

Catching Up To California: The U.S. Supreme Court Rules That Title VII Protects Gay and Transgender Applicants and Employees

Key Points

- Title VII prohibits discrimination based on sexual orientation and gender identity.
- The holding does not change currently-existing legal obligations for California employers as discrimination based on sexual orientation and gender identity is prohibited under the FEHA.
- California employers should ensure they are complying with FEHA's posting and training requirements.

On Monday, June 15, 2020, the U.S. Supreme Court published a [long-awaited opinion, *Bostock v. Clayton County*](#), holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity.

The *Bostock* decision resolved cases on appeal from three federal circuits: *Bostock v. Clayton County* (Eleventh Circuit), *Zarda v. Altitude Express, Inc.*, (Second Circuit) and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (6th Circuit). In each case, the employee alleged that they were fired for being gay or transgender in violation of Title VII.

The question before the Court in *Bostock* was therefore whether Title VII, which prohibits discrimination in the workplace "because of sex," encompasses discrimination based on sexual orientation and gender identity. In its 6-to-3 opinion, the Court held that it does, explaining: "For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'" (Slip Op. p.12).

While this landmark ruling does not change currently-existing legal obligations for California employers, the U.S. Supreme Court's decision resolves unsettled questions regarding the degree of protection provided by Title VII, if any, to gay and transgender employees in more than half of the states.

But in California, the Fair Employment and Housing Act (FEHA), has long made it illegal for an employer with 5 or more



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employees to discriminate against employees and applicants on the basis of sexual orientation. In more recent years, the California Legislature amended FEHA to explicitly prohibit discrimination on the basis of gender identity and gender expression, defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." The FEHA also prohibits harassment on the basis of gender identity or gender expression, regardless of the employer's size.

And, [as reported in our June 28, 2017 alert](#), the California Fair Employment and Housing Council (FEHC) issued specific regulations that clarified and expanded protections for transgender applicants and employees.

For example, the regulations clarify that employers may not discriminate against an individual who is transitioning, has transitioned, or is perceived to be transitioning. Employers also may not impose upon an applicant or employee any physical appearance, grooming or dress standard that is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity, and employers must permit employees to use facilities (such as restrooms and locker rooms) that correspond to the employee's gender identity or gender expression.

California employers should continue to ensure that they are complying with California laws requiring posting notice of employee's rights¹ and training of supervisors² on how to identify and prevent harassment based on gender identity, gender expression and sexual orientation. California employers should also review their Equal Employment Opportunity policies (anti-discrimination, anti-harassment and anti-retaliation policies) to ensure that such policies clearly prohibit discrimination on the basis of an employee's sexual orientation, gender identity and gender expression.

¹ California employers with more than 5 employees must display, in a place that is easily accessible and visible to all employees, a poster containing transgender employees' rights. The Department of Fair Employment & Housing has created [a poster that employers can use](#).

² California's mandatory harassment prevention training requirement applies to employers with 50 or more employees and requires training of all supervisors.

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