



DELAWARE

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ENFORCEMENT

Gender identity issues are here to stay

by Lauren E.M. Russell

As we have noted in the past, Delaware law now protects employees from discrimination on the basis of gender identity, also known as transgender nondiscrimination (e.g., see "Revisiting gender identity discrimination" on pg. 1 of our September issue). However, Congress hasn't yet amended Title VII of the Civil Rights Act of 1964 or any other antidiscrimination statute to protect individuals on the basis of gender identity. In the absence of congressional action, some federal regulatory bodies are stepping in to address the issue.

As if OFCCP compliance wasn't hard enough

One of the regulatory agencies that's stepping in to address transgender discrimination is the Office of Federal Contract Compliance Programs (OFCCP), which issued a directive prohibiting such discrimination effective August 19, 2014. Under the directive, the OFCCP adopts the position that discrimination on the basis of gender identity is a

form of sex discrimination and is therefore a violation of federal law and OFCCP regulations.

The OFCCP reached its position after noting that the Executive Orders it's responsible for enforcing are interpreted in accordance with Title VII. The directive takes notice of a decision issued by the Equal Employment Opportunity Commission (EEOC) in *Macy v. Holder*. That case was brought by a federal employee and was therefore subject to an administrative hearing before the EEOC. In the resulting decision, the agency concluded that transgender employees are frequently subjected to discrimination because of sex stereotyping, meaning they are discriminated against or harassed because they don't look or act in a way that conforms with societal expectations for their biological sex. Such discriminatory conduct constitutes discrimination on the basis of sex, which is prohibited under Title VII.

Relying on the EEOC's position, the OFCCP has declared that discrimination on the basis of gender identity is a violation of federal contractor regulations.

What it means for federal contractors

Executive Order 11246 prohibits federal contractors and subcontractors from discriminating against employees on the basis of sex (among other protected characteristics). If your business is engaged in federal contract work in Delaware or elsewhere, you are now required to address allegations of discrimination on the basis of gender identity the same way you would any other claim of sex discrimination. The OFCCP considers such claims valid, and you may face stiff penalties for violations of OFCCP-enforced requirements, up to and including debarment from federal contracts.

OFCCP isn't alone

The OFCCP isn't the only administrative agency that's reading its authority to include transgender nondiscrimination. The EEOC recently filed two lawsuits — one in Florida and one in Michigan — accusing employers of violating the provisions of Title VII by discharging transgender employees. The lawsuits are consistent with the EEOC's Strategic

Enforcement Plan, which governs its actions from 2013 through 2016. Consequently, employers can expect to see additional cases seeking to expand the definition of "sex" under Title VII.

Bottom line

As gender identity issues become more socially acceptable, we will see protections for transgender individuals grow in line with the protections offered to other minority groups. Although federal protection against transgender discrimination hasn't yet been codified, it is recognized as a viable claim by the EEOC and the OFCCP, and businesses should act accordingly.

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