

## LGBT Issues in Employment



### *Obergefell v. Hodges*

On June 26, 2015, the Supreme Court handed down *Obergefell v. Hodges*, a landmark decision that invalidated state marriage bans on the basis of the Fourteenth Amendment's Due Process Clause.

While this decision did not affect employment laws directly, it will decidedly have an impact on employers in very specific ways, and it will likely reinforce the EEOC's interpretation of Title VII as to LGBT persons.



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## The Definition of "Spouse"

- After the decision in *United States v. Windsor*, the Department of Labor published a final rule that defined a "spouse" to include same-sex spouses if their marriage was legal in the place of celebration. Since same-sex marriage is now legal nationally, FMLA protections extend to all same-sex spouses.
- Businesses that offered domestic partner benefits to same-sex spouses before same-sex marriage was legal in the state are now considering whether to extend partner benefits only in the case of marriage. There is nothing legally with doing so, although businesses that have done so have engendered negative press.

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The question left unanswered currently is whether employers that offer benefits covered by the Employee Retirement Income Security Act ("ERISA") will be required to include same-sex spouses. ERISA generally allows private employers to determine who can be eligible dependents for purposes of employee health plans.

Still, plans that discriminate between same-sex and opposite-sex spouses may face scrutiny and ultimate fail to pass muster.



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The *Obergefell* decision, despite being rather sweeping in potential effect, did not explicitly provide LGBT individuals with protection from discrimination in the employment context.

It's not hard to extrapolate that such protection may be forthcoming based on the court's Due Process argument. Opportunity Commission ("EEOC") on the matter.

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## EEOC Interpretation of Title VII

The EEOC has taken the position that the prohibition on discrimination based on "sex" in Title VII of the Civil Rights Act of 1964 applies as to LGBT individuals and has been pursuing cases against employers that explicitly discriminate on this basis.



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These actions are the result of the Strategic Enforcement Plan ("SEP") adopted in December 2012, which includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as a top enforcement priority.

The EEOC began aggressively pursuing such cases at the federal level (where the EEOC serves as an adjudicator and not just an agency bringing actions) in *Lusardi v. McHugh* and *Macy v. Holder*. Based on these rulings in favor of transgender employees, the EEOC has begun taking action against private entities.



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***EEOC v. Lakeland Eye Clinic, P.A***  
***September 2014***

When a male employee began transitioning to female and began presenting as female, her employer fired her. EEOC sued on her behalf, reaching a settlement of \$150,000.

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***EEOC v. R.G. & G.R. Harris***  
***Funeral Homes Inc.***  
***September 2014***

A funeral director/embalmer informed the funeral home owner that she would be transitioning from male to female. The owner fired her, saying that what she was "proposing to do" was unacceptable.

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**Claims by lesbian, gay, and bisexual individuals**

Sex discrimination includes adverse actions taken because of a person's failure to conform to sex-stereotypes.

*Rosa v. Department of Veterans Affairs*, EEOC Appeal No. 0120091318, 2009 WL 2513955 (E.E.O.C.) (August 3, 2009)  
(harassment against a male employee including repeated innuendos about his sexuality and verbal mocking using "very feminine voices" can constitute discrimination based on sex).

*Baker v. Social Security Administration*, EEOC Appeal No. 0120110008, 2013 WL 1182258 (E.E.O.C.) (Jan. 11, 2013)  
(Complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-conforming behavior, and the fact that a Complainant characterized the basis of discrimination as sexual orientation does not defeat an otherwise valid sex discrimination claim).

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Several municipalities such as Louisville, Lexington, Morehead, Covington, Danville, Frankfort, Midway and even Vicco have adopted Fairness Ordinances aimed at extending protections in employment, housing and public accommodations to LGBT people.

Employers should consult local municipal code to determine what added anti-discrimination protections apply.



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**OSHA Guidance on Restroom Policies for Transgender Persons**

OSHA released guidance on how employers should provide restrooms for transgender employees.

Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity



OSHA's advice extends beyond that, however, to give employers a guide as to how to provide appropriate restroom facilities.



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While this may seem trivial, transgender persons may have health or safety issues beyond those of cisgender individuals.

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- Employers should not require employees to provide documentation of gender identity to have access to bathroom facilities.
- Transgender employees cannot be required to use segregated bathroom facilities (The EEOC ruled that transgender employees cannot be denied access to common restrooms used by others of the same gender identity).
- Employers should allow the transgender individual to determine the most appropriate and safest option.

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Any questions?



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