

Creating a gender orientation policy for your workplace

If you look through your company's employee handbook, you will probably find language prohibiting discrimination based on an employee's race, religion, national origin, age, physical disabilities, and gender. But does your policy manual address harassment or discrimination based upon an employee's sexual identity or orientation?

Most U.S. employers have yet to address the issue in their official written policies, and even fewer have provided managers and other employees with training on the matter. That omission could prove costly to your company.

Is there a Federal statute governing sexual identity discrimination?

The answer, for now, is no.

The number one reason cited for not having an official company policy on sexual orientation or sexual identity (also known as Gay, Lesbian, Bisexual and Transgender or GLBT) is the lack of an official federal mandate covering GLBT treatment under the Civil Rights Act. While employees are clearly protected from discrimination based on race, color, religion, sex and national origin under Title VII of the Civil Rights Act of 1964 no federal law specifically prohibits discrimination on the basis of sexual orientation or gender identity.

There is some indication that this might be changing. The proposed Employment Non-Discrimination Act (ENDA) would make it illegal for employers and others to discriminate against an individual because of his or her sexual identity or orientation. (An earlier version passed the House but not the Senate in 2007, but it omitted the protection for gender identity.) President Obama has been vocal in his support of the ENDA, with the transgender clause restored, so the possibility of federal legislation in the near future exists.

Case law and state statutes filling the void

In the absence of official federal legislation, state laws and case law are defining the rules for dealing with GLBT employees and applicants in the workplace. And there has been activity of interest to employers on both fronts.

Case in point: In a recent decision, the court in *Schroer v. Billington* awarded more than \$491,000 in damages to a transgendered veteran who was initially offered a job with the Library of Congress when he applied and appeared as a male applicant.

When he later reported to work as a woman, the Library withdrew the offer, claiming a “poor fit” for the job. The court ruled that the library had discriminated against the veteran based on “sex stereotypes,” rejecting the defense counsel’s assertion that transsexual or transgender individuals were not covered under Title VII (and allowing a judgment “based on the language of the statute itself”). Even with the lack of federal legislation, legislative protection does exist for GLBT individuals on a state level.

As of today, almost half the states and the District of Columbia had enacted laws prohibiting sexual orientation discrimination in public and private employment, including: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. Some states and local governments also prohibit workplace discrimination based on gender identity, including: the District of Columbia, California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Washington and Vermont.

Is there really discrimination against GLBT people in the workplace?

The best way to answer that is with a set of surveys about the people involved.

The issue starts early.

In a 2005 study of students from ages 13 through 18, 33% of the teens interviewed reported that students in their school were frequently harassed because of their perceived or actual sexual orientation. 52% frequently heard students make homophobic remarks, 69% frequently heard students say, “that’s so gay,” or “you’re so gay” as part of an expression where “gay” was meant to mean something bad or devalued.

Over 90% of GLBT teens surveyed had been verbally or physically assaulted during the past year because of their perceived or actual sexual orientation, gender expression, race/ethnicity, disability or religion. The non-GLBT group reported a 62% rate of similar assaults. Clearly, even when the issue was not related to gender orientation, a GLBT teen was more likely to be a target of verbal abuse or assault than a straight or perceived straight student.

The problems continue in the workplace

Hard data on the level of workplace discrimination is hard to come by. Many employees are hesitant to report incidents of abuse, discrimination or harassment for fear of job loss. Employers who refuse to hire GLBT applicants are unlikely to self-report, and until recently, and only in certain states,

those who have been denied jobs or promotions have had little legal ground to stand on.

Some smaller studies do exist, such as the 2002 Harris Interactive/Witeck-Combs survey of 2,000 employees that found that:

- Nearly 10% of GLBT respondents reported unfair dismissal or pressure to leave a job due to their sexual orientation.
- Two out of five GLBT employees said they consistently faced some form of hostility or harassment on the job because of their sexual orientation or identity.
- 73% of all respondents agreed that GLBT workers experienced harassment and are denied promotions.
- 77% of all respondents support policies aimed at protecting GLBT employees.

What employers need to do

Many companies are taking a stance on the issue of gender identity and sexual orientation discrimination even if they see no legal obligation at this time. As of February 2009, 423 (85%) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 176 (more than one-third) had policies that include gender identity. Even “conservative” companies like Wal-Mart have adopted anti-discrimination and harassment policies for sexual orientation. If your company hasn’t yet address GLBT issues, here are five key steps you can take to prevent sexual orientation discrimination in the workplace:

1. Understand current laws

The legal issues and obligations are in flux, as new legislation and case law shapes the face of discrimination. Stay up to date on the rules and decisions affecting your business locations.

2. Examine internal policies and procedures to ensure that they don’t discriminate against lesbian, gay, bisexual and transgender employees.

Even if current legislation and case law does not demonstrate an obligation to address GLBT issues, having a clear and non-discriminatory policy in place can protect your company from future litigation as the rules are tested.

3. Make sure employees understand and abide by company sexual orientation anti-discrimination policies.

Providing sensitivity training and diversity training to employees can help head off employee to employee conflict on issues of gender identity or sexual orientation. Let employees know that whatever their personal preferences or feelings, discrimination and harassment are not acceptable in the workplace.

4. Ensure that recruiting practices are fair and consistent.

Train those who handle interviewing, testing, benefits administration and recordkeeping about what is and is not acceptable to ask, record, offer or refuse when it comes to GLBT applicants or employees. Prevention now will save you from headaches later.

5. Publicly handle workplace harassment and bullying.

If employees violate company policy with regard to gay, lesbian, bisexual or transgendered employees or applicants (or customers), make sure the issue is openly addressed and corrected. Being above board shows employees that you stand by your policies.

The future of GLBT legislation

It's difficult to tell if federal legislation will be forthcoming soon on this issue. In the meantime, creating a discrimination-free workplace will benefit all employees. As you develop your policies, paying close attention to state and local laws, and tracking court decisions in your area is the best way to stay current on your obligations and limitations as an employer.