

Employee Benefit ■ Plan Review

Using Employees' Requested Pronouns: It's About Dignity, Respect and Minimizing Legal Risks

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As employers strive to create inclusive and compliant workplaces, you should note that using an employee's requested pronouns not only conveys respect but also helps you stay in compliance with anti-discrimination laws. In fact, the Equal Employment Opportunity Commission (EEOC) takes the position that intentionally and repeatedly using the wrong pronouns to refer to LGBTQ+ employees may give rise to an actionable Title VII claim based on sexual orientation and gender identity discrimination. Although the legal parameters in this area are still being defined, employers that create an inclusive environment for all workers can reduce their risk of facing these types of discrimination claims. What do you need to know about this developing area of law?

Here is a quick refresher, as well as three best practices for creating a safe and legally compliant work environment for transgender and non-binary employees.

THE LEGAL LANDSCAPE IS EVOLVING

The EEOC issued relevant workplace guidance on sexual orientation and gender identity discrimination after the U.S. Supreme Court's 2020 holding in *Bostock v. Clayton County, Georgia*. In this landmark ruling, the Court held that workplace discrimination based on

sexual orientation and gender identity constitutes unlawful "sex" discrimination in violation of Title VII of the Civil Rights Act of 1964. In the Court's majority opinion, Justice Gorsuch stated that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual person based on sex."

Notably, however, the parameters are still being tested nearly three years after the Supreme Court's decision and the EEOC's subsequent guidance.

Additionally, even though further protections have been afforded to LGBTQ+ employees, there are still unanswered questions about how misgendering or refusing to use an employee's preferred pronouns will be analyzed in conjunction with the protection of individual religious freedoms.

COMING INTO FOCUS

However, we are beginning to see the legal landscape take shape. Indeed, the U.S. Court of Appeals for the Seventh Circuit recently weighed in on this issue, in *Kluge v. Brownsburg Community School Corp.*¹ In this case, the school district maintained a policy that required its faculty to honor the preferred

names and pronouns of transgender students. The policy was subsequently challenged by the plaintiff who claimed that the policy violated his religious beliefs. The court held that allowing the plaintiff to be excepted from the district's policy based on his religion would pose an undue hardship, as this would create further harm to students in addition to a disrupted learning environment. As such, the district was not obligated to accommodate the plaintiff's religious beliefs under these circumstances. As a result, even though he had religious objections, the plaintiff was required to abide by the policy requiring the use of preferred names and pronouns.

Although the Seventh Circuit covers only Illinois, Indiana, and Wisconsin, we expect more federal appeals courts to weigh in on this issue – and the U.S. Supreme Court could ultimately resolve disagreements that arise among the circuit courts. Indeed, several ongoing legal debates over transgender workers' rights with seemingly conflicting results may find their way to the Supreme Court in the near future.

Also of note, the EEOC itself recently filed a lawsuit on behalf of a transgender employee who claimed sex discrimination in violation of Title VII based on gender identity. The basis of the complaint included allegations such as intentional misgendering, asking invasive questions about the employee's body, and making anti-trans comments. Although the case is still pending, the lawsuit

illustrates the EEOC's commitment to protecting transgender employees in the workplace, specifically regarding intentional misgendering claims, and employers should expect to see a rise in these claims.

BEST PRACTICES FOR BUILDING INCLUSIVE WORKPLACES

While the legal landscape in this area continues to unfold, employers need to remain cognizant that gender identity and sexual orientation are protected categories under Title VII. As a result, you should maintain policies and practices that ensure a safe and legally compliant work environment for LGBTQ+ employees. Referring to employees by the names and gender pronouns with which they identify will not only help you stay legally compliant but also remains an important component of treating employees with the dignity and respect necessary to building a healthy work environment.

Consider the following three best practices for creating and maintaining a positive and inclusive work environment:

1. Refer to employees by the name and gender pronoun with which they identify. This creates an atmosphere of respect for all employees. An accidental misuse of a transgender employee's preferred name and/or pronoun may not violate Title VII. However, intentional and repeated

transgressions would likely violate your anti-harassment policy and could establish a hostile work environment.

2. Address teasing, offhand comments, and other isolated incidents immediately. Ensure that such behavior will not be tolerated. Remind employees about the provisions in the employee handbook that expressly prohibit this type of misconduct.
3. Train supervisors and managers to recognize the significance of these issues and their role as leaders in fostering a safe and legally compliant work environment. You may also want to provide additional awareness training to all employees.

CONCLUSION

In addition to reviewing policies and practices to ensure legal compliance with the Supreme Court's *Bostock* ruling and the EEOC's guidance, employers should continue to take the steps necessary to foster safe and inclusive work environments for all. 🌟

NOTE

1. *Kluge v. Brownsburg Community School Corp.*, No. 21-2475 (7th Cir. 2023).

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