Answers to an Employer's Legal Questions About Domestic Partner Benefits and Sexual Orientation Nondiscrimination Policies

by Jordan Lorence

EXECUTIVE SUMMARY

Although many attorneys advise businesses to adopt written anti-discrimination policies, no law compels them to do so. Regardless of whether an employer has a written nondiscrimination policy, it is subject to federal laws prohibiting discrimination on the basis of race, color, religion, sex, national origin, age and disability.

Twelve states, the District of Columbia, and a number of local governmental units also prohibit sexual orientation discrimination. Therefore, employers may not discriminate on the basis of sexual orientation in those jurisdictions.

No law requires all businesses to extend benefits to the unmarried partners of their employees. Several cities, such as San Francisco, Los Angeles and Seattle, require businesses that have contracts with those cities to offer domestic partner benefits. A company can avoid this requirement by not contracting to offer goods or services to those cities.

Corporations that include sexual orientation in written nondiscrimination policies may create several legal dilemmas.

First, many courts find that employee handbooks and corporate policies create contractual terms of employment that may be enforced in court. Therefore, employers with sexual orientation policies may be subject to lawsuits even in states and localities that do not prohibit such discrimination.

Second, adopting a sexual orientation policy may interfere with the employer's ability to discipline employees for inappropriate behavior in the workplace, or perhaps even for behavior outside the workplace.

Third, the employer's duty to protect employees from a sexually hostile work environment can conflict with the implementation of the sexual orientation policy. That is particularly the case if a company chooses to permit employees to promote and celebrate sexual orientation diversity in the workplace. Offended employees could sue for a sexually hostile work environment. On the other hand, if an employer does not permit employees to promote and celebrate sexual orientation in the workplace, employees may sue the company under its own anti-discrimination policy.

A corporation could compound this problem by including transgendered or gender identity in its corporate nondiscrimination policy. Women employees may sue if the employer permits transgendered men to use the women's restroom. Transgendered men may sue if the employer does not permit them to wear women's clothes to work or to use the women's restroom. Either way, a conflict is likely to arise between the employer's duty to prevent a sexually hostile work environment and the self-imposed duty of protecting transgendered employees.

Finally, a corporation's sexual orientation nondiscrimination policy may conflict with the duty not to discriminate on the basis of religion. Implementation of diversity policies that include sexual orientation often include prohibitions against expressing opposition to gay sex. If an employee is disciplined or dismissed for expressing a religious belief that gay sex is wrong, the employee can sue for violation of a federally protected right.

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I. Current Federal, State and Local Laws

Do any federal, state or local laws require private employers to have written nondiscrimination policies?

No.

No federal, state or local laws require private employers to adopt specific company policies prohibiting discrimination on any grounds.[1] Conversely, the lack of a policy does not mean the company is permitted to discriminate against certain classes of employees.

Title VII of the Civil Rights Act of 1964 bans discrimination on the basis of "race, color, religion, sex or national origin," 42 U.S.C. § 2000e-2(a), and states have their own civil rights laws providing similar protections. Notice, though, that the list does not include sexual orientation. *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001) (claim of harassment of an employee based on his sexual orientation not actionable under Title VII); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001) (same). Other federal laws that ban discrimination on the basis of age and disability do not cover issues involving sexual orientation either. However, 12 states, the District of Columbia, and a number of cities and counties prohibit discrimination on the basis of sexual orientation in employment and public accommodations, depending on the way the jurisdiction's law is written.[2]

Don't I need to include sexual orientation in my nondiscrimination policy to help defend against potential sexual orientation discrimination lawsuits?

No.

Although many labor lawyers believe that it is useful to have a written nondiscrimination policy for purposes of defending litigation, it can be counterproductive to include classes of employees not protected by federal law. With the growing number of states, cities and localities giving protected status to various classes of people, with differing definitions of the classes, it is difficult for a corporation that does business in multiple jurisdictions to adequately describe every protected class in its written policy. Accordingly, many labor lawyers are now advising clients to adopt a policy like the following: "The Company does not discriminate in its employment practices based upon race, color, religion, sex or national origin, or on any other basis that is unlawful under applicable Federal, state or local laws." The advantage of this type of policy is that it does not have to be revised if the law changes, and it does not subject the company to potential litigation in jurisdictions that do not prohibit certain types of discrimination.

Do state or local laws prohibiting sexual orientation discrimination require private businesses to offer employee benefits to the unmarried domestic partners of their employees?

No.

There are no cases in which a court has used a state or local law banning sexual orientation discrimination to order businesses to offer employee benefits to the unmarried partners of their employees. In *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. App. 1995), the City of Minneapolis argued that Minnesota's sexual orientation provision required it to provide domestic partner benefits for its employees. But the Minnesota Court of Appeals rejected that basis for the Minneapolis policy, and found it to

be invalid. *See also Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516, 530, 213 Cal. Rptr. 410 (1985) (denial of dental benefits does not constitute sexual orientation discrimination, but instead merely distinguishes eligibility on the basis of marriage), pet. for rev. denied (Cal. Aug. 15, 1985); *Phillips v. Wisconsin Personnel Comm'n*, 167 Wis. 2d 205, 482 N.W.2d 121, 127 (Wis. App. 1992) (it is not sexual orientation discrimination under state law to extend employee health insurance coverage only to married spouses of state employees).

Could a state or local unit of government enact a law forcing my company to pay for benefits to unmarried domestic partners of my employees?

This question is currently on the cutting edge of law and has a number of sub-parts. The answers are only partially in view at this time because there has been little litigation on the issue. This is what can be said now: A state, city or county probably could not pass a law requiring all local businesses to offer "hard benefits" to unmarried domestic partners of its employees, such as medical insurance and pension rights, because these are controlled by federal ERISA laws (Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*). *See Air Transport Ass'n of America v. City & County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998). It is possible that a state, city or county could pass a law ordering a business to extend "soft benefits" to the unmarried domestic partners of its employees, such as bereavement leave or family medical leave, because these are not covered by ERISA or any other federal law.[3] However, under the Commerce Clause of the Constitution, states, cities and counties cannot pass laws that impose an "undue burden" on interstate commerce. Therefore, if a city council passed a law that required a national company to offer non-ERISA domestic partner benefits to all of its employees in all states as the condition for the corporation to do business in that one city, the extraterritorial reach of the ordinance beyond the city boundaries may mean that such an ordinance violates the Commerce Clause (this is sometimes referred to in court decisions as the "Dormant Commerce Clause"). However, this conclusion is not certain. The issue is being litigated in *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), which is discussed further below.

My company has a contract to provide certain services to a city. Could that city use the contract as the basis to force my company to offer domestic partner benefits or to force my company to promise not to discriminate on the basis of sexual orientation?

A number of West Coast cities, including, San Francisco, Los Angeles and Seattle, require all businesses that contract to provide goods or services to those cities to extend all benefits offered to married spouses of their employees to the unmarried domestic partners of their employees. This issue is now in the early stages of litigation. The two leading court decisions, both concerning San Francisco's requirements, in essence ruled that cities may not contradict federal ERISA law with such ordinances, or legislate where there is a clear federal law preempting local coverage, such as federal laws regulating the airline industry. *See Air Transport Ass'n of America v. City & County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), and *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001). However, federal law does not regulate "soft benefits" such as bereavement leave and family medical leave, so it is possible that the local units of government could require companies to offer such benefits to their employees' domestic partners. *See S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (holding that San Francisco's requirement that city contractors provide "soft" domestic partner benefits to out-of-state employees working on San Francisco contracts does not violate the Dormant Commerce Clause). This area will probably be litigated further if more cities or counties enact these domestic partner benefits requirements for their contractors. Cities, counties and states

can probably require a company to agree not to discriminate on the basis of sexual orientation as a condition of getting the government contract.

What did the Ninth Circuit rule in the *S.D. Myers* case involving domestic partner benefits?

In *S.D. Myers v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), the Ninth Circuit rejected the arguments of an Ohio company seeking a contract to do work for the City of San Francisco that San Francisco could not require contractors to offer domestic partner benefits to their employees. The Ninth Circuit held, in essence, that the San Francisco ordinance did not violate the Dormant Commerce Clause because it would affect an out-of-state employer only if the employer chose to enter a contract with the city. Also, the Ninth Circuit ruled that the company lacked standing to argue that the contract requirement violated ERISA. Therefore, many of the questions about whether a city could impose a requirement that contractors provide benefits for their employees' unmarried partners remain unanswered at this time. This issue is far from settled.

II. Legal Pitfalls of Corporate Nondiscrimination Policies

A. Creation of Contractual Duty

Regardless of whether my business operates in a jurisdiction that bans sexual orientation discrimination, I think it is good for employee morale for the corporation to have a written nondiscrimination policy. Is there any possible legal downside to having a written nondiscrimination policy?

Yes.

Through written policies and employee handbooks, the company is probably establishing employee rights that can be enforced in court in addition to those created by any relevant anti-discrimination law. In effect, an employee can use the company's policies or employee handbook to argue that the company breached its employment contract with the worker by doing something in conflict with the corporate policy or employee handbook. The Ohio Court of Appeals has explained this legal principle in general:

> *"The 'at-will' concept is only a description of the parties'* prima facie *employment relationship. It intimates nothing about subsidiary contractual arrangements (express or implied) to which an employer may legally obligate himself by adding to that relationship new terms and conditions.... The employer's promulgation of employment manuals or employee handbooks, or other writings styled 'personnel policies and practices,' can create contractual rights which the employer may not abridge without incurring liability."*

Helle v. Landmark, Inc., 15 Ohio App. 3d 1 472 N.E.2d 765,773, (1984). Therefore, by adopting a nondiscrimination policy, a company can create an avenue by which it may be sued for employment discrimination, lack of promotion, lack of benefits, etc. that is independent of and in addition to any local or state laws prohibiting discrimination.

Won't a nondiscrimination policy settle the matter, satisfy the activists and allow my company to move on?

No, not necessarily.

For more details on the consequences of sexual orientation policies, see *Behind the Rhetoric: The Social Goals of GLBT Advocacy in Corporate America* (Corporate Resource Council 2002).

B. Ability to Discipline Employees

Do employers lose the authority to discipline employees for inappropriate behavior in the workplace if they enact nondiscrimination policies based on sexual orientation?

Yes.

Corporations generally have the ability to fire employees or request their resignation upon disclosure of inappropriate behavior. And this is a power a corporation may want to exercise from time to time against an employee engaged in inappropriate words or actions. In May 2001 an employee of the Carlyle Group was asked to resign after he sent an e-mail to other employees boasting about his sexual exploits and his plans for more of the same. ("E-mail Sex Tale Earns Carlyle Staffer Ax," *Washington Times*, May 22, 2001, p. B8.) The employee resigned as requested. However, a corporation that enacts a nondiscrimination policy based on sexual orientation may inadvertently tie its own hands by in effect promising not to discipline employees who bring information about their sexual activities into the workplace. For example, a California trial court awarded a former employee of Shell Oil over $5.3 million in actual and punitive damages after Shell fired him for inadvertently leaving in the copy room sexually explicit materials detailing the "house rules" for "safe sex" practices at a gay party he hosted that weekend. *Collins v. Shell Oil Company*, 1991 Cal.App. LEXIS 783 (1991). There are other complexities to the *Shell Oil* case, but it shows the potential that a sexual orientation policy may grant a right to possess or distribute sexually explicit materials in the workplace, and that an employer may be sued for disciplining an employee because he possessed such materials.

May employers dismiss employees for non-work activity, such as cohabitation or other sex-related activity?

Yes, in some circumstances, when it affects the workplace.

For example, some companies, like Ace Hardware, prohibit employees who are "close relatives, cohabitors or dating employees" to work "within the same departments and/or within the same functional area where one might exercise authority or influence over the other's job status or progression . . . ." *Waggoner v. Ace Hardware Corporation*, 134 Wn.2d 748, 751, 953 P.2d 88 (1998). The Washington Supreme Court upheld the power of Ace Hardware to dismiss two employees who were cohabiting together when one managed the other at work.

May a company terminate an employee because his non-work activity undercuts the corporation's public image?

Yes.

Corporations may fire employees if their non-work activity creates a negative image for the company. For example, the Georgia Attorney General who defended Georgia's sodomy law before the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), withdrew an offer of employment from a woman after learning that she had announced her upcoming "marriage" to another woman. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc). The Court of Appeals held that Bowers was justified in withdrawing the offer because the same-sex "marriage" would create difficulties that "would be likely to harm the public perception of the Department." *Id*. at 1105. Similarly, Kentucky Baptist Homes for Children ("KBHC") terminated an employee upon discovering that she had a female "life partner" because of the potential impact on KBHC's public image. The court rejected the employee's claim that the termination constituted religious discrimination. *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 2001 WL 888365, *4 (W.D. Kentucky, July 23, 2001). And Winn-Dixie Stores, Inc. is currently defending a lawsuit brought by a former Winn-Dixie truck driver who was terminated for cross-dressing in his off hours. The truck driver claims his supervisor said he was being terminated because his cross-dressing "could harm the company image." *Winn-Dixie Seeks to Dismiss Suit Over Firing of Transgendered Employee*, www.hrc.org/worknet/workalert/2001/0402/article06.asp.

Firing employees for non-work activity inconsistent with the employer's image may be more common with employers that have a strong moral or religious component to their

work. For example, many religious employers require employees to live by the employer's moral standards such as no sex outside of marriage. *See, e.g., Pedreira*, 2001 WL 888365, *3 (employee policy against gay sex); *Parker-Bigback v. St. Labre School*, 301 Mont. 16, 7 P.3d 361 (2000) (Catholic school fired female teacher for cohabiting with a man who was not her husband). However, if an employer does fire employees for engaging in sex outside of marriage, the employer must apply its standards evenhandedly to both men and women, and not single out women whose sexual conduct is evidenced by pregnancy. See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

C. Conflict with Hostile Work Environment Law

Do laws or policies banning sexual orientation discrimination conflict with those banning "hostile work environments?"

Yes.

Nondiscrimination laws or policies may embolden gays, lesbians, bisexuals, and transgendered ("GLBT") people to freely discuss their sexual behaviors in the workplace. Such discussions may create a sexually hostile work environment for other employees, something that Title VII says employers must remedy. If the employer tries to stop overt GLBT advocacy or explicit conversation in the workplace, however, it could be accused of violating the sexual orientation law or policy.

Could a corporation be sued because its corporate policy banning discrimination based on sexual orientation creates a "sexually hostile work environment" in violation of federal law?

Yes.

In 1998, the Supreme Court ruled that private employers could be sued under Title VII for same-sex sexual harassment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 785 (1998). The Supreme Court has also ruled that a corporation could be sued vicariously for the actions and words of an employee that creates a sexually hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). A worker subjected to seeing the sexually explicit materials of fellow workers can also state a claim under Title VII for creation of a sexually hostile work environment. *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001). Thus, if a corporation encourages its GLBT employees to "come out," it is possible that the "celebration of their sexual diversity" could create a "sexually hostile work environment" for other employees, which would give rise to a cause of action under Title VII. Therefore, businesses with a sexual orientation policy must walk a very narrow path between Title VII and the policy.

What are the legal standards for proving a discriminatory "hostile work environment" actionable under Title VII?

For a plaintiff to prevail on a hostile work environment claim, the alleged sexual harassment must be so "severe or pervasive" as to "'alter the conditions of [plaintiff's] employment and create an abusive working environment,'" *Faragher*, 524 U.S. at 786 (quoting *Meritor Savings Bank, FSB*, 477 U.S. at 67). To be actionable under Title VII, plaintiff's work environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993)). The "conduct must be extreme to amount to a change in the terms and conditions of employment." 524 U.S. at 788. The conduct at issue in *O'Rourke*, which included repeated sexual remarks, exposure to pornography, and exposure to discussion of sexual exploits, was sufficiently extreme to sustain a Title VII claim. *O'Rourke*, 235 F.3d at 728-29. The employer was liable because it did not take action to prevent harassment by coworkers or supervisors. *O'Rourke*, 235 F.3d at 736.

D. Transgendered Workers

Some diversity advocates are urging corporations to protect transgendered people in the workplace. Is this a good idea or will it create problems for employers?

By prohibiting discrimination against transgendered people under a corporate nondiscrimination policy, a company could be opening itself up to problems few could have imagined several years ago. For example, if a company requires employees to wear uniforms, can an anatomically male employee come dressed in the female's uniform because of his perceived "gender identity" as a woman? Can a cross-dressing male employee use the women's restroom, or if female employees object, can a company require him to use the men's room, or order him to change his clothes? Is the employer required to give transgendered people their own separate restrooms? This is not some far-fetched hypothetical. West Publishing of Eagan, Minnesota, a large publisher of legal materials, was recently sued by a cross-dressing male under Minnesota's sexual orientation law, which explicitly prohibits discrimination against transgendered people. After complaints by several women employees that a man dressed as a woman was using the women's restroom at work, West officials requested that the man use the single-occupancy restrooms and not the women's restrooms. He refused, left his job at West and sued for sexual orientation discrimination. The trial court dismissed the suit, but the Minnesota Court of Appeals reversed, ruling that it was an insufficient defense as a matter of law for West Publishing to argue "that Goins is a man and that an employer may legitimately segregate restrooms by sex." *Goins v. West Group*, 619 N.W.2d 424, 429 (Minn. App. 2000). Upon further appeal the Minnesota Supreme Court held that it is not sexual orientation discrimination under the Minnesota sexual orientation law to designate employee restroom use on the basis of biological sex, and reinstated the trial court's dismissal. *Goins v. West Group*, 635 N.W. 2d 717, 723 (Minn. 2001). However, the fact that the suit was brought and the claim substantiated in the Minnesota Court of Appeals demonstrates the danger of adding transgendered to a corporation's non-discrimination policy. Employers should not expect transgendered employers elsewhere to be dissuaded by the Minnesota case, especially those other states or localities where laws prohibit discrimination against transgendered persons.

E. Conflict with Religious Discrimination Law

What about employees with religious beliefs against gay sex? Could they possibly sue and win a case against a company with a nondiscrimination policy protecting sexual orientation?

Yes, under certain circumstances.

Under federal Title VII protections, an employer must make reasonable accommodations of an employee's religious beliefs. Thus, an employer could be sued for taking adverse action against an employee who requested a change in a job assignment because she perceived that performing her job assignment would violate her beliefs against gay sex. An employee recently sued an employer that fired him for refusing to assign foster children to gay or lesbian couples because of his religious beliefs. *Phillips v. Collings*, 256 F.3d 843 (8th Cir. 2001).

Could a company be sued for disciplining or firing an employee whose expression of religious beliefs violates the company's diversity policy?

Yes.

If an employer's implementation of its sexual orientation policy prohibits speech or writing that opposes gay or lesbian relationships, an employee's expression of religious beliefs may violate the company policy. At Hewlett Packard, part of the implementation of the Hewlett Packard diversity policy included dis-

playing in the workplace posters of certain persons protected by the policy. The company placed a poster depicting two gay men near the cubicle of a Christian who objected to the poster. He responded to the poster by placing Bible verses about gay sex on his overhead bins. When he refused to remove the Bible verses unless the company removed the poster, he was fired for his opposition to the diversity advertising campaign. The employee sued Hewlett Packard for religious discrimination in violation of Title VII. The federal judge dismissed the lawsuit, holding as a matter of law that the company did not have to accommodate the employee's religious beliefs. *Peterson v. Hewlett-Packard Co.*, Case No. CIV 00-68-S-LMB, Slip op. at 16-18 (June 1, 2001). The court held that allowing the employee to display the Bible verses "may well have exposed HP to potential lawsuits filed by other HP employees asserting harassment claims." Slip op. at 17. However, the only reason another employee could possibly have sued for harassment is that the company voluntarily undertook a duty to prohibit condemnation of gay and lesbian relationships. A company's self-imposed duty (or a state-imposed duty) to protect sexual orientation cannot trump the federal prohibition against discriminating on the basis of religion. The Hewlett Packard case is on appeal to the United States Court of Appeals for the Ninth Circuit.

Endnotes

[1] Executive Order 11246 requires that federal government contractors display an "Equal Employment Opportunity Is the Law" poster (provided by the Office of Federal Contract Compliance Programs) on their premises. But there is no requirement that government contractors have a written nondiscrimination policy of their own.

[2] The states that prohibit discrimination on the basis of sexual orientation in employment and public accommodations are California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin.

[3] Vermont law requires employers to extend benefits such as family leave and workers' compensation to the civil union partners of their employees. 15 V.S.A § 1204(e). Vermont employers are not required to extend medical insurance or pension benefits to their employees' civil union partners, for those matters are controlled by ERISA. Vermont Division of Health Care Administration, HCA Bulletin 110, December 21, 2000, www.bishca.state.vt.us/Regs&Bulls/hcabulls/HCABUL110.htm.

For additional information, or for review of your Human Resource Policies, please contact Paul Weber at the Corporate Resource Council, (480) 444-0030.

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