This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

LGBT Employee Rights in the Nonprofit Workplace

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Exact data for nonprofit workplaces is not available, but a 2011 study by the Williams Institute found that lesbian, gay, bisexual and transgender (LGBT) employees make up at least seven million private sector employees, one million state and local government employees, and 200,000 federal employees. The purpose of this article is to review the current state of federal and Georgia law affecting LGBT workplace rights and offer practical considerations for the nonprofit employer.

Federal Law on LGBT Rights

LGBT rights may be established on the basis of sexual orientation and/or gender identity discrimination. Federal law does not explicitly protect private sector LGBT employees from discrimination by their employers on the basis of their sexual orientation or gender identity.[1] However, government agencies, such as the federal Equal Employment Opportunity Commission ("EEOC"), have become more open to claims of sexual orientation and gender identity discrimination, which may signal that a change is beginning that could lead to similar claims in the courts.

LGBT rights were also expanded by recent decisions of the United States Supreme Court:

- In *Hollingsworth v. Perry*, the Court ruled that California's voter-approved Proposition 8 banning same-sex marriage violated the U.S. Constitution, but the Court stopped short of ruling on the constitutionality of same-sex marriage bans in other states.

- In *United States v. Windsor*, the Court overturned Section 3 of the Defense of Marriage Act and expanded the definitions of "marriage" and "spouse" under federal law to include same-sex marriages and spouses.

- In *Obergefell v. Hodges*, the Court legalized same-sex marriages in the U.S. and required the recognition of same-sex marriages validly performed in other

[1] If an employer is a federal government contractor, then the definition of protected employment classes includes both sexual orientation and gender identity by operation of an executive order.

jurisdictions by ruling that the fundamental right to marry is protected by the U.S. Constitution.

While these rulings clarify the spousal treatment of same-sex couples, whether these rulings will result in expanded federal protection for LGBT employees remains unclear.

Georgia and Local Law on LGBT Rights

Statewide measures. Although eighteen states and the District of Columbia have enacted legislation prohibiting employment discrimination on the basis of sexual orientation and/or gender identity, Georgia does not have any statewide employment discrimination protection measures for LGBT employees working in either the private or public sectors.

Local measures affecting private and public sector employers. Only the City of Atlanta prohibits employment discrimination for both private and public sector employees on the basis of sexual orientation and gender identity (an employer must have ten or more employees to be governed by this ordinance).

Local measures affecting public sector employers only. Several Georgia cities and counties provide some form of employment discrimination protection for public sector LGBT employees. The cities of Avondale Estates, Clarkston, Columbus, Decatur, Doraville, Pinelake, and Savannah as well as the counties of Athens-Clarke and Macon-Bibb prohibit discrimination against public sector employees for both sexual orientation and gender identity. The cities of East Point and Tybee Island, the counties of DeKalb and Fulton, and the unincorporated community of North Druid Hills all prohibit discrimination against public sector employees on the basis of sexual orientation.

Practical Considerations—Mandatory Changes to Policies

Benefits. All Georgia employers who offer health and welfare or retirement benefits to their employees' spouses under a federally regulated plan are potentially affected by the *Windsor* decision. As interpreted by various federal agencies, *Windsor* requires that all plans that provide benefits to any spouse must provide those same benefits to same-sex spouses ***so long as the marriage was legal in the place of celebration***. After *Obergefell*, marriages performed in any state on or after June 26, 2015 meet this legal standard and should be recognized. Employers should review plan documents, employee communications, open enrollment materials, and policies to ensure coverage is offered to these same-sex spouses on the same basis that coverage is offered to opposite sex spouses. Note, however, if a plan does not provide benefits to any spouse, then the plan is not required to provide those benefits to same-sex spouses. The IRS encouraged employers to adopt amendments for qualified plans clarifying their compliance with the *Windsor* decision by the later of the end of the plan's remedial amendment period or December 31, 2014.

Family Leave. Prior to March 27, 2015, the Department of Labor determined spousal eligibility under the Family and Medical Leave Act (FMLA) based on whether the marriage was legal ***in the employee's state of domicile***. Given Georgia's ban on same-sex marriage at the time, Georgia employers with employees domiciled in Georgia were not required to extend FMLA coverage to same-sex spouses regardless of where the marriage was celebrated. Effective on March 27, 2015, the law in this area changes, and the Department of Labor amended FMLA rules to provide coverage to same-sex spouses based on ***whether the marriage was legal in the place of celebration***. This was a significant legal change that affected employers in Georgia. In light of the *Obergefell* decision, employees no longer need to examine the place of celebration or the place of domicile. All marriages performed in any state on or after June 26, 2015 should be recognized for FMLA purposes. Employers should review their leave policies to ensure they are in compliance with this requirement.

Definition of protected classes – Employers with at least 10 employees located within the City of Atlanta are required to treat sexual orientation and gender identity as protected employment classes. These employers should revise their company policies and practices to expand the definition of protected classes accordingly.

Practical Considerations—Voluntary Changes to Policies

If an employer decides voluntarily to implement policies protecting LGBT employees in their workplace, the employer should consider:

Revising company policies and practices to expand the definition of protected classes – The policies and documents to be revised need to be identified, and any changes to employment policies should be drafted clearly. Because the EEOC is paying so much attention to this issue, employers should consider adding gender identity and sexual orientation to nondiscrimination policies. An optional policy or practice could include compliance with OSHA's transgender bathroom access guidelines.

Training and communications regarding the revised policies and practices – Any changes should be appropriately communicated to employees. Employees should also receive appropriate training on how to resolve potential issues.

Religious objections to a new policy -- In the event that an employee has a religious objection to a new policy protecting LGBT employees, an employer should take reasonable steps to accommodate that employee's religious needs when necessary without creating undue hardship.

Having a plan for action if a complaint arises -- If an employer implements policies protecting LGBT employees, then violations of such policies should be treated just like violations against any other protected employment class.

Remedial actions – When taking remedial action against a potential offending employee, it is important to note that several court decisions on the topic have drawn an important line between an employee's beliefs and an employee's actions.

Other benefits. Employers may consider voluntarily providing additional employee benefits aimed at recruiting or retaining LGBT employees. Examples could include extending benefits to domestic partners or providing medical coverage for gender reassignment surgery for transgender employees.

Conclusion

The legislative and judicial landscape of LGBT rights are in flux. The issues presented to nonprofit employers create new, complicated and sensitive questions for all employees, not just LGBT ones. Nonprofit employers should take proactive steps to identify the policies or benefits that should be amended, ensure that the amendments are compliant with federal, state and local laws currently in place, and stay updated on both legislative and judicial updates.

Additional Resources

You may also find the following materials helpful as you review your organization's policies.

IRS Notice 2014-19

http://www.irs.gov/pub/irs-drop/n-14-19.pdf

OSHA Best Practices: A Guide to Restroom Access for Transgender Workers

https://www.osha.gov/Publications/OSHA3795.pdf

DOL Final Rule to Revise the Definition of "Spouse" under the FMLA'

http://www.dol.gov/whd/fmla/spouse/index.htm

City of Atlanta Non-Discrimination Laws

http://www.atlantaga.gov/index.aspx?page=1089

The Williams Institute Study

http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf

Global Guide to Legal Recognition of Same-Sex Relationships

http://www.samesexrelationshipguide.com/