LGBTQ+ Issues in the Workplace: Legal Obligations and Best Practices

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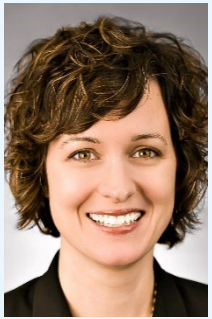
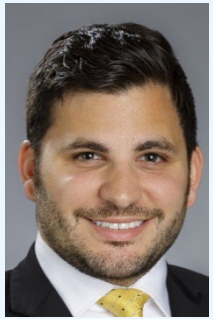
Meet the Presenters



Aimee E. Delaney counsels employers on all aspects of the employment relationship spanning from hire through termination, including leave and disability considerations, misclassification issues, employee misconduct and other disciplinary matters. She also represents employers in federal and state employment law litigation.



Vincent M. Rizzo has extensive experience defending entities and employees against claims involving discrimination, retaliation, personal injury, and property damage. He has also provided training to a number of entities regarding workplace compliance and best practices. Vincent helped the firm obtain a 100% rating in the Corporate Equality Index from the Human Rights Campaign.

Corporate Equality Index

FEDERAL PROTECTIONS

Statutes

- No federal statute *explicitly* protects LGBTQ status in the workplace
- Equality Act
- Title VII
  - Prohibits employment discrimination because of an individual's race, color, religion, sex, or national origin

BOSTOCK V. CLAYTON COUNTY

Title VII

It shall be an unlawful employment practice for an employer 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

Majority Ruling

Discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination, which is protected under Title VII

Reasoning

- “Homosexuality and transgender status are inextricably bound up with sex"
- “It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex“

Who is affected?

- *Covered:*
  - All companies and labor unions with 15 or more employees
  - Employment Agencies
  - State & Local Government
  - Apprenticeship Programs
- *Not Covered:*
  - Federal Government Employees
  - Independent Contractors

New EEOC Resources

- Explains the significance of the *Bostock* ruling;
- Compiles in one location information about sexual orientation and gender identity discrimination;
- Consistent with *Bostock*, reiterates the EEOC's established positions on basic Title VII concepts, rights, and responsibilities as they pertain to discrimination based on sexual orientation and gender identity; and
- Provides information about the EEOC's role in enforcing Title VII and protecting employees' civil rights.

STATE PROTECTIONS

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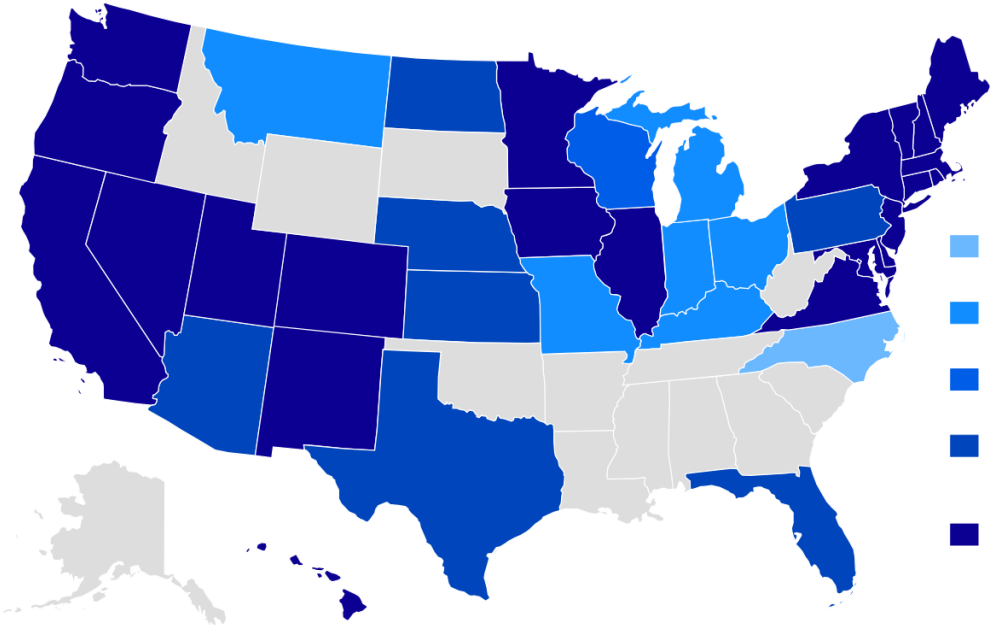
State Protections



- **Prohibit discrimination against public employees based on sexual orientation only** (1 State): North Carolina
- **Prohibit discrimination against public employees based on sexual orientation and gender identity** (6 States): Indiana, Kentucky, Michigan, Missouri, Montana, Ohio
- **Prohibit discrimination based on sexual orientation only** (1 State): Wisconsin
- **Enforcement authorities are accepting complaints on the basis of sexual orientation and gender identity because the state has adopted the Bostock rationale into state law*** (7 States): Arizona, Florida, Kansas, Nebraska, North Dakota, Pennsylvania, Texas
- **Prohibit discrimination based on sexual orientation and gender identity** (22 States & DC): California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, Washington, DC

Source: Human Rights Campaign - www.hrc.org
Updated March 22, 2021

EMPLOYEE HANDBOOK

Company Non-Discrimination Policy

Example of an organization's Non-Discrimination Policy:

> XYZ Organization hires, promotes, compensates and administers all of its employment practices without regard to race, color, national origin, gender, age, religion, ***sexual orientation, gender identity, marital status***, disability or any other legally protected status.

What is Prohibited:

- Offensive verbal or physical conduct may constitute unlawful harassment when such conduct **unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment**
- Conduct that is not the basis of an employment decision and that does not create a hostile or offensive work environment is still subject to disciplinary action under this policy. This policy will be used to stop conduct that, if repeated, could create a hostile or offensive work environment, and to encourage a professional work environment.

WORDS MATTER

Definitions of LGBTQ+ Terms

Definitions of LGBTQ+ Terms

- **Sexual orientation**: Refers to an individual's physical and/or emotional attraction to the same and/or opposite gender. "Heterosexual," "bisexual" and "homosexual" are all sexual orientations.
- **Gender identity**: Refers to a person's innate, deeply felt psychological identification as male or female, which may or may not correspond to the person's body or designated sex at birth (meaning the sex originally designated on the person's birth certificate).
- **Gender expression**: Refers to how a person outwardly expresses their gender.
- **Ally**: A person who is not LGBT but shows support for LGBT people and promotes equality in a variety of ways.

Definitions of LGBTQ+ Terms

- **Lesbian**: A woman whose physical and/or emotional attachments are to women.
- **Gay** : A man whose physical and/or emotional attachments are to men.
- **Bisexual**: a man or woman whose physical and/or emotional attractions and attachments are to persons of both genders.
- **Transgender**: An umbrella term for individuals whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Should be used as an adjective, i.e. transgender women and transgender men.
- **Queer**: A term often used to express fluid identities and orientations that don't necessarily fit a particular category. It is also often used as an umbrella term to refer to all LGBT people. Depending on the user, the term has either a derogatory or an affirming connotation, as many have sought to reclaim the term that was once widely used in a negative way.

Sources: *HRC, Out & Equal, and the ABA*

Definitions of LGBTQ+ Terms

- **Gender-fluid:** A person who does not identify with a single fixed gender or has a fluid or unfixed gender identity.
- **Cisgender:** A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them at birth.
- **Gender non-conforming:** A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category.

Definitions of LGBTQ+ Terms

- **Non-binary:** An adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories.
- **Pansexual:** Describes someone who has the potential for emotional, romantic or sexual attraction to people of any gender though not necessarily simultaneously, in the same way or to the same degree. Sometimes used interchangeably with bisexual.

WHAT CAN YOU DO?

Creating an inclusive and respectful work atmosphere

Best Practices in the Workplace

In addition to preventing discrimination and harassment, it is important to follow best practices to foster an open and inclusive workplace environment.

Some Best Practices:

- Use the Right Words
- Respect Privacy
- Avoid Stereotyping
- Avoid Making Assumptions

Also, it's important to be mindful of **Implicit Bias**

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FOLLOWING BEST PRACTICES

In the following situations, think about what the issues are, and what best practices the employee(s) should have observed.

First Vignette

First Vignette – The Issues

- **Issue 1**: Improper terminology
- **Issue 2**: Making assumptions/stereotyping based on sexual orientation
- **Issue 3**: Inappropriate questions and conversation
- **Issue 4**: Mistakenly "outing" an LGBTQ employee

First Vignette – Best Practices

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Second Vignette

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Second Vignette – The Issues

- **Issue 1**: Improper terminology
- **Issue 2**: Improper conversation
- **Issue 3**: Stereotyping and assumptions
- **Issue 4**: Off-Duty conduct

Second Vignette – Best Practices

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Third Vignette

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Third Vignette

- **Issue 1**: Improper terminology
- **Issue 2**: Policing restroom use
- **Issue 3**: Gender Stereotyping
- **Issue 4**: Speculating about private medical information

Third Vignette – Best Practices

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Summary of Best Practices

- Words Matter
  - Use gender neutral and inclusive language
  - Use the correct terminology, the proper names, and the correct pronouns
- Treat LGBTQ+ people the same as anyone else
  - Talk about what you would with anybody (weather, sports, hobbies, etc.)
  - Take your cue from the LGBTQ+ person about what they do and don't want to share or talk about
- Respect personal boundaries and privacy
- Ensure access to restrooms and other facilities

Questions

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Thank You

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