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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
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
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
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
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
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
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.
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