THE
NATIONAL LAW REVIEW

Transgender and Sexual Orientation Discrimination Under Title VII

Thursday, June 2, 2016

On May 13, 2016, the Department of Labor ("DOL") and the Department of Education ("DOE") issued a joint directive to school districts nationwide titled the "Dear Colleague Letter on Transgender Students." The correspondence "summarizes a school's Title IX obligations regarding transgender students and explains how the [DOE] and the [DOL] evaluate a school's compliance with these obligations." The letter makes clear that ***"[a]s a condition of receiving Federal funds***, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities." (Emphasis added). While the information applies directly, through Title IX, to school districts, private employers on a much broader scale must also be cognizant of the new interpretation of "sex" discrimination.

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The DOE and DOL issued this guidance, more in the form of a mandate, on the heels of the Fourth Circuit Court of Appeals decision in *Grimm v. Gloucester County School Board,* 2016 WL 1567467 (4th Cir. April 19, 2016), wherein the Fourth Circuit ruled, in a 2 to 1 opinion, that requiring a student to use the restroom accompanying that student's biological sex is sex discrimination in violation of Title IX. In short, the Fourth Circuit held that schools must treat transgender students consistent with their gender identity, not their biological sex, if the school district provides segregated restrooms. The majority opinion in *Grimm* relied heavily, if not exclusively, on the DOE's interpretation of Title IX and its position that requiring transgender students to use the restroom associated with their biological sex equated to discrimination on the basis of the students' sex. The school district in *Grimm*, along with multiple state attorney generals, petitioned the Fourth Circuit for a hearing before the full panel on the issue. That petition was denied. It is anticipated that the *Grimm* decision will be appealed to the United States Supreme Court for review.

While the face of the May 2016 correspondence may appear to limit the application only to school districts receiving federal funds, there is, in actuality, a much greater import to the directive. Employers, through Title IX's sister statute, Title VII, will inevitably be faced with similar questions of transgender and sexual orientation discrimination.

Importantly, the Equal Employment Opportunity Commission ("EEOC") has issued guidance on the employer handling of transgendered and homosexual or bisexual employees. The EEOC has indicated that it "interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation**." Traditionally, the term "sex" under Title VII had been limited to gender discrimination, *i.e.* the employer discriminated against the employee because of the employee's gender. Expanding that term to include an employee's gender identity and encompassing sexual orientation dramatically increases employees covered by this protected category. In the future, if the EEOC's interpretation is given full effect under judicial scrutiny, a significant uptick in "sex" discrimination claims is sure to follow.

While the *Grimm* decision arose, in large part, because of the school district's decision to not allow a transgender student to use the restroom associated with his gender identity, employers will face additional, more traditional employment issues related to hiring, failing to hire, discharging, demoting, promoting, considering vacation and

other benefit programs, etc. for lesbian, gay, bisexual, and transgender employees. This is in addition to employers being required to offer transgender restrooms and other facilities. As always, employers must remain cognizant of instances of harassment by co-employees/supervisors and hostile work environment claims associated therewith. At this juncture, employers can no longer consider the term "sex" to only include the gender of the current or prospective employee.

Moving forward, it is critical that employers stay abreast of the EEOC's ***current*** interpretations of Title VII and to quickly consult with legal counsel when questions arise concerning the proper classification of employees. Undoubtedly, litigation and claims concerning gender identity and sexual orientation discrimination will only increase while the EEOC's interpretation of Title VII, and Title IX, is vetted through judicial review. Until a clearer picture of the law is created, employers must proceed cautiously to avoid substantial gender identity and sexual orientation discrimination claims and the litigation costs associated with defending those allegations.

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