



On December 18, 2014, Attorney General Eric Holder announced a significant shift in the Department of Justice's position on the scope of federal civil rights protections when the DOJ issued a memo stating that it will now take the position in litigation that Title VII of the Civil Rights Act of 1964 extends to claims of discrimination based on an individual's gender identity, including transgender status. While the Attorney General's memo simply serves as guidance to the departments within the DOJ (such as the EEOC), it is significant because it reverses the DOJ's previous position and reflects a shift that is taking place across the country.

Title VII makes it unlawful for employers to discriminate in employment of an individual "because of such individual's...sex," among other protected characteristics. The Attorney General's memo means that the DOJ will no longer take the position in litigation that Title VII's prohibition against sex discrimination excludes discrimination based on gender identity per se, including transgender discrimination. The DOJ's position is in line with the President's July 2014 Executive Order and related rules issued by the OFCCP earlier this month protecting employees of federal contractors from discrimination based on their sexual orientation or gender identity.

In addition, 18 states, the District of Columbia, and many local municipalities provide for such workplace anti-discrimination protections. Several federal courts have also held that Title VII may protect employees against sex discrimination based on sex stereotyping.

This is also consistent with recent enforcement activity by the EEOC. Since at least 2012, the EEOC has taken the position that Title VII's prohibition on sex discrimination means both biological differences and gender, which includes "cultural and social aspects associated with masculinity and femininity." In a 2012 case, the EEOC held that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition." In September 2014, the EEOC brought two lawsuits against private employers alleging that they had discriminated against transgender employees on the basis of sex.

As employers review their employment policies for 2015, they should consider the implications of these developments and whether revisions to equal employment opportunity and other policies are necessary.



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