



PROGRAM MATERIALS

Program #30188

July 13, 2020

Making History & Moving Forward: What Bostock Means for You, Your Company, and Inclusiveness in the Workplace

**Copyright ©2020 by Ashley R. Lynam, Esq. - Fowler
Hirtzel McNulty & Spaulding, LLP.**

All Rights Reserved.

Licensed to Celesq®, Inc.

Celesq® AttorneysEd Center

www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487

Phone 561-241-1919

Fax 561-241-1969



Making History & Moving Forward: What Bostock Means for You, Your Company, and Inclusiveness in the Workplace

FOWLER HIRTZEL McNULTY & SPAULDING, LLP

Ashley R. Lynam, Esq.

215-932-0400

alynam@fhmslaw.com



The Sexual Misconduct Liability Group

- The Sexual Misconduct Liability Group at FHMS specializes in the investigation and defense of sexual misconduct claims for clients including high profile commercial organizations, sports teams, homeowners, hotels, educational institutions, charitable and social service organizations and more, often involving third party criminal acts, children, the elderly and disabled requiring particularized skill and precision to navigate, advise upon and defend.
- The SML group also advises upon and defends both private and public employers in sex-based harassment, discrimination and misconduct claims and suits. We analyze, edit and assist in the drafting and implementation of written sexual misconduct policies and procedures including employee handbooks, Title IX policies, Clery Act and campus law enforcement compliance and more. We have represented corporate representatives, current and former employees and independent contractors, and other witnesses for deposition and trial
- Our firm specializes on rapid response for catastrophic and high-exposure losses, guaranteeing 24/7 attention to our clients and promising that no call will ever go unanswered.

Ashley R. Lynam, Esq. (She/Her)



- Former rape prosecutor with the Philadelphia District Attorney's Office who specialized in human trafficking investigations. Ashley approaches each SML matter with sensitivity to the nuanced issues that arise in ever-changing employment environments.
- Ms. Lynam is well-known for vigorously protecting her client's confidentiality while nevertheless providing an aggressive defense, given the sensitive nature of SML claims. Ms. Lynam and her practice have tried several suits to jury and have also obtained successful resolutions via summary judgment and other motions, all while managing her client's important privacy, public interest and policy concerns throughout litigation and resolution.
- Ms. Lynam graduated summa cum laude from Villanova University's School of Business where she was the president of the nationally ranked mock trial team and cum laude from Villanova University's School of Law where she was chair of the Moot Court Board. Ms. Lynam is an executive board member of Villanova's Institute to Address Commercial Sexual Exploitation, an advisory board member of Villanova's Alumni Association, and a board member of The Salvation Army of Greater Philadelphia. Ms. Lynam is licensed and actively practices in Pennsylvania, New York and New Jersey and has been named a "Rising Star" in all four editions of "Super Lawyers" published in Philadelphia Magazine since 2017.

BOSTOCK v. CLAYTON COUNTY

590 U.S. ____ (2020)

- ✓ Overview of the players, procedure and history
- ✓ Details of holding and rationale
- ✓ Survey of state impact
- ✓ Recommendations for employers & questions

Bostock v. Clayton County, Georgia

■ THE PLAYERS:

- Gerald Bostock was fired by Clayton County, Georgia for conduct “unbecoming” of a county employee shortly after he began participating in a gay recreational softball league.
- Donald Zarda was fired by Altitude Express days after he mentioned being gay.
- Aimee Stephens was fired by RG & GR Harris Funeral Homes after informing her employer of her intent to “live and work full-time as a woman” after being hired as a man.
- During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens passed away. Their estates pressed their causes for the benefit of their heirs.

■ THE PROCEDURE:

- Each employee sued alleging sex discrimination under Title VII of the Civil Rights Act of 1964.
- The Eleventh Circuit held that Title VII does not prohibit an employer from firing employees for being gay and Gary Bostock’s suit was dismissed as a matter of law.
- The Second and Sixth Circuits permitted the claims of Donald Zarda and Aimee Stephens, respectively, to proceed.

■ THE “STIPULATION”:

- **The employers did not dispute that the gay or transgender status of the employee was a determinative factor in their terminations.**

Bostock v. Clayton County, Georgia

- **THE EMPLOYEES' POSITION:**

- The employees maintained that they were fired **because of sex** in violation of Title VI.

- **THE EMPLOYERS' POSITION:**

- **“Even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.” Bostock at 13.**
 - **Statutory text/Legislative purpose:** the statute could, but does not, contain specific language encompassing discrimination on the basis of gay or transgender status. Indeed, legislative efforts post 1964 have attempted to include gay and/or transgender status and have failed. (Alito dissent at 4); (Kavanaugh dissent at 15-16).
 - **Ordinary conversation:** discrimination on the basis of homosexuality and gender and transgender status aren't referred to as sex discrimination in ordinary conversation. (Alito dissent at 3); (Kavanaugh dissent at 8-13).
 - **Unintentional:** an employer who discriminates on the basis of homosexuality or transgender status does not intend to discriminate on the basis of sex. (Kavanaugh dissent at 12-13). The employers do not intend to harm women more than men, or men more than women.
 - **“Ignorance:”** the employers argue they could refuse to hire or gay or transgender employee without ever learning of the applicant's sex.
 - **Religious Infringement:** the employers asserted a fear that complying with Title VII's mandates here may require some employers to violate their religious freedoms.

Title VII of the Civil Rights Act of 1964: A Brief History

- **The Civil Rights Act of 1964 was proposed by President John F. Kennedy in 1963 and initially opposed by filibuster in the Senate. Following his assassination in November of 1963, President Lyndon B. Johnson pushed the bill forward, which ultimately passed and was signed into law on July 2, 1964.**
- **The Civil Rights Act brought sweeping changes to voting rights (Title I), public accommodations and desegregation of public facilities and education (Titles II – IV), established the Commission on Civil Rights (Title V), addressed discrimination in federally assisted programs (Title VI), removal of discrimination cases to federal court (Title IX, not to be confused with Title IX of the Education Amendments Act of 1972 related to sex discrimination in federally funded education), and of course Title VII related to equal employment opportunity.**
- **Title VII states that it is “unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individuals’ race, color, religion, sex, or national origin.” §2000e-2(a)(1).**

A Closer Look....

SEC. 2000e-2

(a) Employer Practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge **any individual**, or otherwise to discriminate against **any individual** with respect to his compensation, terms, conditions, or privileges of employment **because of** such **individual's** race, color, religion, **sex** or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive **any individual** of employment opportunities or to otherwise adversely affect his status as an employee, **because of** such **individual's** race, color, religion, sex or national origin.

What is “Because of Sex”?

- While Title VII covers far more, the only statutorily protected issue for consideration in Bostock is “because of sex,” and more specifically what Title VII says about it.
- “Because of sex” has been defined as “by reason of” or “on account of.” University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 350 (2013) (citing Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176 (2009)). This means that Title VII’s “because of” standard incorporates the simple and traditional standard of but-for causation. Nassar, 570 U.S. at 176.
- That form of causation is established whenever a particular outcome would not have happened “but for” the purported cause. Gross, 557 U.S. at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, but-for causation is established. Bostock, 590 U.S. at 5.
- In Title VII, the adoption of the traditional but-for standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, it is sufficient to trigger Title VII.

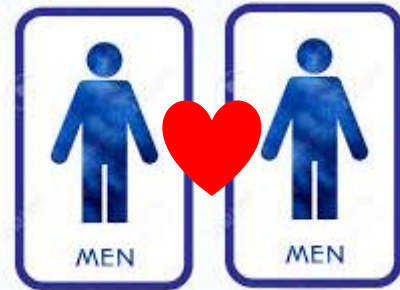
What is “Discrimination”?

- Discrimination today means roughly the same thing it did in 1964 when The Civil Rights Act was passed: “To make a difference in treatment or favor (of one as compared with others).” Bostock at 7, citing Webster’s New International Dictionary 745 (2d ed. 1954).
- To discriminate against a person, then, means treating that individual worse than others who are similarly situated. Burlington N. & S.F.R. Co. v. White, 548 US 53, 59 (2006).
- In so-called “disparate treatment” cases, the Supreme Court has held that the difference in treatment based on sex must be intentional. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1998).
- An employer who intentionally treats a person worse because of sex – such as by firing the person for actions or attributes it would tolerate in an individual of another sex –discriminates against that person in violation of Title VII.

What did the Court Hold?

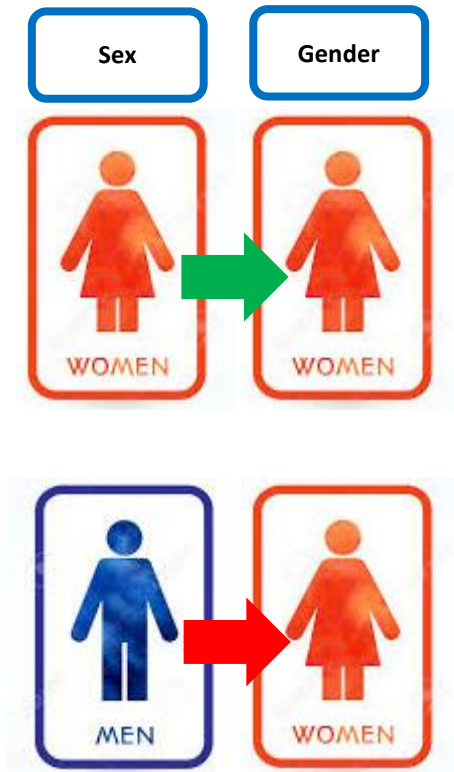
- In a direct address to the employer's position that they did not discriminate on the basis of sex to either group, the Court noted that the statute addresses this position directly. **See red highlights in prior slide.**
- The statute states several times that employers may not discriminate against an **individual** on the basis of sex. The meaning of individual today means the same thing it did in 1964: "a particular being as distinguished from a class, species, or collection." Bostock at 8, citing Webster's New International Dictionary at 1267.
- The Court explored the absurd consequence of adopting the employer's logic:
 - Suppose an employer fires a woman for refusing her boss's sexual advances. It would not be a defense for the employer to note that, while he certainly sexually harassed that individual woman, he generally gives preferential treatment to women and indeed has more women in leadership positions in his company than men.
 - The employer in this hypothetical is liable under Title VII for treating *this woman* worse on the basis of her sex.
 - So too, if an employer fires a woman for being insufficiently feminine, or a man for being insufficiently masculine, *even if he fires both*, makes each employment decision in part on the basis of sex affecting the individual.

Bostock v. Clayton County, Georgia



- “... it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” Bostock at 9.
- Consider an employer with two employees, both of whom are attracted to men. In the employer’s mind, the two individuals are materially identical in all respects, except that one is a man and the other is a woman.
- If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.
- Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.

Bostock v. Clayton County, Georgia



- Let's try another example with transgender employees.
- If an employer retains an otherwise identical employee who was identified as male at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Bostock at 10.
- “The individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”
- “When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play – both the individual’s sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). **But Title VII doesn’t care.**”
Bostock at 11.

What Precedent did the Court Rely Upon?

- **Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (pur curiam)** in which a company allegedly refused to hire women with young children, but did hire men with young children. Because its discrimination depended not only on the employee's sex as a female but also the presence of another criterion – namely, being a parent of young children – the company contended it hadn't engaged in discrimination "because of sex." The company also maintained that, as a whole, it tended to favor hiring women over men.
- **Los Angeles Dept. of Water and Power v. Manhart, 435 US 702 (1978)** in which an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not known to discriminate against women, but was relying on what they believed to be a statistically accurate statement about life expectancy. The Court dismissed as irrelevant the employer's insistence that its actions were motivated by an objective to achieve class-wide equality.
- **Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)** in which a male plaintiff alleged he was singled out by his male co-workers for sexual harassment. The Court held it immaterial that members of the same sex as the victim committed the alleged discrimination. The conduct would not have occurred to a female employer, meeting the statute's but-for causation standard.

Point/Counterpoint

- **Statutory text/Legislative purpose:** the statute could, but does not, contain specific language encompassing discrimination on the basis of gay or transgender status. Indeed, legislative efforts post 1964 have attempted to include gay and/or transgender status and have failed. (Alito dissent at 4);(Kavanaugh dissent at 15-16).
 - The reasons for the “failure” are unknown,” and also unnecessary when sex is already clearly implicated.
 - The “legislative purpose,” which is replete with congressional testimony offered for the benefit of women, might not have included protections on the basis of sex *for men*. See Oncale. It did not stop SCOTU then, why now?
 - “Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.” Milner v. Department of Navy, 562 US 562, 574 (2011).
 - “...the fact that [the statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply ‘demonstrates [the] breadth of a legislative command.’” S.P.R.L. v. Imrex Co., 473 US 479, 499 (1985).
 - The majority opinion did not go so far as to say legislative intent and historical context is irrelevant. The employers merely suggested that few in 1964 could have expected the present *result*... which does nothing to address the legislative *meaning*. Bostock. At 26.

Point/Counterpoint

- **Ordinary conversation:** discrimination on the basis of homosexuality and gender and transgender status aren't referred to as sex discrimination in ordinary conversation. (Alito dissent at 3, Kavanaugh dissent at 8-13).
 - In Phillips, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given the undisputed fact that other women were hired, it would be highly unlikely for her to attribute her sex as the sole cause in conversation
- **Religious Infringement:** the employers asserted a "fear" that complying with Title VII's mandates here may require some employers to violate their religious freedoms.
 - "[W]hile other employers in other cases may raise free exercise arguments that merit careful considerations, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way." Bostock at 33.

Point/Counterpoint

- **Unintentional:** an employer who discriminates on the basis of homosexuality or transgender status does not intend to discriminate on the basis of sex. (Kavanaugh dissent at 12-13). The employers do not intend to harm woman more than men, or men more than women.
 - An employer who will employ a woman attracted to men but not a man attracted to men necessarily discriminates on the basis of sex. In Phillips, the employer understood their discrimination to be on the basis of motherhood, not womanhood. In Manhart, intentional discrimination was not in dispute –the employer’s intent was related to to ap olicy that favored men over women based on actuarial data.
- **“Ignorance:”** the employers argue they could reuse to hire or gay or transgender employee without ever learning of the applicant’s sex.
 - Replace the hypothetical with an employer asking an applicant if they are black or Catholic. If they employer fires both, they violate Title VII. Recall, Oncale solidified Title VII protections on the basis of sex, regardless of the sex.

BOSTOCK LESSONS TO BE LEARNED

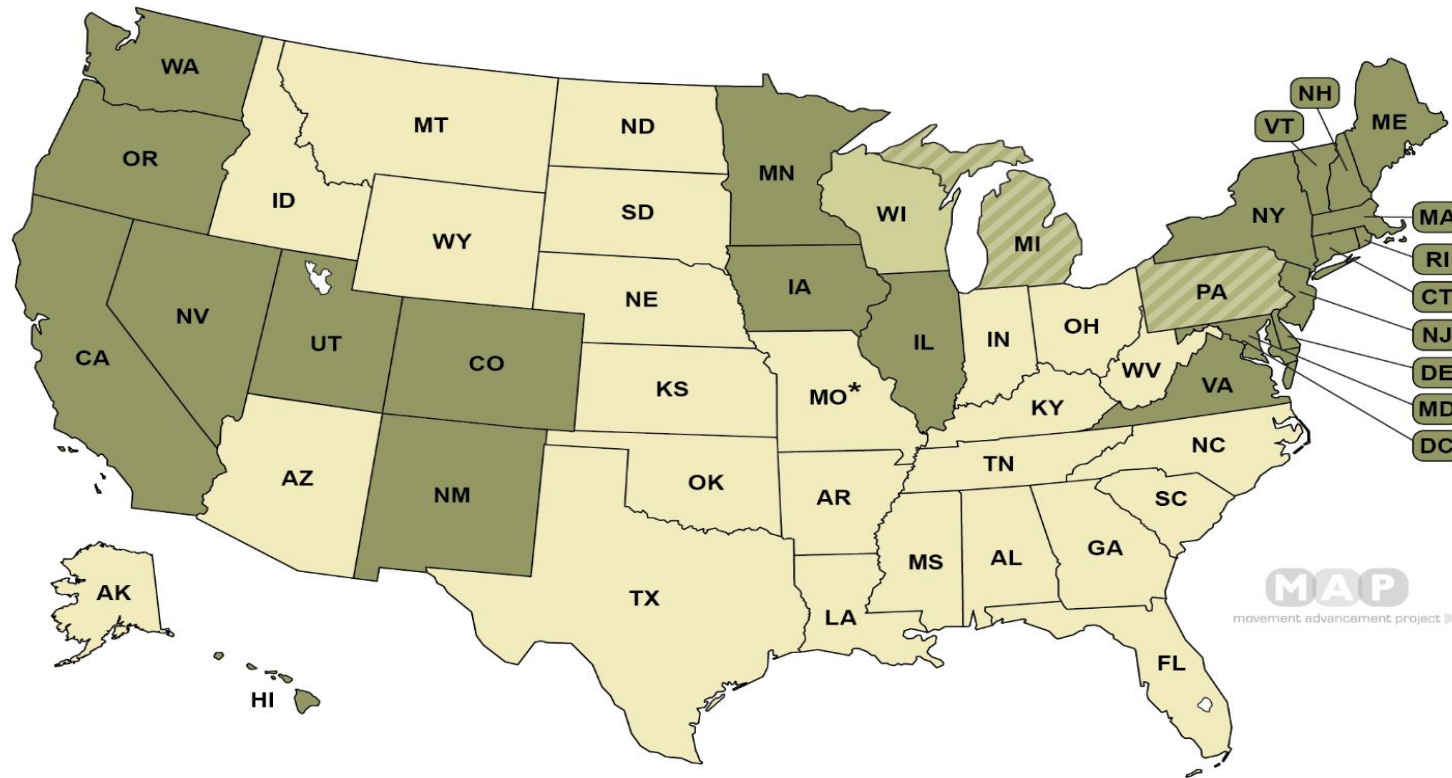


- ❑ “It is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.” Bostock at 14.
- ❑ “The plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action.” Id.
- ❑ “An employer cannot escape liability by demonstrating that it treats males and females comparably as groups.” Bostock at 15.

State Impact Survey

- Prior to Bostock, State law explicitly prohibited discrimination based on sexual orientation and gender identity in 22 states, 2 territories and the District of Columbia:
 - Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, D.C., Virginia, Illinois, Iowa, Minnesota, New Mexico, Colorado, Utah, Nevada, California, Oregon, Washington, Hawaii, Puerto Rico & Guam
- State law explicitly interprets existing but not explicit prohibition on sex discrimination to include sexual orientation and/or gender identity in 2 states:
 - Pennsylvania & Michigan
 - Note: Pennsylvania's Human Relations Commission has explicitly stated it interprets current protections against sex discrimination to include protections for both sexual orientation and gender identity.
- State law explicitly prohibits discrimination based on sexual orientation only in 1 state:
 - Wisconsin
- NO EXPLICIT PROHIBITION FOR DISCRIMINATION ON SEXUAL ORIENTATION OR GENDER IDENTITY EXISTS IN STATE LAW IN 25 STATES AND 3 Territories:
 - North Carolina, South Carolina, Georgia, Florida, West Virginia, Tennessee, Alabama, Mississippi, Kentucky, Ohio, Indiana, Louisiana, Arkansas, Missouri, Oklahoma, Texas, Kansas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Idaho, Arizona, Alaska, American Samoa, Northern Mariana Islands, US Virgin Islands.

Pre-Bostock State Impact Survey



U.S. Territories

American Samoa

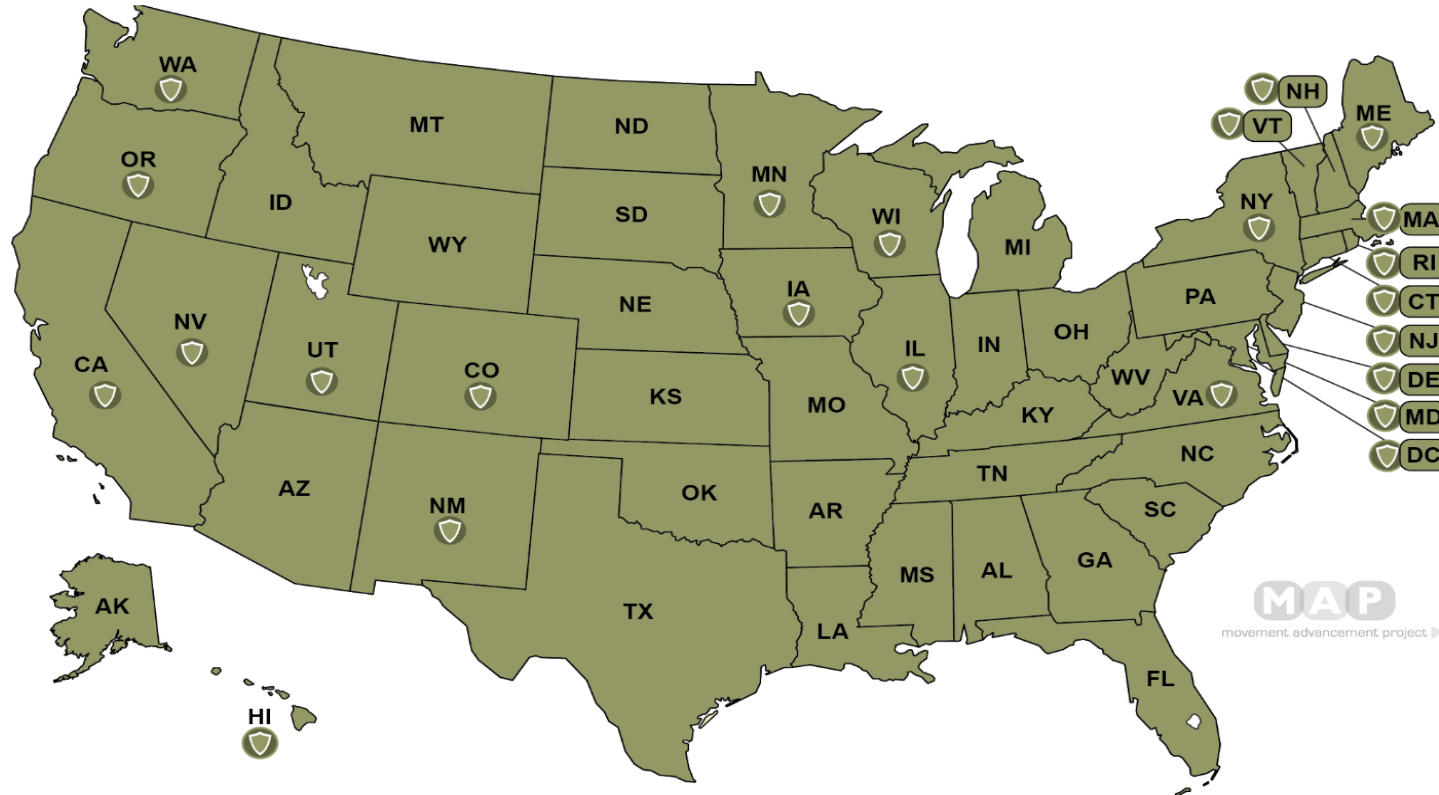
Commonwealth of the
Northern Mariana Islands

Guam

Puerto Rico

U.S. Virgin Islands

Post-Bostock State Impact Survey



MAP
movement advancement project

U.S. Territories

American Samoa

Commonwealth of the
Northern Mariana Islands

Guam

Puerto Rico

U.S. Virgin Islands

Considerations Post-Bostock

- Title VII only applies to employers with 15 or more full-time employees. An individual fired for being gay or transgender would have no recourse under Title VII in those 25 states discussed before if the individual works at a company with 14 or fewer full-time employees.
- Exceptions to the application of Title VII still exist:
 - Independent contractors and private membership clubs
 - American Indian Tribes
 - Religious organization hiring for religious functions
 - Bona Fide Occupational Qualification (BFOQ)
- Bostock does not address the (BFOQ) exception, which states that it “shall not be an unlawful employment practice for an employer to hire and employ employees... where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”
 - The BFOQ tests:
 - (1) That all or substantially all members of the opposite group are unable to perform the role;
 - (2) That the essence of the business would be undermined without protected group-based hiring decisions
 - (3) That no reasonable alternative to the discriminatory hiring exists.

Broad Implications of Bostock

- The Bostock decision was clear and direct in its majority opinion and could have broad implications on other forms of sex and gender based discrimination in the areas of housing, education, credit, health care and more. However, the Court could simultaneously alter other statutory protections by, for example expanding religious freedom defenses or other existing exceptions discussed in the last slide.
- Consider these other protections and the potential implications:
 - The Equal Pay Act of 1963 (EPA) protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
 - Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employment discrimination based on genetic information about an application or employee.
 - The Civil Rights Act of 1991, among other things, provides monetary damages in cases of intentional employment discrimination.
- Title VII remedies include:
 - Back-pay for work missed and front-pay for future earnings
 - Reinstatement
 - Retroactive seniority
 - Attorneys fees
 - Both compensatory and punitive damages

Recommendations for Employers: How to Prevent Discrimination

TRAIN

- Train Human Resources managers and all employees on local, state and federal laws including EEO decisions.
- Implement a strong EEO policy that is **genuinely embraced** at the highest levels.

PROMOTE

- Promote an inclusive culture by welcoming an environment that welcomes and celebrates personal differences in a safe and professional setting.
- Establish neutral and objective criteria to avoid subjective employment decisions based on personal stereotypes or hidden biases.

FOSTER

- Foster open communication and early dispute resolution, which can minimize escalating misunderstandings and serve as continuing training.

Recommendations for Employers: How to Recruit, Hire & Promote

DIVERSIFY

- Recruit, hire and promote with EEO principles in mind and diversity your pool of candidates and team members in all levels of the company.

SELF-REFLECT

- Monitor for compliance but conducted self-analyses to determine whether any practices disadvantage members of the LGBTQIA (or any other protected class or marginalized group).
- DO THE WORK to correct historical discrimination within society that may have permeated your company.

TRANSPARENCY

- Ensure selection criteria does not disproportionately affect a particular community.
- Make known promotion criteria, job openings, and communicate with all eligible employees.



QUESTIONS?

Ashley R. Lynam, Esq.
215-932-0400
alynam@fhmslaw.com