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LEGAL DEVELOPMENTS IN PROTECTIONS FOR LGBTQ WORKERS

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Agenda

- Terminology
- Missouri and Illinois Law
- Federal Law
- Agency Guidance
- Concepts and Trends in the Law
- Best Practices



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An emerging issue:




- An increasing number of people are openly living as LGBTQ.
- There remains some uncertainty about whether and the extent to which sexual orientation and gender identity are protected categories under federal civil rights laws.
- As a result, there is continued uncertainty about what an employer's obligations are under the law in order to accommodate LGBTQ employees.

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Terminology




- **LGBTQ**
 - Lesbian, Gay, Bisexual, Transgender, Queer and/or Questioning
- **Queer**
 - An umbrella term that encompasses anything that exists outside of the dominant narrative
 - Encompasses individuals who are L, G, B and/or T and/or who do not know
- **Questioning**
 - In the process of exploring one's gender identity and how to define one's sexual orientation

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Terminology




- **Sexual Orientation**
 - An individual's enduring physical, romantic and/or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual and heterosexual (straight) orientations
 - Separate from an individual's gender identity
- **Gender Identity**
 - One's internal sense of gender, which may be different from one's assigned sex, and which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the individual's core identity

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Terminology




- **Transgender**
 - Identifying with or expressing a gender that differs from the one that corresponds to the person's sex at birth
- **Gender Nonconformity**
 - One's gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes
- **Gender Stereotypes**
 - Stereotypical notions of masculinity and femininity, including expectations of how men and women represent or communicate their gender to others through behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics

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Terminology




- **Gender Transition**
 - Experience by which a transgender person goes from living and identifying as her/his assigned sex to living and identifying as the sex consistent with her/his gender identity
 - Often includes a social transition, during which an individual begins to live, identify with, and outwardly portray herself/ himself as the sex consistent with her/his gender identity
 - Can, but does not have to, include medical treatments or procedures

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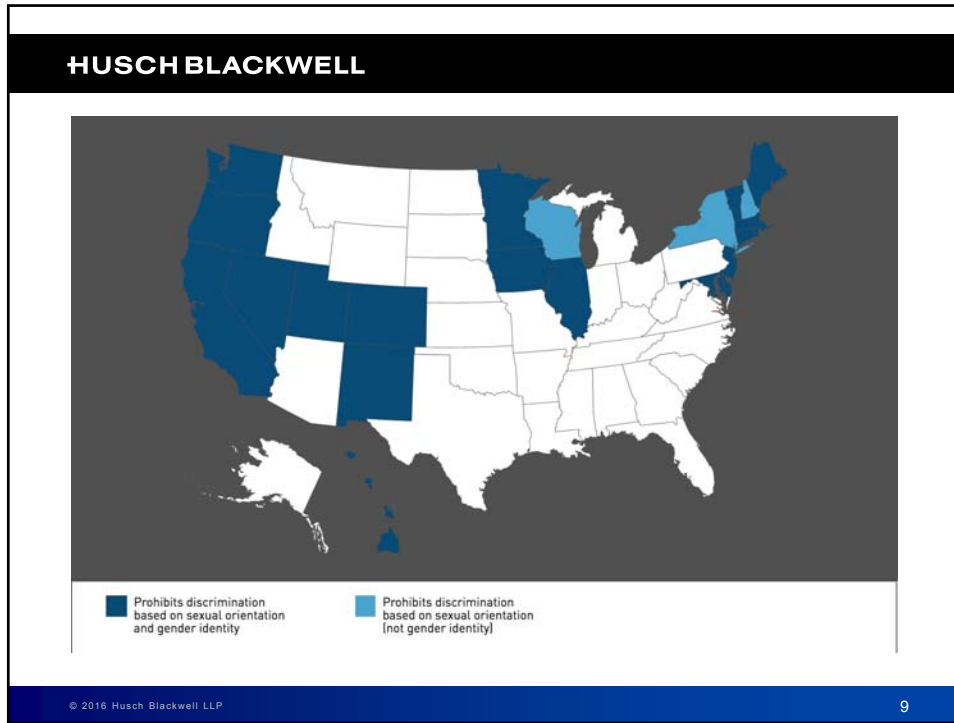
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Terms to Avoid



- **"Transgenderers" or "a transgender"**
 - Use instead "transgender woman" or "transgender man"
- **"Sex change"**
 - Use instead: "sex reassignment surgery" or "gender confirmation surgery"
- **"Pre-operative" or "post-operative"**
 - Use instead: "transitioning"

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19 states (plus DC) prohibit discrimination based on gender identity and sexual orientation

- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Iowa
- Illinois
- Massachusetts
- Maryland
- Maine
- Minnesota
- New Jersey
- New Mexico
- Nevada
- Oregon
- Rhode Island
- Utah
- Vermont
- Washington
- District of Columbia

3 states prohibit discrimination based on sexual orientation only

- New Hampshire
- New York
- Wisconsin

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Path toward Anti-Discrimination

- Employment Non-Discrimination Act (ENDA)
- Equality Act
- State progress
- State anti-LGBTQ bills
- Executive order for public schools

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Missouri Law

- No statewide protection for private employees
- Statewide prohibition of discrimination on the basis of sexual orientation for public employees by executive order
- Cities and counties with protections for private employees:
 - Jackson County
 - St. Louis County
 - St. Louis City
 - Clayton
 - Columbia
 - Creve Coeur
 - Ferguson
 - Kansas City
 - Kirksville
 - Kirkwood
 - Maplewood
 - Olivette
 - Richmond Heights
 - University City

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Sample Ordinance: St. Louis City

- Ordinance No. 67119
- “It shall be a prohibited discriminatory employment practice . . . [f]or an employer to fail or refuse to hire, to discharge or otherwise to discriminate against any individual with respect to compensation or the terms, conditions or privileges of employment, because of race, color, age, religion, sex, familial status, disability, sexual orientation, national origin or ancestry.”
- Penalties:
 - \$250 to \$500 fine; and/or
 - Imprisonment for up to 90 days

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Illinois Law

- Statewide prohibition of discrimination on the basis of sexual orientation and gender identity for both public and private employees
 - Illinois Human Rights Act, 775 ILCS 5/1-102

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Federal Law

- Title VII
- Price Waterhouse
- Interpretation by the EEOC vs. Interpretation by federal courts
 - Disparate treatment
 - Sex-based stereotypes
 - Association

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EEOC Guidance

- LGBTQ claims on the front burner
- Crystal clear that LGBTQ employees are covered under Title VII
 - Gender identity discrimination is sex discrimination
 - Macy v. Department of Justice
 - Sexual orientation discrimination is sex discrimination
 - Baldwin v. Department of Transportation

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OSHA Guidance

- All employees must have access to restrooms that correspond with their gender identity
 - Health and safety matter
- Best practice is to provide additional options:
 - Single-occupancy gender-neutral facilities
 - Multiple-occupant, gender neutral facilities with lockable single occupant stalls
- Cannot require employees to provide medical or legal documentation of gender identity
- Cannot require any employee to use a segregated facility

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Federal Contractors

- April 8, 2015
 - Prohibition of discrimination on the basis of sexual orientation and gender identity
 - Dos
 - Take affirmative action
 - Update equal opportunity clauses
 - Post notices
 - Ensure facilities are not segregated
 - Report visa denials
 - Don'ts
 - Ask for self-identification
 - Set goals
 - Collect data
 - Conduct statistical analyses

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Private Protections

- Some businesses have self-imposed anti-discrimination policies.
 - The large majority (89%) of Fortune 500 companies prohibit sexual orientation discrimination.
 - Two-thirds prohibit gender identity discrimination.
- Private corporations have also threatened to boycott states (e.g. North Carolina) with legalized discrimination.

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Practical scenarios

- Restroom access
- Dress and appearance
- Names and pronouns
- Transition periods
- Coworker discomfort
- Employee benefits

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Best Practices

- Have someone trained talk to the people involved and find out what they want.
- Tailor accommodations on a case-by-case basis where possible.
- Manage the reactions of others.
- Recognize that failure to provide accommodations and manage reactions could lead to litigation or an OCR complaint.
- Think about the public relations angles and manage communications.

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Best Practices

- Follow EEOC/OSHA guidelines (even though not binding) to avoid legal action.
- Comply with local ordinances that protect LGBT employees.
- Adopt a non-discrimination/non-harassment/EEO policy that covers sexual orientation and gender identity.
- Educate your managers and supervisors.

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Questions?



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