



**LGBTQ FOR EMPLOYERS 101:
MANAGING LGBTQ ISSUES IN
TODAY'S WORKPLACE**


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Agenda

- The Current Legal Landscape
- The Trump Administration
- Employer Solutions / Considerations
- Balancing Competing Rights – Religion and LGBTQ Rights
- Global Mobility Issues




Is Discrimination Related to LGBT Status Protected?

THE CURRENT LEGAL LANDSCAPE

Federal Law

Title VII


- o Prohibits gender discrimination, but not sexual orientation or gender identity
- o But ... may afford some protection
 - Gender stereotyping
 - Same-sex harassment
 - Retaliation



Federal Law

Title VII

- o Discrimination or harassment based on sex stereotypes about how a man or woman should behave violates the law
- o Includes protection based on sexual orientation in some jurisdictions/circuits
- o Includes protection based on gender identity and expression in several jurisdictions/circuits



Federal Law

Americans With Disabilities Act


- o *Expressly excludes homosexuality, bisexuality, and transexualism from coverage*



Federal Enforcement



Equal Employment Opportunity Commission

- o Taken the position that Title VII prohibits discrimination based on sexual orientation and transgender status




Executive Order 13672 (OFCCP) Agencies:

- o Department of Justice
- o OSHA
- o OPM



Federal Contractors




On July 21, 2014, President Obama signed Executive Order 13672 to prohibit federal employees, contractors, and subcontractors from discriminating on the basis of sexual orientation or gender identity.

EEOC's Strategic Enforcement Plan

The EEOC has instructed its investigators and attorneys that:

- District, field and area offices should take and investigate charges from individuals who believe they have been discriminated against because of transgender status
- All offices should accept charges alleging sexual orientation-related discrimination



EEOC Gender Stereotyping

According to the EEOC, it is illegal for an employer to deny employment opportunities or permit harassment because:

- A woman does not dress or talk in a feminine manner
- A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women
- A female employee dates women instead of men
- A male employee plans to marry a man
- An employee transitions from female to male or male to female

EEOC Fact Sheet

- On May 2, 2016, the EEOC issued a fact sheet addressing transgender employees' rights in the workplace.
- Titled "Bathroom Access for Transgender Employees Under Title VII of the Civil Rights Act of 1964," the fact sheet declares:
 - Employers may not discriminate against employees on the basis of gender identity; and
 - Employers may not restrict the ability of transgender employees to use restrooms consistent with their gender identity.
- The EEOC also announced that contrary state laws are not a defense to a Title VII claim.
- Available at: <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>


EEOC Initiatives

- Since 2013, the agency has resolved nearly 4,000 charges based on LGBTQ-based discrimination. Recovered \$10.8 million.
- Ensuring anti-discrimination protection for LGBTQ people was also a pillar of the EEOC's most recent strategic enforcement plan, which highlights the agency's priorities through 2021.

Sexual Orientation and Title VII

- *En banc* Seventh Circuit ruled that Title VII does protect against discrimination based on sexual orientation
- What does it mean to discriminate on the basis of sex? Is sexual orientation discrimination a subset of discrimination based on sex?
- Employer chose not to appeal to Supreme Court


Hively v. Ivy Tech



Sexual Orientation and Title VII

- Eleventh Circuit three-judge panel found that Title VII does not cover bias based on sexual orientation
- Court denied *en banc* review
- Petition for certiorari pending before the U.S. Supreme Court – Employer's response due today (10/11)


Evans v. Georgia Regional Hosp.



Sexual Orientation and Title VII


- Second Circuit three-judge panel found that it had to follow precedent
- Found Title VII does not cover bias based on sexual orientation

Zarda v. Altitude Express



Sexual Orientation and Title VII


- Second Circuit not done yet!
- Employer asked for *en banc* review
- 50 employers (including Google, Microsoft) have filed briefs arguing that Title VII prohibits discrimination based on sexual orientation
- EEOC has weighed in, asked that precedent be overturned



Sexual Orientation and Title VII

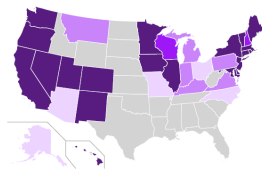
- On the other hand ...
- Department of Justice filed a brief stating:

"discrimination because of sexual orientation is not discrimination because of sex under Title VII"



State Law

- 20 states (plus D.C.) prohibit discrimination based on sexual orientation and gender identity
- 2 states prohibit discrimination based on sexual orientation only
- 11 states prohibit discrimination based on sexual orientation and/or gender identity against public employees only




Prohibit discrimination based on sexual orientation and gender identity (20 states & D.C.): California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming

Prohibit discrimination based on sexual orientation only (2 states): New Hampshire, Wisconsin

Prohibit discrimination against public employees based on sexual orientation and gender identity (8 states): Indiana, Kentucky, Michigan, Minnesota, Pennsylvania, Virginia

Prohibit discrimination against public employees based on sexual orientation only (3 states): Alaska, Arizona, Missouri, West Virginia, Ohio

Local Law



- 227 Cities, Towns, Counties and Townships currently prohibit discrimination based on sexual orientation and/or gender identity
- Only 6 states have no protections at the state or local level (Alabama, Arkansas, North Carolina, North Dakota, South Dakota, Tennessee)

THE TRUMP ADMINISTRATION AND LGBTQ ISSUES

What do we know so far



- Candidate Trump claimed he would "do everything in [his] power to protect LGBTQ citizens"
- President-elect Trump stated that marriage equality was "settled"
- Trump Administration claimed Executive Order 13672 would remain intact ...

But then The Trump Administration:

- Deleted White House LGBT page on inauguration day
- Promised to – and has – appoint conservative justices and judges
- Chose candidates for appointment who are strongly anti-LGBTQ (including VP Pence, AG Sessions, Ben Carson, Betsy DeVos, Tom Price, etc.)
- Floated a draft religious freedom executive order and vowed to give churches more political power
- Deleted questions pertaining to sexual orientation from two federal surveys (although HHS just reversed course as to NSOAPP)
- Announced (via tweet) of his plans to ban transgender individuals from serving in the military



But then The Trump Administration:



- Withdrew the Department of Justice's prior request that a district court in Texas lift a stay in a case dealing with access to restrooms for transgender students
- Rescinded the Department of Justice and Department of Education's restroom guidance requiring schools to let people use restrooms matching their gender identity
- Signed the Fair Pay and Safe Workplaces order, which took the enforcement mechanism out of Executive Order 13672
- Appointed Gov. Sam Brownback as a global ambassador for religious freedom

A Glimmer of Hope in Congress?

- Equality Act introduced, which would amend Title VII include sex, sexual orientation and gender identity as protected categories from discrimination or segregation for purposes of: public accommodations, facilities, funding, employment, housing, loans and credit, jury selection
- Do No Harm Act introduced, which was designed to confirm that RFRA-based rights do not justify harm to others
- NDAA Anti-transgender Amendment failed to pass the House



Other Federal Movement on the Horizon



- Make-up and direction of the EEOC
 - Status of appointments to the Commission
 - Who the new EEOC Chair fight for the agency's current interpretation?
 - Who will be General Counsel?
 - What will the new EEOC mean for the Strategic Enforcement Plan and the agency?

Introduction of Nondiscrimination Bills




- Comprehensive bills that prohibit discrimination based on both sexual orientation and gender identity introduced in 16 states
- Other bills that provide partial protection against discrimination based on sexual orientation introduced in 13 states

Introduction of Anti-Transgender Bills

Bills introduced in 15 states, including:

- Barring access to or even criminalizing the use of appropriate facilities
- Restricting transgender students' ability to fully participate in school
- Authorizing healthcare discrimination against transgender individuals
- Allowing religiously-motivated discrimination against transgender individuals




Other Anti-LGBTQ Measures Introduced



- Religious exemptions from state non-discrimination laws
- Restrictions on name and gender marker changes
- State-sponsored exclusions from health care plans for health services related to a gender transition
- Permit health care providers to refuse medical care based on religious objections

Other Anti-LGBTQ Measures Introduced

- Allow commercial entities or government officials to discriminate based on beliefs about same-sex marriage
- State-wide bills that prevent cities and local government entities from passing nondiscrimination protections (AK, NC, TN)
- Permit cities to deny same-sex couples the same benefits provided to opposite-sex couples



How Your Company Can Become More LGBT Inclusive

**EMPLOYER
CONSIDERATIONS/SOLUTIONS**

Know your workplace

- ~5% of the U.S. workforce identifies as lesbian, gay, bisexual or transgender
- 21% of LGBTQ employees report some form of workplace discrimination
- One out of every 25 complaints made about workplace discrimination comes from LGBTQ employees



Know Your Workplace



- 90% of transgender people report being harassed on the job
- The transgender community reports an unemployment rate at double the overall national rate
- 53% of LGBTQ employees are not open to colleagues about their sexual orientation/gender identity
- 64% of LGBTQ individuals have heard anti-LGBTQ slurs and jokes at work, and only 4% have felt comfortable enough to speak up to a supervisor
- 20% of LGBTQ employees report looking for a new job because their work environment was not accepting of them

Preventing a Charge

Culture and...

Policy & Procedures (including Harassment & Discrimination)	Training & Education	Behavioral Expectations & Support	Facilities
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Preventing a Charge - Culture

Ask yourself:

- Have we ever had a claim or charge?
- What is our general attitude towards inclusion?
- How would the general employee population describe inclusion?
- Does our organization use inclusive language?
- What do our employees know about LGBT issues?
- How comfortable are our employees with their understanding of LGBT individuals?

Culture and Policies & Procedures

EEO, Anti-harassment, Non-discrimination, Code of Conduct:

- Include "sexual orientation," "gender identity and expression"
- Prohibit problematic behavior, including LGBT-specific behavior
- Address accommodation issues, dress code for transitioning employees
- Commitment to provide a workplace free of harassment and discrimination

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Culture and Training & Education

Train managers and employees about:

- Policies, expected behavior
- Role in supporting, enforcing policies
- Reporting and complaint structure
- Prevention of harassment and discrimination
- Diversity training, general education
- Potential consequences




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Culture and Behavioral Expectations

Make sure employees understand expectations:

- Name, pronoun usage for employees undergoing gender transition
- Privacy – employee, co-workers
- What is unacceptable



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Culture and Facilities Access

Restrooms, Locker Rooms:

- Should permit access according to gender presentation
- Address privacy concerns by minor facilities modifications, as needed




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Other Steps

Other steps to consider:

- Include LGBT in diversity metrics
- Survey workplace to understand the workplace, needs of LGBT employees
- Direct your philanthropic support to LGBT organizations
- Set up an ERG



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Highlighting a Journey in Progress.....



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CNA Five Steps to Advancing Workplace Culture

1. Build the Business Case
2. Define the Culture
3. Get a Pulse
4. Build a Plan
5. Execute

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CNA Building the Case


The Business Case for Diversity & Inclusion

McKinsey and Company studied 366 companies in the United States, Canada, Latin America and the United Kingdom and found correlations between diversity and financial performance.	Companies in the top quartile for diversity were 35% more likely to have financial returns above respective national industry medians.
Companies in the top quartile for gender diversity were 15% more likely to have financial returns above their medians.	Conversely, companies in the bottom quartile both for diversity were statistically less likely to achieve above-average returns than average companies to which they were compared.

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CNA Building the Case

Diversity & Inclusion Today



Biggest challenge: grow our profit.	To grow our profit, we need to differentiate.	To differentiate, we need to innovate.	To innovate, we need diverse talent.	To activate the diversity, we need a culture of inclusion.	To manage all this, we need inclusive leadership.
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"Diversity is important. Real diversity of thought comes from diversity of people who can bring different perspectives to discussions."

DINO E. ROBUSTO
CHAIRMAN AND CHIEF EXECUTIVE OFFICER

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CNA Defining the Culture

Inclusion@CNA

A work environment in which all employees feel valued because of their differences and therefore are motivated and have opportunities to contribute their fullest toward business goals.

Our Winning Behaviors

- Accountable
- Externally Focused
- Collaborative
- Innovative
- Continuously Learning
- **Inclusive**

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CNA **Execute: Harness the Power of the ERGs**

Vision:
A CNA where gay, lesbian, bisexual, transgender and queer (GLBTQ) employees are valued, visible, engaged, and focused on corporate successes.

Objectives		
Workforce	Workplace	Marketplace
Talent acquisition and employee retention; look to support the leadership development of our best and brightest talent.	Career advancement and professional development, increased cultural competency, and a stronger sense of community at CNA.	Business development and community outreach, including strengthening our relationships with key trading partners.
<ul style="list-style-type: none"> Monitor, complete, and promote our results of the annual Human Rights Campaign's Corporate Equality Index Survey. Enhance corporate benefits and policies in accordance with the HRC CEI in order to attract and retain employees Provide development opportunities through roles on the Pride @CNA executive committee, program planning, and event coordination. Work with Talent Acquisition to develop recruiting strategy for GLBTQ talent 	<ul style="list-style-type: none"> Gather best practices from community events which can be shared and implemented at CNA through the HR Centers of Excellence Leverage the formal launch of ERGs to increase visibility and membership through all CNA locations. Provide opportunities to educate employees on LGBTQ issues impacting our community. Seek opportunities to leverage Ally support and participation. 	<ul style="list-style-type: none"> Participate at conferences and other resource sharing opportunities in order to share best practices and lessons learned with key partners. Demonstrate commitment to LGBTQ causes and organizations through charitable giving and volunteer opportunities. Promote CNA through sponsorship of charitable events or participation in job fairs.

CNA **Execute: Activate the Masses**

What You Can Do

- Be Involved.**
- Start A Dialogue.**
- Stay Informed.**
- Advocate.**

Accommodating Protected and Potentially Competing Rights

LGBTQ ISSUES AND RELIGION IN THE WORKPLACE

Burwell v. Hobby Lobby (June 2014)



Closely-held, for-profit entities with religious objections to certain aspects of the birth control mandate imposed by the Patient Protection and Affordable Care Act ("the ACA") could avoid the mandate by invoking the Religious Freedom Restoration Act (RFRA)

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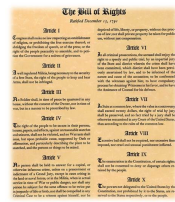
Obergefell v. Hodges (June 2015)

Majority Holding:

- The Due Process and Equal Protection clauses of the Fourteenth Amendment require states to recognize same-sex marriages
- States also must recognize other states' marriages
- Essentially overruled Section 2 of DOMA



Obergefell v. Hodges (June 2015)




Religious Liberties Discussion:


- "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."

Federal RFRA

- Applies to all federal laws and regulations unless the law itself contains a RFRA exception
- Creates exception to generally-applicable laws for litigants who can claim federal law places a "substantial burden" on their religion, unless the government can meet a high burden
- Does not apply to state laws
- Not a silver bullet




Mini-RFRAs



- Judicial and Legislative: some state constitutions are interpreted more broadly than First Amendment
- Many states try to answer/ modify the federal RFRA:
 - Specifying whether they apply between non-state actors
 - Clarifying they apply to corporations
 - Saying a burden need not be substantial
 - Saying a governmental interest must be "exceedingly" compelling

State Legislation



- More than 100 active bills across 22 states
 - State-level RFRAs allowing people assert religious liberty as a justification for denying services to LGBT people
 - Marriage-Related Religious Exemption laws
 - Restroom Bills
 - Prohibiting local governments from passing nondiscrimination protections

A Balancing Act

- Religious rights and freedom of expression versus other individual employee rights
 - Do one employee's rights trump another employee's rights?
 - Can a religious objection prevent a co-worker from undergoing a gender transition?
- Potential conflict between federal and state/local law
 - What is an employer's obligations if federal law conflicts with state or local law?

A Balancing Act

- What are an employers' rights to have:
 - Policies that differ from state/local law
 - Diversity initiatives with which certain employees do not agree
- Benefits plans and LGBTQ employees:
 - Are same-sex benefits required?
 - What do federal (Title VII, OFCCP) and state law (insurance codes, non-discrimination provisions) mandate?
 - What is the status of HHS rule regarding blanket exclusions for procedures relating to gender transition?

GLOBAL MOBILITY ISSUES

Top 10 Considerations	
1	APPLY POLICIES GLOBALLY. Make it clear that anti-lesbian, gay, bisexual and gender identity discrimination and harassment will not be tolerated in any regions in which you operate, including in locations where it is not prohibited by law.
2	INCLUDE SEXUAL ORIENTATION AND GENDER IDENTITY IN ANY RELOCATION POLICY. Be clear that the company supports lesbian, gay, bisexual, and transgender staff when they take on overseas assignments. Provide assurances that staff will be brought home if they encounter problems.
3	TRAIN MANAGERS AND RELOCATION STAFF. Train those involved in arranging overseas postings on any particular considerations that may need to be taken into account for lesbian, gay, bisexual, and transgender staff.
4	GIVE STAFF ENOUGH INFORMATION BEFORE THEY RELOCATE. Provide lesbian, gay, bisexual, and transgender staff with sufficient information about the country they are being posted to, beyond simply the laws and practices affecting sexual orientation and gender identity. Be clear about the level of support they will receive once they are abroad, so they can make an informed decision about taking on the assignment.
5	PROVIDE ALTERNATIVE OPPORTUNITIES. Where possible, offer alternative postings or equivalent opportunities to lesbian, gay, bisexual, and transgender employees who decide an overseas assignment isn't suitable because of their sexual orientation. Ensure staff won't suffer a detriment to their career if they feel unable to go.

Top 10 Continued	
6	OFFER SAME-SEX PARTNERS EQUIVALENT BENEFITS. Support same-sex partners to accompany employees in exactly the same way as heterosexual partners, where immigration rules allow. Where local laws are restrictive, find alternative means of enabling the partner to enter the country or find ways to compensate accordingly.
7	SUPPORT STAFF NETWORKS. Make it possible for employees posted abroad to maintain contact with their staff network back home. Establish local chapters of your global network in as many countries as possible and promote collaborative working between them.
8	PROVIDE TRAINING TO IN-COUNTRY MANAGERS. Train managers in overseas offices about the organization's policies and the importance of equality at work, so they can support staff on international postings. Over time this will help to transform workplace cultures abroad.
9	OFFER GLOBAL CAREER DEVELOPMENT OPPORTUNITIES. Establish formal mentoring relationships between lesbian, bisexual, and transgender staff in different locations around the world to develop the next generation of leaders.
10	CHAMPION EQUALITY WHEREVER YOU ARE BASED. Use your influence as a global employer to promote messages of lesbian, gay, bisexual, and transgender equality worldwide. Support local organizations campaigning for equality abroad.