SUPREME COURT HOLDS DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY ILLEGAL UNDER TITLE VII

On Monday, June 15, 2020, the U.S. Supreme Court resolved three cases addressing whether discrimination based on sexual orientation and gender identity is illegal under Title VII of the Civil Rights Act of 1964. The Court determined that they are. It, therefore, reversed the Eleventh Circuit’s decision in Bostock v. Clayton County and remanded that case and affirmed the Second and Sixth Circuit’s decisions in Altitude Express, Inc. v. Zarda and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC. The decision resolving the three consolidated cases is referred to as the Bostock decision.

THE HOLDING AND ITS PRACTICAL EFFECTS

The Bostock decision holds that Title VII’s prohibition against discrimination “because of sex” includes sexual orientation and gender identity. In essence, this adds those characteristics to the list of those protected under Title VII. While federal contractors have been subject to these prohibitions for some time under Executive Order 11246 (as amended by Executive Order 13672), and many state and local laws already prohibited such discrimination, it is now clearly illegal under Title VII. The main practical effect of this opinion is that employees may now bring discrimination claims under Title VII based upon sexual orientation and gender identity. It remains to be seen what additional legal implications might derive from Bostock. The Court’s decision explicitly stated that it does not resolve any of the issues related to bathrooms, locker rooms, women’s sports, etc.

REASONING OF THE OPINION AND DISSENTS

The reasoning of the 6-3 majority opinion authored by Justice Gorsuch is essentially that where a person is discriminated against because they are attracted to individuals of their same gender, or because they identify as a gender other than what was identified at their birth, their own “sex” is inextricably involved in the discrimination. A male who has a male partner and is, on that basis, terminated would not have been terminated if the individual were a female with a male partner. The individual’s gender is therefore a cause of the discrimination. Similar logic applies to discrimination based on gender identity. Therefore, under the broad, strict language of the statute, such discrimination is illegal, regardless of whether the authors of Title VII envisioned when it was drafted in 1964 that it would be applied to prohibit discrimination based on sexual orientation and gender identity.

Two dissenting opinions by Justice Alito (joined by Justice Thomas) and Justice Kavanaugh take issue with the majority opinion, arguing that “sex” is a different concept from “gender identity” or “sexual orientation”—that the law and ordinary usage have always distinguished these concepts, and that the “updating” of Title VII to match 2020 sensibilities, even under the guise of Gorsuch’s letter-of-the-law textualism, is an improper exercise in judicial activism and should have been left to the legislature.

The Bostock opinions were published together and may be accessed here.

INTERACTION WITH CHANGES TO SECTION 1557 REGULATIONS

One likely impact of this decision on health care employers and other entities subject to the Affordable Care Act (the “ACA”) is that it may undermine recently announced changes to the anti-discrimination provisions of the ACA. On Friday, June 12 (a mere three days before the Bostock decision was released), it was announced that the regulations implementing Section 1557 of the ACA (the anti-discrimination provisions) had been revised to eliminate protections against discrimination based upon gender identity and sex stereotyping in matters involving health care, including but not limited to employee benefit plan coverage. The Office for Civil Rights of the Department of Health and Human Services (“OCR”) takes the position that the previous regulatory protections that existed under the Obama administration exceeded the statutory authority of the agency. Part of OCR’s reasoning, though, was based on its position that “because of sex” means only biological sex, which is a position that the Supreme Court has now (three days later) rejected.

Hall Render will continue to monitor related developments and post updates as appropriate.

PRACTICAL TAKEAWAYS

If policies, handbooks and other documents do not already reflect that employers shall not discriminate on the basis of sexual orientation
and gender identity, they should be updated, and employers should now view these traits as federally protected characteristics if they did not already do so. Annual trainings, EEO statements, codes of conduct, job postings and orientation paperwork are among the documents likely in need of updates. Benefits of employment (e.g., covered procedures, inclusion of same sex spouses) should be evaluated for potentially discriminatory elements. Other than that, employers should be aware that there will be increased attention, and thus, additional liability risk related to the current interpretation of Title VII. Finally, covered employers should monitor developments related to their Section 1557 obligations.

If you have any questions, please contact:

- Brian Sabey at (720) 282-2025 or briansabey@hallrender.com;
- Robin Sheridan at (414) 721-0469 or rsheridan@hallrender.com; or
- Your regular Hall Render attorney.

To learn more about our Human Resources Consulting services, click here.

Hall Render blog posts and articles are intended for informational purposes only. For ethical reasons, Hall Render attorneys cannot—outside of an attorney-client relationship—answer specific questions that would be legal advice.