

LGBTQ ISSUES IN THE WORKPLACE:

WHAT DOES A TRUMP ADMINISTRATION MEAN
FOR EMPLOYERS?



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AGENDA



- **Summary of the Current Status of the Law Regarding Discrimination Based on Sexual Orientation and Gender Identity**
- **The Trump Administration and Its Role In Shaping the Law in this Area**
- **Recent Developments at the State and Local Level**
- **How Employers Should Respond**

CURRENT STATUS OF THE LAW



FEDERAL LAW

Title VII

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



Discrimination

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individuality, excluding or restricting members of the group on the grounds of race, sex, or age

FEDERAL ENFORCEMENT

Equal Employment Opportunity Commission

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

Executive Order 13672 (OFCCP)

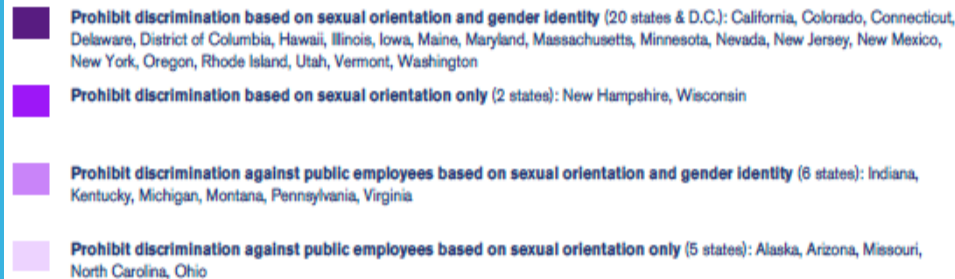
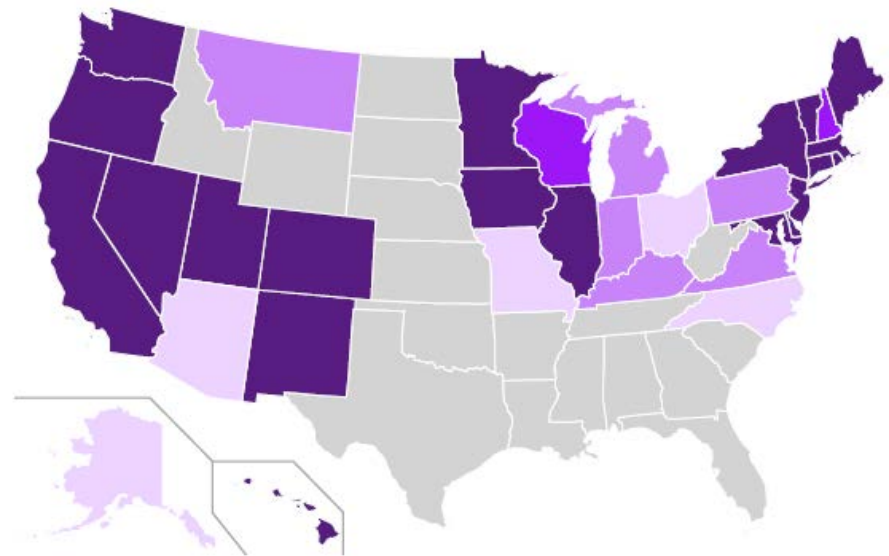
Agencies:

- Department of Justice
- OSHA
- OPM



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



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



CANDIDATE DONALD TRUMP



A screenshot of a tweet from Donald J. Trump. The tweet is displayed in a white box with a light gray border. At the top left is a circular profile picture of Donald Trump. To its right is the name "Donald J. Trump" in bold black text, followed by a blue verified account checkmark and the handle "@realDonaldTrump" in a smaller font. On the top right of the tweet box is a blue "Follow" button with a white Twitter bird icon. The main text of the tweet reads: "Thank you to the LGBT community! I will fight for you while Hillary brings in more people that will threaten your freedoms and beliefs." Below the text is the timestamp "1:31 PM - 14 Jun 2016". At the bottom left are three icons: a speech bubble for replies, a retweet symbol, and a heart for likes. To the right of these icons are the numbers "31,723" and "58,823" respectively. On the far right bottom of the tweet box is a small gray information icon (an 'i' in a circle).

Donald J. Trump 
@realDonaldTrump

 Follow

Thank you to the LGBT community! I will fight for you while Hillary brings in more people that will threaten your freedoms and beliefs.

1:31 PM - 14 Jun 2016

  31,723  58,823 

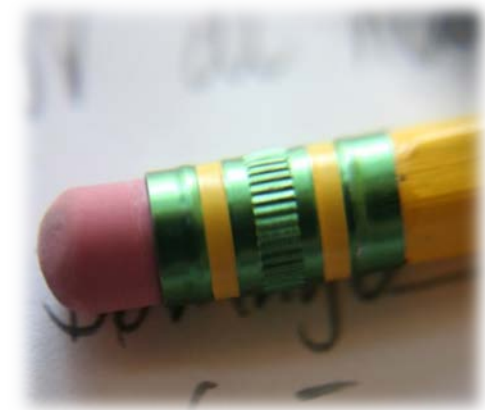
WHAT DO WE KNOW SO FAR



- 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 LGBTQ 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 NSOAAP)
- 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

US DEPARTMENT OF JUSTICE

- Rescinds Guidance Stating that Title VII's prohibition on gender discrimination covers discrimination based on gender identity
- Issues Guidance on Federal Law Protections for Religious Liberty



OTHER FEDERAL MOVEMENT ON THE HORIZON



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

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



RECENT DEVELOPMENTS AT THE STATE AND LOCAL LEVELS



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 EMPLOYERS CAN RESPOND



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

KNOW YOUR WORKPLACE

Consider –

- Voluntary self-identification to assess your workplace
- Include LGBTQ issues in your diversity metrics and efforts
- Workplace survey to understand your workplace, including needs of LGBTQ employees



KNOW YOUR POLICIES



- As legal standards evolve, review your policies and procedures
 - EEO policy
 - Anti-harassment and Non-discrimination policies
 - Code of Conduct
- Prepare for accommodating gender transition in the workplace
- Consider including examples of LGBTQ discrimination in your anti-harassment training

TRAINING

Train managers and employees

- *About policies*
- *Role in supporting, enforcing policies*
- *Reporting and complaint structure*
- *Prevention of harassment and discrimination*
- *Potential consequences*



KNOW THE LAW


- The law is in flux, so stay tuned
- Court decisions, federal policy, the changing EEOC and state and local measures will change the landscape going forward
- Many measures do not reach private employers, but stay abreast of constantly changing legal standards



THE ROLE OF INSURANCE COVERAGE

- Employment Practices Liability Insurance (EPLI) policies cover claims alleging discrimination, harassment, including on the basis of sexual orientation or gender identity
- Retaliation is also covered broadly under EPLI policies
- Denial or reductions of benefits or retaliation because of an employee's sexual orientation or gender identity may implicate the FMLA
- Some EPLI policies expressly include violation of FMLA in the definition of wrongful employment act
- Liquidated damages, often associated with FMLA claims, are typically included in the definition of "loss" but ensure that it also includes such damages under the FMLA.

INSURANCE COVERAGE & SAME-SEX COUPLES

- Coverage may also apply to domestic partners
 - the definition of “spouse” typically includes domestic partners “under the internal policy of the insured entity” -- to address jurisdictions that still may not recognize same-sex marriage
 - Third party coverage may also be implicated in denial of services cases, but these claims may also be covered under a commercial general liability policy
 - The key is to determine which insurance policy should be primary and align the other insurance clause to reflect the intent of the insured and the insurer
- 

THE UN HIGH COMMISSION ON HUMAN RIGHTS

Companies should...



RESPECT HUMAN RIGHTS

of LGBTI workers, customers and community members



ELIMINATE DISCRIMINATION

against LGBTI employees in the workplace



SUPPORT LGBTI STAFF

at work



NOT DISCRIMINATE

against LGBTI customers, suppliers and distributors—and insist that business partners do the same



STAND UP FOR HUMAN RIGHTS

of LGBTI people in the communities where they do business



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER



FREE & EQUAL
UNITED NATIONS FOR LGBTI EQUALITY

KNOW YOUR POSITION



Be prepared for your LGBTQ employees to:

- Request formation of an LGBTQ employee resource group
- Seek more inclusive policies, language
- Request that you get involved (amici, philanthropic, etc.)

Consider your response to local, state measures

QUESTIONS?

