

Trump Administration's Position on Transgender Rights Not Likely To Impact Employers

President Trump's administration rescinded the Obama administration's directive that allowed transgender public school students to use the bathroom matching their gender identity and also declared that discrimination against transgender students was sex discrimination under Title IX. It is important for employers to note, however, that the Trump administration's action applies *only* in the public school setting.

President Trump's action now creates a conflict with the position advocated in recent years by the U.S. Equal Employment Opportunity Commission ("EEOC") regarding transgender rights in the workplace: discrimination based on sexual orientation and transgender status is sex discrimination, which is prohibited by Title VII of the Civil Rights Act of 1964. The EEOC's strategic enforcement plan for 2017-2021 includes ensuring anti-discrimination protection for LGBT people as a priority. Victoria Lipnic, recently appointed to chair the EEOC by President Trump, has said the agency's enforcement plan and priorities will largely remain the same under the Trump administration.

Even with a Republican majority on the EEOC (which President Trump can create through his commission appointments), the EEOC has proven less prone to dramatic shifts in enforcement priorities and interpretations following a change in the Chief Executive compared to other agencies. A growing number of decisions from federal district courts may also make it more difficult to reverse the EEOC's current guidance under Title VII. Further, a change in the EEOC's position would not reverse court rulings establishing precedent under Title VII, and private litigants would still be able to bring claims alleging discrimination based on sexual orientation or gender identity citing those rulings.

Recently, district courts have begun to agree with the EEOC's position, holding that Title VII prohibits discrimination based on sexual orientation. Two influential appellate courts—the Second Circuit and the Seventh Circuit—are also currently considering whether to overturn long-standing precedent and find in favor of appellants claiming sex discrimination based on sexual orientation. See *Christiansen v. Omnicom Grp., Inc.*, 167

Related Capabilities

- Labor & Employment

F. Supp. 3d 598 (S.D.N.Y. 2016) (appeal heard by the Second Circuit on January 20, 2017); Hively v. Ivy Tech Community College, 830 F.3d 698 (7th Cir. 2016) (rehearing granted and heard *en banc* November 30, 2016).

For now, given the acceptance of the EEOC's position in the courts, it would be prudent for employers to maintain their policies protecting LGBT rights to comply with the EEOC's current interpretation as well as any applicable state or local law, which remain unchanged by the Trump administration's actions. Employers would also be wise to stay tuned for developments within the EEOC and as courts decide additional cases under Title VII.