

# Six Tips to Step up Employment Policies After the Blockbuster Supreme Court LGBT Ruling

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Resolving a trio of closely watched cases, the U.S. Supreme Court recently held in a blockbuster, 6-3 decision that Title VII's bar against workplace discrimination on the basis of sex extends to anti-LGBT bias. According to the court, Congress in Title VII "adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

The Supreme Court's decision is a game-changer for every employer covered by Title VII. Even though many employers – especially those subject to state or local anti-LGBT discrimination laws – already barred sexual orientation and gender identity bias as a policy matter, the ruling provides an opportunity to refine and step up employment policies and procedures to ensure that employees and managers fully understand and appreciate the practical implications of the court's landmark ruling.

Here are tips for employers:

## **1. Create Gender Transition Guidelines**

Transitioning individuals want to know how transitions are handled in the workplace and whom, within the organization, they should contact to begin the process. The answer to these questions can be addressed in gender transition guidelines, which reduce the transitioning employee's stress by minimizing uncertainties and tendering an offer of a safe, open dialogue with the employer.

Policies should address what employees can expect from management, how personnel and administrative records will be handled, the issuance of new identification, communication plans and timeline, and the selection of preferred names and pronouns.

Best practices for the transitioning individual should be explained. Employers can include an expectation that the employee will work with the company to make sure it understands the transitioning employee's needs. All employees should know a company's transgender and gender nonconforming guidelines too.

The guidelines can require employees to use a pronoun that the transitioning employee prefers. The use of disfavored pronouns, even if unintentional, can be perceived as a microaggression against the transitioning employee. The guidelines should warn that continued employee use of a non-favored pronoun will be addressed as a performance issue.

## **2. EEO Policies**

Many employers have already expressly banned sexual orientation and gender identity discrimination in their EEO policies. Employers that have not should be protected if they prohibit sex discrimination, although a policy revision to expressly condemn this type of sex discrimination is preferable.

Consider obtaining a new employee acknowledgment of any updated policy. Employee acknowledgments protect employees because they confirm an employee has been advised how to report harassment. The acknowledgment protects employers from some co-worker harassment claims where the employee never complained consistently with the policy.

## **3. Additional EEO Compliance Training**

Incorporate a discussion of LGBT discrimination into existing EEO compliance training customized appropriately for the audience (e.g., employees, human resource managers, recruiters). Implement periodic refresher training. Separate sessions for leaders, who will be on the front lines of enforcing non-discrimination, should be considered.

## **4. Update Dress Policies**

The legality of sex-specific dress codes (e.g., blouse and skirt for women and pants for men) was not considered in the recent trio of LGBT cases, but the court's decision suggests employers should consider moving away from them. Dress codes that identify items of clothing that are permissible without identifying which gender shall wear them are optimal. Sex-specific dress codes should likely be revised unless the employer is prepared to prove the sex-specific code goes to the "essence" of the business operations. Be sure to consult legal counsel before enforcing sex-specific dress codes.

## 5. The Customer is Not Always Right

Employers can be liable for how they allow customers to treat their employees. Refrain from acquiescing to discriminatory customer preferences. In general, LGBT employees should not be taken off an assignment or job because a customer requests a non-LGBT employee.

## 6. Ensure Nondiscrimination in Health and Other Employee Benefit Programs

Gender confirmation surgery, fertility treatment for same-sex couples, and coverage for domestic partners and the partners' children are examples of LGBT-inclusive benefits.

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