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# BOARDROOMS ON EDGE

## HR's Role in Protecting Your Brand's Reputation

37<sup>th</sup> Annual Workforce Management Briefing

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New York, NY

Your Workforce. Our Business.<sup>SM</sup>

37<sup>th</sup> Annual Workforce Management Briefing

## **BOARDROOMS ON EDGE**

HR's Role in Protecting Your Brand's Reputation

# **Gender Identity: Know Your Obligations and How to Foster an Inclusive Workplace**

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# Presented By

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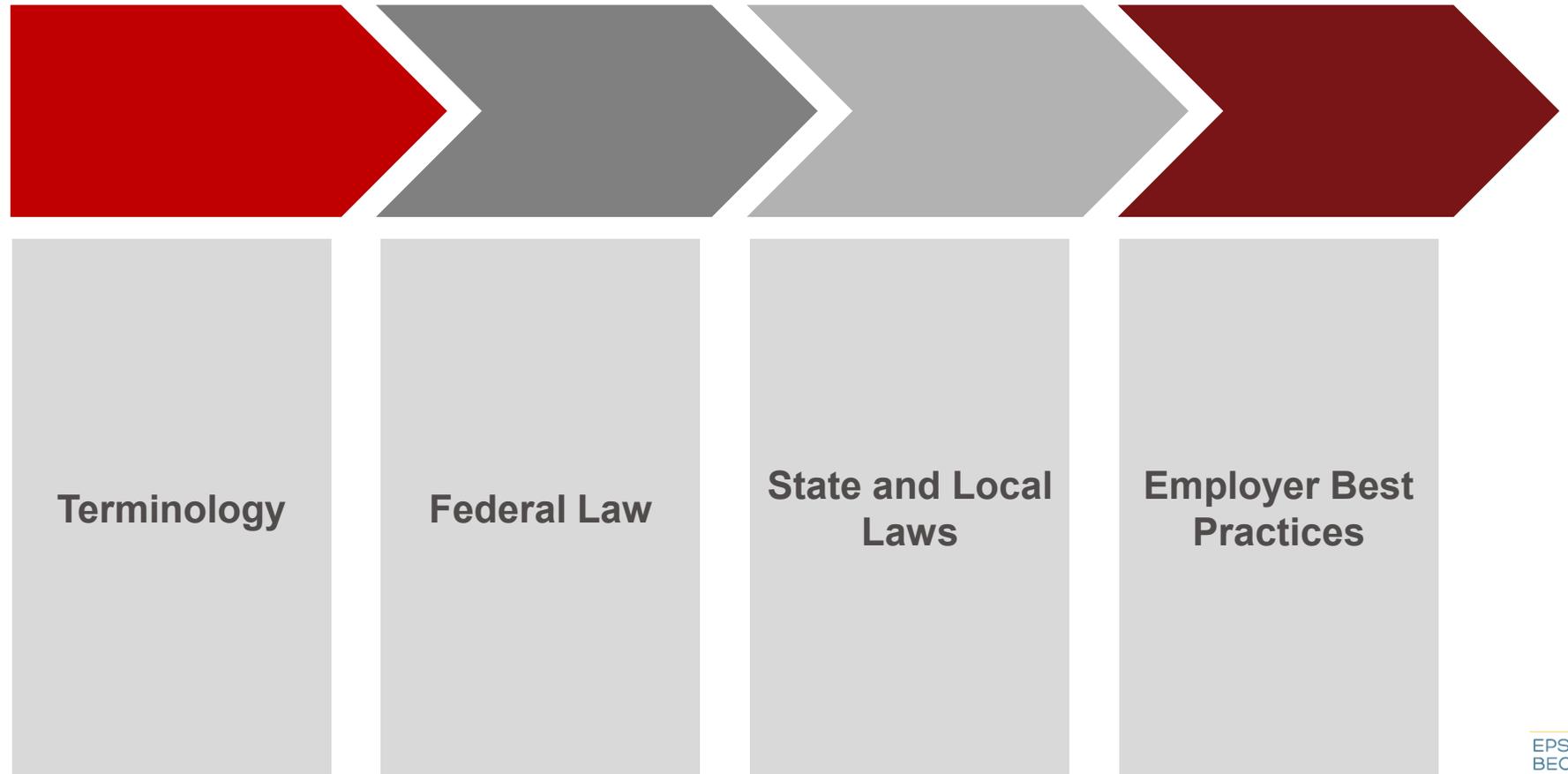


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# Agenda

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# Terminology

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## **Sex Assigned at Birth**

is the sex that the medical community labels a person when they are born – male, female, or intersex



## **Sexual Orientation**

is used to refer to an individual's physical and/or emotional attraction to the same and/or other genders



## **Gender Identity**

is distinct from sexual orientation. It refers to a person's innate psychological identification as male or female, which may or may not correspond to the person's body or designated sex at birth



## **Gender Expression**

is the way in which a person presents his or her gender. It refers to external characteristics and behaviors that are socially defined as masculine or feminine, such as dress, grooming, mannerisms, speech patterns, and social interactions



## **Cisgender**

is used to describe a person whose gender identity matches the sex assigned at birth

# Terminology

**Transgender** is a broad term that applies to people who experience and/or express an innate sense of gender different from that at birth. Being transgender does not imply any specific sexual orientation

**Transitioning** refers to the process through which a person modifies their physical characteristics and/or manner of gender expression to be consistent with their gender identity



**Non-Binary/Genderqueer** describes individuals who typically reject notions of static categories of gender and embrace a fluidity of gender identity. People who identify as “genderqueer” may see themselves as being both male and female, neither male nor female, or as falling completely outside these categories

**LGBT(Q)(I)(+)** has become the umbrella term that cinches together all individuals who are gay, lesbian, bisexual, transgender, queer, and intersex, and the “+” is used to incorporate all others

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## **BOARDROOMS ON EDGE**

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# Federal Law

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## Title VII of the Civil Rights Act of 1964: The Origins of LGBT Equal Protections



### Title VII of the Civil Rights Act of 1964 (“Title VII”)

- > Title VII prohibits employment discrimination based on sex
- > The U.S. Supreme Court expanded the protections of Title VII to protect against
  - gender stereotypes
  - same-sex sexual harassment
- > Federal courts do not agree on whether “sex” includes sexual orientation and/or gender identity

Two federal cases, *Price Waterhouse v. Hopkins* (1989) and *Oncale v. Sundowner* (1998), created some protections for LGBT employees.

The court in *Price Waterhouse* held that it is unlawful to discriminate based on gender stereotypes.

The decision in *Oncale* recognized unlawful harassment between members of the same sex, especially where the harassment included imitations of sex acts.

# The Circuit Split

## Sexual Orientation

Federal Circuit

Sexual Orientation Protections Under Title VII?

1<sup>st</sup> Circuit\*

No

2<sup>nd</sup> Circuit\*

Yes

3<sup>rd</sup> Circuit\*

No

4<sup>th</sup> Circuit\*

No

5<sup>th</sup> Circuit\*

No

6<sup>th</sup> Circuit\*

No

7<sup>th</sup> Circuit\*

Yes

8<sup>th</sup> Circuit\*

No

9<sup>th</sup> Circuit\*

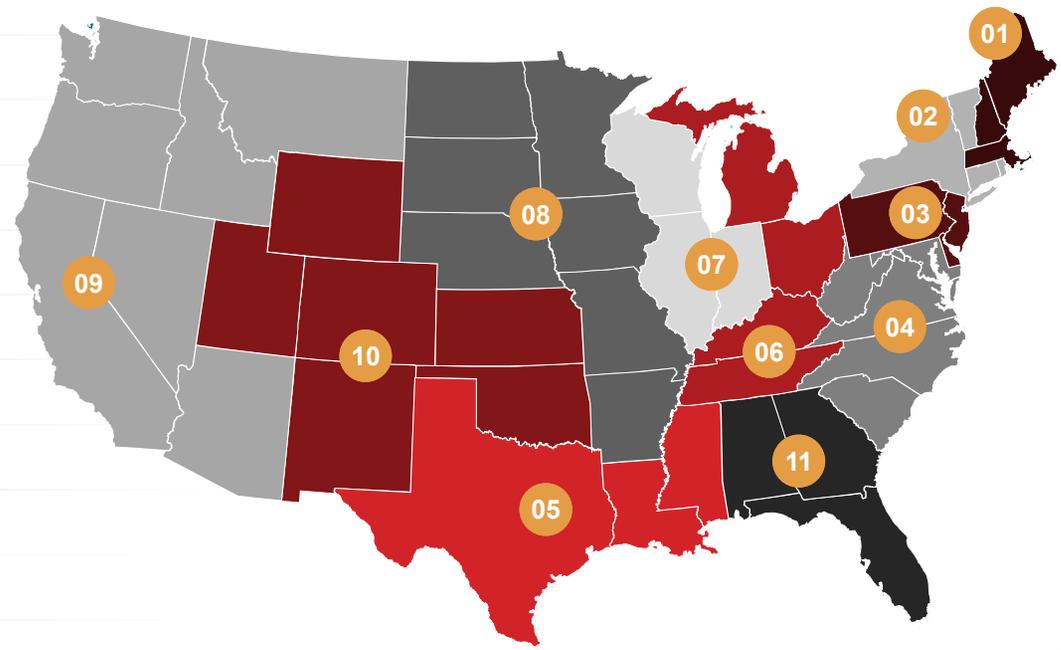
No

10<sup>th</sup> Circuit\*

No

11<sup>th</sup> Circuit\*

No



# The Circuit Split

## Gender Identity

Federal Circuit

Gender Identity Protections Under Title VII?

1<sup>st</sup> Circuit\*

Yes

2<sup>nd</sup> Circuit\*

No

3<sup>rd</sup> Circuit\*

No

4<sup>th</sup> Circuit\*

No

5<sup>th</sup> Circuit\*

No

6<sup>th</sup> Circuit\*

Yes

7<sup>th</sup> Circuit\*

Yes

8<sup>th</sup> Circuit\*

No

9<sup>th</sup> Circuit\*

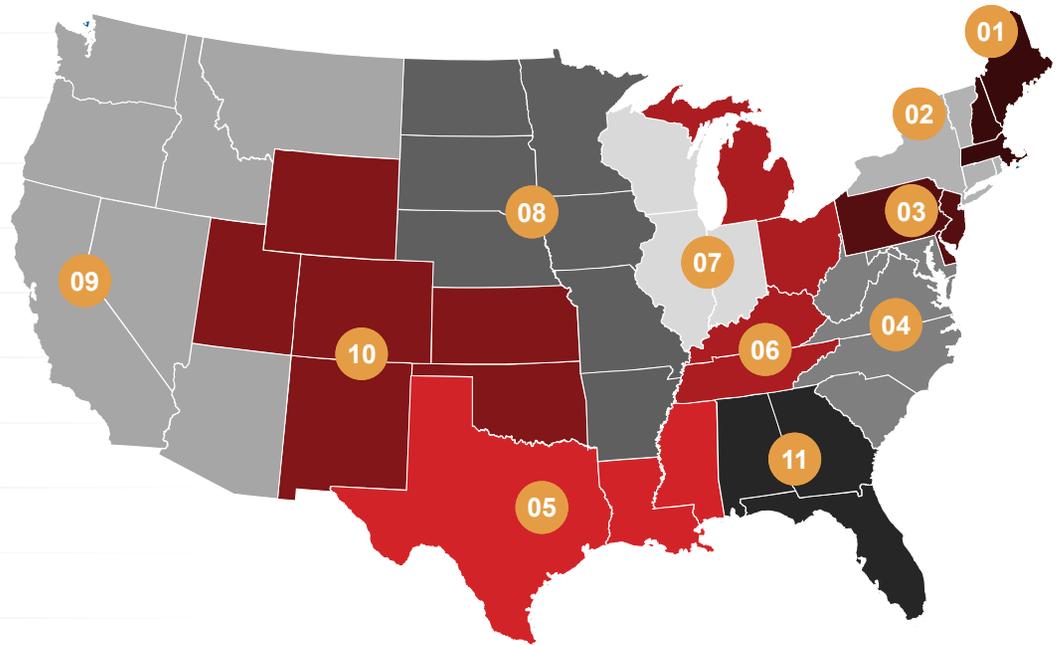
Yes

10<sup>th</sup> Circuit\*

No

11<sup>th</sup> Circuit\*

Yes



# The U.S. Supreme Court

## Silent on the Issue



On December 11, 2017, the Supreme Court denied certiorari in *Evans v. Georgia Regional Hospital* (11th Circuit), which presented the question of “whether the prohibition of Title VII of the Civil Rights Act of 1964 against employment discrimination ‘because of . . . sex’ encompasses discrimination based on an individual’s sexual orientation.” (A lesbian formerly employed as a security guard could not sue for sexual orientation discrimination under Title VII.)



The Supreme Court heard *Masterpiece Cakeshop v. Colorado Civil Rights Commission* on June 4. The case was decided narrowly, so the larger constitutional issues of discrimination and free speech remain open.



The Supreme Court denied certiorari in *Barber v. Bryant* (5th Circuit) in early 2018, a case that dismissed a constitutional challenge to Mississippi’s religious and moral convictions law that permits people to discriminate against LGBTQ people.



## The EEOC's Broad Interpretation and Aggressive Enforcement of Title VII



In 2012, the Equal Employment Opportunity Commission (EEOC) adopted its current **Strategic Enforcement Plan (SEP)**

- According to the SEP, “coverage of **lesbian, gay, bisexual and transgender individuals** under Title VII's sex discrimination provisions, as they may apply” is a **top EEOC enforcement priority**



The EEOC **interprets and enforces** Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation**



According to the EEOC, these protections apply “**regardless** of any contrary state or local laws”

## The EEOC's Broad Interpretation and Aggressive Enforcement of Title VII (cont'd)



### EEOC's Guidance: "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers"

#### EEOC's position:

The following  
actions are  
unlawful:

- Failing to hire an applicant because he/she is a transgender man/woman
- Firing an employee because he/she is planning, or has made, a gender transition
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees
- Harassing employees because of their sexual orientation, for example, by using derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex

# The EEOC, Title VII, and Transgender Rights

## Case Law: Gender Identity



*Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012): Intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and therefore violates Title VII.



*Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013): Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex-based discrimination and/or harassment.



*Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015): Restrictions on a transgender female's ability to use a common female restroom constituted disparate treatment on the basis of sex, and restroom restrictions plus hostile remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex.

# The EEOC, Title VII, and Sexual Orientation

## Case Law: Sexual Orientation



In March of 2016, the EEOC filed its first two sex discrimination cases in federal court based on sexual orientation:

- *EEOC v. Scott Medical Health Center, P.C.* (W.D. Pa., No. 2:16-cv-00225-CB, filed March 1, 2016)
- *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.* (D. Md., No. 1:16-cv-00595-RDB, filed March 1, 2016)



The EEOC's legal reasoning:

- Sexual orientation discrimination on its face entails treating employees less favorably because of sex and, as such, is a violation of Title VII
- Harassment based on non-conformity with the employer's gender-based expectations, preferences, or stereotypes is a violation of Title VII

# Conflicting Opinions Between EEOC & DOJ



## Two Executive Agencies at Odds

### On June 23, 2017, the EEOC filed an amicus brief in support of the employee in *Zarda v. Altitude Express*

- The EEOC asserts that sexual orientation is a violation of Title VII:
  - Sexual orientation discrimination is, by definition, discrimination because of sex
  - Sexual orientation discrimination constitutes associational discrimination that violates Title VII
  - Sexual orientation discrimination necessarily involves sex stereotyping

### On July 26, 2017, the Department of Justice (DOJ) filed an amicus brief in support of the employer in *Zarda v. Altitude Express*

- The DOJ expressly believes there is no Title VII violation in sexual orientation cases unless men and women are treated differently
- The DOJ only recognizes sexual orientation and gender identity discrimination where the plaintiff can prove sex-based:
  - “But for,”
  - Gender stereotyping, or
  - Associational discrimination

# The Americans with Disabilities Act (ADA)

## Gender Dysphoria

The ADA specifically excludes from the definition of “disability”:



- Homosexuality and bisexuality
- Transvestism, transsexualism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

5/1/8/17 *Blatt v. Cabela’s Retail, Inc.* (E.D. Pa), holds:



- Transgender people not categorically barred from protection by the ADA if they suffer from gender dysphoria

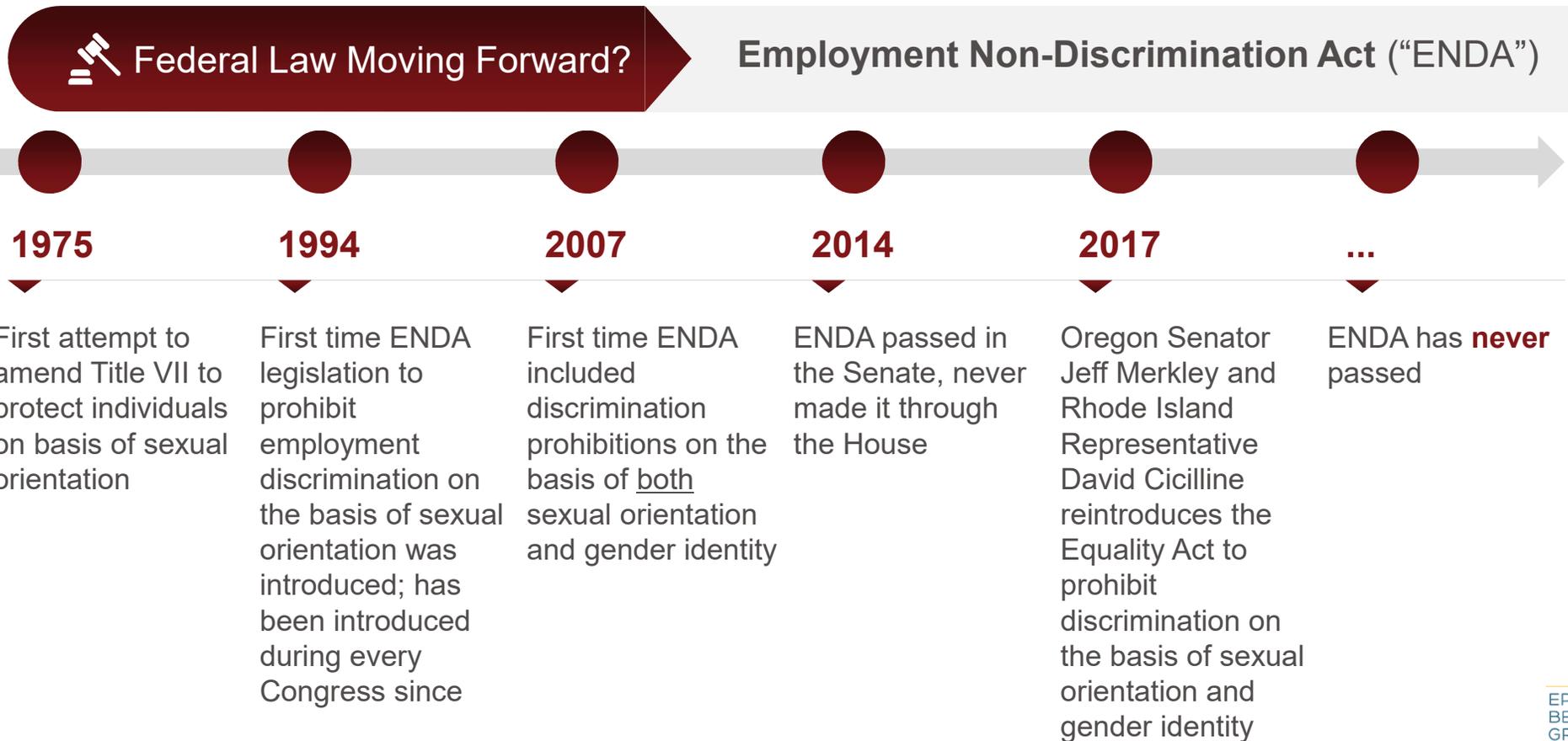
Being transgender is not *in and of itself* an ADA disability, but:



- The ADA’s exclusion of “gender identity disorders” from the definition of “disability” must be read narrowly

In so ruling, the court held that transgender individuals who experience certain symptoms associated with such disorders (such as the gender dysphoria symptoms in this case) may be protected by the ADA

# Proposed Changes to Federal Law



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## **BOARDROOMS ON EDGE**

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# State and Local Laws

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# State and Local Laws



Many states and localities have passed human rights/anti-discrimination laws prohibiting private and public employers from discriminating against individuals on the basis of **sexual orientation** and **gender identity**\*

California

Illinois

Minnesota

Oregon

Colorado

Iowa

New Jersey

Rhode Island

Connecticut

Massachusetts

New Mexico

Vermont

Delaware

Maryland

Nevada

Utah

Hawaii

Maine

New York\*\*

Washington

\* The District of Columbia also protects individuals on the basis of gender identity.

\*\* Although the New York State Human Rights Law (NYSHRL) does not prohibit discrimination on the basis of gender identity, New York State Division of Human Right's regulation, which went into effect January 20, 2016, states that discrimination on the basis of gender identity is sex discrimination under NYSHRL (9 NYCRR § 466.13).

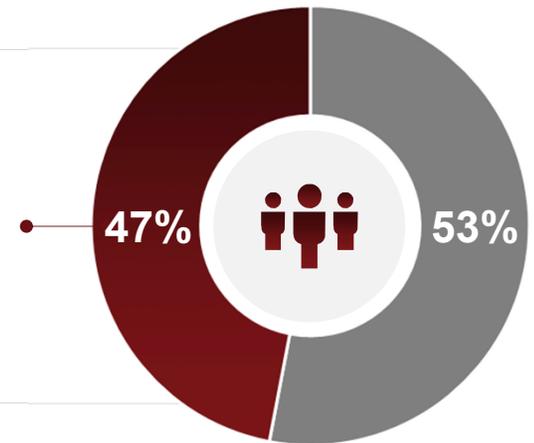
# State and Local Laws

## An Overview of LGBT protections



According to the Human Rights Campaign, as of January 28, 2017, at least 225 cities and counties prohibit employment discrimination on the basis of gender identity in employment ordinances that govern all public and private employers in those jurisdictions

47% of the LGBT population lives in states prohibiting discrimination based on sexual orientation and gender identity



*Data from the Movement Advancement Project*



According to *The Washington Post*, despite more than 120 anti-LGBT bills introduced across the country, none have passed

## State and Local Laws (cont'd)



The New York City Human Rights Law (NYCHRL) protects individuals from discrimination on the basis of gender, gender identity, or gender expression

In December of 2015, the City's Commission on Human Rights issued guidance:

- Employers are required to use an individual's preferred name, pronoun (e.g., "he," "she," "they," or "ze"), and title (e.g., "Mr.," "Mx.," or "Ms.")
- Employers and other covered entities may not prohibit individuals from using single-sex programs or facilities, such as bathrooms or locker rooms
- Employers are prohibited from requiring employees to wear different uniforms or apply different grooming and appearance standards based on that individual's sex or gender
- Employers must also provide reasonable accommodations to employees who are undergoing a gender transition

## State and Local Laws (cont'd)

In May 2017, the **California** Department of Fair Employment and Housing approved new regulations regarding transgender identity and expression in the workplace. The regulations describe new policies that employers must implement, such as:

1

Employers are required to provide equal access to bathroom facilities regardless of the sex of the employee.

3

Employers cannot impose a dress standard that is inconsistent with an employee's gender identity or expression in the absence of a business necessity.

5

Employers cannot inquire or require documentation on sex, gender, gender identity, or gender expression as a condition of employment.

2

Employers are prohibited from discriminating against an individual who is transitioning, has transitioned, or is perceived to be gender transitioning.

4

Employers must abide by an employee's request to be identified by a certain name or a certain gender identity.

# State Preemption Laws

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Three states have passed laws that prevent local governments from passing anti-discrimination legislation. These states include:

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Tennessee, Arkansas, and North Carolina

**Tennessee**  
(2011)

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**Arkansas**  
(2015)

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**North Carolina**  
(2016)

# “Religious Freedom Laws”

## RFRA Laws

Other states have attempted to pass “religious freedom laws” allowing people to refuse to do business with certain people because of personal religious opposition to same-sex marriage, extramarital sex, or transgender people. These states include:

### Mississippi:

On June 22, 2017, however, a panel of the U.S. Court of Appeals for the Fifth Circuit held a “religious freedom law” constitutional.

### Indiana:

In 2015, then-Indiana Gov. Mike Pence signed one, but a public backlash led lawmakers to amend it before it took effect.

### Georgia:

Georgia’s governor recently vetoed legislation that would have given faith-based organizations in Georgia the option to deny services and jobs to the LGBT community.

# Bathroom Bills

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## Mississippi Stands Alone

1

One state has successfully maintained a “bathroom bill” that prohibits individuals from using the bathroom that corresponds with the person’s gender identity, instead requiring bathroom usage on the basis of sex.

- **Mississippi’s HB 1523:** The bill enables almost any individual or organization to use religion as a justification to discriminate against LGBTQ Mississippians at work, at school, and in their communities. On June 22, 2017, a panel of the Fifth Circuit Court of Appeals cleared the way for the bill to become law in Mississippi.

2

**North Carolina’s HB-2:** On March 30, 2017, the legislature *partially repealed* the provisions in House Bill 2 relating to public restroom use, removing the requirement that individuals use a restroom associated with the person’s birth sex.

3

Importantly, these bills do not affect private employers’ ability to establish policies relating to their employees.

# Bathroom Bills

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## Unisex Facilities: OSHA Guidance



### OSHA Guidance: “A Guide to Restroom Access for Transgender Workers”

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

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The best policies also provide employees with additional options, which they may use, including:

- Single-occupancy gender-neutral (unisex) facilities
- Use of multiple-occupant, gender-neutral restroom facilities with lockable single-occupant stalls

Regardless of the physical layout of a worksite, all employers must find solutions that are safe, convenient, and respect transgender employees

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# Employer Best Practices

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# Employer Best Practices

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## EEO and Non-Harassment Policies



Consider updating anti-harassment, non-discrimination, and equal employment opportunity (EEO) policies to include “gender identity or expression” among protected categories, even where not protected under applicable law



Consider including examples of harassment based on gender identity or expression in non-harassment policies, such as:

- Deliberately using an employee’s incorrect name or pronouns
- Gossiping about, or otherwise disclosing, another employee’s gender identity
- Using transphobic or homophobic language or making derogatory jokes
- Disclosing an employee’s status when the employee has not made status public

# Employer Best Practices



## Restroom Use and Access

2

Never require an employee seeking to use a gender-specific restroom to prove their gender by any means

4

If possible, provide gender-neutral, single-occupancy restrooms for employees who desire additional privacy (however, never **require** any employee to use such a restroom)

1

Employees should be free to choose which restroom to use based on their gender identity or expression

3

Do not prohibit a transgender or gender non-conforming employee from using the restroom of their choosing

5

Proactively address concerns from employees who may be uncomfortable



# Employer Best Practices

## Dress Codes, Grooming Standards

Provide employees with gender-neutral dress codes, uniforms, and grooming standards. For example:

Say “business casual attire (such as dress pants and dress shirts or blouses or business casual dresses), no jeans and no shorts,” NOT “business casual attire (slacks for men, dresses, and dress skirts for women)”

**Do not** create policies that:

- Divide rules between “men” and “women”
  - Require only men to have short hair
  - Impose facial hair/hair length restrictions on men only
  - Limit rules on jewelry to women
  - Maintain rules about nail length for women only
  - Mention neckties with respect to men only

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If a workplace issues uniforms and provides options that are typically associated with men and women, permit employees to choose the style that most fits their gender identity and preferences

# Employer Best Practices

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## Use of Preferred Names, Pronouns, and Titles/ Updating Personnel Records

Always use an employee's chosen name

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Always refer to transgender and gender non-conforming individuals by their correct pronoun and title

- Pronouns can include: he/him/his, she/her/hers, they/them/theirs, or ze/hir
  - Titles: Mr./Mrs./Mx.
- 

Update policies and forms to use they/them/theirs instead of he/him/his and she/her/hers

Create a place/forms to declare preferred names/pronouns

- Applicant tracking system
  - Onboarding process, HRIS/HRMS
  - Email signatures
  - Name badges/security badges
  - Some types of records require the employee to legally change their name
- 

In regard to EEO-1 forms, consult with non-binary and gender nonconforming employees to determine which gender option feels most comfortable

# Employer Best Practices

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## Transitioning in the Workplace

### Consider preparing gender transition guidelines that:

- State the company's commitment to providing an inclusive workplace for transitioning employees
- Educate the workforce about gender transition
- Address restroom and locker access
- Set forth appearance standards
- Identify leave benefits and medical coverage
- Address appropriate pronoun usage

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**Guidelines should be made accessible for employees, supervisors, and human resources professionals as needed, and they can be shared via intranet or through a human resources hotline**

# Employer Best Practices

## Transitioning in the Workplace

Encourage transitioning employees to create a transition plan that includes:

✓ Expected timeline

✓ List of stakeholders

✓ List of resources

✓ Communication plan

✓ Time off for medical treatments

✓ Potential roadblocks and strategies for addressing them

✓ Employee records – name & gender changes

✓ Name change – professional licenses

✓ Security badges/ photograph changes

# Employer Best Practices



## Education and Training



Provide all employees with training on gender identity issues

- Encourage employees to ask questions and learn more about gender identity issues and transitioning in the workplace



Communicate any applicable state and local laws



Supervisory employees and human resources personnel should receive additional training on transitioning employees

- Provide training on how to recognize, and take action to stop, any actions that might constitute discrimination or harassment of employees on the basis of gender identity or expression

# Employer Best Practices



## Health Care

*Offer coverage for transition-related treatments and procedures in employer-provided health care and short-term disability plans. These include:*

- **Hormone replacement therapy**
  - Estrogens (also androgen blockers) and testosterone
  - “Growth hormones” (puberty blockers)
- **Mental health services**
- **Surgical reconstruction**
  - Breast/chest reconstruction
  - Facial reconstruction
  - Gonadal surgery
  - Genital reconstruction
- **Other procedures or services**
  - Hair removal (electrolysis)
  - Speech therapy
  - Tracheal shaving

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**Any Questions?**

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