



COMPLIANCE BULLETIN

U.S. Justice Dept. Reverses Title VII Transgender Policy

HIGHLIGHTS

- The DOJ has reversed its 2014 policy on gender identity discrimination in employment.
- Title VII's prohibition against sex discrimination does not include gender identity, DOJ now says.
- The DOJ's new position conflicts with EEOC guidance and some federal court rulings.

IMPORTANT DATES

October 4, 2017

The DOJ issued a memo rescinding its prior Title VII position against gender identity discrimination.

OVERVIEW

The U.S. Department of Justice (DOJ) has announced that it no longer considers employment discrimination based on gender identity, including transgendered status, to be prohibited under Title VII of the Civil Rights Act of 1964 (Title VII). In a [memorandum](#) issued on Oct. 4, 2017, the DOJ reversed its 2014 guidance that had interpreted Title VII's prohibition against discrimination "based on sex" to include discrimination based on gender identity.

The DOJ now takes the position that Title VII does not protect transgendered and other individuals from gender identity discrimination in the workplace. This conflicts with guidance issued by the Equal Employment Opportunity Commission (EEOC), which is the federal agency responsible for enforcing Title VII, and may conflict with court rulings in some states.

ACTION STEPS

Title VII compliance can be complex. Employers may not be able to rely on the DOJ's guidance. Rather, employers should ensure their policies comply with all applicable requirements, including EEOC guidance, state laws and court decisions addressing gender identity discrimination under Title VII.

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Background

Title VII of the Civil Rights Act of 1964 (Title VII) is a federal law that prohibits employers with 15 or more employees from discriminating against employees and job applicants on the basis of their race, color, religion, sex or national origin. Since its enactment, several federal courts have held that the law's inclusion of the word "sex" means that its protections only extend to traditional notions of gender.

In 1989, however, the U.S. Supreme Court issued a [decision](#) holding that "gender stereotyping" falls within Title VII's prohibition against sex discrimination. Relying in part on that decision, the EEOC [ruled](#) in 2012 that intentional discrimination against a transgender individual because of that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII. The EEOC incorporated that view into its Title VII [enforcement guidance](#) and has since held that the following (and other) employer actions violate Title VII:

- ✓ Restricting a transgender woman's ability to use a common female restroom facility;
- ✓ Intentionally misusing a transgender employee's new name and pronoun; and
- ✓ Failing to revise employment records to reflect an employee's gender identity change.

In a [2014 memorandum](#), the DOJ announced that it would follow the EEOC's approach in Title VII cases. Specifically, the DOJ said it read Title VII's prohibition against discrimination because of sex to include discrimination "founded on sex-based considerations, including discrimination based on an employee's transitioning to, or identifying as, a different sex altogether."

The DOJ's New Position

The DOJ withdrew its 2014 position in its [Oct. 4, 2017 memorandum](#) and announced that it will no longer assert that Title VII prohibits discrimination based on gender identity per se. Instead, the DOJ said it now interprets Title VII's prohibition against sex discrimination to apply only in cases where sex-based considerations cause disparate treatment of men and women.

The DOJ said its view is that Title VII does not prohibit employment practices, such as sex-specific bathrooms, that take account of employees' sex but do not impose different burdens on similarly situated members of each sex. The DOJ will take this position "in all pending and future matters," but will preserve the issue for further review in cases where controlling federal court decisions conflict with its view.

Considerations for Employers

Because the DOJ does not have direct authority to enforce Title VII, employers should not rely solely on its memorandum for Title VII compliance purposes. The EEOC, which interprets and enforces Title VII's prohibition against sex discrimination as forbidding any employment discrimination based on sexual orientation or gender identity, has authority to file lawsuits against employers in federal court. While the DOJ may become involved in these cases, its viewpoints will not necessarily control the outcome.

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In fact, several federal courts have already issued [opinions](#) holding that gender identity discrimination violates Title VII. Other cases addressing the issue are currently pending. Employers should review the decisions that apply in their locations and continue to watch for legal developments affecting Title VII.

Employers should also be aware that state and local fair employment laws may explicitly prohibit them from discriminating against individuals based on sexual orientation or gender identity. Even if a state or local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will still enforce Title VII against covered employers in that location.

More Information

Contact Touchstone Consulting Group or visit the EEOC's [website](#) for more information.