



Gender Identity and Expression Anti-Discrimination Law

Insights

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On May 24, 2011, Nevada Governor Brian Sandoval signed into law Assembly Bill 211, which amends Nevada law and provides for protection from discrimination in employment based upon the gender identity or expression of a person. The bill defines "gender identity or expression" as "a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth." Specifically, the bill states, in part, that it is an unlawful employment practice for an employer "[t]o fail or refuse to hire, or to discharge any person, or otherwise discriminate against any person with respect to the person's compensation, terms, conditions, or privileges of employment, because of his or her...gender identity or expression...."

The new bill amends Nevada law regarding equal opportunities for private employment ("EEO Statute"); for state, county, and municipal employees; for public works contracts; and for apprenticeships.

The EEO Statute applies to any employer who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It also applies to employment agencies, labor organizations, and the State of Nevada and any of its political subdivisions but excludes the United States or any corporation wholly owned by the United States, and any Indian tribe.

The EEO Statute already prohibits discrimination in employment based on race, color, religion, sex, sexual orientation, age, disability or national origin. Except for adding the additional category of "gender identity or expression," the new law does not change any of the procedures or the application of the EEO Statute. Even with this new amendment, the EEO Statute still permits employers to hire and employ employees based on an individual's gender identity or expression if that characteristic is a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of that particular business or enterprise. Care should be exercised before relying on a BFOQ defense. The courts have narrowly construed this exception.

The bill also specifically protects the right of Nevada employers to maintain dress and grooming policies which include gender-based provisions:

It is not an unlawful employment practice for an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards so long as such requirements

are not precluded by law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.

Therefore, an employee may appear, groom, and dress consistent with his/her gender identity or expression, but the employee must still comply with the employer's policies relating to these items. For example, if an employer requires that men's hair must not extend below the top of the shirt collar, a biologically-female employee whose gender identity or expression is male must comply with that hair length policy (so long as the employer's appearance and/or grooming policy differentiating between men and women does not impose an unreasonably greater burden of compliance on one sex).

The Restroom Issue

Until the Nevada Equal Rights Commission ("NERC") or the courts issue some form of additional interpretation of the new amendment, Nevada employers must look to the sparse language in the new law. Employers in other states with similar laws have had to consider whether or not employees should be permitted to use the restroom/locker room that complies with their gender identity or expression rather than their biological gender. The answer, generally, is yes. The state agencies enforcing these laws in other states take the position that an employer must allow an employee to use restrooms appropriate to their gender identity rather than their assigned gender at birth without being harassed or questioned.

What Does This Mean For Nevada Employers?

Most employees who fall under this new protected class are not attempting to draw attention to themselves, but instead are trying to be as comfortable and unobtrusive as possible. Therefore, if an issue does arise in the workplace regarding an employee protected by this new law, (such as another employee complaining because a biological male is using the women's restroom), the employer should first explain to the complaining employee the scope of the new protected classification. Also, if feasible, the employer may also remind both employees of any alternate restroom facilities that would afford the employee more privacy. Care should be used not to convey any subtle pressure on the transgendered employees not to use the regular restroom facilities.

The bill does not take effect until October 1, 2011. However, employers should begin to prepare for the bill by making their managers and supervisors aware of the new protected classification, and emphasizing that discrimination or harassment because of an employee's gender identity or expression should be handled the same as discrimination or harassment based on any other protected classification. Further, all EEO/Discipline/Harassment training classes should be updated to include the employer's obligation to comply with this new law, and that any discrimination or harassment based on an employee's gender identity or expression could result in discipline up to and including termination. In addition, new employee orientation should also be updated to include "gender identity or expression" as a protected classification when covering company policies. Finally, at the time of the next employee handbook printing, or sooner if feasible, the

EEO/Discipline/Harassment Policy should be revised to include gender identity or expression as a protected classification.

For further advice about how this law affects your business, contact any attorney in the Las Vegas office of Fisher Phillips at 702-252-3131.

This Legal Alert provides an overview of a specific new law. It is not intended to, and should not be construed as, legal advice on any particular fact situation.