Fine Print

A Quarterly Publication of The Ohio State Bar Association and Our Members

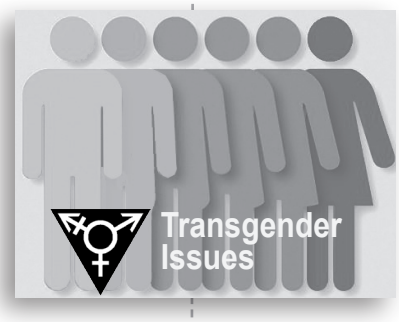
Issue 66 • Winter 2016

Employers Must Address Transgender Workplace Issues

By Pat Peters, Esq.

Workplace transgender issues commonly involve restroom and dress code policies, as well as claims of discrimination or a hostile work environment.

In 2012, the Equal Employment Opportunities Commission (EEOC) held in *Macy v. Holder* that transgender discrimination violates Title VII because it is discrimination "based on sex." The EEOC will continue to prioritize LGBTIQ (Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer/Questioning) discrimination under Title VII in its Strategic Enforcement Plan in 2016.



The EEOC has also ramped up its enforcement of such claims. In *EEOC v. Lakeland Eye Clinic*, a male employee began wearing makeup and feminine attire to work. The transitioning employee was subjected to derogatory comments, and co-workers stopped referring clients to her. Lakeland Eye Clinic terminated the employee two months later, stating that the position was being eliminated. However, the employee was replaced by a male. The case settled for $150,000.

In another case, *EEOC v. RG & GR Harris Funeral Homes*, the employee claimed she experienced discrimination because she was a transitioning male-to-female and/or because she did not conform to the employer's gender-based stereotypes. The court denied the employer's motion to dismiss, finding that, "even though transgendered/transsexual status is currently not a protected class under Title VII, Title VII nevertheless protects transsexuals from discrimination for failing to act in accordance and/or identity with their perceived sex or gender."

(Note: Title VII has been used to protect individuals against sex discrimination based on gender stereotyping since the 1989 U.S. Supreme Court decision in *Price Waterhouse v. Hopkins*. Since that time, courts have held that transgendered/transsexual employees, by definition, are individuals who fail to conform to traditional gender stereotypes. See *Smith v. Salem, Ohio (6th Cir. 2004)*.

One difficult decision employers will face when working with transitioning employees is deciding which restroom they will use during the transition, and management will likely receive complaints from other employees who also use these facilities. In June 2015, the Occupational Safety and Health Administration (OSHA) published its "Best Practices: A Guide to Restroom Access for Transgender Workers." Under OSHA's Sanitation Standard, employers must "allow employees prompt access to sanitary facilities." The guidance advises employers to grant employees

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What "International Law" Is Most Likely to Affect My Business?

By Paul Allaer, Esq.

Q: *What is "international law"?*
A: The only true "international laws" (laws that apply across national boundaries) are treaties negotiated and ratified by the governments of the participating nations.

Q: *What are some examples of multilateral treaties?*
A: The U.S. has ratified a number of multilateral treaties that are currently in force, including: the 1980 United Nations Convention on the International Sale of Goods (known as the "Vienna Sales Convention"); the 1958 New York Convention on Enforcement of Foreign Arbitral Awards; and the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.

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access to "restrooms that correspond to their gender identity." The American Psychological Association defines "gender identity" as a person's innate, internal sense of his or her gender. As an alternative, OSHA encourages employers to provide alternative, single occupancy or gender-neutral restrooms in addition to traditional "Men" and "Women" restrooms.

Several pending cases involve claims of sex discrimination based on an alleged unlawful refusal to allow a transitioning male-to-female employee to use the women's restroom. While the EEOC maintains that such conduct violates Title VII, the federal courts will likely rule on this issue in 2016.

While transgender/transsexual employees are not yet identified as a protected class under Title VII, this category of discrimination will likely broaden in 2016. Employers should reevaluate their policies for dealing with these hot-button issues, and be prepared to adapt to rapid changes to the law in this area.

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Q: *Which multilateral treaty is most likely to affect my business?*
A: The Vienna Sales Convention is most likely to directly affect Ohio businesses, both small and large. It applies automatically in certain international sales transactions, unless parties opt out. It also applies to contracts for the sale of goods between parties whose places of business are in different countries, if both countries have adopted and ratified it. Notably, the Vienna Sales Convention does not apply to contracts for the sale of services.

Most of the biggest international markets for Ohio companies have ratified the Vienna Sales Convention...

Q: *Which countries have ratified the Vienna Sales Convention?*
A: Most of the biggest international markets for Ohio companies have ratified the Vienna Sales Convention, including Brazil, a growing export market for Ohio businesses. However, India and the United Kingdom have not yet ratified the Vienna Sales Convention.

Q: *How does the Vienna Sales Convention differ from the Uniform Commercial Code (UCC)?*
A: Contracts under the Vienna Sales Convention:

- need not be in writing (UCC contracts over $500 must be in writing);
- require a "mirror image acceptance," meaning that the acceptance must exactly match the offer (not required under the UCC);
- do not follow the default U.S. "mailbox" rule, which specifies that an acceptance is considered effective at the time it is mailed;
- allow buyers only two years to claim that delivered goods do not match the contract, unless an express guarantee provides otherwise (the UCC allows four years).

Q: *How does the Vienna Sales Convention work in practice?*
A: An Ohio business sells products to its distributor in Germany. Because both the U.S. and Germany have ratified the Vienna Sales Convention, it will automatically apply to this particular sales transaction, unless the parties have specifically and expressly decided to opt out of the Vienna Sales Convention. The Ohio business may prefer that Ohio law apply, rather than the Vienna Sales Convention for this particular transaction, but such evaluation should be made on a country-by-country basis. For example, when making a sale to a distributor or customer located in, say, Kyrgyzstan or Uganda, it may be preferable to have the Vienna Sales Convention apply.

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What Small Business Should Know:

IRS Raises Tangible Property Expensing Threshold to $2,500

The Internal Revenue Service has simplified the small business recordkeeping requirements for by raising from $500 to $2,500 the safe harbor threshold for deducting certain capital items.

The change affects businesses that do not maintain an audited financial statement. It applies to amounts spent to acquire, produce or improve tangible property that would normally qualify as a capital item.

Because the new $2,500 threshold applies to any such item substantiated by an invoice, small businesses will be able to immediately deduct many expenditures that would otherwise need to be spread over a period of years through annual depreciation deductions.

Businesses can still claim otherwise deductible repair and maintenance costs, even if they exceed the $2,500 threshold.

The new $2,500 threshold takes effect starting with tax year 2016. The IRS also will provide audit protection to eligible businesses by not challenging use of the new $2,500 threshold in tax years before 2016.

For taxpayers with an applicable financial statement, the de minimis or small-dollar threshold remains $5,000.

Information provided by the Internal Revenue Service.