

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

### Supreme Court bars discrimination against LGBT workers

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against individuals because of their sex. In a landmark ruling this week, the Supreme Court held that Title VII protections against sex discrimination encompass workplace discrimination on the basis of sexual orientation and gender identity.

Volume 43

Issue 34

June 17, 2020

#### Authors

Nancy Vary, JD

Laurie S. DuChateau, JD

#### Background

Last year, the Supreme Court agreed to consider whether Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on lesbian, gay, bisexual and transgender (LGBT) status — an issue on which federal appellate courts have disagreed. To resolve the circuit split, the court consolidated three appeals cases: two addressed employment protections based on sexual orientation (*Bostock v. Clayton County, Georgia* and *Altitude Express, Inc. v. Zarda*), and one addressed protections based on gender identity (*R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*). In each of the cases, a long-term employee was fired shortly after revealing their sexual orientation or gender identity. Each employee brought suit for sex discrimination under Title VII. Oral arguments were heard by the Supreme Court on October 8, 2019.

#### *Bostock v. Clayton County*

On June 15, 2020, the Supreme Court ruled that an employer who fires a worker merely for being gay or transgender violates Title VII. In a 6-3 decision, the Court held that discrimination based on sexual orientation or transgender status constitutes a form of discrimination “because of ... sex” prohibited by Title VII — even if Congress may not have had that in mind at the time the law was written.

#### Majority opinion

Writing for the Court, Justice Neil Gorsuch said, “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a

person for being homosexual or transgender without discriminating against that individual based on sex.”

While Title VII bars discrimination on the basis of sex, it doesn’t explicitly mention sexual orientation or gender identity. Acknowledging that even if the drafters of Title VII “might not have anticipated their work would lead to this particular result,” the majority concluded that the statutory language was clear. Relying on prior Supreme Court decisions, including those finding that sexual harassment was a form of sex discrimination, Justice Gorsuch wrote that “homosexuality and transgender status are inextricably bound up with sex.”

Clarifying the legal test for proving workplace bias, the majority held that liability attaches as long as the individual applicant’s sex is a factor in the employer’s decision — even if it is not the primary factor. Thus, if an employee would not have been fired or suffered some other adverse employment action except for their employer’s bias, Title VII’s “but-for” causation standard is met. Recognizing that employment actions often have multiple causes, the majority explained, “For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”

The Court emphasized that it was not addressing some of the broader concerns that the employers in these cases had raised in the context of Title VII, including workplace issues like bathrooms, locker rooms and dress codes as well as the protection of religious liberties. The majority stressed that those issues were not before the Court and “are questions for future cases.” Its ruling in *Bostock* only says that an “employer who fires an individual merely for being gay or transgender defies the law.”

### In dissent

In a dissenting opinion with Justice Clarence Thomas, Justice Samuel Alito wrote that the question before that Court is “not whether discrimination because of sexual orientation or gender identity should be outlawed,” but rather “whether Congress did that in 1964.” Concluding that it did not, Justice Alito stressed that there “is only one word for what the Court has done today: legislation.” He cautioned that the majority’s rationale may have “far-reaching consequences” in such areas as women’s sports, housing, employment by religious organizations, healthcare, and freedom of speech.

### Potential impact on ACA’s nondiscrimination protections

Section 1557 of the Affordable Care Act (ACA) prohibits certain health care providers, health benefit plans, and health insurers from discriminating against individuals on the basis of race, color, national origin, sex, age and disability. 2016 regulations defined sex discrimination as encompassing discrimination on the basis of gender identity. Last Friday, the Centers for Medicare & Medicaid Services finalized new Section 1557 regulations. Among other things, these new rules no longer define sex discrimination to include gender identity and sex stereotyping or require certain health plans and insurers to cover gender reassignment surgery. The *Bostock* ruling may strengthen legal challenges to these changes.

Writing separately, Justice Brett Kavanaugh acknowledged “the important victory achieved today by gay and lesbian Americans” but, like Justice Alito, asserted that “the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.”

## In closing

While many state and local laws already prohibit employment discrimination on the basis of sexual orientation and gender identity, a majority have no such prohibitions. The *Bostock* decision expands the definition of sex to include sexual orientation and gender identity, extending broad workplace protections to LGBT employees across the country. In light of that, employers should review their existing handbooks, policies and practices to ensure that they contain appropriate protections for LGBT workers and update any anti-harassment, anti-discrimination and other training materials as necessary.

### **Produced by the Compliance Consulting Practice**

The Compliance Consulting Practice is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.