

LGBT Update: A Practical Perspective

(of LGBT Laws in the Workplace)



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Overview

- Executive Order 11246 amended to include sexual orientation, gender identity
- Words and Terms
- Restroom guidance – OSHA and EEOC
- Key cases—*Windsor*, *Hobby Lobby*, *Masterpiece Cakeshop*
- OFCCP's position
- Corporate culture concepts

Definitions – Words Matter

- “Problem” words
 - What are they?
 - What do you do?
- Source of definitions: Case law, media, other?
- LGBTQA
- Cisgender
- Non-Binary
- Gender identity vs. gender expression

How to Talk about Sex

- Sexual orientation
- Gay
- Lesbian
- Straight
- Bisexual
- Asexual
- Intersex
- Androgynous
- Ally

More Words-What to Say, Not to Say

- Homosexual
- Sexual preference
- Homosexual (or gay) lifestyle
- Queer
- Transgendered vs. transgender (and “-ism’s”)
- Transsexual
- Transvestite
- Pronouns

Key Legal Considerations

- Federal statutes
- Federal regulations
- Executive Orders
- Judicial interpretation
- Agency guidance – EEOC and OSHA
- State and local laws

Employment Non-Discrimination Act (ENDA)

- Routinely, yet unsuccessfully, introduced since 1994
- ENDA would:
 - ❑ Ban hiring and employment discrimination based on sexual orientation or sexual identity
 - ❑ Apply to civilian, non-religious employers with at least 15 employees
 - ❑ Provide rights to individuals who currently rely on a diverse Federal, state and local laws, and creative strategies

Employment Non-Discrimination Act (ENDA)

- “Gender identity” – gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth
- “Sexual orientation” – homosexuality, heterosexuality, or bisexuality
- Requires “reasonable access”
- Religious organizations exempted*

Burwell v. Hobby Lobby: U.S. Supreme Court Decision (June 30, 2014)

- Closely-held for-profit corporations exempt from law to which they religiously object if less restrictive means of furthering law's interest.
- Court struck down contraceptive HHS mandate regulation under Affordable Care Act (ACA) requiring employers to cover certain contraceptives for female employees.
 - ❑ Mandate not least restrictive way to ensure contraceptive care access,
 - ❑ Less restrictive alternative already being provided for religious non-profit groups

Burwell v. Hobby Lobby: U.S. Supreme Court Decision (June 30, 2014)

- First time Court recognized for-profit corporation's religious belief claim
- Limited to closely-held companies
- Interprets Religious Freedom Restoration Act (RFRA); not First Amendment free exercise of religion case

Hobby Lobby Case: Effect on ENDA Support

- ACLU, Gay & Lesbian Advocates & Defenders, Lambda Legal, National Center for Lesbian Rights and Transgender Law Center jointly announced withdrawal of support for Senate ENDA bill due to sweeping religious exemption.
- Exemption: “allows religious organizations to discriminate based on sexual orientation and gender identity”
- Group: exemption has “long been a source of significant concern to us”

Hobby Lobby Case: Aftermath

- Some faith leaders reacted to *Hobby Lobby* by requesting exemption from EO 11246
- *Masterpiece Cakeshop* (2018)
 - OFCCP Directive 2018-03 (Aug. 10, 2018) says OFCCP cannot restrict religious rights in investigating complaints and enforcing EO 11246. Government will protect religious exercise.
 - OFCCP's FAQ's on intersection of LGBT and religion superseded.

EEOC Position on LGBT

- **Transgender Status:** Discrimination against individual because person is transgender is, by definition, discrimination based on sex, and violates Title VII (*Macy v. Dept. of Justice*, EEOC April 2012). In 2016, EEOC filed cases based on transgender discrimination. (e.g., *EEOC v. Rent-A-Center E. Inc.*, C.D. IL July 2016).

EEOC Position on LGBT

- **Sexual Orientation:** Title VII protects gay, lesbian and bisexual individuals against sex discrimination, which includes adverse actions taken because of a person's failure to conform to sex or gender stereotypes. *Veretto v. U.S. Postal Service* (EEOC July 2011); *Castello v. U.S. Postal Service*, EEOC Dec. 2011). In 2016, EEOC filed several cases alleging sexual orientation discrimination.
- Now, split in Courts of Appeal

EEOC and OFCCP Interactions

- “Sister agencies”
- Share information
- Enter into Memorandum of Understanding adopting other agency’s position or guidance
- OFCCP may share information collected in an audit with other enforcement agencies. (7/16 scheduling letter revision)

Federal Laws and LGBT

TITLE VII – LIMITED PROTECTION – but expanding

- *Price Waterhouse v. Hopkins* (gender identity stereotypes) (1989)
- *Oncale v. Sundowner Offshore Services* (sexual harassment applies also when both parties were of the same-sex) (1998)
- *Macy v. Holder* (Sex v. gender identity discrimination) (2012)

Federal Law: Same-Sex Harassment

- *Rene v. MGM Grand Hotel* (9th Cir. 2002) Plaintiff's sexual orientation irrelevant to claim that gay male allowed to bring Title VII claim due to sexually demeaning treatment by male employees
- *Bibby v. Phila. Coca Cola Bottling* (3rd Cir. 2001) Court stated same-sex harassment considered discrimination due to sex where evidence that person harassing plaintiff sexually desires him or where due to gender non-conformity; evidence not found in this case.

Federal Law: Gender Stereotyping

- *Glenn v. Brumby* (11th Cir. 2011) (Court stated that government agent violates Equal Protection clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of gender non-conformity)
- *Lewis v. Heartland Inns of America* (8th Cir. 2010) (female employee with masculine appearance and dress style discharged)
- *Prowel v. Wise Business Forums* (3d Cir. 2009) (summary judgment for employer denied where evidence by homosexual that harassment due to him not complying with employer's idea of how men should "look, speak and act")

Federal Law: Same-Sex Harassment

- *Spearman v. Ford Motor Co.* (6th Cir. 2000) (employee taunted with comments about his alleged homosexuality lost claim)
- *Medina v. Income Support Div., State of New Mexico* (10th Cir. 2005) (case based on discrimination by lesbian against heterosexual woman failed)

Americans with Disabilities Act

- Transvestitism excluded
- Gender Identity Disorder excluded except when results from physical impairment
- Gender dysphoria controversy
- Not required to accommodate if condition not a disability impairment
- Medical information must be kept confidential

Defense of Marriage Act

- DOMA enacted in 1996
 - Exceptions to Full Faith and Credit
 - State does not have to recognize a same-sex marriage performed outside its jurisdiction
 - Marriage is between one man and one woman only
 - No Federal recognition for same-sex spouses

But, then came *Windsor*....

U.S. v. Windsor (U.S. Supreme Court Decision)

- Decided June 26, 2013
- The Supreme Court struck down Section 3 of DOMA
 - Court held DOMA violated the equal protection component of Fifth Amendment's Due Process clause
 - For purposes of Federal law, defining spouse to exclude same-sex spouse is unconstitutional

What *Windsor* Did Not Do

- No Federal constitutional right to same-sex marriage
- Section of DOMA left intact:
 - States can choose not to honor same-sex marriage performed out of state
- Did not address constitutionality of state DOMA laws

Obergefell v. Hodges

U.S. Supreme Court Decision – 2015

- Constitutional right to same-sex marriage
- 14th Amendment requires:
 - A state to license same-sex marriage and
 - Recognize same-sex marriage

IRS/Treasury Announcement

- August 29, 2013
- Following *Windsor*, IRS and Treasury jointly announced:
 - “Same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes.”
- IRS issued Revenue Ruling and FAQs
- Adopted “state of celebration” standard

Tax Implications*

- Employee's income tax treatment of health coverage
 - Pre-*Windsor*, employee taxed on fair market value of same-sex spouse's coverage for federal tax purposes
 - Post-*Windsor*, employers should stop imputing income for covered same-sex spouses
 - Employee may be eligible for refund
- Employer may seek refund of FICA taxes paid on imputed income
- Cafeteria Plans

**** I am not a tax attorney!***

Revised FMLA Regulations

- Purpose: Ensure families have flexibility to deal with serious medical and family situations without fear of job loss.
- Recognized *Windsor* striking down DOMA's provision that "marriage" and "spouse" limited to opposite-sex marriage for purpose of Federal law.
- Extended FMLA protections to all eligible employees in legal same-sex marriages **regardless of where couples live.**

Impact on Health/Welfare Plans

- Eligibility
 - Same-sex spouse
 - Same-sex spouse's children
- FSAs and HSAs
- HIPAA Special Enrollment Rights
- COBRA
- Fringe Benefits
- Cafeteria Plans

Impact on Retirement Plans

- Hardship withdrawals
- Qualified Domestic Relations Orders
- Death benefits
 - Rollovers
 - Spousal consent rules

Legal Tensions

- HB2 example
- City vs. State vs. Federal
- Religious accommodation vs. No Sex Discrimination
- Constitutional claims
- National Labor Relations Act
- Evolving legal landscape

Corporate Culture

- Training
- Affinity/resource groups
- Surveys
- Communications
- Evolving cultural landscape
- Culture of respect

Final Questions



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