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EXECUTIVE SERIES: LABOR & EMPLOYMENT



Staying Current on LGBTQ+ Issues Affecting the Workplace

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Robert Duston, Esq.

Partner | Labor & Employment Group



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Overview

- Rob Duston is a business lawyer and litigator with more than 30 years of experience helping businesses, schools and other entities primarily in three areas of law:
 - Compliance with the public requirements of the ADA, FHA, and Section 504 of the Rehabilitation Act
 - Employment and labor issues likely to impact operations or lead to negative media attention
 - Legal issues affecting higher education and schools

Degrees

- J.D., University of Virginia School of Law
- B.A., with distinction, George Mason University

Kayla M. Kienzle, Esq.

Associate | Labor & Employment Group



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Overview

- Kayla Kienzle represents employers in employment litigation, including cases related to claims of discrimination, retaliation, breach of contract, and breach of non-competition and non-solicitation agreements. She also has experience with class and collective actions and mass arbitrations.

Degrees

- J.D., *cum laude*, University of St. Thomas School of Law
- B.A., Iowa State University

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Definitions

- Sex
- Gender
- Gender Identity
- Gender Expression
- Gender Non-Conforming
- Sexual Orientation
- Transgender
- Cisgender
- Transition



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Federal Legal Protections

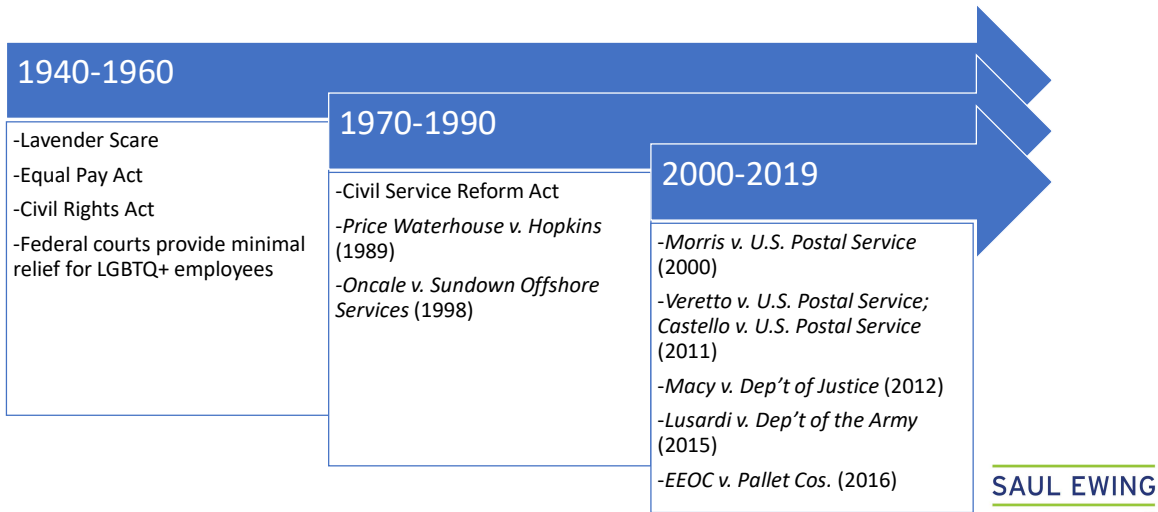
- Title VII
 - Prohibits employment discrimination based on race, color, national origin, religion, sex (including sexual orientation, gender identity, and pregnancy), harassment, and retaliation
- EEOC
 - Investigates claims of job discrimination and files employment discrimination lawsuits
 - History of EEOC interpretation
 - Recent EEOC guidance
- Office of Federal Contract Compliance Programs
- Executive Orders
 - Clinton
 - Obama
 - Trump
 - Biden

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History of EEOC Interpretation



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Executive Orders

• Clinton

- **1995** Executive Order establishing criteria for the issuance of security clearances included sexual orientation in its non-discrimination language
- **1998** Executive Order prohibiting discrimination based on sexual orientation in federal civilian workforce

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Executive Orders

- **Obama**

- **2014** Executive Order prohibiting discrimination based on sexual orientation and gender identity by federal contractors

- **Trump**

- **2017** Executive Order reversing Obama-era policy which used Title VII to protect transgender employees from discrimination

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2020 Supreme Court Case: *Bostock v. Clayton County, Georgia*



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Executive Orders

- Biden
 - **2021** Executive Order following *Bostock* directing heads of federal agencies to review existing regulations, orders, guidance documents, policies, programs, or other agency actions to ensure they are consistent with their protection of LGBTQ+ status and consider to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination

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Recent EEOC Guidance Following *Bostock*

- Employers who consistently call workers by the wrong pronouns or name could be creating a hostile work environment
- Denying an employee access to a bathroom or other sex-segregated facility such as a lactation or changing room appropriate with their gender identity could be sex-based workplace harassment



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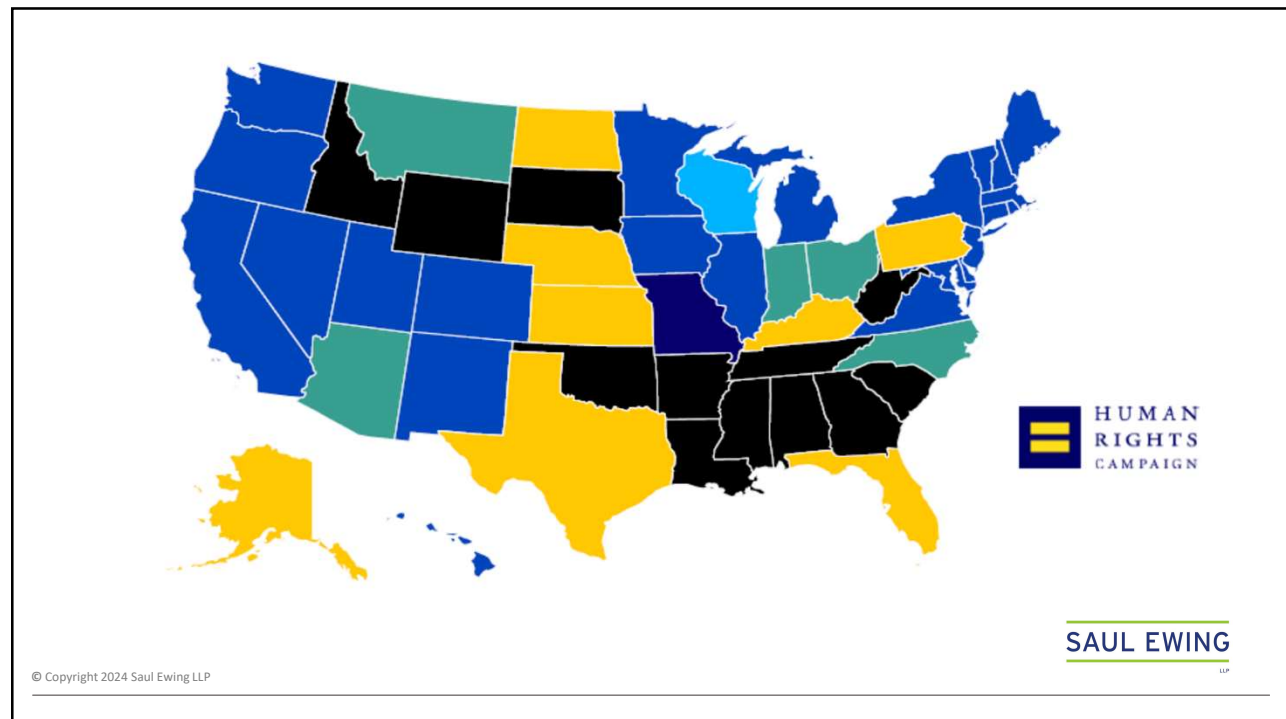
State Law Protections

- Vary in Language and Coverage
 - 23 states and the District of Columbia have laws explicitly prohibiting workplace discrimination based on gender identity and sexual orientation
 - Some have extended sex discrimination laws to cover sexual orientation and gender identity
- State-by-State Protections

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Other State Law Protections

- New Hampshire
 - Transgender individuals who have been diagnosed with a gender dysphoria may also be protected under the state's disability discrimination law
- New York
 - Gender dysphoria and similar gender related conditions are included in the definition of disability under some state laws

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Study: State of the LGBTQ+ Community at Work



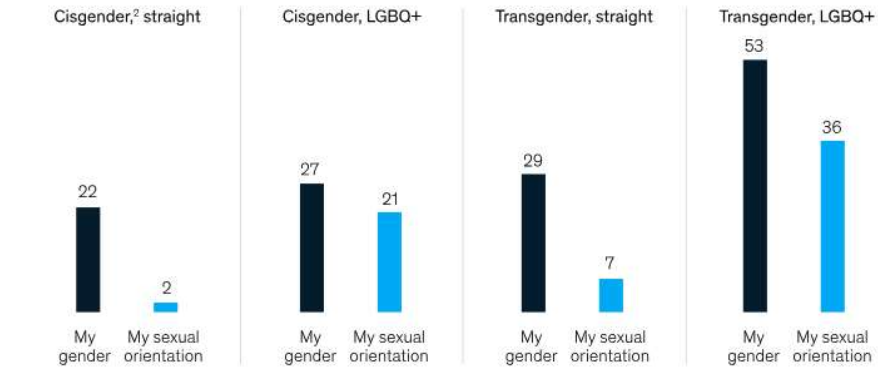
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Transgender people, whether straight or LGBTQ+, are more likely to view their gender or orientation as a barrier to future advancement.

Biggest personal barrier to personal advancement,¹ %



¹Original poll question: Going forward, do you think your gender or sexual orientation will make it harder for you to get a raise, promotion, or chance to get ahead?

²Cisgender people are those whose gender identity corresponds with their gender assigned at birth.

Source: *Women in the Workplace 2019*, LeanIn.Org and McKinsey, 2019, [womenintheworkplace.com](https://www.womenintheworkplace.com)

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BARRIERS FOR LGBT EMPLOYEES

A recent study suggests that nearly 50% of LGBT workers remain closeted at work and fear being stereotyped or jeopardizing professional connections⁵. Anti-LGBT bias is highly prevalent in the workplace and creates massive hurdles in the day-to-day:

Hiring/Firing

- 27% of transgender workers reported being **fired, not hired, or denied promotion** in 2016-2017.⁶
- Applicants may obscure details about sexual orientation or gender identity.⁷

Wages

- Despite comprising 4.5% of adults in the United States, LGBT adults comprise **6.2% of people who earn less than \$36,000 a year**.¹
- 22% of LGBT workers were not paid or promoted at the same rate as colleagues.⁸
- Gay men report higher salaries than lesbian women, but both report **less income than non-LGBT colleagues**.⁹

Benefits

- Only 1 out of 5 U.S. companies offer paid family leave for LGBT employees.¹⁰
- Only 58% of Fortune 500 companies offer **transgender-inclusive benefits**.¹¹



THE INTERSECTIONAL DIFFERENCE

Transgender employees and LGBT workers of color experience disproportionately higher levels of discrimination in the workplace:

- More than 25% of trans employees were fired, not hired or not promoted because of gender identity or expression.¹²
- When applying for jobs, LGBT people of color (POC) report 2x more discrimination based on sexual orientation.⁸

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Common Issues in the Workplace

- Harassment
- Discrimination
- Misgendering
- Stereotyping
- Employee Benefits
- Restroom Access
- Dress Codes and Grooming Standards



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Bathrooms

- Courts have recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers
- EEOC: Employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity



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Proper Pronoun Use

- Intentional and repeated misgendering of an employee can be “severe and pervasive” enough to support a claim of hostile work environment under Title VII. *Copeland v. Ga. Dep’t of Corr.*, 97 F.4th 766 (11th Cir. 2024)

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Dress Codes

- Courts have allowed employers to set gender-based dress codes as long as they do not make the requirements more difficult for women than men, or vice versa
- *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006)
- *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000)



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Employee Benefits

- If an employer offers different benefits based on the sex of the employee's spouse, an employee who is married to a same sex spouse may have a valid sex discrimination claim. *Jimenez v. Laborer's Welfare Fund et al.*, 493 F. Supp. 3d 671, 674 (N.D. Ill. 2020); *Hall v. BNSF R.R. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).

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Religious Employers/Individual Employee Objections

- Potential Implications of Supreme Court's Public Accommodation Decisions
 - *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)
- Extent to Which Employers Can Use a Religious Exemption Still Unfolding in Courts
 - *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023)

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Backlash in Many States

- Some Backlash and Legislation Does Not Involve the Workplace
 - School restrictions/forced outing in schools/curriculum censorship
 - Religious exemptions
 - Barriers to accurate IDs
 - Healthcare funding restrictions
 - Other anti-LGBTQ+ bills
- Restroom Legislation
- Attacks on DEI Training

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Best Practices for Employers

- Implement an Effective Equal Employment Opportunity Policy
- Train Supervisors and Managers to Avoid Asking Specific Interview Questions
- Implement Gender Transition and Gender Identity Policies
- Encourage Employees to Identify Pronouns in Email Signature
- Offer Trainings on Sexual Orientation, Gender Identity, and Transgender-Related Issues
- Train Those Responsible for Handling Internal Complaints

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Gender Transition in the Workplace Policy

- Policy should ensure that transition will be treated as confidential and disclosed only on a need-to-know basis
 - Opportunity for the employee to inform key personnel
 - Initial contact who will help put together a support team to develop a workplace transition plan (if wanted)

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Frequently Asked Questions

How should an employer handle a transgender employee's request for a name change?

Handle the same way you would handle any employee's name-change request. Anyone can legally change their name (assuming it is not for fraudulent reasons), choose to go by a nickname, or use a different name if their name is difficult to pronounce.

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Frequently Asked Questions

Could an employer's discriminatory action be justified by customer or client preference?

No. An employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity.

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Frequently Asked Questions

Can a covered employer require a transgender employee to dress in accordance with their sex assigned at birth?

No. Prohibiting a transgender person from dressing or presenting consistent with that person's identity would constitute sex discrimination.

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