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State Laws Are Not a Defense to Title VII's Prohibition on LGBT Discrimination, Says the EEOC

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Mississippi and North Carolina recently passed legislation categorized as "sweeping anti-LGBT laws." North Carolina's bill, H.B. 2, requires transgender people to use public restrooms according to the biological sex assigned on their birth certificate and prevents them from filing suit. Mississippi's bill, H.B. 1523, allows employers to decide "whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organization." It also allows the organization to establish "sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings." Mississippi's bill has garnered mild support by those who claim it protects sincerely held religious beliefs, but the bill has been sharply criticized by those who believe it legalizes discrimination.[1]

On Monday, May 2, 2016, seemingly in response to legislation like HB 1523 and HB2, the EEOC released guidance to employers regarding LGBT workers.[2] The EEOC clarified that it interprets and enforces Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination to "forbid[] any employment discrimination based on gender identity or sexual orientation." The EEOC explained that its interpretation is consistent with United States Supreme Court precedent holding that employment decisions motivated by gender stereotyping are unlawful sex discrimination. The EEOC also addressed perceptions that its interpretation expands Title VII by stating that "it has not recognized any new protected characteristic under Title VII" and has only "applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals."

Most notably, the EEOC stated that "[t]hese protections apply regardless of any contrary state or local laws." "[I]f a state or local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will still enforce Title VII's discrimination prohibitions against covered employers in that jurisdiction because contrary state law is not a defense under Title VII." What does this mean? This apparently means that, per the EEOC, an employer governed by Title VII (those with 15 or more employees) cannot use a state law as a defense and/or legitimate nondiscriminatory reason for an adverse employment action against an employee because of their gender identity or sexual orientation. If intentional discrimination occurs, the employer will be liable under Title VII. To date, no court has ruled on this issue.

Nonetheless, the EEOC provides examples of impermissible discriminatory behavior under Title VII that apparently would be permissible under HB 1523. This includes: failing to hire an applicant because they are a transgender person, firing an employee who plans to transition, denying equal access to restrooms corresponding with the employee's gender identity, harassing a transitioning employee by intentionally and persistently failing to use the name and gender pronoun that corresponds with the employee's gender identity, and denying a promotion because an employee is gay. The EEOC has already filed several lawsuits in federal courts based on some of these behaviors.

Until courts rule otherwise on these issues, employers should seek counsel to ensure that their policies, procedures and handbooks comply with federal antidiscrimination laws. Employers should also consider transitioning plans, best methods to communicate with and educate all employees, management and supervisory training, and how to handle requests for accommodation by an employee who is transitioning.

[1] The bill, which is effective July 1, 2016, has other sweeping discriminatory applications to the LGBT community (including on same-sex marriage and adoption) that has resulted in protests for its immediate repeal.

[2] Days later, the Department of Justice notified North Carolina officials that sex-segregating restrooms and other workplace facilities based on the gender assigned at birth is facially discriminatory against transgender employees and violates Title VII. The DOJ gave the governor until May 9, 2016 to respond whether the state "will remedy these violations." Private individuals represented by the ACLU and others have already sued the state over HB2.