

EMPLOYMENT & IMMIGRATION LAW

Changing Gender — The New Sex Discrimination

SHIFTING TIDE OF LEGAL DECISIONS SHOULD PUT EMPLOYERS ON ALERT

By **ROBERT G. BRODY** and
REBECCA E. GOLDBERG

Sex discrimination used to mean one thing: treating a man differently because he's a man or a woman differently because she's a woman. But our nation is in the midst of a civil rights revolution around sexual orientation and gender identity.

The old understanding of sex discrimination law is quickly changing and employers need to be ready. Employers nationwide need to determine if their policies and training provide enough protection for employees who face discrimination based on something other than biological sex, primarily sexual orientation and gender identity.

A sweeping decision by the 11th Circuit Court of Appeals last month treated discrimination against transsexuals as "sex discrimination" subject to intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The sweeping ruling by a court that normally leans conservative signals a sea change in sex discrimination law in the private sector, even though the constitutional holding applies only to government employers.

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This conclusion is buttressed by the recent trend toward inclusion of gender identity (often involving transsexuals) as well as sexual orientation, in non-discrimination law. Given this new world, employers need to ensure their policies and training reflect this shift. This enhanced legal scrutiny is not limited to hiring and firing decisions. In fact, the new focus may be bullying and harassment.

A transsexual is someone who identifies with a gender other than his or her biological sex. The term applies both to those who have had sex reassignment surgery and those who have not. It is not the same as sexual orientation, which refers to a person's sexual preference. "The Diagnostic and Statistical Manual of Mental Disorders," the handbook used by mental health professionals, does not distinguish between transsexuality and Gender Identity Disorder, which refers to a person's significant discontent with his or her biological sex. A number of other terms, such as "transgender," describe similar concepts.

The 11th Circuit's decision last month in *Glenn v. Brumby* arose out of the termination of Vandy Beth Glenn, a legislative editor for Georgia's General Assembly. She was fired after she announced her intent to transition from male to female. There was no issue of pretext in this case. Her boss made it perfectly clear that he was firing her because he found transsexuality to be "unsettling" and "unnatural."

It is rare to see such candor in other kinds

of civil rights cases. The idea of transsexuals as a protected class has not yet permeated the national consciousness, so such open discrimination was likely presumed lawful. Needless to say, Glenn's supervisor was wrong. Employers need to recognize the changing definition of "sex" and understand that discrimination on the basis of transsexuality or sexual orientation is often illegal. Following that recognition, employers need to convince their supervisors and employees that the company will treat such discrimination as seriously as it does other kinds of unlawful discrimination.

Becoming A Protected Class

Unsurprisingly, when Title VII of the Civil Rights Act was enacted in 1964, banning sex discrimination and other kinds of bias by most public and private employers, transsexuality was not part of the regular lexicon. Early court cases rejected the notion that discriminating against a transsexual was prohibited under the statute. They held that Title VII prohibited discriminating against a man because he's a man and a woman because she's a woman and the inquiry ended there.

But then the tide began to shift. In its landmark decision in *Price Waterhouse v. Hopkins* in



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1988, the U.S. Supreme Court held that "sex stereotyping" violated Title VII. Although that case involved a woman characterized as too "macho" and did not involve transsexuality at all, it provided a basis for new arguments that Title VII prohibited discrimination against transsexuals because they, too, failed to conform to gender stereotypes. While a few circuit courts held that transsexuals were victims of sex discrimination under a "sex stereotyping" theory, most circuits did not. They held that "sex" in Title VII did not refer to gender identity. Even Glenn, who could have sued under Title VII, did not pursue a statutory claim.

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Sorting Out ICE's Prosecutorial Discretion Program

AUTHORITIES CONSULT LIST OF FACTORS IN MAKING DEPORTATION DECISIONS

By **RENEE C. REDMAN**

On June 17, 2011, the director of the Office of Immigration and Customs Enforcement (ICE), John Morton, issued two memoranda outlining a framework to be used when exercising "prosecutorial discretion" in the context of deportation of non-U.S. citizens.

ICE, the federal agency charged with enforcing immigration law, released several more memos and announcements throughout the summer and fall, and in November, announced that it planned to review all pending cases in immigration courts, and that "low priority" cases could be subject to administrative closure or termination.

Many non-U.S. citizens, believing they are "low priority," are interpreting ICE's announcements as some sort of program for legalizing immigration status and are eager to file applications with ICE. They are mistaken. While this recent focus on "prosecutorial discretion" is healthy and encouraging, ICE's decision to not pursue deportation of a particular individual does not lead to valid immigration status or even permission to work.

Discretion has always been a vital component of this country's immigration laws. Perhaps based on the U.S. Supreme Court's long-standing rule that non-U.S. citizens do not

have the right to enter or remain in the country, immigration authorities have always had broad discretion to grant or deny applications by non-citizens seeking permission to enter. In addition, ICE officers, agents and attorneys, like their criminal law enforcement counterparts, have exercised their "prosecutorial discretion" in deciding whether to enforce immigration law against non-citizens already in the country.

Deportation proceedings, currently termed "removal proceedings" in immigration law, are civil proceedings but they can resemble criminal proceedings. There are many points in the deportation process at which discretion can be employed, including whether to place a detainee on someone in criminal proceedings, whether to arrest a person, whether to detain a person, whether to charge a person with an immigration violation, whether to dismiss charges, whether to agree to administratively close deportation proceedings, whether to appeal, and whether to stay deportation from the United States.

Limited Avenues

When and how immigration officials exercise their discretionary powers became more important in 1996 after Congress limited the avenues of relief available to people facing deportation.

In 2000, the commissioner of the Immigration and Naturalization Service (INS) issued a guidance memo outlining factors to be considered including the person's immigration history and status, length of stay in the U.S., criminal history, cooperation with law enforcement, and military service, as well as humanitarian concerns and available INS resources. These factors were reiterated and adopted in a 2005 memorandum by ICE after that agency assumed the enforcement duties of the former INS. The 2005 memo also added national security.

Director Morton's June 17 memos turned out to be the kick-off of a prosecutorial discretion program that is ongoing. One memo, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," stated ICE's policy to not initiate removal proceedings against crime victims and witnesses. The second, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" adopted eight prior memos dating back to 1976, including the 2000 and 2005 memos, and rescinded two others. It reiterated ICE's enforcement priorities: national security, border security, public safety, and the integrity of the immigration system. It also stated that ICE officers, agents and attorneys should consider the totality of the circumstances of each case individually in light of the enforcement priorities.

The memo also provided a page-long list of factors to be considered, including whether the

person is pursuing advanced education after completing high school in the U.S. It pointed out that particular positive consideration should be given to: veterans and members of the U.S. armed forces; longtime lawful permanent residents; children and elderly people; people who have lived in the United States since childhood; pregnant or nursing women; victims of domestic violence; trafficking, or other serious crimes; people with serious mental or physical disabilities; and people with serious health conditions.

Particular negative consideration should be given to: individuals who pose a clear risk to national security, are serious felons, are repeat offenders, have lengthy criminal records of any kind, are known gang members, pose a clear danger to public safety, or have egregious records of immigration violations, including records of illegal re-entry or immigration fraud.



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Feds Target Connecticut, R.I. Construction Industry

SCRUTINY WILL FOCUS ON WAGE AND HOUR, MISCLASSIFICATION ISSUES

By **MATTHEW K. CURTIN** and
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Connecticut and Rhode Island construction industry employers will face increased government scrutiny of their labor and employment practices over the next several years. On Nov. 30, 2011, the Hartford office of the U.S. Department of Labor's Wage and Hour Division issued a press release announcing a "multiyear enforcement initiative" aimed at improving what it sees as "widespread noncompliance with minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act" in the Connecticut and Rhode Island construction industry.

The investigation initiative will purportedly "remedy systemic violations and promote sustained compliance among contractors and subcontractors working on construction projects."

Multi-Year Initiative

The Labor Department's enforcement initiative is set to span several years, with no set end date. Investigators will target "large" construction projects in Connecticut and Rhode Island. The scope of investigations will be wide ranging, with federal officials scrutinizing any and all employment practices of the general contractors, subcontractors, or any other business entity providing services at a job site.

Investigators need not announce ahead of time the timing of a visit, nor will the Labor Department disclose the reason for an investigation. The impetus for many of these investigations will be complaints to federal officials, although the Labor Department will not disclose such information. Indeed, investigators will actively reach out to employees and unions in an effort to educate them about the investigative efforts and enlist their participation in the program.

The current initiative raises the profile of enforcement measures that have been ongoing for several years. Since 2008, the Labor Depart-

ment's Hartford office has conducted 183 investigations of construction industry employers throughout Connecticut and Rhode Island. As a result, construction industry employers paid nearly \$3.3 million in back wages for 1,226 employees.

Moreover, the Connecticut Department of Labor regularly conducts independent contractor misclassification investigations that result in overwhelming civil penalties and crippling stop work orders. The Connecticut DOL issued 17 stop work orders due to independent contractor misclassification for the one-week period from Oct. 27, 2011, through Nov. 3, 2011 alone.

In addition, the Connecticut DOL reports that, overall, it issued 159 stop work orders and recovered \$6 million in unpaid wages for the prior fiscal year as a result of investigations into violations of prevailing wage laws, workers' compensation laws, child labor laws, record-keeping laws, and overtime and minimum wage laws in a range of industries. The Connecticut DOL acknowledged that many of these investigations targeted construction projects.

In an effort to enhance their employment practices investigations, the federal Labor Department and Connecticut DOL executed a memorandum of understanding that allows the two agencies to coordinate sharing of information and resources. This sharing of information and resources will likely result in more frequent and aggressive investigation of the construction industry for the foreseeable future.

Increased Scrutiny

While the scope of the investigations will be essentially unfettered, there are some common issues that investigators will be watching. For example, investigators will be looking for independent contractor misclassification. Over the past several years, state and federal labor officials have vigorously pursued construction employers that misclassify employees as independent contractors. Federal and state law, however, utilize different legal standards for de-

termining independent contractor status, so a review of contractor classification is essential to help ensure compliance with the applicable jurisdiction.

Investigators will also aim to ensure compliance with applicable minimum wage laws and various child labor laws. The federal minimum wage is currently \$7.25 per hour, while the state minimum wage is \$7.40 per hour in Rhode Island and \$8.25 per hour in Connecticut. Employers must comply with the more stringent requirement established by applicable state law.

Investigations will also target employers' failure to pay overtime and failure to pay for all compensable hours worked. Simply speaking, employers must pay employees for all hours the employee performs work for the employer. Common construction industry non-payment violations include failure to pay employees for donning and doffing, travel time between work sites, waiting time, compensable meal periods, and post-project activities such as clean-up duties.

While the government is known to target these common violations, investigators may look to remedy any violations of applicable employment laws. They will have broad authority to enter a worksite and scrutinize any and all employment practices of the on-site employers. It is therefore important for targeted employers to ensure they are in compliance with all relevant labor and employment laws.

Employer Reaction

In response to this initiative, construction industry employers must proactively ensure that their pay practices conform to the Fair Labor Standards Act and to Connecticut and Rhode Island wage and hour laws, as applicable. The federal government's announcement highlights the fact that investigations will not focus solely



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on high-profile violations, such as independent contractor misclassification, failure to pay overtime, and faulty recordkeeping.

Moreover, with the Connecticut and the U.S. Departments of Labor now sharing information and resources, construction industry employers can expect more frequent and aggressive investigations.

Targeted employers found to be violating applicable employment laws may be facing stop work orders, double back-wage payments to affected employees, civil fines, or even criminal penalties. To help avoid such serious financial and criminal penalties, construction industry employers in Connecticut and Rhode Island should strongly consider compliance self-audits with the assistance of experienced outside counsel. Correcting a violation before a surprise federal investigation occurs is well worth the effort. ■

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Due to the mixed results in the courts, several attempts were made to amend Title VII to include both sexual orientation and gender identity in the definition of "sex." These attempts have always failed. State legislatures, on the other hand, were far more willing to broaden their statutes. Just three months ago, Connecticut added gender identity to its non-discrimination law. Currently, 15 states and the District of Columbia explicitly ban discrimination on the basis of gender identity.

Employers in all states would be well advised to operate under the assumption that gender identity, as well as sexual orientation, is protected by federal law. No employer wants to be the test case in its circuit. While at one point, employers might reasonably have assumed transsexuals were not a protected class unless there was a state law to the contrary or they were located in one of a few circuits, the trend toward inclusion under federal law is becoming more pronounced. In fact, while the 11th Circuit holding is technically limited to constitutional claims, the court relied on Title VII cases, including *Price Waterhouse*, to arrive at its

conclusion. Moreover, it directly stated it would decide a Title VII case the same way, except that the employer would not have available the additional defense that its decision met intermediate scrutiny. In other words, the employer would have no defenses to such discrimination.

The *Glenn* case also reviewed the employer's actions under a disability analysis. Because disabilities are only entitled to rational basis review under the Equal Protection Clause, the 11th Circuit accepted the employer's proffered rationale that it feared lawsuits over bathroom usage, while it rejected that rationale in its sex discrimination analysis. Private employers are not governed by the Constitution and do not need to worry about claims under the Americans with Disabilities Act because Gender Identity Disorder is specifically excluded from coverage under that law. However, state or local disability laws may be more inclusive than the ADA.

Advice For Private Employers

Absent contrary state or local law, private employers do not need to provide reasonable accommodations for an employee's Gender Identity Disorder because the ADA, which requires that employers make reasonable accom-

modations for qualified disabled employees, excludes this condition from coverage. But employers must be careful not to enforce dress code and bathroom policies in a manner that could be considered *sexually* discriminatory. In other words, accommodations may, as a practical matter, be necessary.

But the most likely problem is workplace harassment. Research suggests as many as 97 percent of transsexual employees are harassed at work, more than double the number who reported being denied a job or promotion or fired. To prevent this problem, employers should proactively include gender identity in their anti-harassment policies and training programs. Waiting until an employee identifies as transsexual to implement these changes can draw negative attention to the employee and exacerbate the problem.

Sexual Orientation?

Employers should use this case as an impetus to ensure their policies and training cover sexual orientation, as well. Employment discrimination on the basis of sexual orientation is forbidden in 21 states, including Connecticut, and the District of Columbia. Although courts have been more reluctant to apply Title VII's

prohibition on "sex discrimination" to sexual orientation than to gender identity, there is an argument that sexual orientation discrimination is about sex stereotyping, too: it is a stereotype that men are attracted to women and vice versa and the gay or bisexual employee fails to conform to that stereotype.

In 2009, the 3rd Circuit Court of Appeals recognized a claim based on "gender stereotyping" of a gay employee, while acknowledging that Title VII does not protect sexual orientation. As the court noted, the "line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw." Employers who wish to stay out of court should train their teams to avoid treading anywhere near discrimination or harassment because of sex, sex stereotypes, gender identity, and sexual orientation.

As the *Glenn* decision shows, the legal definition of "sex" is changing. The line between lawful and unlawful conduct is often very murky. When the Fourteenth Amendment was ratified in 1868 and when Title VII was enacted in 1964, these issues were not on the radar. In 2012, employers who do not heed the signs of change are taking a dangerous risk. ■