DEFINITIONS

• L: Lesbian
• G: Gay
• B: Bisexual
• T: Transgender
• Q: Queer/Questioning
• I: Intersex
• A: Asexual

DEFINITIONS

• Gender Identity – sense of being either male or female, regardless of physical anatomy
• Sexual Orientation – the type of sexual or romantic attraction that one feels – whether to the same sex or the opposite sex
• Gender stereotypes – assuming that persons should act a certain way based upon their sex
CURRENT STATE OF THE LAW

• South Carolina Human Affairs Law does not currently identify sexual orientation or gender identity as protected classes.

• But that is not the end of the analysis . . . .

LOCAL ORDINANCES

• Richland County, Charleston, Columbia, Latta, Myrtle Beach, Mt. Pleasant, North Charleston, and Folly Beach.

• Various prohibitions relating to housing, public accommodations, and public and private sector employment.

FEDERAL LAW - TITLE VII

• It shall be an unlawful employment practice for an employer
  1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
CURRENT STATE OF FEDERAL LAW

- EEOC interprets Title VII "Sex"
  - Title VII prohibits employment discrimination based on gender identity or transgender status
  - Applies regardless of any state laws to the contrary
  - Applies existing sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias.
  - "The Commission has obtained approximately $6.4 million in monetary relief for individuals, as well as numerous employer policy changes, in voluntary resolutions of LGBT discrimination charges under Title VII since data collection began in 2013."

EEOC’S 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 corresponds to gender identity
- Denying an employee a promotion because he is gay or straight
- Discriminating in terms and conditions or employment or denying spousal recognition or benefits
- Harassing or discriminating against an employee because of sexual orientation or gender identity
- Contending it is a disability

EEOC - TRANSGENDER DECISIONS

- Employee cannot be denied access to restroom used by other employees of same gender identity despite lack of medical procedures or other employees’ negative reactions. Lusardi v. McHugh, EEOC Appeal No. 0120133395 (April 1, 2015)
- Intentional misuse of transgender employee’s name or pronoun may constitute sex harassment and discrimination. Jameson v. U.S. Postal Service, 2013 WL 2368729 (May 21, 2013)
- Employer’s failure to revise its records pursuant to changes in gender identity presented a valid Title VII claim. Complainant v. Dep’t of Veterans Affairs, 2014 WL 1653484 (April 16, 2014)
THREE SUPREME COURT CASES

• Altitude Express Inc. v. Zarda, Bostock v. Clayton County, and R.G. & G.R. Harris Funeral Homes v. EEOC

• Cases addressing whether discrimination because of "sex" encompasses discrimination based on an individual’s sexual orientation or gender identity

• Split among circuits / split among federal agencies

• Oral argument was October 8, 2019

SUPREME COURT OF THE UNITED STATES

  – Employee sued former employer for denying her partnership
  – Contended she was denied partnership because she was judged on what a female employee should look and act like
  – Employer failed to prove it would have denied her partnership anyway (compared to other performers and statistics who made partner)
  – Gender stereotyping is actionable as sex discrimination

FEDERAL CONTRACTORS – EXECUTIVE ORDER 13672

• Signed in 2014.
• Prohibited discrimination in the civilian federal workforce on the basis of gender identity and in hiring by federal contractors on the basis of both sexual orientation and gender identity.
COMMON QUESTIONS WE RECEIVE

WHAT ABOUT THE BATHROOM?

OSHA GUIDANCE

• Core principle: “All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.”
  • Sanitation Standard 1910.141(c)(1)(ii)
    – Toilet facilities for each sex
    – Can be accessed when employees need them
  • Restroom access is a safety matter because “it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives.”
  • 700,000 transgender – 22% denied access to gender appropriate restrooms
  • www.osha.gov/Publications/OSHA3795.pdf

OPTIONS

• single-occupancy gender-neutral (unisex) facilities
• multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls
• multiple occupant but gender-segregated restrooms add privacy features such as flaps to cover gaps in stall doors or stall walls and doors that extend from floor to ceiling.
PLEASE DO NOT . . .

- ask an employee to provide any medical or legal documentation of the employee’s gender identity
- ask an employee to use a segregated facility apart from other employees because of the employee's gender identity or transgender status
- deny an employee access to a common restroom corresponding to the employee’s gender identity.

AND REMEMBER . . .

- If someone is uncomfortable sharing facilities, remind them that everyone needs to use the restroom.
- They have the option of possibly using a restroom on a different floor or in a different area or waiting for the transgender employee to exit before using the restroom.

COMMON QUESTIONS WE RECEIVE

EEO-1 FILINGS FOR NON-BINARY EMPLOYEES
**EEO-1**

EEOC guidance in an FAQ to employers on Form EEO-1 indicates employers can report employee counts and labor hours for non-binary gender employees by job category and pay band and racial group in the comment box on the Certification Page with a preface of "Additional Employee Data."

**COMMON QUESTIONS WE RECEIVE**

**HOW SHOULD I HANDLE A TRANSGENDER EMPLOYEE’S REQUEST FOR A NAME CHANGE?**

**NAME CHANGES – REQUIRED DOCUMENTS**

- IRS requires the name on an employee’s W-2 form to match the name on the social security card. These records can be changed when the employee has completed a legal name change.
- Benefit documents typically should reflect legal name to ensure proper claim handling.
- A note can be placed with internal records for preferred name.
NAME CHANGES – COMPANY COMMUNICATIONS

• Handle name change the same way you would handle a request from any other employee.
• E-mail addresses, business cards, nameplates, schedules, company ID cards, etc. should reflect name change the way other employees are permitted to use nicknames, etc.

COMMON QUESTIONS WE RECEIVE

PREFERRED PRONOUNS

• HE/HIM/HIS, SHE/HER/HERS
• THEY/THEM/THEIRS OR ZE/HIR
• John Doe v. State of Arizona, 7/8/2019
COMMON QUESTIONS WE RECEIVE

WHAT KIND OF DOCUMENTATION MAY AN EMPLOYER REQUIRE A TRANSITIONING EMPLOYEE TO PROVIDE?

- Employers cannot ask for any documentation they do not request from other employees under similar circumstances.
- FMLA
- Medical leave / doctor’s notes

COMMON QUESTIONS WE RECEIVE

IS THE ADA AND ACCOMMODATION ANALYSIS PART OF THE EQUATION?
ADA

- 42 U.S.C. §12211(b)(1)
  - Homosexuality and bisexuality
  - For purposes of the definition of “disability” in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.
  - Certain conditions
  - Under this chapter, the term “disability” shall not include—
    1. transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.

FEDERAL COURTS

  - Holding: Transgender individuals who experience gender dysphoria are protected by the ADA
  - Cabela’s required employee to use restroom of her biological gender (male)
  - Would not provide her with a nametag reflecting her female name or a female uniform
  - Employee filed claim for ADA discrimination, failure to accommodate and retaliation claims
  - Court concluded that the ADA provision excluding “gender identity disorder” should be narrowly read not to include gender dysphoria which could be distinguished because of the distress required for a diagnosis which could be disabling

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION (DSM-5)

- May 22, 2013
  - Gender Dysphoria replaced Gender Identity Disorder (GID)
  - People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender
  - https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria
  - Treatment typically includes psychotherapy and support in undergoing gender transition
  - Distinguished between children and adults finding that children usually outgrow it
COMMON QUESTIONS WE RECEIVE

WHAT ABOUT RELIGIOUS OBJECTIONS?

COMMON QUESTIONS WE RECEIVE

SO WHAT SHOULD I DO ABOUT ANTI-DISCRIMINATION AND ANTI-HARASSMENT POLICIES?

Policy Language Encompassing LGBTQIA

• "sexual orientation, gender identity, gender preference" as part of the list of protected classes

• Prohibit gender stereotyping
BEST PRACTICES

- Harassment and Discrimination Policies
  - Annual training on harassment and discrimination
  - Train supervisors on how to treat employees
  - Enforce policy
  - Discipline violations
- Adopt gender neutral dress codes
- Address bathroom issue
- Recognize gender identity and use pronouns
- Consider assigning someone in the HR office to work with those employees who are transitioning if they request it.

EEOC JUNE 2016 RELEASE FROM STUDY ON WORKPLACE HARASSMENT

- Workplace Harassment Remains a Persistent Problem
  - 1/3 of 2015 charges included an allegation of workplace harassment "including sexual orientation, gender identity, and pregnancy"
  - EEOC alone recovered $164.5 million for workers alleging harassment
- Workplace Harassment Too Often Goes Unreported
  - Common workplace-based responses by those who experience sex-based harassment are to
    - Avoid the harasser
    - Deny or downplay the gravity of the situation
    - Attempt to ignore, forget, or endure the behavior
    - The least common response to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint
    - Only 3 of 4 individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct
    - Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation

EEOC – JUNE 2016 RELEASE (CONT.)

- It Starts at the Top - Leadership and Accountability Are Critical
  - “The importance of leadership cannot be overstated - effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company.”
  - “At all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation.”
  - “Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so).”
  - Anti-harassment efforts must be given the necessary time and resources to be effective
EEOC – JUNE 2016 RELEASE (CONT.)

• Training Must Change
  • Much of the training done over the last 30 years has not worked as a prevention tool - it’s been too focused on simply avoiding legal liability
  • Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees
  • When trained correctly, middle-managers and first-line supervisors in particular can be an employer’s most valuable resource in preventing and stopping harassment

EEOC – JUNE 2016 RELEASE (CONT.)

• “Bystander intervention training” - increasingly used to combat sexual violence on school campuses - empowers co-workers and gives them the tools to intervene when they witness harassing behavior, and may show promise for harassment prevention
  • Workplace “civility training” that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions
  • Training should be repetitive
  • https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm

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