

SEXUAL ORIENTATION AND GENDER IDENTITY IN THE WORKPLACE

INTRODUCTION

The law forbids sexual orientation and gender identity discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Additionally, it is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity. Harassment can include offensive or derogatory remarks about sexual orientation, a person's transgender status, or gender transition.

This document outlines best practices for workplace compliance with Supreme Court rulings and guidelines regarding sexual orientation and gender identity.

BOSTOCK V. CLAYTON COUNTY, GEORGIA

In *Bostock v. Clayton County, Georgia*, No. 17-1618 (S. Ct. June 15, 2020), the United States Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." For example, suppose an employer fires an employee because that person was identified as male at birth but uses feminine pronouns and identifies as a female. In that case, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact that the employee was initially identified as male.

WORKPLACE POLICIES AND PRACTICES

Generally, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone or discriminate in any other way because coworkers, customers, or clients would prefer to work with people with a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. As an example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions or to direct these employees toward certain stores or geographic areas.

Regarding the use of locker rooms and restrooms, employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. If an employer has separate bathrooms, locker rooms, or showers for men and women, all men, including transgender men, should be allowed to use the men's facilities, and all women, including transgender women, should be allowed to use the women's facilities.

Additionally, prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.

RECOMMENDATIONS

In light of the Supreme Court rulings in *Bostock v. Clayton County, Georgia*, members are strongly encouraged to revise their nondiscrimination policies to include gender identity and gender expression as protected categories (and sexual orientation if not already included) and conduct regular training on sexual orientation and gender identity.

- 1) Ensure that non-discrimination policies include the following:
 - A clear statement that failure to behave in a non-discriminatory manner toward colleagues regardless of sexual orientation, gender identity, or transgender status could result in discipline, up to and including termination.
 - A clear statement that employees shall behave appropriately and work cooperatively and respectfully with colleagues regardless of sexual orientation, gender identity, or transgender status.
 - A dress code policy, if any, which does not consider sex or gender identity in establishing requirements for appropriate workplace attire.
 - A statement that employees may wear uniforms that correspond with their gender identity if "male" and "female" versions of uniforms are necessary.
 - Ensure that policies address restroom access and allow employees and applicants to use restrooms that are consistent with their gender identity, as well as all single-stall restrooms in their building or facility.
- 2) Ensure that sexual orientation and gender identity are included in annual harassment and discrimination training for staff and elected officials. Training should inform employees and elected officials that it is their responsibility to report acts of discrimination or harassment and to address derogatory language, jokes, and behavior.

ADDITIONAL CONSIDERATIONS

Pronouns and Names

Employers are encouraged to be mindful of using pronouns and names that are consistent with employees' stated preferences. If there is uncertainty, employers may communicate respectfully with the employee about their pronouns or name. Such communication should be confidential and there should be an agreement with the employee on a plan for communicating their pronoun or name preferences (or changes in pronouns or name) to coworkers and customers.

Facilities

To ensure equal access, all single-stall restrooms in buildings or facilities should have gender-neutral signage and be for the use of all employees.

Confidentiality

Be mindful that although an employee's sexual orientation, transgender status, or transition may become common knowledge in a workplace, personal details about any employee's sexual orientation, transgender status, or transition are private and entitled to confidentiality.

Administrative and Personnel Records:

If an employee's name or gender identity change during their employment and they request it be changed in employee records, update the records wherever possible. Employers should consider which records must reflect employees' names and sex assigned at birth and which documents can be modified to respect employees' preferences, such as email addresses, nameplates, business cards, or security badges.

INFORMATION RESOURCES

Title VII of the Civil Rights Act of 1964

<https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=Title%20VII%20prohibits%20employment%20discrimination,several%20sections%20of%20Title%20VII.>

Bostock v. Clayton County, Georgia – U.S. Supreme Court ruling

https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

U.S. Equal Employment Opportunity Commission –
Sexual Orientation and Gender Identity Discrimination Guide

<https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination>

U.S. Department of Labor – DOL Policies on Gender Identity: Rights and Responsibilities

<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity>

U.S. Department of Labor – Frequently Asked Questions: Sexual Orientation and Gender Identity

<https://www.dol.gov/agencies/ofccp/faqs/lgbt>

**Contact MML Risk Management Services Staff
or your Loss Control Consultant for more information.**



Important Phone Numbers

MML Risk Management Services	734.662.3246 or 800.653.2483
Loss Control Services	800.482.0626
US Equal Employment Opportunity Commission	313.226.4600
Detroit Field Office	

Note:

***This document is not intended to be legal advice.
It only identifies some of the issues surrounding this topic.
Public agencies are encouraged to review their procedures with an expert
or a competent attorney who is knowledgeable about the subject.***