to complain/communicate issues;
- Anonymous surveys to elicit feedback;
- Tracking metrics relating to the LGBT+ workforce;
- Creating standardized hiring/onboarding/promotion/transfer/termination criteria; and
- Providing support.

Phillips urged employers to "conduct LGBTQ sensitivity training of managers, staff, and especially HR professionals and in-house counsel." She also suggested that employers distribute a Transgender/Gender Non-Conforming Policy and collaborate with transgender employees regarding their gender-transition plans.

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Heading off LGBTQ+ discrimination

Ogletree Deakins attorney Nonnie Shivers suggested these "core proactive steps" to prevent LGBTQ+ discrimination:

- Inclusive policies;
- Modernized training with realistic and representative scenarios and situations;
- Guidelines and resources for transitioning in the workplace;
- Including LGBTQ demographics, if collected, in key diversity and inclusion campaigns and reports; and
- Asking senior leaders to sponsor and support LGBTQ+ organizations within the business and outside the business.

When a complaint is lodged

Sometimes, despite employers' best efforts, an employee nonetheless feels the burn of discrimination. What should employers do when an internal complaint of LGBTQ+ discrimination or harassment is made? For starters, Colaizzi and Shivers both stressed that employers should take these complaints as seriously as they do other complaints of discrimination.

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Seek legal help if necessary

"If an employer believes, for whatever reason, that the protected category at issue is not, in fact, protected, that belief should be confirmed with legal counsel and, in any event, should not preclude an investigation," Colaizzi said. "Many cases involving LGBTQ+ categories have been analyzed under more familiar themes of sex discrimination, and an employer cannot simply dismiss a complaint as not falling under any legal protection."

Discrimination complaints

FisherBroyles attorney Eric Meyer underscored that companies should offer multiple avenues through which discrimination complaints may be made. When a complaint of LGBTQ+ discrimination does arise, employers should:

- Take them seriously;
- Investigate;
- Communicate actions steps; and
- Take steps that are reasonably designed to end the complained-of behavior.

Use it as an opportunity

Shivers suggested that when a complaint arises, employers should educate themselves on the nuances of the area (both factually and legally) if and when they find themselves in unfamiliar territory. "Use the opportunity to set expectations, especially in this emerging area, and to educate—it's hard to discriminate and harass (or defend that behavior if corroborated) when it occurs up close and the mirror is reflected on you," she said.

The right investigator

Phillips focused on the investigation aspect of the complaint. "It's essential that the investigator should be well versed and sensitive to LGBTQ+ issues and be careful not to misgender or out someone in the workplace," she said. "The investigator should be comfortable with gender fluidity and how to handle and respond to these types of situations."

The employer may want to consider hiring counsel or skilled investigators who are comfortable handling these issues, Phillips added. "It could be devastating to the complainant and the witnesses if they are consciously or unconsciously treated differently based on their sexual orientation or gender identity."

One last takeaway

Colaizzi offered one last takeaway for employers. "Cases involving LGBTQ+ issues are now firmly entrenched in the federal and state courts, and as a result, the roller-coaster treatment they get in the political environment will matter less and less as the courts make legal determinations as to protected classes and characteristics," she predicted. "Pay attention to what the courts and state legislatures are saying, not necessarily what politicians are saying."

About the Author

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation and trends for *Employment Law Daily*. As a practicing attorney for 12 years, Wolf 's experience includes litigation of employment and civil rights matters.