

## US Attorney General Jefferson Sessions Issues New Guidance On Transgender Employees

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Yesterday, U.S. Attorney General Jefferson Sessions issued new guidance reversing the federal government's former position that gender identity is protected under Title VII.

In a memo sent to the heads of all federal agencies and the U.S. attorneys, the attorney general stated that as a matter of law, "Title VII does not prohibit discrimination based on gender identity *per se*." The memorandum further stated the DOJ will take the position in all pending and future matters that Title VII does not protect against discrimination on the basis of gender identity or transgender status.

Sessions' memo explains Title VII expressly prohibits discrimination on the basis of sex but makes no reference to gender, and that courts have interpreted "sex" to mean biologically male or female. Sessions concluded employers may differentiate on the basis of sex in employment practices, so long as the practices do not expose members of one sex to disadvantageous terms or conditions of employment to which the other sex is not exposed. The memo highlighted sex-specific bathrooms as such an example. Sessions explained while Title VII prohibits "sex-stereotypes," insofar as that sort of sex-based consideration causes disparate treatment between men and women, Title VII is not properly construed to proscribe employment practices that take into account the sex of employees, but do not impose different burdens on similarly situated members of each sex.

This guidance reverses and withdraws previous guidance by Attorney General Eric Holder in a December 15, 2014 memorandum in which Holder stated Title VII prohibits employers from using "sex-based considerations," such as gender identity, in employment decisions. Sessions' memo also runs contrary to the current position of the U.S. Equal Employment Opportunity Commission, which treats discrimination against an employee on the basis of gender identity, including transgender status and sexual orientation, as violations of Title VII.

Currently, there is a split of authority in the courts on whether sex discrimination under Title VII includes discrimination on the basis of gender identity and sex stereotyping, and thus prohibits discrimination against transgender individuals. The U.S. Supreme Court will likely have to resolve the issue in the future, but may issue some relevant guidance this term in the *Gloucester County School Board v. G.G.* case (involving issues of a school district's obligations to a transgender student).

While it is now the position of the Department of Justice that Title VII protections do not extend to transgender individuals, employers should still be careful to avoid discrimination on the basis of gender identity, as the law is still unsettled. As Attorney General Sessions' memorandum notes, there are still federal statutes that prohibit discrimination against transgender persons, and states and localities may have additional protections. Moreover, the EEOC could still bring suit against employers who engage in transgender discrimination.

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