

Insights, News & Events

5 EMPLOYER TAKEAWAYS AS EEOC ISSUES NEW GUIDANCE ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN THE WORKPLACE

Insights
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The Equal Employment Opportunity Commission (EEOC) observed LGBTQ+ Pride Month and the one-year anniversary of the landmark [*Bostock v. Clayton County Supreme Court decision*](#) by announcing new resources to aid employers in understanding the EEOC's position regarding sexual orientation and gender identity discrimination. These resources include a new [landing page](#) and a new [technical assistance document](#). These new resources, according to the EEOC, will "help educate employees, applicants and employers about rights of all employees, including lesbian, gay, bisexual and transgender workers, to be free from sexual orientation and gender identity discrimination in employment." What are the five biggest takeaways from this new guidance for employers?

Brief Overview of the *Bostock v. Clayton County* Decision

In order to appreciate the EEOC's new guidance documents, it is helpful to understand the significance of last year's [*Bostock v. Clayton County decision*](#), which held that firing individuals because of their sexual orientation or transgender status violates Title

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VII's prohibition of discrimination on the basis of sex. This decision resulted from three cases: *Altitude Express Inc. v. Zarda* and *Bostock v. Clayton County*, in which gay men were fired because of their sexual orientation; and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment and Opportunity Commission*, where a transgender woman was fired because of her gender identity.

The Supreme Court consolidated these cases and issued a single opinion, addressing "whether an employer can fire somebody simply for being homosexual or transgender." The Court's conclusion was clear: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids." However, the Court noted that its decision did not address various religious liberty issues, such as the First Amendment, the Religious Freedom Restoration Act, and exemptions provided to religious employers by Title VII.

Since the *Bostock* decision, the EEOC and other courts have interpreted *Bostock's* holding to prohibit all forms of harassment and discrimination when done on the basis of sexual orientation and gender identity.

EEOC's Guidance, Summarized

The new EEOC landing page consolidates information concerning sexual orientation and gender identity discrimination and provides links to updated fact sheets regarding recent EEOC litigation. The technical assistance document explains the significance of the *Bostock* decision and reiterates the EEOC's position on Title VII rights and responsibilities regarding discrimination based on sexual orientation and gender identity. For example, according to the document, employers cannot:

- Discriminate against individuals based on sexual orientation or gender identity with respect to terms,

conditions, or privileges of employment, including hiring, firing, furloughs, reductions in force, promotions, demotions, discipline, training, work assignments, pay, overtime, other compensation, or fringe benefits.

- Create or tolerate harassment based on sexual orientation or gender identity, including harassment by customers or clients. This may include intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee.
- Use customer preference to fire, refuse to hire, or assign work.
- Discriminate because an individual does not conform to a sex-based stereotype about feminine or masculine behavior (whether or not an employer knows the individual's sexual orientation or gender identity).
- Require a transgender employee to dress or use a bathroom in accordance with the employee's sex assigned at birth. However, employers may have separate bathrooms, locker rooms, and showers for men and women, or may have unisex or single-use bathrooms, locker rooms, and showers.
- Retaliate against any employee for opposing employment discrimination that the employee reasonably believes is unlawful; filing an EEOC charge or complaint; or participating in any investigation, hearing, or other proceeding connected to Title VII enforcement.

The document likewise notes that employers cannot discriminate, create, or tolerate harassment against straight or cisgender (someone whose gender identity corresponds with the sex assigned at birth) individuals.

The EEOC also addressed the tension between protections for private employers and employees with sincerely held religious beliefs and LGBTQ+ employees and applicants by noting, "Courts and the EEOC

consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws.”

What Does This Mean for Employers? 5 Biggest Takeaways

As a federal law, Title VII prohibitions on discrimination based on sexual orientation or gender identity extend nationwide regardless of state or local laws. The EEOC guidance clarified a few specific recurring questions regarding protections for LGBTQ+ employees, offering five key takeaways for employers:

1. An employer covered by Title VII is not permitted to fire, refuse to hire, segregate, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity.
2. Whether or not an employer knows an employee’s sexual orientation or gender identity, employers are not permitted to discriminate against an employee because that employee does not conform to sex-based stereotypes about traditional feminine or masculine behavior.
3. Prohibiting a transgender person from dressing or presenting consistent with that person’s gender identity would constitute sex discrimination.
4. If an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men’s facilities and all women (including transgender women) should be allowed to use the women’s facilities. However, it should be noted that this stance is a controversial hot button issue that is still developing, especially given the fact that the Supreme Court expressly left this issue unaddressed in *Bostock*, stating: “Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.”

5. Intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Conclusion

This new guidance makes clear that any discrimination based on sexual orientation or gender identity is prohibited under Title VII. Thus, employers should update their policies and practices to comply with the EEOC's position.

Should you have questions about compliance matters in this area, you should contact your Fisher Phillips lawyer or the author of this Insight. To ensure you stay up to speed with the latest developments, make sure you are subscribed to Fisher Phillips' [Insight System](#) to get the most up-to-date information.