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FEDS SAY TITLE VII DOESN'T COVER TRANSGENDER WORKERS

Insights
Oct 6, 2017

Attorney General Jeff Sessions formally reversed the federal government's position on whether transgender workers are covered by Title VII of the Civil Rights Act, informing all U.S. Attorneys and heads of all federal agencies that the Department of Justice (DOJ) no longer believes that the antidiscrimination statute provides such coverage. The October 4 memo indicates that, according to the DOJ, "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status."

BACKGROUND: DOJ AND EEOC HAD BOTH CONCLUDED TRANSGENDER STATUS COVERED BY TITLE VII

On December 15, 2014, then-Attorney General Eric Holder issued a groundbreaking memorandum announcing that the DOJ would consider adverse employment actions against transgender individuals to be in violation of federal civil rights laws. Acknowledging that the federal government's position has "evolved over time," Holder said he had "determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." He admitted that Congress may not have had such claims in mind when it enacted Title VII, but said that Supreme Court case law warranted an extension of the law to cover "reasonably comparable evils."

Another federal agency, the Equal Employment Opportunity Commission (EEOC), had decided two years earlier that

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transgender status was a protected category under Title VII. In 2012's *Macy v. Holder* decision, the EEOC upheld the rights of a federal worker to bring a transgender discrimination claim against her employer. Thus, the December 2014 memorandum brought the DOJ on the same level as the EEOC and aligned the two agencies most responsible for the enforcement of federal civil rights laws.

SHIFTING STANCES: DOJ REVERSES COURSE

Sessions' October 4 memo heralds a reversal of course for the nation's top law enforcement agency and effectively relegates the December 2014 Holder memorandum to the dustbin. Sessions acknowledged that Title VII and other federal rights laws could provide various protections to transgender individuals, but that gender identity *per se* is not protected. "This is a conclusion of law, not policy," he stated, pointing to various cases from various federal jurisdictions to support his position. He also noted that Congress has seen fit to specifically identify "gender identity" as a protected category in other statutory schemes, but has not yet amended Title VII to provide such protection, which is a signal that Title VII has not yet been interpreted by a majority in Congress to cover transgender workers.

As a result of the memo, all U.S. Attorneys and agency heads are instructed to align with this position in all pending and future litigation and enforcement matters, except where controlling lower court precedent dictates otherwise. In those cases, Sessions asks his DOJ lawyers to preserve the issue for potential future review.

WHAT DOES THIS MEAN FOR EMPLOYERS?

While this memorandum is far-reaching and could have a lasting impact on the nation's civil rights laws, it should not signal to employers that it is now acceptable to discriminate against a category of workers or applicants. The memorandum acknowledged that the DOJ's new position should not be "construed to condone mistreatment on the basis of gender identity, or to express a policy view on whether Congress should amend Title VII to provide different or additional protections."

Moreover, many states and local governments have enacted protections which would prohibit discrimination based on

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gender identity or transgender status, and courts in many such jurisdictions have arrived at conclusions which contradict the new DOJ position. Since 2014, federal contractors have been subject to an executive order extending antidiscrimination protections to cover sexual orientation and gender identity, and President Trump affirmed earlier this year that these protections are still in place. The Sessions memo does not change this legal responsibility.

Employers that rely on the Sessions memorandum and ignore these laws and court decisions could find themselves on the wrong end of a costly employment discrimination judgment.

If you have any questions about this memorandum, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal agency memorandum. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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