



Gender Identity Issues and Changes in the Workplace

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Editor's Note:

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One of the most talked about legal topics this past year – which can also be considered one of the most confusing at times – is transgender rights as it applies to employees, patrons and residents of public entities.

Over the past few years, there has been an increased movement to adopt and promote laws that prohibit discrimination against Lesbian, Gay, Bisexual and Transgender people (LGBT or LGBTQ). Illinois is one of approximately 23 states that put into place anti-discrimination laws. Additionally, over 36 municipalities in Illinois have ordinances and regulations prohibiting discrimination based on sexual orientation and/or gender-identity. However, it is difficult to understand how to comply because of questions regarding the differences between sexual orientation, gender identity, transgender and/or sex and what is protected under each in federal, state and local laws. Indeed, understanding the nuances and differences of gender identity, sexual orientation, transgender and sex can be described as a discussion similar to Abbot & Costello's "Who's on First?" skit.

In Illinois, the confusion is attributable in part to the United States Seventh Circuit Appellate Court's holding that Title VII prohibits discrimination based on gender identity, but not sexual orientation.¹ Similarly, the district court for the Northern District of Illinois has held that the Illinois Human Rights Act ("IHRA") does not prohibit discrimination based on sexual orientation in employment.² In these decisions, the courts have made a delineation between gender identity and sexual orientation based on reasoning that the term "sex" within Title VII, does not include "sexual preference," but that it does encompass "sexual identity."³

However, the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), through the issuance of guidance, rulemaking, pursuit of litigation and holdings as it related to federal contractors set forth its position

that Title VII protects employees from discrimination based on sexual orientation and gender identity.⁴ Additionally, it should be noted that the Illinois Department of Human Rights lists "Sexual orientation – (including gender-related identity)" as a type of discrimination that employers are prohibited from discriminating against employees based on.⁵

Indeed, after the EEOC issued a 2015 ruling in a federal contractor case that Title VII's prohibition on sex discrimination encompasses any discrimination in which an individual is treated adversely due to any sex-based consideration, assumption, expectation, stereotype or norm, federal appellate and district courts started to broaden the definition of sex discrimination protected under Title VII.⁶

In fact, the Seventh Circuit recently vacated and set for rehearing a seminal decision in *Hively v. Ivy Tech Cmty. Coll., S. Bend*⁷ in which it affirmed the lower court's decision that sexual orientation is not protected under Title VII. Based on other court rulings, it would not be surprising if the Seventh Circuit reverses its decision in *Hively* and holds that discrimination based on sexual orientation or gender identity are both prohibited under Title VII.

Still, for public entities, this leaves a multitude of questions about what does it mean and what does it require. For example, at the forefront of almost all employers' minds are the following questions:

- How do we deal with the use of restrooms and changing areas?
- What accommodations are reasonable and how do you accommodate an individual whose gender expression (outward appearance) is different than their gender identity (gender person identifies with)?
- How do you handle opposing views in the workplace?

Of these questions, one of the most polarizing is the restroom issue. The EEOC's position is that denying an employee equal access to a common restroom corresponding to the gender

that the employee identifies with and forcing the employee to use the restroom based on his or her biological gender is sex discrimination. In *EEOC v. Deluxe Financial Services Corp*⁸ the EEOC sued a company for refusing to allow an employee to use the women’s restroom. Deluxe entered into a consent decree to settle the case and paid \$115,000 in damages. The EEOC’s position is further supported by OSHA’s June 1, 2015 guidance that employers should allow employees to use restrooms corresponding to the gender that they identify with based on health and safety issues. Both the EEOC and OSHA have taken the position that it is discriminatory to force an employee to use a gender neutral restroom instead of gender specific restrooms if available.

Another question is how to handle training employees on the subject. The Social Security Administration office in Champaign-Urbana recently dealt with this issue when one of its employees, citing religious reasons, refused to participate in LGBTQ awareness training. This raises a multitude of questions as to religious protections or discrimination within the workplace. To avoid these issues, the simple answer is rather than have a stand-alone training, to incorporate it into your anti-discrimination and sexual harassment training that cover all protected statuses.

Additionally, due to this being an area of law that developed and received expanded protection during the Obama administration, there are questions regarding whether there will be changes with the new administration. On February 22, 2017, the U.S. Department of Justice and U.S. Department of Education issued a joint “Dear Colleague” letter stating that it was withdrawing its guidance of Title IX of the Education Amendments of 1972 (Title IX) and implementing regulations that had previously required access to sex-segregated facilities based on gender identity. The February 22, 2017 letter stated that the questions raised regarding the use of restrooms based on gender identity were better suited for the states and local school districts to determine policies regarding. This “Dear Colleague” letter does not undue Title IX or state-level protections for LGBTQ students, nor does it negate any of the issues or arguments that the United States Supreme Court will

be hearing on March 28 regarding access to restrooms based on gender identity. The “Dear Colleague” letter is also specific to Title IX and students in schools and is not guidance on federal discrimination laws such as Title VII or address employment protections or rights of employees. That being said, it will be important to stay updated on any further actions by the new administration, as well as the Title IX case that is pending in the U.S. Supreme Court.

¹ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Vega v. Chicago Park Dist.*, 13 C 451, 2016 WL 806551, at *8 (N.D. Ill. Mar. 2, 2016) (sexual orientation discrimination claims are not covered by Title VII in the Seventh Circuit, but discrimination based on failure to conform to gender/sex norms violates Title VII).

² *Martinez v. Nw. Univ.*, 173 F. Supp. 3d 777, 784 (N.D. Ill. 2016), appeal dismissed (Sept. 21, 2016).

³ *Id* at 1084.

⁴ EEOC Newsroom, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, (2017), https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁵ See Illinois Department of Human Rights webpage, *Employment Charge Information* (2017), <https://www.illinois.gov/dhr/FilingCharge/Pages/Employment.aspx>.

⁶ *Baldwin v. Dep’t of Transportation*, EEOC DOC 0120133080, 2015 WL 4397641, at *4 (July 16, 2015).

⁷ 830 F.3d 698 (7th Cir. 2016), as amended (Aug. 3, 2016), reh’g en banc granted, opinion vacated, 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

⁸ D. Minn., Civ. No. 0:15-cv-02646-ADM-SER.



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