

## New PA. Guidance Interprets Anti-Discrimination Law to Cover LGBT Individuals



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In a significant development for Pennsylvania employers, the Pennsylvania Human Relations Commission (PHRC) has issued new guidance announcing that it takes the position that employment discrimination based on LGBT status is prohibited by the Pennsylvania Human Relations Act (PHRA).

Public support for LGBT rights has risen dramatically in recent years,<sup>1</sup> but laws protecting LGBT individuals have lagged behind public opinion. Only 21 states have laws that prohibit private sector employment discrimination based on sexual orientation and gender identity.<sup>2</sup> Pennsylvania is not one of those states.

The PHRA prohibits employers from discriminating against employees or applicants for employment on the basis of certain protected traits, including sex. The Act also prohibits

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discrimination in public accommodations, housing and commercial property. The Act does not explicitly prohibit discrimination based on LGBT status, and no Pennsylvania reported case has held that the PHRA prohibits discrimination based on LGBT status. The Pennsylvania legislature has considered and rejected bills that would have explicitly protected LGBT status under the PHRA.

The PHRC, however, recently released new guidance (available at <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>) expanding the definition of the term “sex” under the Act to include LGBT status. The PHRC is an agency of the executive branch of the Pennsylvania government under the direction of Governor Tom Wolf. The new PHRC guidance broadens the definition of “sex” under the Act to include “sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and/or gender expression depending on the individual facts of the case.” As a result, the PHRC now takes the position that the Act prohibits “discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.” The guidance announces that the PHRC will accept sex discrimination complaints from individuals alleging discrimination based on their LGBT status, and employers will be forced to defend those complaints.

The PHRC’s issuance of guidance is similar to the approach taken by the U.S. Equal Employment Opportunity Commission (EEOC) with respect to the same issue under the federal nondiscrimination law, Title VII of the Civil Rights Act of 1964. Title VII does not explicitly prohibit LGBT status discrimination. Since Title VII was enacted over 50 years ago, federal courts have frequently concluded that Title VII *does not* protect employees from discrimination based on LGBT status.<sup>3</sup> Bills introduced in Congress to amend Title VII to specifically include LGBT status in the definition of “sex” have failed to pass.

The Obama-era EEOC, however, issued numerous decisions and guidance stating that a claim of discrimination based on sexual orientation is a form of discrimination on the basis of sex under Title VII.<sup>4</sup> The U.S. Courts of Appeals for the Second, Sixth and Seventh Circuits have agreed with the EEOC and held that Title VII prohibits LGBT status discrimination, but other federal courts have disagreed.<sup>5</sup> The U.S. Supreme Court will likely make the ultimate determination on the issue.

It is likely that some Pennsylvania employers will challenge the PHRC’s new interpretation expanding the definition of “sex” under the Act. Perhaps anticipating one type of chal-

lence, the PHRC notes that employers “are free to avail themselves of the protections found within [Pennsylvania’s] Religious Freedom Protection Act” (RFPA) if they believe that enforcement of the PHRC’s guidance against them will violate their free exercise of religion. The guidance devotes nearly two of its six pages to describing how to challenge a PHRC action under the RFPA.

Pennsylvania employers should consider taking the following steps to prepare for the PHRC’s enforcement of its interpretation of discrimination based on sex:

- revise nondiscrimination and equal employment opportunity policies and practices to ensure that sexual orientation, transgender identity, gender transition, gender identity and gender expression are included as protected classes
- conduct nondiscrimination training and anti-harassment training for employees and supervisors that covers discrimination and harassment based on LGBT status
- be cognizant of whether a reduction in force or particular employment policy may have an adverse impact on LGBT individuals
- accommodate employees in the process of a gender transition
- respect the gender pronouns preferred by an individual employee
- remain just as vigilant about inappropriate behaviors targeted at an individual’s sexual orientation, transgender identity, gender transitioning status, gender identity and gender expression as the employer would be for sex, race, age, disability and other protected traits
- consult legal counsel if considering a challenge to the guidance’s applicability to a particular employer or factual scenario.

We will continue to monitor this new development, including any litigation challenging the application of the PHRC’s interpretation of “sex.”

## Endnotes

- 1 See, e.g., Hannah Fingerhut, *Support steady for same-sex marriage and acceptance of homosexuality*, Pew Research Center (May 12, 2016), <http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/>.
- 2 Human Rights Campaign, *Employment Map*, <https://www.hrc.org/state-maps/employment> (last visited Sept. 26, 2018). The absence of federal and state laws expressly protecting the rights of individuals based on their sexual orientation or gender identity has not stopped municipalities (including Philadelphia) from adopting their own ordinances prohibiting employment discrimination based on sexual orientation or gender identity. Furthermore, many employers have chosen to voluntarily include these protected traits in their nondiscrimination policies.
- 3 See e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018) (collecting cases).
- 4 See U.S. Equal Employment Opportunity Commission, *What You Should Show About EEOC and the Enforcement Protections for LGBT Workers*, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm). It is unclear whether the EEOC, under President Trump, will continue to take such a position. In perhaps a telltale sign that the EEOC may soon reverse its position, the U.S. Department of Justice is now at odds with the EEOC. In *Zarda*, the Justice Department filed an amicus brief arguing that Title VII does not protect employees from discrimination based on sexual orientation. Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, The New York Times (July 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>.
- 5 Susan K. Lessack, *Circuit Split on Sexual Orientation Discrimination Continues With New Second Circuit Opinion*, Pepper Hamilton LLP (Mar. 5, 2018), <https://www.pepperlaw.com/publications/circuit-split-on-sexual-orientation-discrimination-continues-with-new-second-circuit-opinion-2018-03-05/>.