



**THE NEW DIVERSITY:**  
Transgender Persons and the EEOC's Aggressive Push to Redefine  
Title VII to Include Sexual Orientation and Gender Identity

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™

---

---

---

---

---

---

---

---

**The Times They Are A-Changing**



- Public sentiment concerning LGBT issues has evolved rapidly
- Congress has failed to pass sexual orientation/gender identity protections in employment
- Congressional inaction has left administrative agencies, states, municipalities and courts to fill in the gaps
- The U.S. Supreme Court recently legalized same-sex marriage



fisherphillips.com

---

---

---

---



---

---

---

---

**The Times They Are A-Changing**

- The courts have long recognized protection for persons who do not conform to standard gender stereotypes
- Amendment of Title VII and other laws may not be necessary
- Let's look at the definitions, laws, and evolution to understand your rights and obligations

fisherphillips.com

---

---

---

---

---

---

---

---

## Let's Start with the Definitions



- **Sex** = Biological sex at birth (male or female)
- **Gender identity** = one's own gender identification, which may be the same or opposite of biological fact

fisherphillips.com

---

---

---

---

---

---

---

---

## Definitions



- **Transgender** = people who live, or wish to begin living, in the gender role associated with the other sex from the one in which they were born
- **Sexual Orientation** = The status of being straight, gay or bisexual

fisherphillips.com

---

---

---

---

---

---

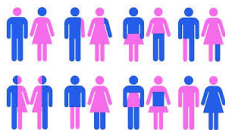
---

---

## Definitions



- **"Gender identity discrimination"** means treating someone differently (segregating them, denying them benefits) based on the fact that the person identifies with a gender that is different than their biological gender



fisherphillips.com

---

---

---

---

---

---

---

---

## Hierarchy of Laws

**US Constitution**  
**Federal Laws**  
**State Laws**  
**Local Laws**



fisherphillips.com




---

---

---

---

---

---

---

---

## US Constitution

- The US Constitution regulates *governmental* action.
- Cases decided by the US Supreme Court under the US Constitution can provide persons and institutions with expanded rights that limit the government.
- If your company is a non-governmental entity, then the US Constitution does not impact your actions.



fisherphillips.com




---

---

---

---

---

---

---

---

## What is the Law at the Federal Level?

### The Employment Non-Discrimination Act (ENDA)

- First introduced in Congress in 1974
- Since 1994, ENDA has been reintroduced in every session of Congress except one
- Has not been passed by Congress
- If passed, it will prohibit discrimination in hiring and employment on the basis of sexual orientation and gender identity
- Would apply to private, non-religious employers with at least 15 employees

fisherphillips.com




---

---

---

---

---

---

---

---

### What is the Law at the State Level Nationwide?



- Twenty-two states have laws prohibiting discrimination against individuals based on gender identity and/or sexual orientation:
  - CA, CO, CT, DE, HI, IA, IL, MA, MD, ME, MN, NH, NJ, NM, NV, NY, OR, RI, UT, VT, WA, and WI
  - Also DC, Guam, and Puerto Rico
- Twelve other states, by executive order, have transgender and/or sexual orientation inclusive discrimination prohibitions for state employees:
  - AK, AR, IN, KY, LA, MI, MO, MT, NC, OH, PA, and VA



fisherphillips.com

---

---

---

---

---

---

---

---

### What is the Law at the Local Level Nationwide?



- At least 225 cities and counties have laws or ordinances prohibiting discrimination against individuals based on gender identity and/or sexual orientation
- Many major cities and metropolitan areas protect gender identity and expression, including Atlanta, Austin, Baltimore, Boston, Buffalo, Chicago, Dallas, Denver, Detroit, Indianapolis, Los Angeles, Milwaukee, Nashville, New Orleans, New York City, Oakland, Philadelphia, Pittsburgh, San Diego, and San Francisco

fisherphillips.com

---

---

---

---

---

---

---

---

### What is the Law in Florida?



- In 2016, Florida lawmakers considered a bill, SB 120, that would have added sexual orientation and gender identity to the protected classes under the Florida Civil Rights Act for employment, housing, and public accommodations
- SB 120 failed at the committee level and did not reach the floor for a vote
- Supporters have vowed to bring the bill back every year until it passes



fisherphillips.com

---

---

---

---

---

---

---

---



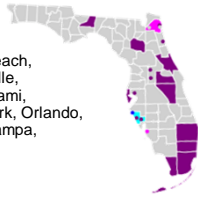
## What is the Law in Florida?



### • Florida Counties & Cities that prohibit employment discrimination for sexual orientation and gender identity:

- Alachua, Broward, Leon, Miami-Dade, Monroe, Orange, Osceola, Palm Beach, Pinellas and Volusia

- Atlantic Beach, Boynton Beach, Cape Coral, Delray Beach, Dunedin, Gainesville, Greenacres, Gulfport, Jacksonville, Key West, Lake Worth, Largo, Leesburg, Mascotte, Miami, Miami Beach, Neptune Beach, North Port, Oakland Park, Orlando, Pembroke Pines, St. Augustine Beach, Tallahassee, Tampa, Venice, West Palm Beach, and Wilton Manors



fisherphillips.com

---

---

---

---

---

---

---

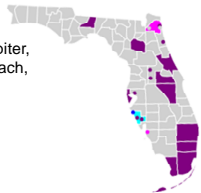
---

## What is the Law in Florida?



### • Florida Counties & Cities that prohibit employment discrimination for sexual orientation only:

- Sarasota
- Fort Lauderdale, Hialeah, Hypoluxo, Juno Beach, Jupiter, Miami Shores, Palm Beach Gardens, Royal Palm Beach, Sarasota, St. Petersburg



fisherphillips.com

---

---

---

---

---

---

---

---

## What is the Law for Students in Florida?



- U.S. Dept. of Justice and U.S. Dept. of Ed. issued joint guidance expressing the departments' interpretation of Title IX's protections to include discrimination based on gender identity.

### • Public schools or schools that receive federal financial assistance are obligated to:

- Respond promptly to sex-based harassment;
- Treat students consistent with their gender identity;
- Allow students to participate in sex-segregated activities and use sex-segregated facilities consistent with their gender identity; and
- Protect students' privacy related to their transgender status under Title IX and FERPA.



fisherphillips.com

---

---

---

---

---

---

---

---

## What is the Law for Students in Florida?



- The only Florida law that addresses gender identity obligations for a school in its student relationships is the FHSAA.
- The FHSAA added gender identity participation to its bylaws (Bylaw 4.3) last year.
- This bylaw permits a student to participate in interscholastic athletics "in a manner consistent with their gender identity and expression, irrespective of the gender listed on a student's birth certificate and/or records."
- There are fairly complicated procedures for the student and school to follow if the school does not want to grant the student's request.
- This bylaw applies to any public or private school that is a member of FHSAA unless it can meet a stringent test to prove it is a religious institution and it files for an exemption.



fisherphillips.com

---

---

---

---

---

---

---

---

## The Changing Landscape



- As of 2011, there were an estimated 700,000 transgender Americans and the current number is likely much higher
- According to a 2014 study, 90% of transgender employees have experienced harassment, mistreatment, or discrimination at work
- Where state and/or local laws exist, LGBT discrimination complaints are filed at comparable rates to sex and race discrimination

fisherphillips.com

---

---

---

---

---

---

---

---

## Application of Title VII to LGBT Employees: Historically



- Prohibits discrimination "because of sex"
- No explicit protections for sexual orientation or gender identity
- Traditional view: discrimination based on gender identity and/or sexual orientation is not covered by the sex discrimination prohibition of Title VII
- Title VII claims by LGBT employees typically dismissed by courts
- *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984): the court held that "sex" under Title VII meant "biological sex" and not "sexual identity"

fisherphillips.com

---

---

---

---

---

---

---

---

### *Price Waterhouse v. Hopkins* (U.S. 1989)



- Female employee alleged denial of partnership in accounting firm was due to gender nonconformity
  - Called "macho"
  - "Overcompensated for being a woman"
  - Needed "course at charm school"
  - Should walk, talk and dress more femininely
  - Should wear make-up and jewelry; style hair
- Supreme Court: Gender stereotyping is actionable under Title VII as discrimination "because of sex"
- Held: Violation of Title VII to deny a woman partnership based on her failure to conform to gender stereotype

fisherphillips.com

---

---

---

---

---

---

---

---

### *Nichols v. Azteca Restaurant Enterprises* (9<sup>th</sup> Cir. 2001)



- Male employee can sue for harassment by male co-workers based on his failure to conform to a masculine stereotype
- *Nichols* spawned a whole new breed of harassment claims:
  - Claims based on insults, comments and taunting of employees based on other employees' perception that they are behaving in a way that is too masculine or too feminine.
  - "Sissy," "wimp" and "girly-man" have become the hot-button slurs of this new generation of harassment suits

fisherphillips.com

---

---

---

---

---

---

---

---

### Evolution of Gender Identity Claims



- With *Price Waterhouse* and *Nichols* as precedent, as with other laws, the courts began to interpret Title VII expansively to include claims against transgender individuals
- In *Smith v. City of Salem* (6<sup>th</sup> Cir. 2004), a transsexual fire department lieutenant claimed he was fired from his position because he began dressing like a woman



fisherphillips.com

---

---

---

---

---

---

---

---

**Smith v. City of Salem (6th Cir. 2004)**

"After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex..."



fisherphillips.com

---

---

---

---

---

---

---

---

**Smith v. City of Salem (6th Cir. 2004)**

... it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."

fisherphillips.com

---

---

---

---

---

---

---

---

**Many Other Gender Stereotyping Cases Followed**

- **Ianetta v. Putnam Investments (D. Mass. 2001)** (plaintiff stated a case for sex discrimination involving sexual orientation because discrimination was attributed to his failure to meet a male gender stereotype preferred by the employer)
- **Tronetti v. TLC Healthnet (W.D.N.Y. 2003)** (denying a motion to dismiss where transsexual filed Title VII claim, noting that transsexuals "are not gender-less, they are either male or female and are thus protected under Title VII to the extent they are discriminated against on the basis of sex")
- **Barnes v. City of Cincinnati (6th Cir. 2005)** (issues of transsexualism fall within the definition of sex discrimination, because ultimate issue is gender non-conformity)

fisherphillips.com

---

---

---

---

---

---

---

---

## Other Gender Stereotyping Cases



- ***Mitchell v. Axcen* (W.D. Penn. 2006)** (motion to dismiss denied where transgender individual contended Title VII violation occurred because harassment was due to failure to conform to gender-stereotypes)
- ***Creed v. Family Express* (N.D. Ind. 2007)** (permitting case of transgender person who sued for sex discrimination under Title VII as the claim was found to involve the employee's appearance or conduct and the employer's stereotypical perceptions)
- ***Lopez v. River Oaks Imaging* (S.D. Tex. 2008)** (holding that transgender persons were not covered by Title VII *per se*, but protected to the extent they fail to conform to traditional gender stereotypes)

fisherphillips.com

---

---

---

---

---

---

---

---

## Other Gender Stereotyping Cases, Cont'd



- ***Kastl v. Maricopa County Community College* (9th Cir. 2009)** (finding it is unlawful to discriminate against transgender persons because they do not behave in accordance with employer's expectations for men and women; with issue focused on use of restroom prior to completion of sex reassignment surgery)
- ***Michaels v. Akal Security* (D. Colo. 2010)** (transgender person stated viable claim of gender discrimination under Title VII because the issue was her failure to look like a man)
- ***Glenn v. Brumby* (11th Cir. 2011)** (motion for summary judgment denied in sex discrimination claim under Title VII because sexual stereotypes involved)

fisherphillips.com

---

---

---

---

---

---

---

---

## EEOC Decisions: Sexual Orientation



- ***Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015)**
  - "Complainant has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

fisherphillips.com

---

---

---

---

---

---

---

---

## EEOC Decisions: Gender Identity



- ***Macy v. Dep't of Justice***, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (EEOC held that intentional discrimination against a transgender individual because of that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII)
- ***Jameson v. U.S. Postal Service***, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) (intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment)

fisherphillips.com

---

---

---

---

---

---

---

---

## EEOC Decisions: Gender Identity



- ***Complainant v. Dep't of Veterans Affairs***, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014) (employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim)
- ***Lusardi v. Dep't of the Army***, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015) (EEOC held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment)

fisherphillips.com

---

---

---

---

---

---

---

---

## Application of Title VII to LGBT Employees: The New Perspective



- **EEOC**: Title VII prohibits discrimination and harassment on the basis of gender identity and sexual orientation
- **DOJ**: In 2014, adopted the position that Title VII protects transgender employees
- **Courts**: increasingly interpreting "because of sex" broadly to include gender identity, not yet as inclined to extend protections for sexual orientation

***Generally speaking, lesbian, gay, and bisexual persons have fewer rights than transgender persons in the current climate!***

fisherphillips.com

---

---

---

---

---

---

---

---

## Other Changes to the Legal Landscape



### LGBT Executive Orders

- July 2014, President Obama signed two Executive Orders prohibiting discrimination on the basis of sexual orientation and gender identity
- Affects federal employees and employees of federal contractors:
  - Employers with contracts of \$10,000 or more
  - Approximately 21% of U.S. workforce
- No religious exemption is expressly provided in this Executive Order.

fisherphillips.com

---

---

---

---

---

---

---

---

## Other Changes to the Legal Landscape



### OSHA

- In 2015, OSHA issued Best Practices, "A Guide to Restroom Access to Transgender Workers"
- Recommends allowing transitioning employees to use the restroom of their choice
- Employers may offer (but not *require*) single-use, gender-neutral restrooms



fisherphillips.com

---

---

---

---

---

---

---

---

## An Active EEOC



- EEOC Strategic Enforcement Plan FY 2013-2016:
  - Commission recognizes that coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply, are elements of emerging or developing issues
- In FY 2015, EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation (1,181) and/or gender identity/transgender status (271):
  - This represents an increase of approximately 28% over the total LGBT charges filed in FY 2014 (1,100).

fisherphillips.com

---

---

---

---

---

---

---

---

## EEOC Enforcement Actions: Transgender



- In September 2014, EEOC filed its first two transgender suits against private employers:
  - **EEOC v. G.R. Harris Funeral Homes:**
    - Filed in federal court in Michigan alleging wrongful termination after disclosing intention to transition from one sex to the other; Court denied motion to dismiss due to possible sex stereotyping
  - **EEOC v. Lakeland Eye Clinic:**
    - Filed in federal court in Florida against an employer for allegedly firing its director of hearing services after she began wearing feminine clothing to work and informed the clinic she was transitioning from male to female.

fisherphillips.com

---

---

---

---

---

---

---

---

## EEOC Enforcement Actions: Sexual Orientation



- In March 2016, EEOC filed its first two lawsuits against private employers alleging discrimination and harassment based on sexual orientation:
  - **EEOC v. Scott Medical Health Center (PA)**
  - **EEOC v. Pallet Companies (MD)**

fisherphillips.com

---

---

---

---

---

---

---

---

## What Does This Mean For Employers and Schools?



- Examples of issues we are seeing involve employees/students:
  - who want to use the restroom of the gender with which they identify
  - who want to dress in the gender with which they identify
  - going through chemical and/or surgical procedures to change gender
  - who want to be called by the name or pronoun of their self-identification
  - who want to compete or participate in events that are associated with the gender with which they identify
  - who may be subject to bullying, hazing, harassment, or isolation at work

fisherphillips.com

---

---

---

---

---

---

---

---



## What Does This Mean For Employers and Schools?



### Competing Issues to Consider: Others' Concerns

- Others might object to the presence of the transgender employee or student, requiring intervention of the employer or school
- There may be religious or privacy objections which require the intervention of the employer or school
  - "Parents are upset..."
  - "But other employees are complaining..."
  - "What will our customers think?"
  - "We'll lose business"



fisherphillips.com

---

---

---

---

---

---

---

---

## So, What Do You Do?



- An employee complains to you that she is uncomfortable with her transgender co-worker using the women's bathroom. She feels it is an invasion of her privacy. What do you do?



fisherphillips.com

---

---

---

---

---

---

---

---

## Keep in Mind



- **Privacy concerns have generally been rejected by the courts:**
  - *Cruzan v. Special School District No. 1* (8th Cir. 2002) (a female employee sued her employer over its decision to allow a transsexual co-worker to use the female restroom, claiming creation of a hostile work environment. The Court rejected the privacy notions and religious concerns, finding there was an alternative restroom for the offended plaintiff)
- **Perceived Community Bias?**
  - *Schroerer v. Billington* (D.D.C. 2008): "Deference to the real or presumed biases of others is discrimination, no less than if the employer acts on behalf of his own prejudices."

fisherphillips.com

---

---

---

---

---

---

---

---

## So, What Do You Do?



- When faced with a request to accommodate a transgender employee or student, what are the options for approaching the issue?



fisherphillips.com

---

---

---

---

---

---

---

---

## Dressing the Part



- Employers/Schools have the right to enforce policies relating to employees' and students' physical appearance and attire:
  - Safety, professionalism/public image, productivity
- May be required to allow employees/students to dress consistent with gender identity
- Do not require adherence to male/female dress code
- Avoid gender stereotyping
- Accommodate during "transition" – determine which policies apply

fisherphillips.com

---

---

---

---

---

---

---

---

## Which Way to the Restroom?



- **March 2015:** Utah enacts law requiring employers to afford "reasonable accommodations based on gender identity" to employees, including in restrooms
- **May 2015:** OSHA requires employers to provide "meaningful" access to workplace restrooms, including for transgender employees
- **Spring 2016:** North Carolina and Mississippi regulations regarding bathrooms stir national concern
- **September 2016:** California is the first state to adopt a law requiring all single-user restrooms in businesses, places of public accommodation, and local and state agencies to be identified as "all-gender."

fisherphillips.com

---

---

---

---

---

---

---

---

## Restroom Takeaways



- Check for local laws and regulations
- Do not require transgender employees/students to use certain restrooms
- Allow employee/students to choose based on gender identity
- Suggest other, more private facilities if available
- Consider unisex/gender neutral designation



fisherphillips.com

---

---

---

---

---

---

---

---

## Best Practices



- **Preparation:** The law is quickly evolving.
  - Employers should ensure that management is aware of and complies with the company's policies. Train, train, train.
  - Schools should create a Response Team to address students' and employees' issues. The team in most schools is made up of Division Heads, Guidance, Nurse, Dean of Students, and possibly the Head of School.
  - When in doubt, consult with counsel.



fisherphillips.com

---

---

---

---

---

---

---

---

## Best Practices



- **Awareness:** Be aware of all applicable state and local non-discrimination laws. Watch for changes that may impact your company.
- **Compliance:** Ensure policies comply with all state and local laws and non-discrimination objectives. Think through now whether dress codes and other policies can be changed to be more gender neutral. Look for ways to make restrooms and locker rooms more gender-neutral.
- **Consistency:** Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes:
  - Do not require medical documentation or "proof" of transgender status



fisherphillips.com

---

---

---

---

---

---

---

---

## Best Practices



- **Investigate:** Be alert to bullying and other unprofessional conduct, and discipline where necessary.
- **Educate:** Train employees on policies and place appropriate emphasis on inclusive company culture.
- **Accommodate** (where possible): Goodwill (even if not legally required) can go a long way.

fisherphillips.com

---

---

---

---

---

---

---

---

## Final Questions



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

---

---

---

---

---

---

---

---

**THANK YOU**  
FOR THIS OPPORTUNITY

Suzanne Bogdan  
sbogdan@fisherphillips.com  
954.847.4705

Dana Chang  
dchang@fisherphillips.com  
954.847.4726




---

---

---

---

---

---

---

---