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Attorney General Reverses Obama-Era Protection of Transgender Employees

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In an October 4, 2017 letter to all United States attorneys and heads of federal agencies, Attorney General Jeff Sessions announced that the Department of Justice ("DOJ") will no longer interpret Title VII of the Civil Rights Act of 1964 ("Title VII") to provide employment protections to transgender individuals. This statement reversed former Attorney General Eric Holder's position, who previously concluded that Title VII does protect transgender individuals from employment discrimination.

Although this letter from the Attorney General is a departure from the DOJ's prior position, this announcement is not surprising. Earlier this year the DOJ filed a brief, without being asked by the court, in a case before the Second Circuit Court of Appeals in *Zarda v. Altitude Express*. The DOJ argued that Title VII does not prohibit employment discrimination on the basis of sexual orientation. In that same matter, the current Equal Employment Opportunity Commission's ("EEOC") argued that Title VII *does* prohibit discrimination on the basis of sexual orientation. This case has not

yet been decided, but Judge Rosemary Parker of the Second Circuit noted during oral arguments that "[i]t's a little bit awkward for us to have the federal government on both sides of the case."

The grounds for this change in interpretation by the DOJ could be based on several reasons – whether political or based on a strict textual interpretation of Title VII. Regardless of the motive, however, this policy change is yet another signal that the DOJ will likely continue to actively argue in court, whether they are a party or not, that Title VII and other laws do not provide protection to LGBT individuals. It is also likely that the DOJ will seek to withdraw itself from any active litigation in support of expanding such protection.

Regardless of the rationale for issuing this letter, the impact of the Attorney General's new interpretation of Title VII likely will not have significant immediate impact on employer obligations and conduct for several reasons. First, the DOJ's newly stated position stands in direct opposition to the EEOC interpretation of Title VII, and the EEOC is the primary federal agency tasked with investigating violations of and pursuing enforcement of Title VII. While the DOJ has the ability to prosecute violations of Title VII against state and local governments, it does not do so with nearly the frequency of the EEOC, and does not do so with respect to private employers. Second, courts ultimately will determine the scope of Title VII, not the DOJ. While the DOJ may seek to persuade the courts that Title VII does not provide protection for transgender individuals, as it did in its amicus brief filed in *Zarda*, the DOJ's insertion into such lawsuits does not guarantee that its position will be accepted. The Supreme Court held in *Price Waterhouse v. Hopkins*, almost thirty years ago, that employment discrimination based on sex stereotypes is unlawful sex discrimination under Title VII, and this decision has been relied on in dozens of subsequent lower court decisions in finding that protection from discrimination based on someone's transgender status falls within the text of Title VII. Finally, numerous states and localities, such as New York and the District of Columbia, already have passed legislation to expressly prohibit discrimination based on gender identity.