

GENDER EQUALITY: EMERGING LGBT ISSUES IN THE WORKPLACE ¹

Employment Law Seminar

By Stacey Mark

*Chair, Labor & Employment Group and
Chair, Sustainable Practice Advisory Group*

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INTRODUCTION

There are approximately nine million lesbian, gay, bisexual, and transgender (LGBT) adults in the U.S. (about 3% of the population, based on the 2010 U.S. Census),² over eight million of whom are in the workforce.³ Research indicates that LGBT employees experience high rates of discrimination in the workplace and, when surveyed separately, transgender employees report significantly higher rates of employment discrimination and harassment than lesbian, gay, and bisexual employees.⁴

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

² Gary Gates, *How many people are lesbian, gay, bisexual and transgender?* The Williams Institute (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. By way of comparison, as of 2010, the U.S. census reported the demographic breakdown of the U.S. population (308,715,538 people) by race and Hispanic origin is as follows:

- White 72.4%
- Black or African American 12.6%
- American Indian and Alaska Native 0.9%
- Asian 4.8%
- Native Hawaiian and Other Pacific Islander 0.2%
- Some Other Race 6.2%
- Hispanic or Latino 16.3%

Overview of Race and Hispanic Origin: 2010, <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (issued March 2011).

³ Jennifer C. Pizer, Brad Sears, Christy Mallory, Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715, 719 (2012).

⁴ Between 15% and 43% of lesbian, gay, bisexual, or transgender workers report being fired, denied promotions, or harassed, while 78% of transgender workers reported experiencing at least one form of harassment or mistreatment at work because of their gender identity. *Employment Discrimination Against LGBT Workers*, The Williams Institute, <http://williamsinstitute.law.ucla.edu/headlines/research-on-lgbt-workplace-protections>.

Despite a long way to go to achieve equality, the LGBT community has made significant progress in achieving acceptance over the last 20 years.⁵ However, notwithstanding the increased acceptance by the general population, less than half of the states have passed laws that protect LGBT individuals from discrimination,⁶ and there is currently no federal legislation prohibiting discrimination against individuals based on their LGBT status.

The Employment Non-Discrimination Act (ENDA)⁷ is a proposed federal law that would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity by civilian, non-religious employers with at least 15 employees. A version of ENDA has been introduced in every Congress since 1994, except the 109th Congress under George W. Bush. Similar legislation has been introduced without passage since 1974. Gender identity protections were initially added to the legislation for the first time in 2007.

FEDERAL LAWS PROTECTING LGBT EMPLOYEES

Although federal courts have consistently refused to extend Title VII to discrimination based on sexual orientation,⁸ they have extended Title VII in cases of pervasive same-sex sexual conduct⁹

⁵ *The Atlantic* recently reported that religious congregations across the country have significantly changed their views toward acceptance and support of the LGBT community over the last ten years. See *The Quiet Gay-Rights Revolution in America's Churches*, *The Atlantic* (August 14, 2013), <http://www.theatlantic.com/politics/archive/2013/08/the-quiet-gay-rights-revolution-in-americas-churches/278646/>. Indeed, Pope Francis was quoted in July of this year as saying, "If someone is gay and he searches for the Lord and has good will, who am I to judge?" The Pope's comment is thought to signal significant change in tone, if not policy with respect to the Catholic church's stance towards gays and lesbians. See *CNN Belief blog*, <http://religion.blogs.cnn.com/2013/07/29/pope-francis-on-gays-who-am-i-to-judge/comment-page-42/>. In 2012, President Obama announced that after considerable soul searching, he endorsed gay marriage. See *Washington Post*, *Obama endorses gay marriage, says same-sex couples should have right to wed*, http://articles.washingtonpost.com/2012-05-09/politics/35456733_1_gay-marriage-gay-rights-activists-president-obama.

⁶ Seventeen states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, Oregon, Rhode Island, Washington, Vermont) and the District of Columbia ban discrimination based on sexual orientation and gender identity/expression. Four states (Maryland, New Hampshire, New York, Wisconsin) ban discrimination based on sexual orientation.

⁷ See <http://www.govtrack.us/congress/bills/113/s815/text>. Although President Obama supports the bill's passage, according to *govtrack.us*, the proposed law only has a 14% chance of being enacted.

⁸ See, e.g., *Symonton v. Runyon*, 232 F3d 33, 36 (2000); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F3d 138, 143 (4th Cir.1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F2d 69, 70 (8th Cir1989) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F2d 327, 329-32 (9th Cir1979).

⁹ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 US 75 (1998) (drilling rig operator who was part of eight-person, all-male crew and subjected to sex-related, humiliating actions by three crew members, physically assaulted by two of them in a sexual manner, and threatened with rape, stated claim under Title VII); *Rene v. MGM Grand Hotel, Inc.*, 305 F3d 1061 (9th Cir 2002) (gay man who suffered "severe, pervasive, and unwelcome 'physical conduct of a sexual nature'" at the hands of same-sex co-workers stated a valid claim of sex discrimination under Title VII).

and sexual stereotyping; *i.e.*, when the discrimination is based on the individual's perceived failure to conform to socially-constructed gender expectations.¹⁰ In 2012, the Equal Employment Opportunity Commission (EEOC) formally announced its interpretation of Title VII as including discrimination based on gender identity in *Macy v. Holder*.¹¹

Macy was a transgender woman who, while still presenting as a man, applied for an open position with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). Macy was told the position would be employed as a civil contractor through an agency. Macy alleged in her EEO complaint to ATF that the Director of the crime lab had told her the job was hers, subject to a background check. However, ten days after Macy had the contracting agency notify the Director that she was in the process of transitioning from male to female, the ATF Director of Operations informed her that the position was no longer available due to budget cuts. Suspicious of that explanation, Macy contacted an EEO counselor, who told her that the position had not been cut; the ATF had hired someone else who was further along in the background investigation. Macy believed the ATF's purported reason was pretextual and filed a formal EEO complaint based on sex, gender identity (transgender woman), and sex stereotyping. The ATF acknowledged her complaint on the basis of "gender identity sex (female) stereotyping" but refused to consider her claim for gender identity (transgender woman) and on the basis of sex stereotyping as covered by Title VII. As a result, ATF said her complaint would be adjudicated under Department of Justice Policy, which provided fewer remedies. Dissatisfied with the ATF's response, Macy appealed to the EEOC.

The EEOC sided with Macy, clarifying that Title VII extends not only to discrimination based upon biological sex, but to gender identity, change of sex, and/or transgender status. An employer engages in gender discrimination if it treats an employee differently for failing to conform to any gender-based expectations or norms. Therefore, discrimination against a transgender person is sex discrimination because it is based on the person's failure to conform to socially-constructed gender expectations.¹²

¹⁰ See, e.g., *Price Waterhouse v. Hopkins*, 490 US 228, 104 Led 2d 268 (1989) (partners' statements that candidate for accounting partnership was "macho," "overcompensated for being a woman," and needed to take a course at charm school, criticism of her use of profanity "because it's a lady using foul language," and direction that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" established Title VII claim based on sexual stereotyping); *Schwenk v. Hartford*, 204 F3d 1187, 1201-1202 (9th Cir 2000) (relying on Court's interpretation of "gender" in *Price Waterhouse*, court reasoned that "gender-based animus" under Gender Motivated Violence Act, means a strong emotional response based on the victim's gender or sexual identity); *Sturchio v. Ridge*; 2004 US Distr LEXIS 27345, *4 (WD Wa 2004) (male to female transsexual who asserted that she was harassed because co-workers considered her a biological male and wanted her to act like one stated claim under Title VII).

¹¹ *Macy v. Holder*,
<http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

¹² *Id.*

OREGON LAWS PROTECTING LGBT EMPLOYEES

Oregon has a long history of laws prohibiting discrimination based on LGBT status.¹³ The current ORS Chapter 659A includes “sexual orientation” among the bases upon which it is unlawful for Oregon employers, labor organizations, and employment agencies to discriminate.¹⁴ The Oregon Equality Act, passed in 2007,¹⁵ bans discrimination based on sexual orientation in employment, housing, and public accommodations. The Act defines “sexual orientation” for the purpose of all Oregon statutes (unless the context otherwise indicates) as follows:

“Sexual orientation” means as “an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.”¹⁶

For the purpose of enforcing ORS Chapter 659A, the Oregon Bureau of Labor and Industries (BOLI) provides further clarification of the Oregon Equality Act in OAR 839-005-0003, which provides in relevant part:

(8) “Gender identity” means an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with the individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

(13) “Sex” means the anatomical, physiological and genetic characteristics associated with being male or female.

(14) “Sexual orientation” means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s assigned sex at birth.

Based on the foregoing definitions, Oregon’s laws prohibiting discrimination in employment based on sexual orientation also apply to gender identity and gender expression.

¹³ See *History of LGBT Rights Law*, <http://www.glapn.org/6007historyLGBTQrights.html>.

¹⁴ See ORS 659A.030.

¹⁵ See SB 2 (2007), <http://www.leg.state.or.us/07reg/measpdf/sb0001.dir/sb0002.intro.pdf> Oregon Revised Statutes (ORS) Chapter 659A prohibits discrimination in employment and mandates certain employment practices. The City of Portland and a number of other cities and counties in Oregon also prohibit discrimination on the basis of sexual orientation, gender identity, and/or gender expression. See, e.g., Portland Civil Rights Ordinance 23.01. Other local jurisdictions that have enacted non-discrimination laws include Beaverton, Bend, Benton County, Corvallis, Hillsboro, Lake Oswego, Lincoln City, Multnomah County, and Salem.

¹⁶ ORS 174.100(6).

Disability and Accommodation Issues

- *Is sexual orientation or gender identity a disability for the purpose of disability accommodation?*

Homosexuality and bisexuality are not disabilities for the purpose of the Americans with Disabilities Act (ADA).¹⁷ Under the ADA, transsexualism (not defined) is not a disability, nor is a gender identity disorder (not defined).¹⁸ However, a gender identity disorder resulting from a physical impairment is considered a disability under the ADA.¹⁹

Under Oregon disability law, homosexuality and bisexuality are not disabilities.²⁰ Oregon disability law does not treat transsexualism (not defined) as a disability *per se*, but prohibits discrimination on the basis of transsexualism.²¹ Employers are not, however, required to provide reasonable accommodation for transsexualism.²²

¹⁷ 42 USC 12211(a).

¹⁸ The *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition) (DSM-IV)* explained “gender identity disorder” as follows:

Gender Identity Disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one’s assigned sex. Gender identity refers to an individual’s self-perception as male or female. The term gender dysphoria denotes strong and persistent feelings of discomfort with one’s assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex. The terms gender identity and gender dysphoria should be distinguished from the term sexual orientation, which refers to erotic attraction to males, females, or both.

¹⁹ 42 USC §12211(b)(1).

²⁰ ORS 659A.130.

²¹ OAR 839-006-0205(8)(c). The *Diagnostic and Statistical Manual of Mental Disorders (Fifth Ed 2013) (DSM-5)* defines “transsexual” as “an individual who seeks, or has undergone, a social transition from male to female or female to male, which in many, but not all, cases also involves a somatic transition by cross-sex hormone treatment and genital surgery (sex reassignment surgery).” Outside the clinical context, the term is sometimes criticized as dated, imprecise, and/or offensive. A more current term in clinical use is “gender dysphoria.” See *Highlights of Changes from DSM-IV-TR to DSM-5*, <http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf> (released May 19, 2013) (“In the upcoming fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), people whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria. This diagnosis is a revision of DSM-IV’s criteria for gender identity disorder and is intended to better characterize the experiences of affected children, adolescents, and adults.”). The *DSM-5* explains:

Gender dysphoria refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available. The current term is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity *per se*.”

²² ORS 659A.118(2) (“Notwithstanding any other provision of ORS 659A.103 to 659A.145, an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails

➤ *What accommodation is required?*

Against the foregoing backdrop, it is not surprising that questions often arise with respect to providing reasonable accommodation to transgender employees. In a 1997 policy letter addressing a question from the Governor's office regarding the application of SB 44, Oregon's then, newly-enacted disability law to health insurance for transsexuals, former Labor Commissioner Jack Roberts stated that insurance is a discrimination issue, not a reasonable accommodation issue.²³ Commissioner Roberts stated that Oregon employers, therefore, may not discriminate against transsexuals in the provision of health insurance benefits. He further opined that the inclusion of transsexuals as protected under disability law afforded transsexuals greater protection than that available to homosexuals or bisexuals, while recognizing that accommodation of transsexuals was not necessary because the condition did not affect a person's ability to perform his or her job.

Where does this leave Oregon employers? For the purpose of disability law, the answer is unclear. However, the most common question questions arising in the accommodation context relate to bathrooms, dress code, and benefits, which are deemed working conditions and terms of employment, not accommodations, under Oregon law. Therefore, Commissioner Roberts' letter would appear to remain valid.

- Commissioner Roberts' letter states that insurance must be made available to transsexual employees on a non-discriminatory basis. The Oregon Equality Act's application to ORS Chapter 659A prohibits employers from discriminating in compensation, benefits, or other terms and conditions of employment on the basis of sexual orientation, which includes gender identity and gender expression.²⁴
- With respect to bathrooms, Oregon law requires that employers provide all persons access to restrooms consistent with their expressed gender, regardless of their biological gender.²⁵
- Employers may enforce otherwise valid dress codes as long as the employer reasonably accommodates individuals based on health and safety needs.²⁶

to provide reasonable accommodation to an individual with a disability arising out of transsexualism.”); *see also*, OAR 839-006-0205(8).

²³ 1997 letter from Jack Roberts to Pam Curtis regarding Application of SB 44 to Transsexuals.

²⁴ ORS 659A.030(1)(b) (making it unlawful “for an employer, because of an individual’s *** sex, sexual orientation, *** or because of the sex, sexual orientation of any other person with whom the individual associates, *** to discriminate against the individual in compensation or in terms, conditions or privileges of employment.”); ORS 174.100(6).

²⁵ OAR 839-005-0031(2).

²⁶ OAR 839-005-0031(1)(d).

Application of Oregon Equality Act to the Regulation of Insurance

In 2012, the Oregon Insurance Division issued Bulletin INS 2012-01 to provide guidance to insurers on the effect of the Oregon Equality Act on insurance transactions in Oregon when the transaction or activity relates to gender identity.²⁷ Oregon employers who provide group health benefits through an insured plan will want to make sure that the insurance policies provide coverage consistent with what the law requires. The Division issued the following principles:

Principle #1: An insurer may not discriminate on the basis of an insured's or prospective insured's actual or perceived gender identity, or on the basis that the insured or prospective insured is a transgender person.

In essence, this means that the insurer cannot deny, cancel, limit, revoke, refuse to renew or issue, or set premiums for a policy of insurance based on an individual's sexual orientation (as defined in the Oregon Equality Act). Nor may an insurer designate gender identity disorder (GI/GD) as a preexisting condition for which coverage will be denied or limited, or exclude from coverage all "Gender Identity Disorders."

Principle #2: A health insurer may not deny or limit coverage or deny a claim for a procedure provided for GI/GD if the same procedure is allowed in the treatment of another non-GI/GD-related condition.

This section precludes an insurer from denying coverage for any treatment solely because the treatment is related to gender reassignment or is treatment for GI/GD. If the treatment consists of a service provided for the treatment of other conditions or illnesses, such as hormone therapy, hysterectomy, mastectomy, or vocal training, and the treatment is deemed medically necessary, then the insurer cannot deny coverage because the treatment is for gender reassignment or treatment of GI/GD.

Principle #3: Although a health insurer may categorically exclude coverage for a particular condition or treatment, the insurer may not base such exclusion on gender identity.

For example, an insurer may exclude all cosmetic surgery, but cannot allow it in some instances while denying the same procedure as "cosmetic" in connection with GI/GD.

Principle #4: The mandated coverage for mental health services must include mental health counseling and treatment related to GI/GD.

The Division noted that this rule on its face conflicts with Oregon's Mental Health Parity law (MHP),²⁸ which went into effect on January 1, 2007. That law requires group health insurance policies to cover treatment of chemical dependency and mental/nervous conditions at the same level and with no more restrictions than those imposed for other medical conditions. However,

²⁷ Oregon Insurance Division Bulletin INS 2012-01, <http://www.cbs.state.or.us/ins/bulletins/bulletin2012-01.html>.

²⁸ See Q&A OREGON MENTAL HEALTH PARITY LAW FOR PROVIDERS, <http://www.cbs.state.or.us/ins/bulletins/bulletin2012-01.html>.

while the MHP covered gender identity disorder in children 18 or younger, it did not cover the condition in adults. Consequently, to the extent it excludes mental health treatment related to GI/GD for persons over the age of 18 solely on the basis of gender identity, the MHP's limitation on adult treatment for GI/GD is invalid and will not be enforced.

Principle #5: The perceived gender identity of a person should not prevent appropriate treatment.

This section is to clarify that when treatment is medically necessary, and the coverage is one that is provided under the policy. The fact that the coverage is specified for a particular gender (*e.g.*, pap smear, pelvic exam, or mammogram for women, prostate screening for men) will not preclude treatment for a person who is biologically identified as the sex identified in the statute, even if the person self-identifies as the opposite sex.

Principle #6: The Insurance Division expects insurers' forms to comply with the policy expressed in SB 2 as it is incorporated into insurance regulation with this bulletin.

This rule clarifies that, whether or not non-conforming insurance forms had been accepted in the past, the Division expects all new forms to comply and, in some instances, may require endorsement or revision of existing forms.

PRACTICAL EFFECT OF *WINDSOR* DECISION INVALIDATING DOMA § 3

In June 2013, the U.S. Supreme Court decided *U.S. v. Windsor*,²⁹ in which it struck down as unconstitutional § 3 of the federal Defense of Marriage Act (DOMA). Section 3 defined the terms "marriage" and "spouse" for purposes of all federal laws.³⁰ Under § 3, "marriage" meant a

²⁹ *U.S. v. Windsor*, 570 US ___, 133 S Ct 786 (2012); http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf. Windsor was the surviving spouse of a same-sex marriage under Canadian law. When Windsor was barred from claiming the estate tax exemption for surviving spouses, she paid her taxes and sued to have the court find Section 3 DOMA unconstitutional under the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment. Windsor sued in federal district court in New York. The Department of Justice notified Congress that it would no longer defend the constitutionality of § 3. In response to that notice, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the litigation to defend the constitutionality of § 3 of DOMA. By a 5-4 majority, the Supreme Court concluded that the injury and indignity imposed by § 3 of DOMA violates basic due process and equal protection principles applicable to the Federal Government under the Fifth Amendment. *Id.*, *Slip Op. at p. 20-21* ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States" *** "[A] bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.").

³⁰ Section 3 provides:

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 USC § 7.

The definitions in Section 3 controlled over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. *Windsor, slip op. at p. 2.*

legal union between one man and one woman as husband and wife, and the word “spouse” was limited to a person of the opposite sex who is a husband or a wife. As a result of the *Windsor* decision, those definitions no longer apply, meaning that federal law must recognize a valid same-sex marriage for the purpose of applying federal law. However, because § 2 of DOMA remains intact,³¹ states may refuse to recognize same-sex marriages performed in states or countries where such marriages are valid. The end result has the potential to be an enforcement nightmare for employers, particularly those with offices in multiple states.

The practical effect of DOMA on employers is with respect to employment taxes and benefits. Theoretically, if same-sex couples are treated the same as opposite-sex couples under federal law, then employees in same-sex marriages are subject to employment taxes and eligible for employment benefits on an equal footing with employees in opposite-sex marriages. While that sounds simple enough, many questions remain unanswered, such as the retroactivity of the *Windsor* ruling, and which state’s law applies for the purpose of determining whether the marriage is valid (*e.g.*, the state of celebration, the state of residence, the state of employment).

As of July 2013, 13 states and the District of Columbia allow same-sex marriage.³² Thirty states have constitutional amendments banning (or authorizing the legislature to ban) legal recognition of same-sex marriage.³³ What happens if same-sex marriage is considered valid in the state where the employee was married, but not in the state where the employee lives or works? Fortunately, the Treasury Department and the Department of Labor recently issued guidance on this issue, albeit conflicting.

Tax Treatment Under the Internal Revenue Code

The Treasury Department announced on August 29, 2013, that “same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. The ruling applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage.” The

³¹ Section 2 of DOMA, which was not challenged in *Windsor*, allows States to refuse to recognize same-sex marriages performed under the laws of other States. *See* 28 USC § 1738C.

³² Those states include California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. *See* Social Security Administration list of states permitting and recognizing same-sex marriage, <https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM>.

³³ *Id.* Of these states, nine (Alaska, Arizona, Colorado, Nevada, Mississippi, Montana, Missouri, Oregon, Tennessee) prohibit only same-sex marriage; eighteen (Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin) prohibit both same-sex marriage and civil unions; two states (Michigan, Virginia) make same-sex marriage, civil unions, and other contracts unconstitutional; one state (Hawaii) authorizes the legislature to limit marriage to opposite-sex couples. Two states (Nevada and Michigan) have rejected constitutional amendments banning same-sex marriage.

ruling does not apply to civil unions, registered domestic partnerships, and similar formal relationships recognized under state law.³⁴

Laws Subject to Regulation by the Department of Labor

In contrast, the Department of Labor announced that it will interpret “spouse” as meaning “a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides*, including ‘common law’ marriage and same-sex marriage [emphasis added].”³⁵ This means that an employee working for an employer in a state that does not recognize same-sex marriage may nevertheless be considered a spouse for the purpose of federal family medical leave, if the employee’s state of domicile recognizes the employee’s same-sex marriage. For the purpose of administering federal family medical leave (FMLA) and other federal benefits under the jurisdiction of the Department of Labor, employers will, therefore, need to verify the employee’s marital status in the employee’s state of residence, regardless of applicable law in the state where the employer is located. As a result, employees working in the same facility may not receive equivalent FMLA benefits.

³⁴ All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes, <http://www.treasury.gov/press-center/press-releases/Pages/j12153.aspx>. The IRS provided more detailed guidance in Revenue Ruling 2013-17, which provides in relevant part:

1. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex.
2. For Federal tax purposes, the Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.
3. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

The holdings of this ruling will be applied prospectively as of September 16, 2013, and may be relied upon retroactively for open years by taxpayers. See Revenue Ruling 2013-17, <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>. However, this application does not control potential participant claims for benefits under Employee Retirement Income Security Act (ERISA), Title I.

³⁵ Department of Labor, Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act, <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm>. See also, 29 CFR § 825.122 (Under FMLA, “spouse” means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides.). Since *Windsor* was decided, a federal district court in Ohio found that Ohio’s statute prohibiting the recognition of out-of-state same-sex marriages was a denial of equal protection because Ohio recognizes other out-of-state marriages in which the couple could not have married in Ohio (e.g., where the couple were first cousins or one spouse was underage). *Obergefell v. Kisch*, 2013 WL 8324262 (SD Ohio 2013).

Other Federal Agency Interpretations

Other federal agencies have announced other interpretations. The same day the Supreme Court issued its decision in *Windsor*, the Department of Defense stated its intent to make the same benefits available to all military spouses regardless of sexual orientation.³⁶ The Social Security Administration announced that it will pay benefits to same-sex spouses who otherwise qualify for benefits when the social security number holder (1) was married in a state that permits same-sex marriage, and (2) is domiciled at the time of application, or while the claim is pending a final determination, in a state that recognizes same-sex marriage.³⁷ The U.S. Citizenship and Immigration Service (USCIS) issued a statement that it intends “to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”³⁸

While the foregoing interpretations are all helpful in some respects, a number of significant questions remain open for many federal benefits purposes:

- Is the effect of DOMA retroactive and, if so, to what date?
- For the purpose of federal law and benefit plan terms, what jurisdiction’s law determines the validity of the marriage?
- Are spousal-equivalent relationships recognized?
- How should plan terms be interpreted when “spouse” is (1) not defined with reference to sex or any specific state’s laws, (2) with reference to DOMA, or (3) as opposite-sex only (per IRS rules, plans may have to provide some pension benefits pursuant to IRS Revenue Ruling 2013-17)?
- How do federal anti-discrimination laws apply (expansion of EEOC interpretation of Title VII creates some uncertainty regarding benefit discrimination)?

Application of DOMA Ruling to Oregon Employers

- *State law benefits*

In light of Oregon’s prohibition on discrimination based on LGBT status, the *Windsor* decision should not have much immediate effect on employment benefits in Oregon. Discrimination based on sexual orientation is and has been prohibited in Oregon one form or another for many years.³⁹ Oregon employers are required to recognize same-sex registered domestic partners for the purpose of vacation, sick leave, and state statutory benefits like the Oregon Family Leave Act

³⁶ *Statement by Secretary Hagel on DOMA Ruling*,
<http://www.defense.gov/releases/release.aspx?releaseid=16119>.

³⁷ If the number holder does not meet this criteria, the SSA intends to hold the application and wait for further guidance. See <https://secure.ssa.gov/apps10/public/refernce.nsf/links/08092013111040AM>.

³⁸ See Implementation of the Supreme Court Ruling on the Defense of Marriage Act,
<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=7801c2c9be44210VgnVCM100000082ca60aRCRD&vgnextoid=4579215c310af310VgnVCM100000082ca60aRCRD>.

³⁹ See footnote 13, *supra*.

(OFLA) and Family Military Leave. In addition, all insurance policies delivered in Oregon must treat same-sex registered domestic partners as spouses, even if such policies are part of a plan subject to ERISA. Employers who provide such benefits, therefore, will see few, if any, changes: same-sex registered domestic partner benefits that were considered W-2 income to employees pre-*Windsor* will still be subject to federal income tax, unless the employee was legally married in a state that recognizes same-sex marriage.

- ***ERISA benefits***

ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits. ERISA does not govern benefits such as bereavement leave, most vacation and sick leave, family medical leave, travel and education benefits, relocation expenses, merchandise discount, memberships, membership discounts, and other similar benefits. Nor does ERISA govern benefits provided by federal, state, and local governments, or by churches, although some courts have found that churches may elect ERISA coverage for their pension plans, and, in some cases, their welfare plans.

ERISA supersedes state laws that relate to employee benefit plans, with the exception of state laws that regulate banking, insurance, and securities.⁴⁰ As a result, state and local laws cannot directly require employers to provide benefits for same sex-spouses. ERISA also preempts state anti-discrimination laws, except to the extent state law is consistent with Title VII.⁴¹ Consequently, up to now, employers have been able to differentiate between same-sex and opposite-sex spouses under plans subject to ERISA.

As discussed above, Oregon employers who provide group health benefits through insured plans *must* provide coverage on equal footing to same-sex and opposite-sex spouses and registered domestic partners under the Oregon Equality Act. With respect to ERISA plan benefits that are not subject to indirect regulation by the state, employees and their same-sex spouses will be eligible for benefits on equal footing with opposite-sex spouses under *Windsor*, in accordance with Revenue Ruling 2013-17. This includes benefits under Flexible Spending Accounts, Health Savings Accounts, Health Reimbursement Arrangements, and pension and retirement plans, including rollover and survivor benefits.

At least one court has already found that *Windsor* requires equal treatment of all legally married couples for the purpose of pension plan benefits subject to ERISA. Based on this conclusion, the court held that the surviving spouse of a valid same-sex marriage was entitled to be treated as the surviving spouse under the plan. The court found that ERISA pre-empted the plan's designation of Pennsylvania law, which did not recognize same-sex marriage.⁴²

⁴⁰ 29 USC § 1144.

⁴¹ *Shaw v. Delta Air Lines, Inc.*, 463 US 85, 97 (1983) (pre-Pregnancy Discrimination Act case holding that New York Human Rights law pregnancy discrimination provision preempted as to ERISA plans).

⁴² *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (ED Pa 2013).

Under COBRA, qualified beneficiaries are eligible for continuation coverage.⁴³ The term “qualified beneficiary” includes a spouse.⁴⁴ However, a spouse will not be eligible for benefits unless the employee was enrolled in the plan prior to the qualifying event that triggers coverage.

Those employers who have been differentiating between same-sex and opposite sex spouses under their ERISA plans based on DOMA may want to rethink that position in light of the EEOC’s expansive reading of Title VII. A plan limitation on spousal benefits to opposite-sex spouses may be subject to challenge based on the theory that the plan definitions reflect inherent sexual stereotyping of marriage roles. One step that all employers should take following *Windsor* is to review and update their benefit plan definitions of marriage and spouse, as well as their employment records, to insure they have current information on employee marital status for all tax and benefits purposes.

- ***FMLA Coverage***

For the purpose of FMLA, Oregon employers will need to determine whether married employees with same-sex spouses are domiciled in a state that recognizes same-sex marriage (*e.g.*, Washington). Ironically, those employees who now qualify for FMLA may be eligible for less time off than what was available pre-*Windsor* because their FMLA leave for a spouse’s serious health condition will now run concurrently with any available OFLA leave, whereas before *Windsor*, it did not.

UPDATING WORKPLACE POLICIES TO ADDRESS GENDER IDENTITY

Addressing Sexual Orientation, Gender Identity, and Gender Expression in Employment Policies

There are no laws mandating inclusion of sexual orientation, gender identity, or gender expression in any handbook policies or procedures. That said, employees in general may be unaware of the legal protections and benefits the law affords to LGBT employees unless employers make that information known.

- ***General Definitions***

Employers may want to include in their handbook a general definition of “spouse” for the purpose of the employer’s handbook and benefit plans, unless the employer differentiates based on the particular plan or policy. Under the Oregon law, employers may not distinguish between opposite-sex spouses, same-sex spouses, and registered domestic partners for the purpose of any non-ERISA benefits or insured group health plans. For the purpose of ERISA benefit plans, employers do not have to extend benefits to employees based in same-sex relationships other than marriage (registered domestic partnerships, civil unions, etc.). Employers, nevertheless, may elect to extend benefits to employees in any type of domestic partnership, whether same-sex or opposite sex, formalized or not.

⁴³ 29 USC §§1161-67.

⁴⁴ 29 USC § 1167(3).

- ***EEO and Harassment Policies***

Although no specific policy language is required under federal or Oregon law, it is a good idea for employers to include in their EEO, discrimination, and harassment policies language that addresses the protection of LGBT status. Without explicit policy statements and/or training, employees may not know that discrimination on the basis of an employee's LGBT status is prohibited, and such conduct is unlawful. Moreover, the failure to have a written policy prohibiting such discrimination could be perceived as a negative in any litigation involving employment related claims such as discrimination, harassment, negligent supervision, or intentional infliction of emotional distress.

- ***Dress Codes***

Dress codes often specify dress appropriate attire for men and women. Such policies may be modified to allow transgender employees to choose gender specific requirements consistent with their gender expression, and provide for flexibility to work with employees who do not fit into either category.

- ***Use of Facilities***

While most employers do not have written policies addressed to use of the restrooms, they may want to address the issue in a formal policy to make sure employees can safely use the restrooms and showers based on their expressed gender. Options include providing single-seat, unisex restrooms (with appropriate signage), multiple-stall restrooms with walls that continue to the floor, and showers with privacy screens that lock. If such options are not possible, policies should make clear that employees are entitled to use restrooms that are consistent with their expressed gender, even if that does not match their gender as perceived by others.

- ***Transitioning Employees***

Gender transitions can be disruptive in the workplace. Transitioning employees are not obligated to advise employers that they intend to or are in the process of transition. Having a transition policy may encourage transitioning employees to work with the employer to develop a transition plan that will facilitate a smoother transition for all employees. The policy can address such issues as development of a transition plan, communication with co-workers, changing name and gender pronoun, updating work records and benefits, access to facilities, prohibition on discrimination, and insuring the individual is treated with dignity.

- ***Work Records***

Employers who verify social security numbers may wish to conduct the verification without gender data, which is optional.⁴⁵ Otherwise, transgender workers who have different gender markers in employer records than what the Social Security Administration (SSA) has in their database can be the result in a no-match letter from SSA, which can "out" an employee's otherwise undisclosed transgender status. When employees transition during employment, work

⁴⁵ See, *Social Security Gender No-Match Letters and Transgender Employees*, National Center for Transgender Employees, <http://transequality.org/Issues/nomatch.html>.

records should be changed to show the employee's new name and gender once the employee has begun working full-time in the gender role consistent with the employee's gender identity.

- *Use of Name and Gender Pronouns*

Some transgender employees (whether or not they have transitioned) may identify a preferred gender pronoun that is neutral or specific to their gender identity or expression. Employers and employees should honor such requests. The failure to acknowledge an employee's new name and appropriate pronouns may be used as evidence of discrimination.

APPENDIX

LAWS AFFECTING LGBT EMPLOYMENT IN OREGON

THE OREGON FAMILY FAIRNESS ACT, ORS 106.300 to 106.340 [2007 c.99 §1] (places same-sex couples in registered domestic partnership on same legal footing as opposite-sex spouses for the purpose of all Oregon laws).

THE OREGON EQUALITY ACT, SB 2 (2007) (amended specified Oregon laws to prohibit discrimination based on sexual orientation. Defines “sexual orientation” for the purpose of all Oregon laws).

ORS 174.100 Definitions. As used in the statute laws of this state, unless the context or a specially applicable definition requires otherwise:

(6) “**Sexual orientation**” means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

OREGON EMPLOYMENT LAWS

ORS 659A.006 Declaration of policy against unlawful discrimination; opportunity to obtain employment without unlawful discrimination recognized as a civil right; exception of religious group. (1) It is declared to be the public policy of Oregon that practices of unlawful discrimination against any of its inhabitants because of race, color, religion, sex, **sexual orientation**, national origin, marital status, age, disability or familial status are a matter of state concern and that this discrimination not only threatens the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

(5) It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation:

(a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff;

(b) In employment positions in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift store, nonprofit religious bookstore, nonprofit religious radio station or nonprofit religious shelter; or

(c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

ORS 659A.030 Discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status or age prohibited. (1) It is an unlawful employment practice:

(a) For an employer, because of an individual's race, color, religion, sex, **sexual orientation**, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, **sexual orientation**, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to refuse to hire or employ the individual or to bar or discharge the individual from employment. However, discrimination is not an unlawful employment practice if the discrimination results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

(b) For an employer, because of an individual's race, color, religion, sex, **sexual orientation**, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, **sexual orientation**, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to discriminate against the individual in compensation or in terms, conditions or privileges of employment.

(c) For a labor organization, because of an individual's race, color, religion, sex, **sexual orientation**, national origin, marital status or age if the individual is 18 years of age or older, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to exclude or to expel from its membership the individual or to discriminate in any way against the individual or any other person.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment that expresses directly or indirectly any limitation, specification or discrimination as to an individual's race, color, religion, sex, **sexual orientation**, national origin, marital status or age if the individual is 18 years of age or older, or on the basis of an expunged juvenile record, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification. Identification of prospective employees according to race, color, religion, sex, **sexual orientation**, national origin, marital status or age does not violate this section unless the Commissioner of the Bureau of Labor and Industries, after a hearing conducted pursuant to ORS 659A.805, determines that the designation expresses an intent to limit, specify or discriminate on the basis of race, color, religion, sex, **sexual orientation**, national origin, marital status or age.

(e) For an employment agency, because of an individual's race, color, religion, sex, **sexual orientation**, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, **sexual orientation**, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to classify or refer for employment, or to fail or refuse to refer for employment, or otherwise to discriminate against the individual. However, it is not an unlawful employment practice for an employment agency to classify or refer for employment an individual when the classification or referral results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

(f) For any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.

(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

ORS 659A.118 Reasonable accommodation.

(2) Notwithstanding any other provision of ORS 659A.103 to 659A.145, an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to an individual with a disability arising out of transsexualism.

ORS 659A.130 Conditions that do not constitute impairment. (1) For the purposes of ORS 659A.112 to 659A.139, homosexuality and bisexuality are not physical or mental impairments. An individual who is homosexual or bisexual does not have a disability for the purposes of ORS 659A.112 to 659A.139 solely by reason of being homosexual or bisexual.

(2) For the purposes of ORS 659A.112 to 659A.139, the following conditions are not physical or mental impairments, and an individual with one or more of the following conditions does not have a disability for the purposes of ORS 659A.112 to 659A.139 solely by reason of that condition:

(a) Transvestism, pedophilia, exhibitionism, voyeurism, or other sexual behavior disorders.

OAR 839-006-0205

OAR 839-005-0003

Definitions

As used in enforcing ORS Chapter 659A, including housing discrimination under ORS 659A.145 or 659A.421 or federal housing law:

(7) “Gender expression” means the manner in which an individual’s gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that expression is different from that traditionally associated with the individual’s assigned sex at birth.

(8) “Gender identity” means an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with the individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

(13) “Sex” means the anatomical, physiological and genetic characteristics associated with being male or female.

(14) “**Sexual orientation**” means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s assigned sex at birth.

OAR 839-005-0031

Exceptions to Discrimination Based on Sexual Orientation

(1) The following actions are not unlawful practices under ORS chapter 659A, including housing discrimination under ORS 659A.145 or 659A.421 or federal housing law:

(a) Housing and the use of facilities. It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing or the use of facilities when:

(A) The action taken is based on a bona fide religious belief about **sexual orientation**; and

(B) The housing or the use of facilities involved is closely connected with or related to the primary purpose of the church or institution; and

(c) The housing or the use of facilities involved is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(b) Employment Preference. It is not an unlawful employment practice for a bona fide church or other religious institution, including but not limited to a school, hospital or church camp, to prefer an employee, or an applicant for employment, of one religious sect or persuasion over another if:

(A) The employee or applicant belongs to the same religious sect or persuasion as the church or institution; and

(B) In the opinion of the church or institution, the preference will best serve the purposes of the church or institution; and

(C) The employment involved is closely connected with or related to the primary purposes of the church or institution; and

(D) The employment involved is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(c) Employment Actions. It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about **sexual orientation** when:

(A) The employment position involved is directly related to the operation of the church or other place of worship, such as clergy, religious instructors and support staff;

(B) The employment position involved is in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift store, nonprofit religious bookstore, non-profit religious radio station or nonprofit religious shelter; or

(C) The employment position involves religious activities, as long as the employment position:

(i) Is closely connected with or related to the primary purpose of the church or institution; and

(ii) Is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(d) Dress Code. An employer is not prohibited from enforcing an otherwise valid dress code or policy, as long as the employer provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual.

(2) The above exceptions do not excuse a failure to provide reasonable and appropriate accommodations permitting all persons access to restrooms consistent with their expressed gender.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS Ch 659A

Hist.: BLI 35-2007, f. 12-27-07 cert. ef. 1-1-08; BLI 7-2008(Temp), f. 3-20-08, cert. ef. 3-25-08 thru 9-21-08; Administrative correction 10-21-08; BLI 40-2008(Temp), f. 11-10-08, cert. ef. 11-12-08 thru 5-1-09; BLI 43-2008, f. 12-3-08, cert. ef. 12-5-08; Renumbered from 839-005-0016, BLI 7-2010, f. & cert. ef. 2-24-10; BLI 8-2011, f. 10-13-11, cert. ef. 10-14-11

839-006-0205 Definitions

(8) An employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to an employee or applicant with a disability arising out of transsexualism. However, an employer may not:

- (a) Refuse to hire an applicant or promote an employee;
- (b) Bar or discharge an employee or applicant from employment; or
- (c) Discriminate in compensation, terms, conditions or privileges of employment because an employee or applicant is transsexual when the employee or applicant is otherwise qualified.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103 - 659A.142

Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 4-2007, f. 1-29-07, cert. ef. 2-1-07; BLI 8-2010, f. & cert. ef. 2-24-10

FEDERAL EMPLOYMENT LAWS

Title VII

Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status, <http://www.eeoc.gov/federal/otherprotections.cfm>.

The EEOC has held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and, therefore, is covered under Title VII of the Civil Rights Act of 1964. *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>. The Commission has also found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII. *See Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011), <http://www.eeoc.gov/decisions/0520110649.txt>.

Americans with Disabilities Act

Sec. 12211. Definitions

(a) Homosexuality and bisexuality

(1) For purposes of the definition of “disability” in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term “disability” shall not include:

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.

RESOURCES

Basic Rights Oregon, <http://www.basicrights.org/>

Know Your Rights: Gender Identity, Gender Expression & Trans Oregonians' Rights,
<http://www.basicrights.org/wp-content/uploads/2011/09/Know-Your-Rights-2011.pdf>

Human Rights Campaign, <http://www.hrc.org/>

Transgender Law and Policy Institute, <http://www.transgenderlaw.org/index.htm>

American Civil Liberties Union (ACLU), <https://www.aclu.org/translaw>

Tips for Trans Allies, <http://lgbcenter.ucdavis.edu/lgbt---education/trans---ally---tips> and
<http://web.mit.edu/trans/tipsfortransallies.pdf>.

Transgender People and the Law: Frequently Asked Questions,
https://www.aclu.org/files/assets/lgbttransbrochure_2013_0.pdf

US Office of Personnel Management, <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>

Transgender Restroom Signs, <http://www.justbathroomsigns.com/transgender-signs>