Squire Patton Boggs Summer Associate Taylor Hamel summarizes guidance recently released by the U.S. Equal Employment Opportunity Commission relating to Sexual Orientation and Gender Identity Discrimination.

On June 15, 2020, the U.S. Supreme Court issued its landmark decision in Bostock v. Clayton County, holding that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes employment discrimination based on sexual orientation or transgender status. The Court reached that conclusion because, in its opinion, an employer who fires or otherwise discriminates against an individual simply based on their sexual orientation or gender identity does so “because of... sex.” The Bostock case was one of three consolidated cases—two that dealt with sexual orientation discrimination by an employer and one in which the employer discriminated based on the employee’s transgender status. The Court’s decision was driven by its reasoning that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” Our prior blog post with a detailed review of the decision can
This year, on the one-year anniversary of the *Bostock* decision, and in the middle of LGTBQ+ Pride Month, the U.S. Equal Employment Opportunity Commission (“EEOC”) opened its new hub for educating employers and employees on their respective rights and responsibilities regarding sexual orientation and gender identity (“SOGI”) in the workplace. The new SOGI landing page provides an overview of pertinent information, such as general SOGI protections for employees and time limits for filing claims, as well as links to more detailed resources for navigating SOGI issues in the workplace. Among the newly released materials found on the landing page is the EEOC’s Technical Assistance Document (entitled “Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity”), which provides employers with key guidance regarding SOGI workplace rights. Specific takeaways from the Technical Assistance Document are summarized below.

**Who is protected against discrimination?**

- Job applicants, current employees, and former employees, regardless of citizenship or immigration status, are protected if their employer has 15 or more employees.

- Straight individuals and cisgender individuals (i.e., individuals whose gender corresponds with the sex the person was assigned at birth) are also protected against sexual orientation and gender identity discrimination.

- The protections extend to private employers of 15 or more employees located on Tribal reservations, despite Title VII not applying to Tribal nations.

- The protections apply regardless of contradictory state or local laws.

- Title VII applies to state and local government employers with 15 or more employees, the federal government as an employer, unions, and employment agencies.

**What employment actions are prohibited?**

- Title VII protects against discrimination based on sexual orientation and gender identity with respect to general employment practices, including hiring, termination, compensation, and more.

- Employers may not discriminate because an individual’s behavior or apparel does not conform to the stereotypical behavior or apparel for the individual’s sex assigned at birth. This applies whether or not the employer has knowledge of the individual’s sexual orientation or gender identity.

- Continued or intentional misuse of preferred pronouns could rise to the level of harassment if it becomes sufficiently severe or pervasive.

- An employer may not justify discrimination based on customer or client preferences.
Although an employer may have separate, sex-segregated bathrooms, locker rooms, and showers, the **EEOC takes the position** that employees may not be denied access to the facilities that correspond to their gender identities.

**Are there exceptions?**

- Independent contractors are not protected by Title VII.
- Title VII does not apply to Tribal nations.
- "**Religious organizations**" and "**religious educational institutions**" have limited defenses to claims of discrimination. Title VII allows these entities to hire and employ individuals whose religious beliefs and practices align with those of the organization. The “ministerial exception” also applies to religious organizations and educational institutions. This exception forecloses certain discrimination claims for employees who play key roles in carrying out the organization’s core mission.

By providing this guidance and other helpful materials, the EEOC has ensured that employers and the public can find accessible, easy-to-understand information in a convenient location on the EEOC’s website that will help educate employers on the issue of SOGI discrimination and clarify their obligations under federal law. The EEOC’s SOGI guidance should serve as a guidepost for employers, and in light of the new guidance, employers should consider reviewing their policies, practices, and handbooks to ensure compliance.

© Copyright 2021 Squire Patton Boggs (US) LLP

National Law Review, Volume XI, Number 175