



DELAWARE

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GENDER IDENTITY

Deciphering the feds' changing position on LGBT employment protections under Title VII

by Molly DiBianca

In a memo issued on October 4, 2017, U.S. Attorney General Jeff Sessions formally declared that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on transgender status. The memo directly conflicts with the position of the Equal Employment Opportunity Commission (EEOC), which has long argued that gender identity is protected by federal law. Here's what Delaware employers need to know.

Unanswered question

Courts have been far from unanimous on whether transgender status is a protected characteristic under Title VII. In 1989, the U.S. Supreme Court held that discrimination based on sex stereotypes (i.e., assumptions or expectations of how a person of one sex should dress or behave) is unlawful under Title VII. In that case, a female employee was denied a promotion partly because the employer felt that she did not act "femininely enough." The Court found that sex stereotyping is precisely the type of harm Title VII was intended to prevent.

In 1998, the Supreme Court held that same-sex harassment also constitutes unlawful sex discrimination under Title VII. There was no "sexual" conduct in the case, but the employee was harassed because he was perceived as not being "manly enough." The Court found that the fact that the harassment was done by the employee's male coworkers did not remove it from the jurisdiction of Title VII.

Thus, for the past two decades, the law has been clear that Title VII's prohibition on sex-based discrimination extends beyond just male-female sexual harassment. But just *how far* the prohibition extends is still unsettled at the federal level. The U.S. Court of Appeals for the 3rd Circuit (whose rulings apply to all Delaware employers) has not weighed in directly on the question.

However, at least three other federal appeals courts and several district courts around the country, including a district court in Pennsylvania, have held that under federal law, "sex discrimination" includes discrimination based on sexual orientation, gender identity, and/or transgender status. The EEOC has long shared that view, arguing that Title VII extends to LGBT-related discrimination. During the Obama administration, the U.S. Department of Justice (DOJ) joined the EEOC in adopting that position. That is why Sessions' new memo is important: It reverses the position of the DOJ and announces a position that directly conflicts with the EEOC's.

Bottom line

What are Delaware employers supposed to do with the conflicting positions at the federal level? In short, you need not worry about these developments too much. Delaware law *does* prohibit discrimination based on sexual orientation or gender identity. Thus, Delaware employers should continue to comply with the state's antidiscrimination law, which is broader than federal law — at least on paper.

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