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July 16, 2015

OSHA Joins the Growing Support for Transgender Rights in the Workplace

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WITH THE INCREASED GOVERNMENT SCRUTINY OF TRANSGENDER ISSUES IN THE WORKPLACE, EMPLOYERS SHOULD BE CAREFUL NOT TO DISCRIMINATE AGAINST TRANSGENDER EMPLOYEES AND TO TREAT THEM IN ACCORDANCE WITH THEIR GENDER IDENTITIES.

Most employers are aware that the Occupational Safety and Health Administration (OSHA) regulates worker safety and health matters in the workplace. In its broadest form, OSHA law requires that each employer “shall furnish to each of his employees

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employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. 651, § 5(a)(1). This phrase comes from a broadly interpreted statutory provision commonly known as the “General Duty Clause.” OSHA also regulates employers through regulations and standards, promulgated pursuant to the statute. *See generally* 29 C.F.R. 1910 (General Industry); 29 C.F.R. 1926 (Construction Industry). One of those standards is the “sanitation standard,” 29 C.F.R. 1910.141, which requires, among other things, that employers provide their employees with prompt access to toilet facilities and prohibits employers from imposing unreasonable restrictions on the availability of or employees’ use of toilet facilities.

OSHA recently clarified its sanitation standard by issuing “A Guide to Restroom Access for Transgender Workers” (available at <https://www.osha.gov/Publications/OSHA3795.pdf>) to address the issue as to which facilities may be used by transgender¹ individuals when separate restrooms are provided for men and women. The guidance provides that employees should be entitled to use the facilities that correspond with their gender identity and should not be required to use available gender-neutral facilities. OSHA’s concern is that segregating transgender workers from others by requiring them to use gender-neutral or other specific (and possibly physically remote) restrooms singles them out from their co-workers and may make them fear for their physical safety. The OSHA guidance advises that, “regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees.” Although OSHA guidance does not have the force and effect of law, employers should keep in mind that this guidance is a clarification of existing requirements that mandate safe and convenient restroom facilities — and that can be interpreted to apply to transgender workers. In addition, OSHA may rely on the General Duty Clause to take enforcement actions in appropriate circumstances. Employers also should be aware of any applicable state or municipal laws, rules or regulations regarding restroom access.²

OSHA’s guidance follows the Equal Employment Opportunity Commission’s (EEOC’s) targeting of employer practices that discriminate against transgender individuals, as we reported earlier this year (<http://www.pepperlaw.com/publications/transgender-discrimination-and-the-equal-opportunity-workplace-2015-02-05/>). In its current Strategic Enforcement Plan, the EEOC identified the coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions as an enforcement priority. Even though gender identity and transgender status are not identified as protected classes under Title VII, the EEOC and some courts have taken the position that discrimination

based on those characteristics equates to sex discrimination. Applying that theory, the EEOC has pursued litigation against employers that it concludes have discriminated against transgender employees.

For example, in April 2015, the EEOC found that the Department of the Army discriminated on the basis of sex against Tamara Lusardi, a software quality assurance specialist, by denying her access to the female restroom and by subjecting her to a hostile work environment based on sex. *See Lusardi v. McHugh*, No. 0120133395 (EEOC Apr. 1, 2015).

Even more recently, in June 2015, the EEOC filed a complaint in the U.S. District Court for the District of Minnesota — *EEOC v. Deluxe Financial Services, Inc.*, No. 15-2646 (D. Minn. 2015) — alleging that Deluxe Financial Services discriminated on the basis of sex against Britney Austin, a transgender woman, by refusing to allow her to use the women's restroom, failing to change her sex designation on all internal company records and systems, and subjecting her to a hostile work environment.

Some courts likewise have concluded that, even though transgender status itself is not protected under Title VII, discrimination based on transgender status can constitute sex discrimination under Title VII. For example, on July 10, 2015, the U.S. District Court for the Western District of Oklahoma denied a motion to dismiss the sex discrimination and retaliation claims of a transgender employee. The defendants had argued that the intervenor-plaintiff's transgender status is not a protected class under Title VII. The court concluded, however, that the complaint did state a claim for sex discrimination under Title VII by alleging that the employer took action against the intervenor-plaintiff based on her transition from male to female. Because the defendants' actions were motivated by their dislike of the plaintiff's presented gender, the alleged discrimination was based on sex discrimination. *See United States v. Se. Oklahoma State Univ.* (W.D. Okla. July 10, 2015).

Also, federal government contractors should be aware that they are prohibited from discriminating against employees based on sexual orientation and gender identity, pursuant to Executive Order 13672 signed by President Obama on July 21, 2014.³ The final rule implementing Executive Order 13672 (issued by the Department of Labor's Office of Federal Contract Compliance Programs) became effective on April 8, 2015. The final rule also requires that contractors allow employees and applicants to use restrooms consistent with their gender identity.

Practice Tips

With the increased government scrutiny of transgender issues in the workplace, employers should be careful not to discriminate against transgender employees and to treat them in accordance with their gender identities. Among other things, that means permitting transgender employees to use the restroom assigned to the gender with which they identify and addressing (verbally and in writing) transgender employees by the name and pronoun they prefer. Employers also should consider incorporating transgender, gender identity and sexual orientation as protected classes in their antidiscrimination and antiharassment policies. Even though those are not expressly identified as protected classes under federal law (in contrast to many state and local laws), the EEOC and some courts view discrimination or harassment based on these categories as actionable sex discrimination in violation of Title VII. Employers can expect to see more of these rulings in the future.

Endnotes

- 1 “Transgender” means that an individual’s gender identity is different from the sex he or she was assigned at birth.
- 2 OSHA prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. For more information, see www.osha.gov.
- 3 Executive Order 13672 amended Executive Order 11246, which had prohibited federal contractors and subcontractors from discriminating against employees based on race, color, religion, sex and national origin and required them to take affirmative action to prevent discrimination on those bases from occurring. Executive Order 13672 added sexual orientation and gender identity to the bases of discrimination covered by Executive Order 11246.