Transgender Employees in the Sharing Economy

Insights
11.14.16

The sharing economy is attractive to many transgender employees who fear discrimination in traditional workforces. But are sharing economy employers required to provide them with any special protections? With the employment status of workers in the sharing economy in legal limbo, a question facing many employers is whether state and federal antidiscrimination laws apply to workers. Some states, such as California, specifically protect transgender individuals, and so any discriminatory action by a customer against a transgender individual will be prohibited by law. In most states, however, the situation is less settled.

A unique situation facing the sharing economy is that customers, not coworkers or employers, may be the primary source of discriminatory or harassing actions. Unlike most traditional employment settings, workers in the sharing economy interact directly with customers with little or no involvement by the company. However, when such companies are found to be employers, they can be held liable for the discriminatory and harassing practices of customers. In fact, they are at greater risk since the company's lack of direct interaction with the customers means that there is little opportunity for the company to intervene in the middle of such an interaction. For example, suppose a customer refuses a ride from a transgender driver because of their gender identity. Does the law protect transgender employees in such a situation? If so, what can the employer do?

Title VII of the Civil Rights Act of 1964 has been interpreted in many jurisdictions to protect transgender employees as a type of sex discrimination, even though transgender individuals are not specifically named as a protected category under Title VII. See, for example, the cases *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Therefore, it is prudent for employers to assume that transgender employees are a protected group under federal law even in the absence of state law on the issue. Title VII does not protect against acts committed by customers or vendors. Despite this, a number of courts have held that all employers have obligations to protect employees from discrimination, and that "customer preference" cannot justify discrimination.

For example, in the case *Chaney v. Plainfield Health Center*, a nursing home had a policy in which if a resident requested that only white nurses attend to him or her, the nursing home's policy and practice was to grant such a request. The 7th Circuit Court of Appeals held that a "customer's preference" for being served by an employee of a certain race did not shield the employer from a discrimination claim under Title VII, and that a policy of accommodating such requests from residents violated an African American employee's right to a workplace free from discrimination

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Applying this reasoning, sharing economy employers could find themselves in the hot seat if their practices and policies condone or support such customer requests. To protect themselves, sharing economy employers should take the following steps:

- have a clear anti-harassment and antidiscrimination policy distributed to all employees at the start of their employment that specifically discusses discrimination and harassment by customers;
- provide employees with a means to report discriminatory or harassing actions by customers;
- provide a means of investigating and providing corrective action in the aftermath of a report;
- always follow up with the complaining employee following the report and company action; and
- because many sharing economy apps provide pictures of customers and employees, consider whether the inclusion of such photographs is necessary to the operation of the business, as this could allow customers to inappropriately "screen" employees based on protected categories.