

CHECKLIST: LGBTQ ANTI-BIAS AND TITLE VII COMPLIANCE

A landmark decision by the U.S. Supreme Court on June 15, 2020, held that an employer that “fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.” In light of this ruling, employers that do not already prohibit discrimination based on sexual orientation and gender identity will need to update their policies immediately. The ruling prohibits employers from making adverse employment decisions, such as firing or refusing to hire an individual because they are gay or transgender. It does not address “bathrooms, locker rooms, or anything else of the kind,” so more litigation invoking Title VII protections based on sex is expected. Employers will be wise to prepare for and make changes to policies and practices that could find them on the wrong side of the law.

UPDATE

Include “sexual orientation and gender identity or expression” as a protected class, or include them in the definition of “sex” in:

- The employee handbook**—such as in equal opportunity and anti-harassment statements, or anywhere prohibitions against discrimination based upon sex appear.
- Policies**—such as **nondiscrimination and anti-harassment**, and **dress code** and grooming policies that are not already gender-neutral.
- Employee training**—any diversity, equal opportunity or workplace conduct training such as anti-harassment or bullying and anti-discrimination.

REVIEW

Review additional policies and practices that may discriminate against sexual orientation and gender identity or expression, such as:

- Benefits**—any benefit that discriminates against employees based on these categories that is not already prohibited may soon be unlawful. For example, the recent Health and Human Services **final rule** rescinding health care protections based on gender identity, while based upon Title IX definitions of the Civil Rights Act, may be reversed once again.
- Hiring practices**—background checks and reference checks may necessitate applicants divulge prior names that will expose them to potential employers as transgender. Ensure this information is kept confidential and not used against applicants.
- Workplace rules**—any rules based on gender, such as bathroom use, may need to be revised to allow for gender-neutral or gender identity-based practices.
- Internal communications**—eliminate wording that assumes traditional gender roles and heterosexual relationships and families as the norm.

INVEST

Investing in practices to ensure equality in the workplace may not only keep an employer out of court but can positively impact the bottom line.

- Support diversity and inclusion initiatives** that not only reduce bias but create a safe place for LGBTQ individuals to be their authentic selves and do their best work.
- Educate all employees** about what gender identity and expression means and how this population has experienced discrimination.
- Prepare for disruptions** based on opposing views (often religious-based) by underlining that workplace equality has no expectation of changing an individual’s mind or beliefs but does have an unequivocal expectation of inclusion and respect at work.
- Track both successes and areas for improvement** through meaningful metrics such as employee surveys, exit interviews, employee grievances and discrimination claims.