

HR BOOT CAMP:



BASIC LEGAL CONSIDERATIONS AND HOT TOPICS IN HEALTH CENTER HUMAN RESOURCES MANAGEMENT

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Objectives

- **Identify selected Federal and Tennessee laws regulating the employment relationship and the workplace**
 - ▣ **Formation of the employment relationship**
 - ▣ **Employee's Pay**
 - ▣ **Preventing discrimination and harassment in the workplace**

- **Note practical guidance to prevent liability and ensure personnel management is conducted in a compliant manner**

- **Identify considerations that are unique or vital to human resources in the health center setting**

- **Identify new and developing laws and guidance and strategies to align operations to remain compliant**

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Basic Legal Concepts in HR

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THREE FOCUS AREAS

- Forming the Employment Relationship
- Employee's Pay
- Managing to Preventing Harassment and Discrimination in the Workplace

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Defining the Employment Relationship

- At-will Employment: Employment relationships in Tennessee are presumed to be “at-will”

Employers may legally terminate an employee at any time for any reason (except an illegal one), or for no reason, without incurring legal liability and employees may leave a job at any time for any or no reason with no adverse legal consequences.

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Defining the Employment Relationship

- Exceptions to At-will Employment:
 - ▣ Contract of Employment for Definite Term
 - ▣ Implied Employment Contract
 - ▣ Public Policy
 - ▣ Handbook Exception
- Independent Contractors

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Employment Contracts

- Most useful and usually reserved for executive level employees and providers
- General legal doctrines applicable to all contracts apply
- Special provisions (e.g., non-competition agreements)

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The Implied Contract

- Under certain circumstances, an employment relationship can acquire the aspects of a contract for term through actions
 - ▣ Oral or written assurances by a supervisor, hiring manager, or employer representative
 - ▣ Handbooks, policies, practices or other written assurances may create an implied contract

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The Handbook Exception

To limit a potential assertion that a handbook or personnel policy creates a contract, ***include a clear and unambiguous disclaimer on written materials*** stating that the handbook and/or policies and procedures:

- ▣ Do not create contractual rights
- ▣ Do not alter the at-will employment relationship
- ▣ Are developed at the discretion of the employer and may be amended, modified, or waived in its discretion at any time for any reason without notice to the employee or the employee's consent

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The Public Policy Exception

Category	Example
<i>Statutory remedies for illegal adverse employment actions or common law retaliatory discharge claims provide exceptions to the at-will doctrine</i>	
Refusing to perform an act that state law prohibits	Refusing an employer's request to commit perjury at a trial
Reporting a violation of the law	Reporting an employer's discriminatory conduct (Tenn. Code Ann. § 4-21-301, <i>et seq.</i>)
Engaging in acts that are in the public interest	Performing jury duty (Tenn. Code Ann. § 22-4-108)
Exercising a statutory right	Filing a worker's compensation claim (Tenn. Code Ann. § 50-6-101, <i>et seq.</i>)

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The Public Policy Exception

□ Other Statutory Exceptions:

Category	Statutory Authority
Military service	Tenn. Code Ann. § 8-33-101, <i>et seq.</i>
Voting in elections	Tenn. Code Ann. § 2-1-106, <i>et seq.</i>
Exercising right of association	Tenn. Code Ann. § 50-1-201 through 50-1-204
Wage garnishment	Tenn. Code Ann. § 26-2-101, <i>et seq.</i>
Whistleblowing	Tenn. Code Ann. § 50-1-304; TOSHA, Tenn. Code Ann. § 50-3-409

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Defining the Employment Relationship

- Independent Contractors
 - Classification has implications under federal and state law
 - Federal - Fair Labor Standards Act (“FLSA”); Internal Revenue Code
 - State – Tennessee Worker’s Compensation Act and Tennessee Employment Security Act

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Defining the Employment Relationship

- Administrator’s Interpretation 2015-1 - guidance regarding the application of the standards for determining who is an employee under the FLSA issued to curtail misclassification (July 15, 2015)
 - *Suffer or Permit Standard* - FLSA’s broad definition of “employ” is “to suffer or permit to work”
 - An “entity ‘suffers or permits’ an individual to work if as a matter of economic reality, the individual is dependent on the entity”
 - Common law employee categories or employer-employee classifications under other statutes are not of controlling significance

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Defining the Employment Relationship

- *Economic Realities Test* – to make the determination whether a worker is an employee or an independent contractor under the FLSA, courts use the multifactorial “economic realities” test, which focuses on whether the worker is economically dependent on the employer or in business for himself or herself
 - 1) the extent to which the work performed is an integral part of the employer’s business
 - 2) the worker’s opportunity for profit or loss depending on his or her managerial skill
 - 3) the extent of the relative investments of the employer and the worker
 - 4) whether the work performed requires special skills and initiative
 - 5) the permanency of the relationship
 - 6) the degree of control exercised or retained by the employer
- Forms 1099 and written agreements labeling an individual an independent contractor are not determinative
- DOL agreements with states and the IRS to coordinate the approach to minimize misclassification of employees as independent contractors

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Defining the Employment Relationship

“[M]ost workers are employees under the FLSA’s broad definitions”



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Defining the Employment Relationship

- Joint Employment
 - Administrator's Interpretation No. 2016-01
 - Rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA is as broad as possible
 - *Horizontal Joint Employment* - Joint employment may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee (29 CFR § 791.2) - Focus on the relationship between the employers
 - *Vertical Joint Employment* - Joint employment may exist when an employee of one employer (herein, referred to as an "intermediary employer") is also, with regard to the work performed for the intermediary employer, economically dependent on another employer (herein, referred to as a "potential joint employer" - analysis is the relationship between the employee and the potential employer (is the employee economically dependent on the potential joint employer)

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Establishing an Employment Relationship . . . Or Not.

JOB ANNOUNCEMENTS

Job advertisements may not show a preference for or discourage someone from applying for a job because of his or her race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information

EXAMPLE

EEOC example - ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law

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Federal Laws Regulating Employment

- Immigration Reform and Control Act of 1986 (IRCA)
- Fair Credit Reporting Act (FCRA)
- Employee Polygraph Protection Act
- OSHA
- USERRA
- FMLA
- NLRA
- WARN
- ERISA
- PPACA (a/k/a ACA)
- COBRA
- GINA
- Title VII
- ADA
- ADEA
- Pregnancy Discrimination Act
- Equal Pay Act
- FLSA



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Immigration Reform and Control Act of 1986 (IRCA)

- Amended the Immigration and Nationality Act
- Prohibits hiring illegal aliens
- Makes it illegal for an employer discriminate with respect to hiring, firing, or recruitment or referral for a fee, based upon an individual's citizenship or immigration status
- Prohibits employers from hiring only U.S. citizens or lawful permanent residents unless required to do so by law, regulation or government contract
- Employers may not refuse to accept lawful documentation that establishes the employment eligibility of an employee, or demand additional documentation beyond what is legally required, when verifying employment eligibility (i.e., completing the Department of Homeland Security (DHS) Form I-9), based on the employee's national origin or citizenship status.
It is the employee's choice which of the acceptable Form I-9 documents to show to verify employment eligibility
- Prohibits retaliation against individuals for asserting their rights under the Act, or for filing a charge or assisting in an investigation or proceeding under IRCA
- IRCA's nondiscrimination requirements are enforced by the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division

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Fair Credit Reporting Act (FCRA)

- Use of consumer reports to make employment decisions, including hiring, retention, promotion or reassignment requires compliance FCRA
- The Federal Trade Commission (FTC) enforces the FCRA
- Written notice in a stand-alone format
- Obtain written permission; be clear if the authorization will grant permission to obtain reports throughout employment
- Before taking adverse action, provide the applicant with notice and a copy of the report relied upon and a copy of A Summary of Your Rights Under the Fair Credit Reporting Act
- Adverse Action Notice –
 - the name, address, and phone number of the consumer reporting company that supplied the report
 - a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it
 - a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get an additional free report from the company if the person asks for it within 60 days



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Employee Polygraph Protection Act (EPPA)

- 29 USC § 2001; 29 CFR Part 801
- Prohibits most private employers from using lie detector tests, either for pre-employment screening or during the course of employment
- “Act permits polygraph tests to be administered in the private sector, subject to restrictions, to . . . *pharmaceutical manufacturers, distributors and dispensers*”
- Employers generally may not require or request any employee or job applicant to take a lie detector test, or discharge, discipline, or discriminate against an employee or job applicant for refusing to take a test or for exercising other rights under the Act
- *Notice posting required; Content revised as of August 1, 2016 and existing posters must be replaced with this revised version*

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Occupational Safety and Health Act (OSHA)

- Primary federal law which governs occupational health and safety in the workplace
- OSHA operates in Tennessee through the OSHA-approved state plan (TOSHA) – a safe and healthful workplace
- Employers must provide a workplace free from serious recognized hazards and comply with standards, rules and regulations issued under OSHA
- Hazard Communication: Employers with hazardous chemicals in the workplace must develop and implement a written hazard communication program and train employees on the hazards they are exposed to and proper precautions

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Occupational Safety and Health Act (OSHA)

- Bloodborne Pathogen
- Personal Protective Equipment Standards
- Whistleblower Protection – under a total of 22 laws

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Uniformed Services Employment and Reemployment Rights Act (USERRA)

- USERRA (38 USC § 4301, *et seq.*) prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations
- Protects the reemployment rights of individuals who leave their civilian jobs (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state, District of Columbia, and territory (e.g., Guam) National Guards
- Returning service-members must be promptly reemployed in the same position that they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority
- Enforced by the DOL and the DOJ

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Family Medical Leave Act (FMLA)

- Applies to employers with 50 or more employees
- Provides eligible employees with ***up to 12 weeks of unpaid, job-protected*** leave per year:
 - for the birth and care of the newborn child of an employee
 - for placement with the employee of a child for adoption or foster care
 - to care for an immediate family member (spouse, child, or parent) with a serious health condition
 - to take medical leave when the employee is unable to work because of a serious health condition
- Requires that the employer maintain the eligible employee's group health benefits during the leave
- Eligible employees are those who:
 - work at a location where the employer employs 50 or more employees within 75 miles
 - have worked for the employer at least 12 months and at least 1,250 hours over the past 12 months

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NATIONAL LABOR RELATIONS ACT (NLRA)

- 29 USC §§ 151-169
- Defines the rights of employees and employers, including employees' right to self-organize; form, join, and assist unions; collectively bargain; and *engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* (Section 7 of the NLRA)
- Protects rights of employees whether union-represented or not
- National Labor Relations Board enforces the NLRA

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Sections 7 and 8(a)(1) of the NLRA

- Section 7 protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter
- Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7”
 - Ensure policies are not overly broad in prohibiting certain activities or restricting employees' ability to discuss or complain about working conditions (e.g., prohibiting “defamatory” comments about the company)
 - Confidentiality and e-mail policies must be drafted with care to avoid Section 8(a)(1) concerns

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Workers Adjustment and Retraining Notification (WARN) Act

- Applies to private, for-profit and non-profit employers (some public/quasi-public entities, too) with 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week
- Must provide notice (with limited exceptions) 60 days in advance of covered plant closings and covered mass layoffs
- Private cause of action available; attorney's fee may be awarded

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Employee Retirement Income Security Act (ERISA) of 1974

“[S]ets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans”

- Participation
- Vesting
- Benefit accrual and funding
- Fiduciary responsibilities for those who manage and control plan assets
- Grievance and appeals process for participants
- Right to sue for benefits and breaches of fiduciary duty
- If a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC).

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Patient Protection and Affordable Care Act (PPACA or ACA)

- Employer Shared Responsibility Provision
- Employer mandate requires all employers employing at least 50 individuals to offer health insurance to their employees or pay a fee
- Section 1557 - nondiscrimination provision that will be discussed in detail later in this presentation

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Consolidated Omnibus Budget Reconciliation Act (COBRA)

- Amended ERISA, the Internal Revenue Code and the Public Health Service Act to provide continuation of group health coverage that otherwise might be terminated
- Employers with 20 or more employees are usually required to offer COBRA coverage and to notify their employees of the availability of such coverage
- Certain former employees, retirees, spouses, former spouses, and dependent children have the right to temporary continuation of health coverage at group rates
- Coverage is only available when coverage is lost due to certain specific events –
 - Employees - voluntary or involuntary termination of employment for reasons other than gross misconduct and reduction in the number of hours of employment*
- COBRA participants generally pay the entire premium themselves in advance

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Genetic Information Nondiscrimination Act (GINA)

- Illegal to discriminate against or harass employees or applicants because of genetic information
- Prohibits the use of genetic information in making employment decisions, restricts certain employers and other entities from requesting, requiring or purchasing genetic information
- Strictly limits the disclosure of genetic information

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Title VII of the Civil Rights Act of 1964

- Applies to an employer who has fifteen (15) or more employees
- Prohibits discrimination against any individual on the basis of race, color, religion, sex, or national origin

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Americans with Disabilities Act (ADA)

- Covers employers with 15 or more employees
- Prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment
- Reasonable accommodations required for qualified applicants' or employees' known disabilities if doing so would not impose an undue hardship
- Interactive process; Interaction with FMLA; Section 504 of the Rehabilitation Act of 1973
- EEOC enforcement

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Age Discrimination in Employment Act (ADEA)

- Prohibits employment discrimination against anyone of 40 years of age or older in hiring, promotions, wages, training, benefits, layoffs, terminations, and other terms of conditions of employment
- Implications for separation and severance packages and layoffs/reductions in force

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Pregnancy Discrimination Act

- Applies to employers with 15 or more employees
- Prohibits sex discrimination on the basis of pregnancy or a pregnancy-related condition.

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Equal Pay Act

Prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions

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Fair Labor Standards Act (FLSA)

- Establishes pay and workplace standards:
 - minimum wage (currently \$7.25 per hour)
 - overtime pay (one-and-one-half-times the regular rate of pay) for “non-exempt” employees for all hours worked over 40 in a workweek
 - child labor
 - defines which employees are considered exempt and non-exempt for the purposes of carrying out the law

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Fair Labor Standards Act (FLSA): Exempt vs Non-exempt Employees

- Non-exempt employees: most employees, particularly those who perform work involving repetitive operations with their hands, physical skill and energy (“blue collar employees”)
- Exempt employees: Certain classes of employees (“white collar employees”) are exempt from the minimum wage and overtime rules under the FLSA
 - Executive
 - Administrative
 - Professional
 - Outside Sales
 - Computer Employees (computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees)

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Fair Labor Standards Act (FLSA): Three Tests for Exemption

- Employees must satisfy three tests for the FLSA’s exemption to apply. The tests are:
 - **Salary-level:** Currently, employers must pay the employee \$455 per week (minimum salary level). This minimum salary level is changing and will be discussed in further detail momentarily
 - **Salary Basis:** Subject to limited exceptions, the employer must pay the employee his/her full salary in any week he/she performs work
 - **Duties:** The employee’s primary duty must be “exempt work” and specific duties are outlined for each class of exempt employees

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Fair Labor Standards Act (FLSA): Duties Specifications for Certain Employee Classes

Duties for Classes of Exempt Employees of Interest to CHCs:

- **Executive:** management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; authority to hire and fire (or provide recommendations of weight); customary and regular direction of employees
- **Administrative:** performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; exercise of discretion and independent judgment with respect to matters of significance
- **Professional:** “learned” or “creative” professionals; performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
- **Computer Employees:** application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; design, documentation, testing, creation or modification of computer programs related to machine operating systems

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Hot Topics:

New Regulations and Guidance
and Emerging Trends to Watch

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DOL's Final Rule Revising White Collar OT Exemption



*Employers are on the
clock!*

*Final Rule is Effective
December 1, 2016*

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RECENT PATH TO THE CHANGES

- 2014 - President Obama signed a Presidential Memorandum directing the Department to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards
- DOL published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on July 6, 2015
- Comment Period closed on September 4, 2015 and DOL received over 270,000 comments

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DOL's Changes to White Collar Regulations Under the FLSA

- Final Rule announced on May 18, 2016 changing the regulations that govern the FLSA's "white collar" overtime exemptions
- Sets the minimum salary level for the administrative, executive and professional overtime exemption at \$913 per week (\$47,476 annualized)
- Sets the total compensation level for highly-compensated employees (HCE) at \$134,004 annually – up from the current \$100,000
- Provides for automatic increases in the salary level every 3 years (beginning January 1, 2020) – with the minimum salary level indexed for to the 40th percentile of full-time salary workers in the lowest wage Census region (currently the Southeast region), and the HCE level indexed to the 90th percentile of national full time salary workers

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DOL's Changes to White Collar Regulations Under the FLSA

- Allows employers to count nondiscretionary bonuses and other incentive payments, including commissions, paid on at least a quarterly basis, for up to 10% of the minimum salary level
- Allows for a quarterly make-up payment
- Does not make changes to any of the duties-based requirements (or the concurrent duties test) in any of the white collar exemptions
- Does not make changes to the salary basis test, other than increasing the salary level

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DOL's Changes to White Collar Regulations Under the FLSA

Quarterly Make-up Payments

- Each workweek the employer must pay the employee at least 90% of the minimum salary level, which is \$821.70 (\$42,728.40 annualized)
- If, at the end of the quarter, the employer has not paid the employee salary, bonuses, and commissions totaling \$11,869 ($47,476 \div 4$), then the employer must issue a “quarterly make-up payment” equal to the difference
- The “quarterly make-up payment” is due in the first pay period of the next quarter

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DOL's Changes to White Collar Regulations Under the FLSA

DOL estimates that the 2020 minimum salary level will be approximately \$984 per week (\$51,168 annualized)



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FINAL RULE COMPLIANCE

COMPLIANCE OPTION A: INCREASE SALARIES

- For exempt employees who make less than the new minimum salary level, increase their salary
- Review organization compensation plans, and review job duties

COMPLIANCE OPTION B: RECLASSIFY EMPLOYEES

- Exempt employees who make less than the new minimum salary level can be reclassified as non-exempt and the employer must pay overtime for work in excess of 40 hours in a workweek
- Training for the reclassified employee and his/her manager is critical

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DOL's Changes to White Collar Regulations Under the FLSA

- According to the DOL, the changes are expected to extend overtime pay protections to over 4 million workers within the first year of implementation
- Conduct job duties and compensation review
- Communicate changes within organization
- Train supervisors and managers

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Section 1557 of the Patient Protection and Affordable Care Act



- Materials adapted directly from HHS
- Section 1557 is the nondiscrimination law of the ACA

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Section 1557 of the Patient Protection and Affordable Care Act

- Provides that:

An individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975 (Age Act), or Section 504 of the Rehabilitation Act of 1973 (Section 504), ***be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance***, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Act or its amendments.

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Section 1557 of the Patient Protection and Affordable Care Act

- Federal financial assistance includes grants, property, Medicaid, Medicare Parts A, C and D payments, and tax credits and cost-sharing subsidies under Title I of the ACA
- Medicare Part B is not included

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Section 1557 of the Patient Protection and Affordable Care Act

- First federal civil rights law to broadly prohibit discrimination on the basis of sex in federally funded health programs
- Prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities
- Builds on long-standing and familiar Federal civil rights laws:
 - Title VI of the Civil Rights Act of 1964
 - Title IX of the Education Amendments of 1972
 - Section 504 of the Rehabilitation Act of 1973
 - Age Discrimination Act of 1975
- May 18, 2016 - OCR issued the final rule, *Nondiscrimination in Health Programs and Activities (45 CFR Part 92)*, implementing Section 1557

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Final Rule Implementing Section 1557 of the ACA

- Protects individuals from discrimination in health care on the basis of race, color, national origin, age, disability and sex, *including discrimination based on pregnancy, gender identity and sex stereotyping*
- Enhances language assistance for people with limited English proficiency and helps to ensure effective communication for individuals with disabilities

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Final Rule Implementing Section 1557 of the ACA

- The Final Rule regulates:
 - Any health program or activity any part of which received funding from HHS
 - Any health program or activity that HHS itself administers
 - Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces
- The rule does not apply to employment practices such as hiring or firing, except that covered employers are responsible for their employee health benefit programs in certain circumstances (45 CFR § 92.208)

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Final Rule Implementing Section 1557 of the ACA

- Examples of who must comply with Section 1557:
 - Health Insurers, including issuers that offer plans in the State-based or Federally-facilitated Health Insurance Marketplaces
 - Hospitals
 - Doctors/Practice Groups who participate in the Medicaid program
 - *Community Health Centers*
 - Nursing Homes
 - Health Plans

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Final Rule Implementing Section 1557 of the ACA

- Requires covered entities to:
 - Make electronic information and newly constructed or altered facilities accessible to individuals with disabilities
 - Provide appropriate auxiliary aids and services for individuals with disabilities
 - Take reasonable steps to provide meaningful access to individuals with limited English proficiency

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Final Rule Implementing Section 1557 of the ACA

- Under Section 1557, a covered entity may not:
 - Segregate, delay or deny services or benefits based on an individual's race, color or national origin. For example,
 - A covered entity may not assign patients to patient rooms based on race.
 - A covered entity may not require a mother to disclose her citizenship or immigration status when she applies for health services for her eligible child
 - Delay or deny effective language assistance services to individuals with limited English proficiency (LEP).

The term "national origin" includes, but is not limited to, an individual's, or his or her ancestor's, place of origin (such as a country), or physical, cultural, or linguistic characteristics of a national origin group
- Section 1557 protects individuals in the United States, whether lawfully or not, who experience discrimination based on any of Section 1557's prohibited bases

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Final Rule: Language Assistance Requirements

Rule provisions related to effective language assistance and meaningful access:

- A covered entity **must** take reasonable steps to provide meaningful access to each individual with LEP eligible to be served or likely to be encountered in its health programs and activities. Reasonable steps may include the provision of language assistance services, such as oral language assistance or written translations.
- **Notices:** A covered entity must publish taglines, which are short statements in non-English languages, in significant publications and post in prominent locations and on its website, to notify the individual about the availability of language assistance services.
 - ▣ Statement of Nondiscrimination and Notices of Nondiscrimination and Accessibility Requirements with Taglines
 - ▣ Sample Statement, Notice, and Tagline (translated into different languages are available at: <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/>)
 - ▣ **Compliance deadline: October 17, 2016**

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Final Rule: Language Assistance Requirements

<p><i>The Rule requires the covered entity to post taglines in at least the top 15 languages spoken by individuals with limited English proficiency in Tennessee.</i></p> <p><i>45 CFR § 92.8</i></p>	1	TN	Spanish	111,267
	2	TN	Arabic	7,880
	3	TN	Chinese	6,462
	4	TN	Vietnamese	6,361
	5	TN	Korean	3,969
	6	TN	French	2,544
	7	TN	Laotian	2,418
	8	TN	Amharic*	1,995
	9	TN	German	1,895
	10	TN	Gujarati	1,825
	11	TN	Japanese	1,814
	12	TN	Tagalog	1,635
	13	TN	Hindi	1,346
	14	TN	Russian	1,319
	15	TN	Persian (Farsi)	1,224

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Final Rule: Language Assistance Requirements

- **Statement of Nondiscrimination:**
[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex
 - **Notice:**
Statement of nondiscrimination, list of free aids and services provided to those with disabilities or limited English proficiency, name and contact information for the covered entity's Civil Rights Coordinator, and grievance procedures (internal and external)
 - **Tagline:**
ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx)
- ATENCIÓN: si habla español, tiene a su disposición servicios gratuitos de asistencia lingüística. Llame al 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx)

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Final Rule: Language Assistance Requirements

- A covered entity **must** offer a qualified interpreter when oral interpretation is a reasonable step to provide an individual with meaningful access
- Where language services are required, they **must** be provided free of charge and in a timely manner
- A covered entity must adhere to certain quality standards in delivering language assistance services. For instance, a covered entity **may not**:
 - ▣ Require an individual to provide his or her own interpreter
 - ▣ Rely on a minor child to interpret, except in a life threatening emergency where there is no qualified interpreter immediately available
 - ▣ Rely on interpreters that the individual prefers when there are competency, confidentiality or other concerns
 - ▣ Rely on unqualified bilingual or multilingual staff
 - ▣ Use low-quality video remote interpreting services

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Final Rule: Prohibited Discrimination - Race/Color/National Origin

- HHS has provided examples of race, color or national origin discrimination:
 - ▣ A physician at a hospital's emergency department denied a mother with LEP a Spanish interpreter when she requested language assistance. Instead, the physician used the mother's 13-year-old son as the interpreter, while he was being treated for a dog bite. The hospital also failed to translate or orally explain the discharge instructions in Spanish
 - ▣ A nurse ignored an African-American female, who needed medical attention, and made her wait in the lobby for close to an hour. While she was waiting, a Caucasian male arrived for his appointment with the same health provider. Although he did not have a health emergency, he waited less than five minutes before the nurse called him for a patient room. Computer records verified that the woman had arrived 15 minutes early for her appointment and that her appointment was scheduled before his. The clinic did not have a legitimate, nondiscriminatory reason for treating the Caucasian male first

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Final Rule: Prohibited Sex Discrimination

Covered entities must:

- ▣ Provide equal access to health care, health insurance coverage, and other health programs without discrimination based on sex, including pregnancy, gender identity, or sex stereotypes.
- ▣ Treat individuals consistent with their gender identity, including with respect to access to facilities, such as bathrooms and patient rooms.

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Final Rule: Prohibited Sex Discrimination

- Providers cannot deny or limit sex-specific health services based solely on the fact that the gender identity or gender recorded for an individual does not align with the sex of individuals who usually receive those types of sex-specific services (e.g., denying a transgender male a pap smear or denying a transgender woman a prostate exam)

- Sex specific programs are allowed only if a covered entity can show an exceedingly persuasive justification for the program. That means the sex-specific nature of the program must be substantially related to an important health-related or scientific objective
For example, a breast cancer program cannot refuse to treat men with breast cancer solely because its female patients would feel uncomfortable

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Final Rule: Prohibited Sex Discrimination

HHS has provided examples of sex discrimination:

- Multiple staff at a hospital created a hostile environment for a transgender woman because she was transgender. She was also required to share a room with a male patient.

- A pharmacist would not provide a flu vaccine to a woman and questioned her about her non-gender-conforming clothing and hairstyle.

- Staff at a hospital's emergency department ridiculed a male patient who arrived after sustaining injuries in a domestic incident. Staff did not evaluate the patient under a domestic violence protocol because he was male.

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Final Rule: Prohibited Age Discrimination

- A covered entity may not exclude, deny or limit benefits and services based on an individual's age (e.g., a physician's practice may not deny a 62-year-old man health services because it only accepts patients under age 60)
- A covered entity may base its actions on age when it is a factor necessary to the normal operation, or achievement of a statutory objective of a program. Therefore, this standard does not apply to any age distinction that is authorized under Federal, State, or local law. For example, age rating in premium rates within a 3:1 ratio in MarketplaceSM plans would not violate Section 1557 because it is permitted under the ACA
- A covered entity may also provide different treatment based on age when the treatment is justified by scientific or medical evidence (e.g., a physician may decide to deny a mammogram to a woman under a certain age because recent medical studies have suggested that mammograms may be more harmful than helpful to young women), or based on a specialty (e.g., pediatricians are not required to treat adults and gerontologists not required to treat children)

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Final Rule: Prohibited Discrimination Based on Disability

- An individual may not be excluded or denied benefits or services because of a disability
- **Covered entities must do the following** unless doing so would result in an undue financial burden or would fundamentally alter the program:
 - ▣ Make reasonable changes to policies, procedures and practices where necessary to provide equal access for individuals with disabilities. For example, a clinic must modify its "no pets" policy to permit an individual with a disability to be accompanied by a service animal. Additionally, a clinic must allow an individual with an anxiety disorder to wait for an appointment in a separate, quiet room if the individual is unable to wait in the patient waiting area because of anxiety
 - ▣ Make all health programs and activities provided electronically (e.g., through online appointment systems, electronic billing, information kiosks, etc.) accessible to individuals with disabilities. For example, a doctor's office that requires patients to make appointments only online must modify its procedures so that a person with a disability who cannot use the required method can still make an appointment
 - ▣ Ensure newly constructed and altered facilities are physically accessible to individuals with disabilities
 - ▣ Provide effective communication with individuals with disabilities, including patients and their companions.

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Final Rule: Auxiliary Aids & Services

- Provide auxiliary aids and services to individuals with disabilities free of charge and in a timely manner when necessary to ensure an equal opportunity to participate and benefit from the entity's health programs or activities

- Auxiliary aids and services include, but are not limited to :
 - ▣ Qualified Sign Language Interpreters
 - ▣ Large Print Materials
 - ▣ Text Telephones (TTY)
 - ▣ Captioning
 - ▣ Screen Reader Software
 - ▣ Video Remote Interpreting Services

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Final Rule: Prohibited Discrimination Based on Disability

A covered entity may not:

- ▣ Require an individual to provide his or her own interpreter
- ▣ Rely on a minor child to interpret, except in a life threatening emergency where there is no qualified interpreter immediately available
- ▣ Rely on interpreters that the individual prefers when there are competency, confidentiality or other concerns
- ▣ Rely on unqualified staff interpreters.
- ▣ Use low-quality video remote interpreting services

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Final Rule: Prohibited Discrimination Based on Disability

HHS has provided examples of discrimination based on an individual's disability:

- A hospital denied a visually impaired woman her request for a consent form in an alternative format that was accessible to her. The woman informed the hospital that she could access the information on the form if it was provided in large print or an accessible electronic format that she could read with her screen reader, but the hospital provided her with neither
- A hospital provided individuals who are deaf or hard of hearing with sign language interpreters through an ineffective video relay interpreting device. The hospital operated the device through an unreliable internet connection, which produced irregular pauses and blurry images during the individuals' medical appointments

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Final Rule: Prohibited Discrimination in Health-related Insurance or Coverage

- Covered entities may not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of race, color, national origin, sex, age, or disability
- ***Rule applies to provision of employee health benefits by an employer that receives federal financial assistance and is principally engaged in healthcare***
- Covered entities may not, on any of the above covered bases:
 - ▣ Deny, cancel, limit or refuse to issue or renew a health insurance plan or other health coverage.
 - ▣ Deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage.
 - ▣ Use discriminatory marketing practices or benefit designs (e.g., plan covers treatment for eating disorders in women but not men).
- Categorical exclusions or limitations in coverage for all health care services related to gender transition are prohibited.
- Section 1557 does not prohibit covered entities from determining whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case

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Final Rule Implementing Section 1557 of the ACA

Where application of any requirement of the rule would violate applicable Federal statutes protecting religious freedom and conscience, that application will not be required

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Final Rule Implementing Section 1557 of the ACA: Enforcement

- All enforcement mechanisms available under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975 apply
- OCR enforces Section 1557 as to programs that receive funding from HHS
- When OCR finds violations, a covered entity will be required to take corrective actions, which may include revising policies and procedures, and implementing training and monitoring programs. Covered entities may also be required to pay compensatory damages (45 CFR § 92.301)
- When a covered entity refuses to take corrective actions, OCR may undertake proceedings to suspend or terminate Federal financial assistance from HHS. OCR may also refer the matter to the U.S. Department of Justice for possible enforcement proceedings
- Section 1557 also provides individuals the right to sue covered entities in court for discrimination if the program or activity receives Federal financial assistance from HHS or is a State-based MarketplaceSM

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DRAWING THE CIRCLE WIDER:

Protections for LGBT Workers and Accommodations for Transgender Employees

CONTENT NOTE

Portions of the materials provided in this segment of the training were prepared by or based upon materials developed by Rachel Rosenblatt and Joycelyn Stevenson in collaboration with Tera T. Hambrick and are denoted by an asterisk. This content was a component of the materials Ms. Rosenblatt, Ms. Stevenson, and Ms. Hambrick presented at the Breakfast Briefing conducted by Littler Mendelson, PC on November 10, 2015 entitled, "The New Protected Class? What You Should Know About New Protections for LGBT Workers and Accommodations for Transgender Employees". Ms. Rosenblatt is an Associate and Ms. Stevenson is a Shareholder at Littler Mendelson, PC.

As noted earlier, opinions expressed in the presentation or written materials are solely those of Ms. Hambrick and not necessarily the views of any other person or organization, including, but not limited to, Littler Mendelson, PC.

Recent Events

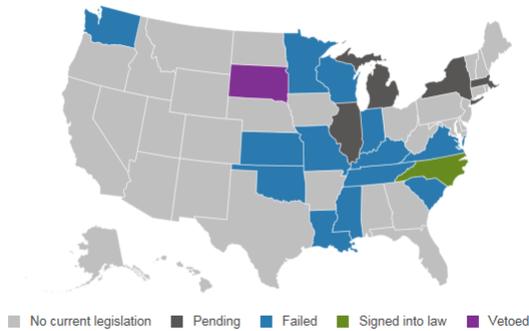
- North Carolina state law limits transgender individuals' access to public restrooms and requires people to use facilities that match their assigned gender at birth
 - NCAA and ACC pull championship and post-season games from NC
 - ACLU filed lawsuit challenging law
 - Companies boycotting state
 - Hurt NC economy
 - Lawmakers now trying to roll back parts of law

Recent Events

- Title IX under federal law bars discrimination in education based on sex
 - In May, Obama administration issued guidance directing public schools to allow transgender students to use bathrooms matching their gender identity or withdrawal of federal funding.
 - Tennessee is one of 11 states that have filed a lawsuit in federal court over guidance, which is being led by Texas Attorney General.
- 19 states have considered legislation in 2016 that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities on the basis of a definition of sex or gender consistent with sex assigned at birth or “biological sex”

State Legislation Status as of 09/13/2016

Status of State Sex-Segregated Facilities Legislation



Source: National Conference of State Legislatures. [Show details](#) -

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Recent Events

- Houston – Proposition 1 (city ordinance protecting residents from discrimination based on sexual orientation and gender identity is defeated)
- Illinois - Township High School District 211 - Federal Government’s position that transgender students have the right to unrestricted use of locker rooms at school
- Seattle Mayor signed his executive order mandating transgender training for city employees. The training will focus on how employees should deal with transgender individuals on the front lines, from the library to city parks

Recent Events

- White House Appoints First Transgender Person As Primary LGBT Liaison
- Colorado House OKs Bill On Transgender Birth Certificates
- South Dakota Gov. Dennis Daugaard vetoes transgender bathroom bill at last minute

Terminology*



- **LGBT:** Lesbian, Gay, Bisexual, Transgender
- **Lesbian:** A woman who is primarily attracted to other women
- **Gay:** A person who is attracted primarily to members of the same sex. Although it can be used for any sex (e.g. gay man, gay woman, gay person), “lesbian” is sometimes the preferred term for women who are attracted to women
- **Bisexual:** A person who is attracted to both people of their own gender and another gender
- **Sexual orientation:** The type of sexual, romantic, and/or physical attraction someone feels toward others

Terminology*



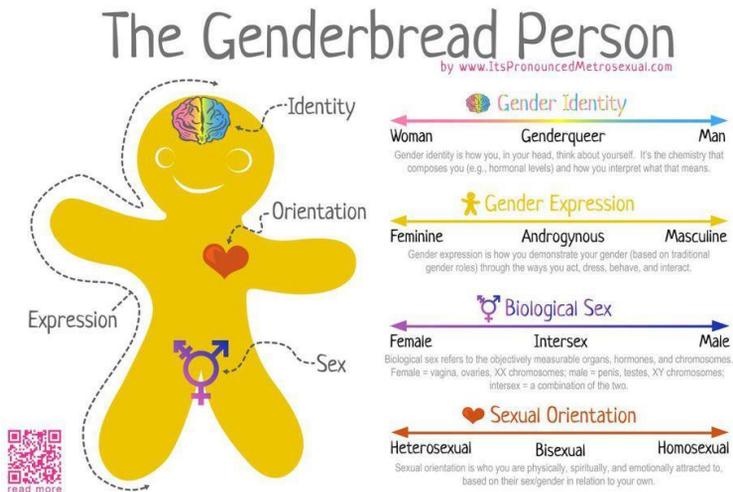
- **Transgender:** Umbrella term to refer to all people who do not identify with their assigned gender at birth; a person who lives as a member of a gender other than expected based on anatomical sex
- **Gender identity:** The sense of “being” male, female, or possessing an identity which falls outside of the widely accepted sexual binary (i.e. “men” and “women”). For most people, gender identity is in accord with their physical anatomy. For transgender people, gender identity may differ from physical anatomy or expected social roles
- *It is important to note that gender identity, biological sex, and sexual orientation are separate and that you cannot assume how someone identifies in one category based on how they identify in another category*

Gender Expression*

Gender expression: A term which refers to the ways in which we each manifest masculinity or femininity. It is usually an extension of our “gender identity,” our innate sense of being male, female, etc.

- Each of us expresses a particular gender every day – by the way we style our hair, select our clothing, or even the way we stand
- Our appearance, speech, behavior, movement, and other factors signal that we feel – and wish to be understood – as masculine or feminine, or as a man or a woman

A Helpful Visual*

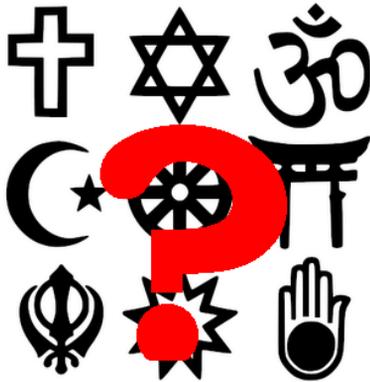


The RIGHT to Marry: Obergefell v. Hodges

U.S. Supreme Court ruled that the 14th Amendment requires:

- ❑ all states must permit marriage between same-sex couples, and
- ❑ all states must recognize marriages performed in other states, including those between same-sex couples

Religious Objections*



Whether religious institutions and religious employers will face consequences for declining to recognize or give equal status to same-sex is likely the next frontier of the legal battle.

Implications for Employers*

Policies and benefits plans must be reviewed to ensure they are treating all married couples equally

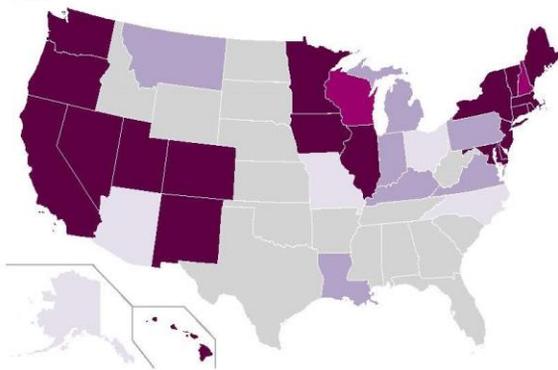
- ❑ Leave policies
- ❑ Non-discrimination provisions
- ❑ Benefit plans
- ❑ Retirement plans
- ❑ Other benefits offered to spouses of employees

The Current Legal Landscape

Current U.S. LGBT State Employment Discrimination Laws*



STATEWIDE EMPLOYMENT LAWS & POLICIES



Updated April 20, 2016

The Federal Equal Employment Opportunity Commission is now accepting complaints of gender identity discrimination in employment based on Title VII's prohibition against sex discrimination.

States that prohibit discrimination based on sexual orientation and gender identity (20 states & D.C.): California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington

States that prohibit discrimination based on sexual orientation only (2 states): New Hampshire, Wisconsin

States that prohibit discrimination against public employees based on sexual orientation and gender identity (7 states): Indiana, Kentucky, Louisiana, Michigan, Montana, Pennsylvania, Virginia

States that prohibit discrimination against public employees based on sexual orientation only (5 states): Alaska, Arizona, Missouri, North Carolina, Ohio

**State courts, commissions, agencies, or attorney general have interpreted the existing law to include some protection against discrimination against transgender individuals in Florida and New York.*

**North Carolina's executive order enumerates sexual orientation and gender identity. However, this order has a bathroom carve out for transgender employees making the executive order not fully-inclusive.*

Tennessee City Laws*

- **Memphis City Code, Sec. 3-8-6. - No discrimination in city employment.**

There shall be no discrimination in city employment of personnel because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, sexual orientation, gender identity or other non-merit factors, nor shall there be any discrimination in the promotion or demotion of city employees because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, sexual orientation, gender identity or other non-merit factors. Gender identity means the actual or perceived gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

- **Knoxville City Code, Sec. 15-57. - Unlawful employment practices generally.**

It shall be an unlawful employment practice for the city to discriminate against a qualified individual on the basis of non-merit factors such as race, ethnic origin, color, national origin, gender, gender identity, genetic information, sexual orientation, age except as otherwise specifically provided in this part, religion, creed, or disability in admission to, access to, or operations of its programs, services, or activities. Discrimination against any qualified individual in recruitment, examination, appointment, training, promotion, demotion, retention, discipline, or any other employment practices because of non-merit factors shall be prohibited.

- **Metropolitan Government of Nashville and Davidson County, 11.20.130 - Metropolitan government prohibited from discriminating.**

It is unlawful for the metropolitan government to fail or refuse to hire or promote, or to discharge any individual, because of such individual's race, religion, creed, gender, gender identity, sexual orientation, national origin, color, age, and/or disability. Nothing in this section shall be interpreted to give an employee a right to partner medical insurance or pension benefits.

Federal Law

Employment Non-Discrimination Act

Congress has failed to approve ENDA, which would make it illegal for employers with 15+ full-time workers to refuse to hire, terminate, or otherwise discriminate against any individual on basis of their actual or perceived sexual orientation or gender identity



Federal Contractors*

On July 21, 2014, President Obama signed Executive Order 13672 to prohibit federal employees, contractors, and subcontractors from discriminating on the basis of sexual orientation or gender identity.



Federal Law*

- Title VII protected categories do **NOT** explicitly include sexual orientation or gender identity

- But ...
 - Several federal courts have found Title VII includes claims based on sexual orientation, transgender status
 - Discrimination or harassment based on “sex stereotypes” about how a man or woman should behave is “sex” discrimination and violates the law

EEOC Gender Stereotyping*

It is illegal for an employer to deny employment opportunities or permit harassment because:

- A woman does not dress or talk in a feminine manner
- A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women
- A female employee dates women instead of men
- A male employee plans to marry a man
- An employee transitions from female to male or male to female

EEOC Fact Sheet Issued

- On May 2, 2016, the EEOC issued a fact sheet, “Bathroom Access for Transgender Employees Under Title VII of the Civil Rights Act of 1964”, addressing transgender employees’ rights in the workplace.
- Employers may not discriminate against employees on the basis of gender identity and
- Employers may not restrict the ability of transgender employees to use restrooms consistent with their gender identity.
- EEOC also announced that contrary state laws are not a defense to a Title VII claim.
- Available at: <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>

Hypothetical #1: True or False?*

The following facts could be used to support a claim of discrimination/harassment:

- Employee is invited to dinner with senior-level managers and told to bring a guest if she would like
- Employee arrives at dinner with her spouse, who is female
- The CFO asks employee the nature of their relationship and how he should refer to her guest

Hypothetical #2: True or False?*

The following facts could be used to support a claim of discrimination/harassment:

- Co-workers direct various comments toward an employee related to race and sexual orientation, and repeatedly write graffiti in the restrooms referring to the employee's sexuality and the employee having AIDS
- Employee complained multiple times, and HR addressed his concerns; both the comments and graffiti stopped
- Six weeks later, the employee was suspended for leaving his work station during work time

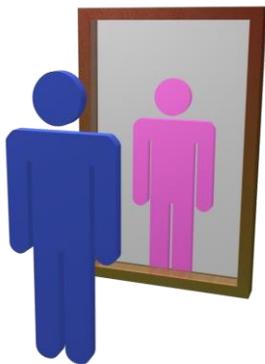
Hypothetical #3: True or False?*

The following facts could be used to support a claim of discrimination/harassment:

- Employee announces their intention to transition to male and asks to be called Joseph
- Employer permits Joseph to begin presenting as male, and uses Joseph and male pronouns to refer to the employee
- Employer requests that Joseph provide proof of a legal name change before modifying Joseph's name in its payroll system

Hypothetical #4: True or False?*

The following facts could be used to support a claim of discrimination/harassment:



- Employee undergoing a gender transition asks to be called by female pronouns and by the name Erin
- Co-worker refuses to call her Erin and refuses to use female pronouns because the co-worker thinks the employee is “still a male”

Hypothetical #5: True or False?*

The following facts could be used to support a claim of discrimination/harassment:

- At the time of hire, employee was perceived to be male
- After submitting the employee's information to the state agency, the employer received a "no match" letter indicating that the employee's name and gender marker did not match state records
- The employer asks the employee whether he previously was known by a different name



Preventing a Charge*



Policies & Procedures*

EEO, Anti-harassment, Non-discrimination, Code of Conduct:

- Include “sexual orientation,” “gender identity and expression”
- Prohibit problematic behavior, including LGBT-specific behavior
- Address accommodation issues, dress code for transitioning employees
- Commitment to provide a workplace free of harassment and discrimination

Training & Education

Train managers and employees about:

- Policies, expected behavior
- Role in supporting, enforcing policies
- Reporting and complaint structure
- Prevention of harassment and discrimination
- Diversity training, general education
- Potential consequences

Behavioral Expectations

Make sure employees understand expectations:

- Name, pronoun usage for employees undergoing gender transition
- Privacy – employee, co-workers
- What is unacceptable

Facilities Access*

Restrooms, Locker Rooms:

- Should permit access according to gender presentation
- Address privacy concerns by minor facilities modifications, as needed
- DOL/OSHA guidelines available at:
<https://www.osha.gov/Publications/OSHA3795.pdf>

The Bathroom Concern

- HR should discuss restroom access with employee to determine whether employee feels comfortable using restroom of their affirmed gender during the early stages of their transition
- Co-workers need to understand that employee is going through an extremely personal process and not trying to get into the women's/men's bathroom

General Rule

- Wherever possible, single-stall or single-occupant bathrooms or dressing rooms should be made available to transgender employees if they choose
- Otherwise, allow employee to use restroom or dressing room that correlates with their gender identity (full-time gender presentation) even if that makes others uncomfortable and regardless of the employee's surgical history

Takeaways

- Marriage is marriage
- **Some** state and local laws prohibit sexual orientation and/or gender identity discrimination (not TN)
- No federal law but federal contractors cannot discriminate based on sexual orientation or gender identity
- EEOC considers discrimination against LGBT part of gender discrimination
- OSHA governs the bathroom
- Be cognizant of other directives
- Develop management strategy and determine best practices for your business

QUESTIONS?



THANK YOU!

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