CHAPTER 2 Litigating LGBTQ Employee Rights

SCOPE

In Chapter 2, we provide practical guidance specific to the plaintiff's attorney representing an LGBTQ client in a workplace-related matter. We provide generalized tips for assessing your client's potential claim, writing the demand letter and seeking early settlement, determining when and by what means your client must first pursue her administrative remedies, preparing for litigation, and litigating the case through discovery and to trial. Finally, we explore alternative methods of dispute resolution which you may find helpful in resolving your client's claim before or during litigation, or which may be required if your client has signed an employment agreement mandating non-judicial dispute resolution such as arbitration.

This chapter is meant only to provide an overview of the complaint and discrimination process for most private sector LGBTQ employees. For more detailed analyses on the technical, procedural, and evidentiary rules governing administrative exhaustion and litigation of employment discrimination claims, you should refer to the publisher's other guides specific to those topics. In addition, we highly recommend an article written by Sharon McGowan—the lawyer who represented Diane Schroer in the landmark transgender discrimination case against the Library of Congress—which reflects on the strategies she used to pursue her client's claim.[1]

SYNOPSIS

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[1] Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205 (2010).

§ 2.01 Assessing a Potential Claim

[1] Initial Consultation

[a] Preparing for and Conducting the Initial Consultation

The first step after receiving a call from an LGBTQ individual regarding a workplace issue is to use an initial consultation to assess whether the individual may have a claim under applicable law, the relative strength of the individual's claim(s), and whether the matter is one you are competent to handle. You should also use the opportunity to build rapport with the potential client, show that you are sympathetic (or empathetic), and demonstrate LGBTQ cultural competency (discussed below) and how your experience will help him/her/them.

An employee's LGBTQ identity may affect all aspects of the employment relationship, often in subtle ways. You should be prepared to take a 360-degree look at your client's situation, which may not be limited to the obvious issues on the surface. For example, an LGBTQ potential client may tell you that due to poor treatment at work, she has been depressed for quite some time. She also tells you that she thinks that her employer has been giving her unfavorable assignments ever since she confidentially shared with Human Resources that she thinks she is depressed because she believes her manager is a homophobe who has been targeting her. In addition to a potential claim for discrimination or hostile work environment, you may also have strong claims for disability discrimination and/or retaliation. In fact, the claims under the ADA and for retaliation could even be stronger than the hostile work environment claims, depending on the particular facts. See the discussions in other sections of this Practice Guide regarding retaliation and disability discrimination.

At the consultation, you should use a checklist to help you with issue-spotting. Create a checklist that helps you remember to draw as many relevant facts about the individual as possible and that includes all of the applicable laws in your jurisdiction that apply to an LGBTQ workplace issue. For example, plaintiff's counsel in the District of Columbia might use a checklist that looks something like the following when meeting with an LGBTQ potential client who works in the private sector:[1]

INTRODUCTORY QUESTIONS	
□	Ensure client understands attorney-client confidentiality and privilege
□	Ask that potential client share all facts, whether she believes they cast her in a positive or negative light
□	Goals of potential client in obtaining legal representation
□	Any other civil litigation history? Has the client been a party to or witness in any litigation or administrative claims?
□	Criminal history? Arrests? Convictions? Details.
□	Ask client about aspects of personal life (relationships, affiliations, activities, social media, etc.)
□	Ensure potential client knows you are sympathetic (or empathetic) to her situation; engender respect and openness
EMPLOYMENT HISTORY	
□	Experience and qualifications
□	Prior employment
□	Performance Record (prior and at current employer)
□	Any prior claims of discrimination? Resolution?
ASSESSING POTENTIAL CLAIMS	
□	Title VII
□	Discrimination
■	Gender or sex stereotyping?
■	Adverse change in terms and conditions of employment?
□	Harassment / Hostile Work Environment
■	Gender or sex stereotyping?
■	Severe or pervasive?

[1] Refer to Chapter 7 (survey of state law) to create your own checklist specific to your jurisdiction. The checklist provided is provided for the sake of example and is not intended to substitute for your own checklist based on the law and particularities present in your own jurisdiction.

	□		Retaliation
		■	Good faith complaint?
	□		Associational
		■	Relationship-based discrimination? Spouse/significant other?
□			ADA
	□		Discrimination
		■	Disabled
		■	Record of Disability
		■	Regarded as Disabled
		■	Associational
	□		Failure to Accommodate
	□		Harassment / Hostile Work Environment
	□		Retaliation
□			Leave and Benefits Laws (FMLA, ERISA, ACA)
	□		Does employer treat same-sex spouses the same as opposite-sex spouses?
	□		Retaliation for use of benefits for same-sex spouse/domestic partner?
□			Occupational Safety and Health
	□		Access to restrooms for transgender employees?
□			District of Columbia Human Rights Act
	□		Same analysis as Title VII and ADA claims
	□		Contains explicit prohibition against discrimination based on sexual orientation and gender identity or expression
□			Is the individual an employee of a federal contractor?
	□		Executive Order explicitly bans discrimination based on sexual orientation and gender identity
	□		Use threat of grievance with OFCCP as leverage

CHECKLIST FOR DISABILITY DISCRIMINATION CLAIMS	
✔	Consider the difference between unfairness and illegal discrimination
✔	Was there another reason why your prospective client was terminated?
✔	History of performance issues?
✔	Personality conflicts at work that predate the knowledge of disability?

✔	The employer knew or figured out that you are [HIV-positive][living with gender dysphoria]	
✔	If the same person that terminated your prospective client knew about your disability at time of hire, there is a rebuttal presumption of no discriminatory intent	
✔	Was your prospective client qualified to perform the essential functions of the job with or without reasonable accommodation?	
✔	How soon after learning of your prospective client's disability did the employer take adverse action?	
✔	Did the employer attempt to engage your client in an interactive process to determine whether accommodation would be possible?	
✔	If so, did your client also engage in good faith?	
✔	Can you demonstrate that the reason given for termination was pretextual (false)?	
✔	Do any other coworkers know about your prospective client's HIV status?	
✔	If your prospective client hasn't disclosed his status, how would anyone know?	
✔	Consider the reasons why your prospective client believes that she is being treated differently because of HIV status. Ask the following questions:	
	✔	Have other employees in similar situations been treated differently or the same?
	✔	Has the employer followed its personnel policies?
	✔	Did the adverse treatment begin shortly after the employer learned of your HIV status?
	✔	If your client was out for HIV-related medical reasons, did the adverse treatment begin upon return to work?
✔	What story will the employer tell? Encourage as much honesty and openness about this; many are embarrassed of facts they believe will reflect poorly on them.	
✔	Do you have any documents or witnesses that would be able to demonstrate that the employer's reasons for termination are false?	
✔	Do medical or health challenges make it exceedingly difficult for your client to perform the essential functions of her position?	
✔	Does your condition prevent full-time work, or require time off for medical appointments, lighter duties or a less stressful position?	
✔	What are some accommodations you believe would be reasonable and that would permit your client to perform her job effectively?	
✔	Anticipate reasons the employer might give as to why your proposed accommodations are unreasonable under the circumstances.	

[b] Building Trust and Demonstrating Cultural Competency

While this Practice Guide discusses cultural competency in more detail in Chapter 5, it is important to insert an introduction here to the importance of cultural competency at this stage of the relationship with a potential client who is facing workplace challenges.

Building your potential client's trust that you care about her as a human being and that you understand her issues as a member of the LGBTQ community is paramount. Your legal skill and experience is not enough to demonstrate to an LGBTQ person why she should trust you to shepherd her through a crisis. If you show her that you are culturally competent, she will be more likely to entrust you with the truth about her situation and the facts that you need to succeed on her behalf. While you may not be a member of the LGBTQ community, you can quickly demonstrate trust-building cultural competency in both the spoken and unspoken way you introduce yourself to a potential client. Even if you are an LGBTQ person, you may need to gain cultural competency in the sub-community of which your potential client is a member or know how to ask questions in a sensitive way. For example, a lesbian attorney may need to gain a better understanding of gay male culture. A white gay male may not, without some cultural education, understand the issues of black trans women. It's important to achieve a broad spectrum of intersectional understanding and competency when it comes to representing LGBTQ persons. The challenges of growing up gay in a Catholic Latinx family are different than those of growing up gay in a progressive non-religious family. It's also important to be willing to admit that you don't know everything about your potential client's culture, but that you are open to learning and understanding her needs and concerns.

On the other hand, if you demonstrate a low level of cultural competence right out of the gate, your potential client will probably go elsewhere to seek assistance. For example, if you did not take the time to know that the United States Supreme Court recognized nationwide marriage equality in 2015 and you are still using outdated terms such as "traditional marriage" or "gay marriage" that reflect you don't understand what marriage equality means, you've probably already lost your prospect. This is especially true in rural and traditionally conservative areas of the country where LGBTQ people are already suspicious of the intentions of heterosexual and cisgender people in their communities. If they perceive you as unfriendly toward their identity or their community, they will not trust you to be a zealous advocate.

You don't have to display the rainbow flag in your office to show an LGBTQ client that her issues mean something to you. But taking the time to learn a few things about lesbian, gay, or transgender culture is an investment in your practice and in your clients that will reap rewards. Referrals come from high levels of trust and positive feelings from your clients and potential clients about your ability to speak their language. You should also understand how important historical events and historical shifts have impacted LGBTQ culture and created generational differences. For example, some younger LGBTQ persons who have grown up in a more tolerant society may have stronger ties to their biological families than LGBTQ persons who had to create a family of peers after having been rejected by their own families. Gay men who survived the AIDS crisis and lost many friends to the disease may have a different outlook than younger gay men.

Consider training yourself and your staff to an appropriate level of cultural competency and sensitivity. How will you or your receptionist or paralegal react when your prospective client who told you her name is Carla shows up to your office but is not wearing the kind of clothing you might expect a woman to wear? What if a potential client named Jacob shows up wearing a

skirt, blouse, and high heels and tells you that they prefer the pronouns they/them/their? Jacob's perception of how you react could determine whether they engage you or decide to keep looking for a lawyer that won't fumble or hesitate to use their preferred pronouns. One of the best assets you can bring to the table is an open mind and basic respect for the notion that many people express themselves in very different ways than you do.

Avail yourself of the many online LGBTQ cultural resources made available by organizations, including the National Center for Transgender Equality, the National Center for Lesbian Rights, Lambda Legal, the Human Rights Campaign, the National LGBTQ Task Force, and many other fine national and local organizations that educate the public on LGBTQ issues.

[2] Due Diligence and Conflicts

You should conduct a reasonable amount of investigation into the facts as your potential client has conveyed them to you before agreeing to represent the potential client. While lawyers must trust their clients to tell the truth, oftentimes, individuals are embarrassed about the facts surrounding their situation, do not yet trust you with all of the relevant facts, or may innocently forget or otherwise fail to disclose important facts. This is especially true if they assume that you are not either part of the LGBTQ community or a strong ally who understands and sympathizes with the particular issues facing the community.

Unfortunately, clients often do not disclose the entire truth to their lawyers, leaving many uncomfortable facts to be revealed at very inopportune times. Your job is to coax as much of the truth out of your client at this stage as you can. You should convey to your potential client why it is important to disclose all facts surrounding the situation, regardless of whether she believes they are highly relevant or whether she believes they cast her in a negative light. Gently caution your client that it is in her best interest to disclose all facts early in the process so that you can honestly assess her claim, so that her (and your) investment of time and money in the case is not wasted, and so that you do not have cause to withdraw from the representation at a later date because she failed to disclose material information about her matter. The conversation should be polite even though it is an honest and assertive one. You should establish that you are not being accusatory or condescending but that you must establish clear boundaries and demand honesty early in the process in order to establish a healthy relationship if the two of you are to have a productive attorney-client relationship.

You should let your client know that you intend to conduct a due diligence investigation into the facts and the public record before you assess whether mutual engagement is possible. You should investigate your potential client's publicly available social, criminal, civil, and employment histories.

Ask your potential client about her social media presence and ask how she uses social media. Just like the general population, LGBTQ people (especially those in middle and younger generations) use social media to communicate and express their feelings and ideas. One good way to start investigating your potential client is to conduct a keyword search on an online search aggregator such as Google or Bing and to search common social media platforms such as Facebook, Instagram, Twitter, or Tumblr for publicly posted content. You should also ask your client if he or she maintains any publicly-viewable profiles on GPS-based dating applications, information that could be relevant in certain situations. While you do not need to invade your client's privacy by reading through all of his or her dating profile messages, you should be aware whether your client uses such applications, ask your client if he has discussed issues relevant to

his matter with anyone via these apps, and ask him to provide you with relevant conversations. If your client is a licensed professional, access publicly available licensing board records. If you are not already familiar with your potential client's character, you should ask questions and seek information designed to assess the potential client's honesty and whether or not she is a financial risk to you.

You can also access publicly available court and criminal records to look for criminal records that could be relevant in the matter or that could be used to impeach your potential client's character. Civil records may reveal information about your potential client that you should know before delving into an attorney-client relationship. For example, has your client brought suit in the past against anyone? If your search reveals a litigious history, you should dig deeper.

You should also discuss money and the investment of time and resources with your potential client. While many of your potential clients may not be able to pay you by the hour, and while you may be willing to take some matters on a contingent fee basis, you should expect some level of investment from your potential client. Those without any skin in the game often do not turn out to be clients with winnable cases.

And as you probably already know, you must ensure that accepting representation does not create any conflicts. Always run a conflicts check before deciding whether to accept representation.

Due Diligence Checklist	
✔	Social Media Profiles (including GPS-based apps)
✔	Civil and Judgment Records
✔	Criminal and Arrest Records
✔	Employment History
✔	Financial Condition
✔	Conflicts Check

[3] Engaging the Client

While it may be impossible to know everything you need to know by the time you put pen to paper with your client, you should have a good sense of who your client is and what you can do for your client assuming what you know is true. Always have a written engagement agreement with clear and specific terms that is specifically tailored to the particular matter or representation. Even if you have represented the same individual in the past or in another matter, you should have a matter-specific agreement with your client. This Practice Guide's purpose is not to instruct you on the specifics of constructing a sound representation agreement—indeed, there are many resources available to guide you on how to do so—but the authors would be remiss to not remind

you that a written agreement with your client is crucial and intended to protect both you and your client from the obvious complications that flow from a soured relationship.

You may seize on another key opportunity to build and manage expectations and a good relationship with your client by providing your new client with an information packet. This packet should anticipate and address key client questions and concerns, highlight important provisions in the attorney-client engagement agreement, and provide easy-to-understand and digestible information and expectations about the process specific to their representation (e.g., a litigation flowchart). Not only will your clients appreciate this because it shows that you are organized and knowledgeable, you can preclude many time-consuming questions from your client by ensuring your client can refer to this simple guide for process-related questions.

§ 2.02 Writing the Demand Letter and Seeking Pre-Charge Settlement

[1] Writing an Effective Demand Letter

[a] Articulating Your Client's Story and Demonstrating Your Competence

The demand letter is your first opportunity to articulate your client's story to the employer and to settle the matter without litigating it. A well-written, succinct and effective demand letter may pique the employer's attention and show the employer that you are competent and that it is in the employer's best interest to attempt to resolve the matter. Depending upon the size of the employer, the employer may immediately forward the demand letter to its inside or outside legal counsel to investigate the facts and evaluate and assess the value of the claims. Often, larger employers will involve their insurance carriers where they have employment practices liability insurance policies in place to indemnify them for certain employment-related claims. Your letter should get the attention of both the employer's attorney and the insurance adjuster, not by being flashy and aggressive, but by articulating the facts and the current law in a compelling way that helps opposing counsel spell out the potential cost of the claim to his client. Your goal is not to write a strongly-worded and accusatory letter that stirs anger and hardens positions; it is to write a cogent explanation of the facts as your client sees them and why that means the employer bears legal responsibility.

Take this opportunity to manage your client's expectations about the relative likelihood of resolution and payment at this stage. An employer will almost never settle a claim at the demand letter stage for more than a fraction of the potential total amount a court or arbitrator might award absent clearly damning direct evidence. While you should avoid an exorbitant monetary demand, your demand should demonstrate that your client's claim is a serious one and that you're not just after a quick buck for yourself. For example, if your client has been out of work for six months with some moderate emotional distress because of a discriminatory termination, don't demand two years of back pay and the maximum statutory allowance for compensatory and punitive damages. While you may point out that such damages are possible should your client succeed at trial, demanding such an amount diminishes your credibility and takes you out of a negotiable settlement range. Employers' counsel appreciate reasonable plaintiffs' counsel, and vice versa.

Your demand letter presents an opportunity for you to educate opposing counsel on why the law affords recovery to your LGBTQ client. She or he—especially if not a well-versed

employment practitioner—may be unaware of the nuances in the statutory and case law that may permit your client's claim. Be credible and convincing in your presentation of the case law; don't exaggerate the cases, but demonstrate that the trend in the law is toward interpreting Title VII to prohibit sexual orientation and gender identity discrimination.

[b] Sample Demand Letter

Please note that the following demand letter is a sample only and is not intended to be used for every client or in every situation and is limited to its narrow hypothetical fact pattern. It serves only as a roadmap on how to design and tailor your own demand letter to your client's specific needs.

[b] Sample Demand Letter

Confidential and for Settlement Purposes Only
Protected by F.R.E. 408 and [State R. Evid.]
July 4, 2017
BY CERTIFIED MAIL
Jane Doe
Director of Human Resources
Acme, Inc.
1000 Main Street
Anytown, NY 10001
Re: [_____Client Full Name]

Dear Ms. Doe:

Plaintiff's Law Firm represents [_____Client Full Name] ("Ms. [_____Client Last Name]"), a former assistant plant manager who worked for Acme, Inc. ("Acme") in its Fargo, North Dakota manufacturing plant and whose employment was terminated on May 31, 2017. Based upon our understanding and review of the facts, we believe that Ms. Last Name has viable claims against Acme resulting from the unlawful termination of her employment by her supervisor, Sam Sampson.

The purpose of this letter is to engage the Company in determining whether it would be mutually advantageous to the parties to settle these potential claims without the need for litigation. Please accept my apologies for directing this letter to you if Acme is currently represented by legal counsel; if so, please forward this communication to your legal counsel immediately and provide me with counsel's contact information.

FACTUAL BACKGROUND

Ms. [_____Client Last Name] identifies as a transgender woman and is in the process of a medical transition from the gender she was assigned at birth (male) to the gender with which she identifies and that she expresses (female). As part of this important journey to express her authentic self, she will require gender reassignment surgery in order to help

complete her transition. By all accounts, Ms. [_____Client Last Name] performed her job above Acme's expectations and Acme recognized her as a successful employee. In March of this year, only about two months before her termination, Ms. [_____Client Last Name] received a 3% raise, indicating the Company's satisfaction with her performance and her ability to provide great customer service. Her last semi-annual performance review, completed in December of last year, clearly demonstrates that Acme believed that she exhibited a strong work ethic and was effective in her position.

On May 2, 2017, Ms. [_____Client Last Name] informed her supervisor, Mr. Sampson, that she would need time off for her gender reassignment surgery, which was scheduled for September 15, 2017. At that time, Mr. Sampson told Ms. [_____Client Last Name] that she would need to wait until 30 days before her surgery to apply for FMLA.

On May 22, 2017, Ms. [_____Client Last Name] was dealing with a difficult employee who would not follow her instructions regarding a plant safety requirement. When Ms. [_____Client Last Name] reported the incident to Mr. Sampson, Mr. Sampson berated her, blamed her for the incident, and told her, "if you were a real dude, you could handle this yourself". Feeling naturally hurt and frustrated by Mr. Sampson's clear bias against her, she went into the employee break room, where she saw a few other employees she worked with. She explained that she felt isolated by Sampson and audibly stated, "this fucking place sucks." She did not threaten anyone. In making these comments in the presence of co-workers, Ms. [_____Client Last Name] was attempting to discuss the terms and conditions of her employment at Acme.

On May 31, 2015, Mr. Sampson informed Ms. [_____Client Last Name] that the Company had decided to terminate her for "performance reasons," also citing that single use of a profane word uttered in the employee break room. Acme does not have a policy against the use of profanity at work and does not regularly discipline its employees for the use of profanity despite the fact that employees frequently use profanity during working hours.

While Ms. [_____Client Last Name] does not deny having used a profane word in the break room on May 22, the fact that Acme took the severe step of terminating Ms. [_____Client Last Name]'s employment after this utterance only weeks after she expressed her need for FMLA leave for gender reassignment surgery raises a strong inference of discrimination and of retaliation. Male employees, especially those in management, in the North Dakota plant are widely known to commonly use profanity on the job without being disciplined, much less terminated, for doing so. In fact, one of Ms. [_____Client Last Name]'s coworkers told her that despite shouting profanity loudly on the plant floor one day, he only received informal verbal counseling. Prior to this incident, Ms. [_____Client Last Name] had never received any warnings or

discipline for her conduct or performance.

It is also very concerning and telling a male coworker friendly with Ms. [_____Client Last Name] told her that Mr. Sampson told him that he "ain't a fan of men who want to be women." He also told Ms. [_____Client Last Name] that male managers have told him that they had no interest in attending a women's charity in which female store employees were participating. The culture that Mr. Sampson and other male managers created made women at Acme's North Dakota plant, including Ms. [_____Client Last Name], feel unwelcome and disrespected.

Given these facts, it is likely that a reasonable juror would view Acme's purported reason for terminating Ms. [_____Client Last Name] (performance or profanity) as a pretext for a termination that was actually based on her status as a transgender woman, which is discrimination "because of … sex" under Title VII. Because the termination occurred shortly after a request for FMLA leave, a jury could also find that Acme was motivated by retaliatory motive because Ms. [_____Client Last Name] exercised her rights under the FMLA.

As a result of Acme's decision to terminate her, Ms. [_____Client Last Name] has suffered significant economic loss and emotional distress. Unfortunately, loss of income has forced Ms. [_____Client Last Name] to indefinitely postpone her medically necessary gender reassignment surgery, as she can no longer afford to proceed with it and no longer has health insurance. In addition, Ms. [_____Client Last Name] faces the harsh reality that her age and status as a transgender woman in a rural conservative area will present very real challenges as she searches for similar employment in her field.

MS. [CLIENT LAST NAME]'S POTENTIAL LEGAL CLAIMS

The following is a non-exhaustive list of claims that Ms. [_____Client Last Name] has against Acme due to its unlawful actions. Ms. [_____Client Last Name] reserves all rights, remedies, and claims against the Company and against all others responsible for her damages, including individuals, who may be liable under Title VII, the Family and Medical Leave Act, and the National Labor Relations Act.

Title VII—Sex Discrimination

Title VII of the Civil Rights Act of 1964 forbids employers from taking adverse action against employees on the basis of their sex. Discrimination on the basis of sex includes discrimination against transgender persons because such discrimination is rooted in stereotypes about sex and gender *[place footnote here citing to Price Waterhouse and authority from your jurisdiction that transgender discrimination is sex discrimination*]. The Equal Employment Opportunity Commission ("EEOC") has made ending

transgender status discrimination in the workplace one of its priorities and takes the position that discrimination on the basis of gender identity or expression constitutes sex stereotyping and therefore amounts to sex discrimination [*place footnote here citing to EEOC decisions such as Macy and Lusardi*]. Two lawsuits filed against two different employers by the EEOC, involve transgender women who informed their employer of their need to transition from male to female and were subsequently terminated [*place footnote here citing to the cases filed by the EEOC*]. One of those cases settled for $150,000.00.

The close proximity between Ms. [_____Client Last Name] having informed the Company of her need for gender reassignment surgery and her termination, coupled with the severity of the Company's discipline against Ms. [_____Client Last Name] vis-à-vis how male and non-transgender employees are treated, raise a strong inference of discrimination against Ms. [_____Client Last Name] because she is transgender. Consequently, there is likely to be a genuine issue, triable to a jury, as to the real reason Acme fired Ms. [_____Client Last Name].

As a result of the Company's unlawful sex discrimination, Ms. [_____Client Last Name] is entitled to, among other things, lost wages and benefits, compensatory and punitive damages, and attorneys' fees and costs. Because of Acme's size and the severity of Ms. [_____Client Last Name]'s emotional damages, she could be entitled to up to $[applicable statutory limit on compensatory damages under Title VII] in addition to her economic damages.

Family and Medical Leave Act—Retaliation

The Family and Medical Leave Act ("FMLA") forbids an employer from retaliating against an employee for having requested FMLA leave [*place footnote here citing to relevant statutory and regulatory provision(s)*]. Ms. [_____Client Last Name] informed Acme of her need for time off under the FMLA in order to undergo gender reassignment surgery, which is a covered serious medical condition under the Act. Acme terminated Ms. [_____Client Last Name]'s employment weeks after her FMLA request without good reason in violation of the FMLA's anti-retaliation provisions. As discussed above, Acme allowed multiple other employees to use profanity on the job with impunity, yet terminated Ms. [_____Client Last Name] for a single use of a profane term in the employee break room.

Due to the Company's FMLA violation, Ms. [_____Client Last Name] is entitled to, among other things, lost wages and benefits, liquidated damages, and attorneys' fees and costs.

National Labor Relations Act

The National Labor Relations Act ("NLRA") protects employees, whether

unionized or not, from adverse action on the basis of having engaged in concerted activity to discuss the terms and conditions of their employment. The National Labor Relations Board ("NLRB"), which enforces the NLRA, has found that even a profane rant on Facebook was protected concerted activity. [*place footnote here citing to relevant NLRB decisions*]

Ms. [_____Client Last Name] made one remark that included one profane word during one isolated instance. She made that remark in the presence of co-workers in the break room and in the context of complaining about the way her supervisor treated her.

While there is no private right of action available to Ms. [_____Client Last Name] under the NLRA, Ms. [_____Client Last Name] may file a Charge with the NLRB against Acme which the NLRB may investigate and prosecute.

CONCLUSION

For the reasons we have stated, we believe that Ms. [_____Client Last Name] has strong legal claims against Acme and intend to seek recovery against Acme on behalf of Ms. [_____Client Last Name]. This letter hereby notifies the Company to preserve all electronic and hard copy documents that may be relevant in future litigation.

That said, if the Company is amenable to resolving this matter without the need for litigation, I am happy to speak with you in greater detail about the circumstances surrounding Ms. [_____Client Last Name]'s termination. It is my hope that we can work out an arrangement that meets the needs and ensures the future success of both Acme and Ms. [_____Client Last Name]. Please note, however, that due to the gravity of this situation and the urgent need to remedy this situation so that Ms. [_____Client Last Name] may proceed with her medically necessary gender reassignment surgery, if this matter has not been resolved by August 31, 2017, we will file an EEOC Charge and an NLRB Charge on her behalf shortly thereafter.

Respectfully,
[
Your name
]
Counsel for [
Client Full Name
]

Enclosure
[Page Break]
Confidential and for Settlement Purposes Only
Protected by F.R.E. 408 and [State R. Evid.]

MONETARY DEMAND FOR SETTLEMENT

Base salary for one year: $37,000.00

Approximate Value of Employer-Paid Benefits for one year: $20,000.00

Compensatory and Punitive Damages: $22,000.00 (equal to the cost of gender reassignment surgery) (A jury award of up to $300,000 is possible based on number of individuals employed by Acme)

Contribution to Attorneys' Fees: NONE AT THIS TIME

TOTAL: $79,000.00 (A jury award of up to $[maximum damages] or more is possible, not including an award of reasonable attorneys' fees and costs by the court)

LEGAL TERMS IN SETTLEMENT AGREEMENT
1. Mutual non-disparagement clause
2. Mutual confidentiality clause
3. Agreement not to contest unemployment
4. Verbal "neutral" employment reference provision with no statements about rehire eligibility
5. A full copy of Ms. [_____Client Last Name]'s performance reviews
[END OF LETTER]

[2] Communication with Employer's Counsel and Negotiating Settlement

Communication with employer's counsel by phone after sending your demand letter may prove a productive effort. You should schedule a call with opposing counsel to discuss your client's facts and to try to learn more about the employer's point of view. You may get an early peek at the employer's theory of any resulting case. A phone conversation will often enable you to assess how serious the employer is taking your client's demand and allow you to convey more detailed or nuanced points that you didn't find appropriate to include in your letter. Employers' counsel appreciate learning as much from you as you do from them. Savvy counsel know when to advise their clients to settle and when to put up a fight. Strike a cooperative and professional tone; be assertive for your client without being unduly aggressive. Most defense counsel simply are not intimidated by tough talk coming from plaintiffs' counsel.

At this early stage, the employer or its insurance adjuster typically assigned a value to your client's claim based upon the employer's investigation of the facts. If you are very confident in the integrity and truth of your client's facts, or if you have very good direct evidence of discriminatory or retaliatory motive, you should communicate your confidence but be open to reasonable offers. Even with very strong evidence, there are too many unknowns that may arise in litigation to gamble away a good early resolution that meets your client's needs. You have an ethical duty to communicate all offers of settlement to your client and have an earnest discussion about what settlement means for your client.

In addition, while employers' counsel have a duty to effectively represent their clients and

will almost always question or challenge your client's claim or account of events, they are humans and they are professionals who can be persuaded by credible plaintiffs and credible plaintiffs' counsel. They will advise their clients to consider early settlement if they believe your client can tell a compelling story supported by strong facts.

§ 2.03 Pursuing and Exhausting Administrative Remedies

[1] Federal Statutory Claims that Require Exhaustion; Time Limits for Filing a Charge of Discrimination

All claims brought under Title VII and the ADA require administrative exhaustion as a prerequisite to litigation. Therefore, the most common claims your clients will bring under Title VII are for sex discrimination (including theories of gender stereotyping and/or associational discrimination) and/or retaliation. Under the ADA, your clients might have claims for disability discrimination (including associational discrimination), failure to provide reasonable accommodation, and/or retaliation.

All such charges of discrimination must be made to the Equal Employment Opportunity Commission within 180 calendar days from the date the discrimination took place. There are plenty of cases that speak to "when the discrimination took place" where it is hard to identify a date because of an ongoing pattern of discrimination. Typically, if the events are related, or a hostile work environment is ongoing, the date the discrimination took place will be the last date the employee experienced harassment. If the discrimination occurred in one single discrete event, the date it occurred will be the date the discrimination took place. Many employees miss their charge filing deadlines because of miscalculating the last date on which discrimination took place. You should be very careful that you do not play a part in causing the employee to miss deadlines; if any deadlines are missed, you should quickly and carefully explain why the employee's failure to seek advice prior to the date she consulted with you resulted in the potential forfeiture of her claim.

For example, take an employee that was demoted from line manager to rank-and-file position on April 1 due to her gender and then complained about such discriminatory demotion on April 15, and was subsequently docked pay because of her complaint on April 30. Under those facts, she may have claims of both discrimination and retaliation under Title VII. She doesn't make a consultation appointment with your office until October 23. If you're in a jurisdiction without a FEPA for private sector employees, such as North Carolina, you would have until the end of that work week—October 27—to file this hypothetical employee's charge of discrimination with the EEOC. While you should still check the boxes for both discrimination and retaliation, your client probably lost her claim of discrimination because she waited too long to file a charge. The discriminatory act of demotion occurred on April 1, meaning that she had until September 28 to file her charge for discriminatory demotion. However, since the failure to exhaust administrative remedies is not a jurisdictional bar, providing only an affirmative defense to the employer, you should still include in your charge all factual and legal assertions necessary to establish a charge of discrimination for discrimination. You should always leave it to the employer to establish its entitlement to the affirmative defense; do not throw away pleading a potential claim for discrimination or retaliation simply because you think your client missed the deadline.

Be very careful about calendaring dates and deadlines, knowing the specific dates upon

which your client tells you she experienced discriminatory acts or harassment, and advising your client about relevant filing deadlines. If your negligence causes your client to miss a deadline, and the employer establishes that the claim is barred as a result, you could be liable for malpractice.

Where a state or local government has a law that provides similar protections to those found in federal law, the state or local government will typically have its own enforcement agency. These agencies, commonly referred to as deferral agencies or Fair Employment Practices Agencies ("FEPA"), accept charges of discrimination from claimants and dual file the charge with the EEOC (meaning they send the EEOC a copy of the charge). The FEPA typically will retain the charge for processing and investigation.

Where the employee first files a charge with the EEOC, the EEOC will forward a copy of the charge to the appropriate FEPA if the employee resides in a jurisdiction with a FEPA. The EEOC typically will retain the charge for processing and investigation.

Typically, the existence of a FEPA that has jurisdiction over the kind of claim your client has extends the charge filing deadline to 300 days from the date of discrimination.

To determine if there is a FEPA in your area, you may contact an EEOC field office in your area, which lists all FEPAs within its jurisdiction. You may also consult Chapter 7 of this Practice Guide for FEPAs in jurisdictions that expressly prohibit discrimination on the basis of sexual orientation and gender identity.

If a FEPA has a contract with EEOC, you may request on behalf of your client that the EEOC review the determination of the FEPA. However, EEOC does not review decisions by FEPAs with which it does not have an agreement to do so. The EEOC will conduct a review only if the request is submitted in writing within fifteen (15) days of receipt of the FEPA's determination. In your client's request for review to the EEOC, you should also include the basis for seeking review.

The 180 or 300-day period begins on the date your client first learns of the discriminatory employment decision regardless when the adverse employment decision takes effect. For example, if your client's employer told her on April 1 that it decided to demote her to an inferior position that will begin on May 1, the deadline for filing a charge will be 180 (or 300 days if a FEPA exists) from April 1 and not from May 1.

However, if your client alleges that she is the target of continuing harassment or a hostile work environment, your client will probably have 180 (or 300) days from the last specific incident of harassment to file a charge of discrimination with EEOC (or FEPA). In such cases, the enforcement agency or court is permitted to take into account all incidents of harassment, even if earlier incidents occurred more than 180 (or 300) days prior to the filing of the charge.

If you plan to file a charge alleging a violation of the Equal Pay Act (which prohibits sex discrimination in wages and benefits), different deadlines apply. Under the Equal Pay Act, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit. The deadline for filing a charge with EEOC or lawsuit in court under the EPA is two years from the day you received the last discriminatory paycheck (this is extended to three years in the case of a willful violation). Sex discrimination in wages is also covered by Title VII of the Civil Rights Act of 1964, which does require filing a charge within 180 or 300

day deadlines.

[2] Agencies that Investigate and Enforce Federal Employment Laws

[a] Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission ("EEOC") enforces most federal employment non-discrimination statutes, including Title VII, ADA Title I, the Age Discrimination in Employment Act ("ADEA"), the Genetic Information Nondiscrimination Act ("GINA"), the Equal Pay Act ("EPA"), and the Pregnancy Discrimination Act ("PDA") against the vast majority of private and public employers.

In creating the EEOC, Congress tasked the agency with preventing and prosecuting discriminatory workplace practices in the public and private sector. As such, the agency investigates charges of discrimination within its purview, issues cause findings when appropriate, and attempts to conciliate (resolve) matters in which it has found that an employer has discriminated against an individual. The agency operates through its Washington, DC headquarters and 53 field offices located throughout the United States.

[b] United States Department of Justice

The Department of Justice shares some responsibility with the EEOC and Department of Labor for enforcement of Title VII and the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") against state and local government employers.

[c] United States Department of Labor

The Office of Federal Contract Compliance Programs ("OFCCP") within the Department of Labor ("DOL") enforces federal anti-discrimination laws against employers holding federal contracts and subcontracts. The Veterans Employment and Training Service ("VETS") within DOL accepts charges of violations of USERRA and attempts to resolve such complaints; if unable to resolve a complaint, they may forward it to the Office of Special Counsel, an independent agency, for prosecution litigation.

[3] Charge of Discrimination

[a] Charge Form

The EEOC offers a standardized charge form (EEOC Form 5) that you should use when preparing your client's charge of discrimination. Here is a sample of that form completed by a hypothetical charging party to make a hypothetical claim of hostile work environment on the basis of sex:

graphics\pub02357\vol001\ch0002\2-1_001.r001.tiff

graphics\pub02357\vol001\ch0002\2-1_001.r001.pdf

[b] Completing the Charge Form Correctly

Do not short shrift the process of completing the charge form. You should remember to

allege all appropriate basis for your client's claims of discrimination. Your failure to do so will likely preclude your ability to litigate such claims later. Likewise, if your client alleges ongoing harassment or hostile work environment, remember to check the continuing action box. Courts examine the administrative charge (for example, an EEOC charge) to determine whether your client sufficiently pleads a particular claim. This form, in conjunction with the attachment and exhibits (discussed below), is your precursor to pleading. While you may learn additional facts after filing the charge that you may include in your complaint if your client decides to sue, you have to form a sufficient factual basis for your claim within the administrative charge.

[c] Attachments and Exhibits to the Charge

You should attach a succinct statement of facts and allegations in numbered paragraphs because EEOC Form 5 does not provide ample space to supplement your client's charge with a factual summary. You may wish to simply write "Please refer to Attachment A to this Form and accompanying Exhibits 1 through 3 for a summary of the facts relevant to Mrs. Doe's Charge of Discrimination."

[d] Amending the Charge as Necessary

Many times, you will encounter a new or prospective client who has already filed her charge before coming to you for help. In these and other circumstances discussed below, you should examine the charge and consider amending the charge as may be appropriate to include additional helpful facts or new claims. Take note, however, that amending a charge to add stale claims (claims filed after the applicable deadline) is unlikely to revive those late-made claims. Sometimes, though, amending a charge form to add facts or allegations relevant to a timely-made claim may be wise and helpful in grabbing the EEOC's attention as it investigates the charge.

You should also amend the charge, or file a new charge, for your client if she has experienced retaliation because of her opposition to discriminatory practices at work or because of her participation in the reporting or administrative process by filing a charge, giving testimony, or otherwise answering questions in the employer's internal investigation that ensued after the filing of the charge.

[4] The Employer's Position Statement

Typically, the employer will prepare and file a position statement with the agency. The position statement will almost always state that the employer took action against the employee for a legitimate non-discriminatory reason (commonly coined "LNDR"). This position statement is the employer's first opportunity to set out its factual findings and legal reasoning for why it should not be found liable for discrimination by the agency. Read the position statement carefully, because it is a useful insight into the employer's theory of the case. While most courts will probably not admit into evidence an employer's position statement written by its lawyers for the purpose of proving an inconsistent statement, it's nonetheless useful for you to keep track of the reasons, beginning with those proffered in this statement, that the employer cites for having terminated, demoted, or failed to promote your client.

Where permitted, you should seek leave from the agency to draft and file an appropriate narrow rebuttal that precisely addresses or highlights only key factual or legal analysis disputes.

[5] Administrative Agency Investigation and Findings

The administrative agency will investigate your client's charge of discrimination. When the EEOC begins an investigation, it will often hold a telephone conference with your client to ask questions about his or her charge and request supporting documentation or witness information.

[6] Conciliation

Because a central purpose of the EEOC is to achieve mediated resolution of disputes in private sector employment, the EEOC must offer the opportunity for the employee and employer to engage in conciliation where the EEOC has found cause that the employer is liable for discrimination. Conciliation, moderated by EEOC staff, is akin to private mediation with which many lawyers are already familiar. While there is no legal mandate for the parties to mediate in good faith to seek a resolution, the EEOC must invite them to participate. The parties may reject the opportunity summarily or may engage in the process. Based upon the particular facts of your client's situation and the robustness of the EEOC's investigation, you will have to assess whether it is in your client's best interest to attempt conciliation. As with any mediation, you and your client should have clear and realistic expectations for what you wish to achieve in conciliation and proceed in conciliation consistent with those expectations.

[7] Administrative Agency Enforcement Litigation

In a very small percentage of cases they investigate, administrative agencies such as the EEOC decide to file suit on behalf of the charging party as an enforcement action. Typically, the EEOC selects cases with very strong facts that present important legal issues reflecting the agency's enforcement priorities. In such cases, the EEOC will file suit and often permit the employee's counsel to intervene or cooperate in the litigation.

§ 2.04 Preparing for Litigation

[1] Gathering and Organizing the Facts

If your client has decided to litigate, you have already done some factual investigation and you have probably already seen many of the documents in your client's possession that are relevant. But now you'll need to make sure you have all of the facts you need to draft a legally sufficient complaint.

One helpful tool is to build a chronology and cast of characters. You will find these documents useful all the way through the course of your litigation as a quick reference guide and a way to help you map out discovery. The chronology lists all of the events and occurrences by date that are most relevant and important in the case. The cast of characters is a list of the people who were involved in your client's story and who may be witnesses in the case. Log all obtainable contact information, whether provided by your client or through your own research, for each of these individuals, as you may need it to contact them for information and to subpoena them when necessary.

Of course, at this stage, you are not expected to have all of the facts, as many will become available through discovery. Take what you do have and build a roadmap for your case. You should be able to articulate the theory of your case in a simple but elegant way; remember that you have to anticipate telling your client's story to a jury of her peers.

[2] Interviewing Potential Witnesses

When you begin preparing to interview potential witnesses, keep in mind your ethical and professional responsibility to not directly contact represented parties. A potential witness who is still employed in a management position with your client's adverse employer/former employer, even if expected to be a friendly witness, may be off-limits if you are aware or believe that the employer has legal counsel. As much as you'd love to contact this person and interview her because you believe she will be helpful, she is a "represented party" because as a manager, she is considered as someone who can speak on behalf of and bind the organization, and is therefore the embodiment of the represented organization for purposes of this rule. You will probably have to notice the employer to depose this individual as a party witness.

As for individuals not affiliated with your client's employer, such as medical providers, friends, and co-workers who are rank-and-file non-managerial employees, use your discretion and good judgment in deciding whether and how to contact them. As you know, your communications with these witnesses are not privileged, so e-mails and letter to them before and during the pendency of the litigation will be discoverable. Telephone or in-person interviews are best where possible, and you should limit the notes you take if practicable. Ask these witnesses if they would be amenable to reviewing and signing an affidavit that contains accurate and complete information that arises out of their personal knowledge. Many witnesses are tempted to include hearsay, speculation, or unsupported conclusions in their affidavits. While you cannot give legal advice to the witness, you can tell her that you are only interested in her personal first-hand knowledge of the facts.

[3] Managing Your Client

While treating your client with respect and dignity, you should also communicate effectively with her to ensure she is not engaging in conduct or behavior that will compromise her case. If you haven't earlier in the process, have a conversation with her about the consequences of many aspects of her conduct in her private life that could impact her ability to prove liability and damages. For example, an arrest for driving under the influence could become discoverable because it could bear on her mental state or emotional damages. If she is still an employee, that kind of behavior could serve as independent grounds for termination. Ongoing social media interaction and content may also become discoverable and could contradict what she has already said about the fact surrounding the adverse action or her emotional distress. Employers frequently try to use social media posts that indicate situational happiness as evidence that the plaintiff is not really emotionally distressed; they may also use evidence of other distressing events happening around or after the time the adverse employment action occurred to show intervening causes of emotional distress.

[4] Preserving Documents and ESI

Very plainly, your client has a duty to preserve and be ready to produce all documents and electronically stored information ("ESI") that is relevant to her litigation. It is best practice to counsel your client early in this process—before the administrative charge is filed if applicable—that she should not delete anything. If she must delete data, you should see it first, in confidence, before she deletes it. She should not remove any social media content; however, she may adjust her social media account privacy settings so that her social media content is not publicly viewable. You should ask her to turn over all relevant documentation and data to you at this stage so that you can carefully review it, index it, and be prepared to produce it as appropriate and required by law.

§ 2.05 Drafting the Complaint

[1] Satisfying the Heightened Pleading Standards under *Twombly* and *Iqbal*[1]

If bringing claims arising out of federal law, you should draft a complaint that meets the federal pleading requirements that the allegations, assumed to be true, spell out a plausible claim under the applicable law. The seminal cases setting forth this standard have generated a great deal of litigation to further clarify the standard and have also generated many motions to dismiss by employers. Your complaint should discourage early dispositive motions because it should contain enough specific factual allegations within your client's knowledge that establish more than a mere possibility that your client could prevail if your client could prove those allegations to be true. Conclusory statements such as "the employer discriminated against the plaintiff by demoting her" are not sufficient to establish plausibility under the federal standard. You must provide facts that explain when she was demoted, who demoted her, what the former and new positions entailed, and facts that tend to show that your client didn't deserve a demotion based on her merits. If your client's supervisors made discriminatory statements to her, detail those statements and the dates and contexts in which they were made in the complaint.

[2] Pleading Jurisdictional, Venue, and Exhaustion Requirements

Remember to plead that the court in which you're filing the complaint has jurisdiction to hear the matter and cite the statutes or cases that provide jurisdiction. Likewise, allege that venue is proper in the particular court and state the reasons why it is.

Very importantly, plead the proper exhaustion of any administrative process that is a condition precedent to the complaint. For example, if you are alleging a claim under Title VII or the ADA, use the following pattern allegations to ensure that you are fully pleading exhaustion of administrative remedies:

1. On [DATE], Ms. [CLIENT LAST NAME] filed a charge of discrimination (Charge No. XXX-XXXX-XXXXX) with the United States Equal Employment Opportunity Commission ("EEOC") against Defendant claiming that Defendant discriminated against Ms. [CLIENT LAST NAME] because of her [SEX / DISABILITY] *inter alia* by demoting Ms. [CLIENT LAST NAME] to an inferior position, by terminating her employment, by creating and permitting a hostile work environment, and by failing to reasonably accommodate her disabilities, contrary to the requirements of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA").

2. Ms. [CLIENT LAST NAME] timely filed the above-referenced charge of discrimination with the [AREA OFFICE] of the United States Equal Opportunity Commission ("EEOC") within 180 days of the occurrence of the acts or omissions of which Ms. [CLIENT LAST NAME] complains.

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[1] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009). Read together, these cases pronounced a heightened pleading standard under Fed. R. Civ. P. 8(a)(2).

3. On [DATE], the EEOC issued Ms. [CLIENT LAST NAME] a "notice of rights" letter (EEOC Form 161) in response to the above-referenced charge of discrimination. On [DATE], Ms. [CLIENT LAST NAME] first received the above-referenced "notice of rights" letter from the EEOC via U.S. Mail. A true copy of the above-referenced "notice of rights" letter is attached hereto as EXHIBIT ___ and is incorporated herein by reference.

4. Ms. [CLIENT LAST NAME] filed this action against Defendants for [SEX / DISABILITY] discrimination within ninety (90) days of her initial receipt of the above-referenced "notice of rights" letter from the EEOC.

5. Pursuant to [42 U.S.C. 2000e-5(e)(1) and (f)(1) / 42 U.S.C. § 12117(a)], Ms. [CLIENT LAST NAME] has satisfied all private, administrative, and judicial prerequisites to the institution of the present action.

[3] Pleading Discrimination "Because of … Sex"

Given the recent case law across a number of federal circuits interpreting Title VII in the context of discrimination claims brought by LGBTQ people, it is especially important to carefully draft the facts in the complaint to avoid a motion to dismiss. While this is true for both LGB and transgender clients, pay close attention to the very thin and arguably artificial line between pleading discrimination because of sex and discrimination because of sexual orientation.

All federal appeals courts to date[2]—except the Second and Seventh Circuits, which recently reversed themselves on this issue[3]—have found that while Title VII may leave room for claims of sex discrimination based on gender stereotyping, it does not permit LGB individuals to prevail on claims that sound in status-based discrimination (because of their sexual orientation).

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[2] Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation."); Wrightson v. Pizza Hut of Am., 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation … ."), *abrogated on other grounds by* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII … ."); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000), *reversed and remanded by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063–64 (9th Cir. 2002) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action."); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality … . Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.") (internal quotations omitted).

[3] *Hively*, 853 F.3d at 339; Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018).

The Sixth Circuit has expressly found that discrimination based on an individual's transgender status is sex discrimination.[4] Other circuits have recognized the claims of transgender plaintiffs because they frequently allege gender stereotyping. Some of these courts have pointed to Congress' refusal to enact laws amending Title VII to include sexual orientation as a protected class as evidence that Title VII's current prohibition against sex discrimination does not include sexual orientation. As of the date of publication of this Practice Guide, this question has not been resolved nationally by the Supreme Court, meaning that practitioners will have to pay close attention to binding authority in their circuits and carefully examine the applicable circuit and district courts' guidance on what constitutes a cognizable claim of sex discrimination when an LGBTQ person is alleging it.

Many of you reading this Practice Guide will surely find yourselves in jurisdictions that explicitly prohibit discrimination on the basis of sexual orientation, gender identity, and/or gender expression. In such cases, if you decide to bring concurrent federal claims under Title VII, you should carefully craft your complaint to allege facts that support your state law claims *and* facts that support a gender or sex stereotyping theory of sex discrimination under Title VII. The Second Circuit recognized this very situation in a footnote to its decision in *Anonymous v. Omnicon Group*, observing that:

> In such a case, one would expect a plaintiff to detail alleged instances of sexual orientation discrimination in violation of state and local law alongside alleged instances of gender stereotyping discrimination in violation of federal law. When evaluating such a complaint, courts should not rely on the mere fact that a complaint alleges sexual orientation discrimination to find that a plaintiff fails to state a separate claim for gender stereotyping discrimination, but should instead independently evaluate the allegations of gender stereotyping.[5]

Recent decisions in some circuit and district courts support the notion that while sexual orientation may not be a protected category, LGBTQ individuals have no less protection under the *Price Waterhouse* theory of sex discrimination than do heterosexual individuals. See Chapter 1 of this Practice Guide for a detailed discussion of the current status of the law in the federal courts. Therefore, if an LGBTQ individual plausibly pleads that his employer targeted him because of its perceptions about his failure to conform to gender stereotypes for a man, he will probably have a sufficiently pleaded claim. That is true even for heterosexual man, which is supported by the Supreme Court's decision in *Oncale*, discussed in Chapter 1.

In *Christiansen v. Omnicon*, the plaintiff had alleged that his direct supervisor engaged in a "pattern of humiliating harassment targeting his effeminacy and sexual orientation."[6] Among the specific allegations were that his supervisor circulated at work and on Facebook a "Muscle Beach Party" poster that depicted various employees' heads on the bodies of people in beach

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[4] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

[5] Christiansen v. Omnicon Grp., Inc., 852 F.3d 195, 205 n. 2 (2d Cir. 2017).

[6] *Id.* at 198.

attire.[7] The plaintiff said that on the poster, his head had been attached to a female body clad in a bikini, lying on the ground with her legs upright in the air in a manner that one of the plaintiff's coworkers described as depicting the plaintiff as "a submissive sissy."[8] The court found that allegation sufficiently pleaded a sex discrimination claim under a theory of gender stereotyping even though it was surrounded by other facts that alleged that the plaintiff's supervisor was motivated to harass him because he is gay.[9]

Prior to its *en banc* decision that found sexual orientation discrimination to be unlawful, the Second Circuit's panel in *Zarda v. Altitude Express*,[10] revealed in a footnote what could serve as a useful pleading tip for practitioners in other cases. In that case, a skydiving instructor alleged that he was terminated shortly after his employer learned that he had disclosed to a customer that he had a boyfriend (implying his same-sex orientation). The court noted that in his complaint, Zarda "alleged that another skydiving instructor had disclosed that he was heterosexual but was not punished."[11] Zarda was trying to establish that heterosexual employees were treated more favorably in similar situations, which, if true, would tend to prove the employer's anti-gay bias. An allegation such as this one in a pleading—perhaps altered a bit in appropriate jurisdictions to implicate a gender stereotyping claim rather than a sexual orientation-based claim—could help your client meet the appropriate pleading standards to establish a *prima facie* case of discrimination under Title VII. In a jurisdiction other than the Seventh Circuit, one might instead allege, "another male skydiving instructor had disclosed to a customer that he has a girlfriend but was not disciplined or terminated."

The Seventh Circuit, sitting *en banc* in *Hively*, posited that discrimination on the basis of sexual orientation will always be sex discrimination.[12] In the view of the eight judges who formed the majority in that decision, sexual orientation discrimination cannot be divorced from sex discrimination because: (1) discriminating against individuals because of their sexual orientation is engaging in sex stereotyping, which the Supreme Court has said violates Title VII; (2) sexual orientation discrimination is "paradigmatic sex discrimination," meaning the plaintiff was subject to sex discrimination due to the fact that she was a woman who dates women rather than a man who dates women; and (3) sexual orientation discrimination is associational discrimination, a theory borne out of Fourteenth Amendment marriage jurisprudence and frequently applied in Title VII cases.[13] The Second Circuit, along similar lines of reasoning, agreed *en banc* in *Zarda*.[14] These lines of reasoning had been adopted by the EEOC and featured prominently in its 2015 *Baldwin v. Foxx* decision[15] and in the dissent from the Eleventh Circuit's

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[7] *Ibid.*

[8] *Id.* at 198.

[9] *Id.* at 199–200. Note that the Second Circuit has since decided that sexual orientation discrimination is per se sex discrimination under Title VII.

[10] Zarda v. Altitude Express, 855 F.3d 76 n.4 (2d Cir. 2017), *reversed and vacated by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (*en banc*), *petition for cert. filed*, Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2018) (No. 17-1623).

[11] *Zarda*, 855 F.3d at 84 n.3.

[12] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 350–351 (7th Cir. 2017).

[13] *Id.* at 345, 346, 349–350.

[14] Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018).

[15] Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641

dismissal of a claim of sexual orientation discrimination in *Evans v. Georgia Reg'l Hosp.*[16]
#Comment Begins

Practice Tip

Until the United States Supreme Court resolves the disparity in Title VII interpretation among the circuits—which it is expected to do before the end of its 2019–2020 term—it is best to take a belt-and-suspenders approach to pleading even in jurisdictions that have expressly recognized that sexual orientation and/or gender identity discrimination is sex discrimination. So, if your client can truthfully so allege, include facts that demonstrate gender stereotyping in addition to the facts that demonstrate status-based discrimination. Couch your sexual orientation and gender identity claims in factual allegations that highlight how your client was treated differently because of their sex.

#Comment Ends#Comment Begins

Practice Tip

When drafting the complaint, recount instances in which the supervisor suggested that it disapproved of your client's failure to conform to gender stereotypes for his apparent of perceived gender. For example, if your client's supervisor told your client that because he is a man, he should not have sex with other men, you will be more likely to have tied the employer's bias to gender stereotypes than if you allege that the supervisor said he disapproved of your client because he is gay. Or if coworkers berated your client because they perceive him to be effeminate, you might allege a hostile work environment based on sex. If your client's supervisor said that God disapproves of women who cut their hair short and wear men's clothing, you may have sufficiently pleaded both religious discrimination and sex discrimination under a gender stereotyping theory; whereas, if you had pleaded that the supervisor said that God doesn't like lesbians, you might have missed the mark. While these examples may seem to most of our readers to represent an almost ridiculous distinction without a difference, it is a distinction forced upon your client by decades of federal jurisprudence across the country. Read the circuit decisions and district court decisions in your jurisdiction, pull the complaints from PACER that survived dispositive motions, and use those pleadings as your models and guides. Each case and fact pattern is different, and you will need to truthfully but artfully show the causal link between the employer's adverse action and his prescriptive gender stereotyping rather than simply state that he's biased against your client because your client identifies as gay, lesbian, bisexual, or transgender.

#Comment Ends

(EEOC July 16, 2015).
[16] Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1262 (11th Cir. 2017).

[4] Telling a Compelling and Human Story

Remember that you're telling the story of a real human being that experienced economic and emotional pain because of the intentional acts of one or more other person(s). While drafting a complaint is not writing poetry, you have to move the reader to compel the employer to pay a large sum of money to the plaintiff. Don't lose sight of the fact that your client has entrusted you with the great responsibility to tell her story to other people who are empowered with the great responsibility of awarding monetary relief to make her whole.

§ 2.06 Discovery

[1] Obtaining Discovery for Your Client

Because other publications offer detailed practical guidance for the discovery phase of litigation, this Practice Guide will not delve into the specifics of discovery practice. There are, however, a few points that you should keep in mind when shepherding your LGBTQ clients' case through discovery.

Absent direct evidence of discriminatory intent, you should engage in thorough discovery to test the employer's proffered legitimate non-discriminatory reason for taking adverse action against your client.

To test the employer's performance justifications, you need to know:

• Who hired, supervised, promoted and disciplined your client.

Recent changes in who supervised your client, after a long term of employment, could explain why your client is suddenly facing conflict at work. But if your client has had the same supervisor for a long time, your client may find it difficult to explain how the person who hired or promoted him was motivated by discriminatory bias when he later disciplined your client. For example, if your client has been out as LGBTQ at work for five years with the same supervisor who has promoted him and approved his salary raises, it will be a challenge to prove that the same supervisor later discriminated against him when he fired him for alleged performance deficiencies.

• All performance evaluations and deposition testimony from supervisors or peers who gave those evaluations.

• The company's employment policies as contained in the employee handbook or elsewhere and all other documentation concerning the company's performance evaluation and improvement process and practices.

Whether the company followed its own policies and procedures with respect to your client, especially if it generally follows those policies with respect to other employees, could tend to make out the contours of a dispute over whether the company actually took action against your client because of his work-related performance.

To the extent possible, you must proffer evidence that rebuts, in detail, the specific performance deficiencies the employer has alleged formed the basis of its decision. It is not going to be enough for your client to simply assert that he or she disagrees with the employer's assessment of his or her performance. You will have to obtain evidence that actually shows that her performance actually met the employer's expectations.

• Every document and email concerning the employee's performance.

• Everything said by anyone about the employer's reasons for acting, and also any rumors about the reasons for the employee's termination. Look for shifting or changing reasons given by the employer.

• Ask for comparator evidence. You will want to demonstrate where possible that other employees who are similarly situated were treated more favorably. For example, if you are alleging discrimination against a gay male client who was fired after openly talking about his boyfriend in front of customers and the employer says that your client was fired for inappropriate discussion of personal relationships with customers and not because he was gay, seek testimony or documentation to determine whether employees have been terminated for discussing their opposite-sex relationships openly in front of customers.

• If the employee was replaced, by whom (name, gender, and/or sexual orientation), and when? What are the terms and conditions of the replacement employee's employment? What standards have been applied to the replacement employee? Were the same evaluation procedures and standards followed?

The point is that you want to show both that the employer's rationale for taking adverse action against your client was unjustified and that it was not the true reason. (This is called pretext).

When the employer has proffered a justification that is based upon economic considerations, such as a reduction in force or poor financial performance by the employer, you should seek the following kinds of information:

• Who hired, supervised, and laid off the employee, noting any changes in supervisors or managers.

• The employer's detailed financial statements, and minutes and notes from board of director and management meetings during which economic concerns were discussed.

• The employee manual and all other documentation concerning procedures for reductions in force and layoffs, as well as whether the employer followed those policies and procedures with respect to your client.

• Every document and email concerning the decision to lay off employees, and everything specific to the decision to lay off your client.

• Everything the decision-makers said about their reasons for acting, and also any scuttlebutt about the reasons for the employee's termination.

• A list of other terminated employees and employees hired around the same time, information about employees who received raises or took pay cuts, and any other cost-saving measures the employer took.

• Your client's job performance information. The employer will often allege that it selected your client for a reduction in force because of her poor performance.

• Information about what happened to your client's job position after she was terminated.

• If the employer hired someone else to fill your client's former position, request all information about that individual's job qualifications and employment terms.

You must prove that the employer's economic hardship rationale is without truth or merit.

Take a belt-and-suspenders approach to establishing the existence of a triable issue of fact regarding your client's *prima facie* case and pretext. Don't just show a genuine dispute as to the employer's justification for terminating your client; also collect other kinds of evidence that will help you show discriminatory motive. For example, look for testimony or documents that demonstrate more favorable treatment of cisgender or heterosexual employees; inappropriate comments about sexual orientation, gender, or indicating religious bias against LGBTQ persons; and evidence of the employer's dishonesty or inconsistent positions.

Because discovery is arguably the most costly phase of litigation and can quickly exhaust yours and your client's limited resources, it is understandable that you will want to be as efficient in your quest for discovery as you can be. Remember that you will not get everything you want, but you must get what you need. In order to survive the employer's almost inevitable motion for summary judgment, you must develop a detailed factual record that demonstrates that material facts are disputed and only a jury can resolve credibility issues to determine whose version of the facts are true.

[2] Responding to the Employer's Discovery Requests

Again, while basic discovery principles that apply to any litigation would apply to your LGBTQ client's case, there are a few important points to consider when responding to employer discovery requests that are pointed at your client's sexual orientation or gender identity.

First, the employer may seek information that is disproportionate or irrelevant to its needs to prove its defenses in the case. Sometimes this is done for innocuous reasons; sometimes it is done in order to frustrate or embarrass your client. It's your job, however, to represent your client's interests and push back against improper discovery requests. The 2015 amendments to the Federal Rules of Civil Procedure replaced the familiar "reasonably calculated to lead to the discovery of admissible evidence" standard for discovery requests with a proportionality requirement. Rule 26(b)(1) now states:

> Parties may obtain discovery regarding any nonprivileged matter

> that is **relevant to any party's claim or defense** and **proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[1]

Applying this new standard, one federal district court, in a case alleging workplace harassment against a transgender employee, denied in part an employer's motion to compel discovery and denied its request for a qualified protective order.[2] The court found the employer's discovery requests "grossly out of proportion" to the employer's legitimate needs to the extent those requests sought information and medical records concerning his gender transition, including his surgeries, drug or hormone therapy, and other medical treatment. The plaintiff claimed that his employer unlawfully required him to prove his male anatomy before letting him use the men's restroom and that he was harassed by coworkers and supervisors.

The employer sought documents related to the employee's diagnosis or treatment for any injury for which he sought compensation. It also asked the plaintiff to name every healthcare provider to have treated him since 2009 regarding his gender transition and any emotional distress. In addition, the employer asked the plaintiff to produce medical records concerning surgeries and drug or hormone therapy related to gender transition. In addition, because the employee refused to provide written authorizations for medical records, the employer requested a qualified protective order allowing it to subpoena records from providers.

Defending its requests, the employer told the court that the information was relevant to when the employee began to transition, when each phase of his gender transition occurred, and the cause and severity of the emotional distress he alleged he suffered. The plaintiff rebutted the employer's justifications by claiming that it sought intrusive information that it didn't need to defend itself and that his medical records were not relevant because he had only alleged garden variety emotional distress, which does not require that he prove physical manifestation of symptoms.

Denying the employer's motion to compel, the court noted that the plaintiff alleged that the employer caused him emotional distress by refusing to let him use the men's restroom until he provided medical evidence that he was biologically or anatomically male. In its motion to compel, the employer essentially argued that the employee had to provide proof of his genitalia and details of his transgender treatment to prove it caused him emotional distress.

Emphatically rejecting the employer's argument, the court explained that the employee did not claim his emotional distress was caused by his transgender status. On the contrary, his transition was emotionally healthy and it was the discriminatory and harassing responses of his

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[1] FED. R. CIV. P. 26(b)(1) (emphasis added).

[2] Roberts v. Clark Cnty. Sch. Dist., 312 F.R.D. 594 (D. Nev. 2016).

coworkers and supervisors that caused him distress. The court opined that the employer "simply does not need to know the intimate details of his transgender transition process to defend itself."

Turning to the employer's requests that the plaintiff identify his healthcare providers, the court noted that the plaintiff was only seeking compensatory damages for ordinary emotional distress caused by the employer's alleged harassment. Because the plaintiff had identified an individual as his therapist, the court compelled the employee to clarify that he did not receive treatment for emotional distress and said that it would rely on the plaintiff's testimony about how the employer's actions and inactions distressed him. If he planned to rely on the therapist's or another person's testimony to support his claim, he would have to produce the name of the witness and a summary of expected testimony.

The employer's request for medical records from all healthcare providers that were involved in the employee's transition from female to male from 2009 to the present were also found to be overly broad. While the court said that the employer could examine the witness about his emotional distress and treatment thereof, the plaintiff would not be compelled to produce the requested records based on the employer's speculation that they might contain references to his mental state, nor must he produce documents related to surgeries or hormone therapy he had.

Finally, the court refused to require the employee to identify his personal email addresses and networking websites with account name and address, finding the employer's request for this information overbroad. However, to avoid any subsequent disputes and motions to compel discovery, the court required the employee to identify the social media platforms on which he had accounts during the previous five years, to review the content, and to produce any content that referred to the lawsuit, to the employer's response to his gender transition, and to his treatment in the workplace.

You should watch out for, and be willing to object to, and refuse to respond to discovery requests from the employer that seeks information about your client that is not relevant to the issue of whether the employer acted with discriminatory motive. Therefore, consistent with the *Roberts* case discussed above, oppose attempts to obtain medical records for the purpose of proving your client's sex or gender. Don't agree to the employer's demand that your client produce stale employment and/or medical records that have little value in demonstrating your client's recent or current conduct or job performance. For example, your client's termination from a job 20 years ago is not likely to be relevant to whether he was meeting the legitimate expectations of the defendant employer. Likewise, don't let the employer obtain evidence of incidents in your client's personal history that may be embarrassing to him but that do not bear upon the employer's decision to terminate his employment or upon your client's economic and compensatory damages resulting from his termination.

§ 2.07 Dispositive Motions

[1] Defending Against a Motion to Dismiss

[a] Amending the Complaint to Avoid Dismissal

If you're faced with a motion to dismiss—and you very well may be because of the hard-to-see difference between a claim of gender stereotyping and one of sexual orientation discrimination—you should seek leave to amend the complaint. Research other complaints in

your jurisdiction (or from similar jurisdictions) that have survived a motion to dismiss. Alter your style and presentation of facts consistent with what the assigned judge or magistrate seems to look for in a complaint. While you ordinarily can't use this opportunity to throw in entirely new claims (especially where your client didn't administratively exhaust them), you can buttress your client's claims with additional relevant facts or re-word your allegations so that they evidence gender stereotyping rather than sexual orientation bias.

[2] Defending Against a Motion for Summary Judgment

Regardless of the kind of claim he or she is litigating, a plaintiff's litigator will know the very familiar standard a court is expected to apply when deciding whether to grant summary judgment—whether the available evidence, when viewed in a light favorable to the non-moving party (usually the plaintiff), shows that the parties genuinely dispute a fact that is central to the disposition of the claim. In the context of a sex discrimination claim, has your client produced enough evidence that calls into question the legitimate non-discriminatory reason that the employer has no doubt proffered for terminating your client? Or in a harassment case, has your client produced evidence that genuinely disputes the employer's assertion that she failed to report the harassment? Regardless of the issue, you have to have compelling enough evidence to send the question of credibility to the jury. You have to show a judge that in order to dispose of the case on its merits, he would have to believe the employer's plausible story over your client's plausible story.

Defending against a motion for summary judgment begins with a well-drafted complaint and thoroughly gathering facts and admissions in discovery. Your client's self-serving testimony and conclusions about her own experience often will not suffice to advance her claims; she will need to produce other evidence—the corroborative testimony of other employees, recordings she lawfully made of her supervisor, a bad performance review given after disparaging comments even where all prior reviews were positive—of discriminatory intent.

Be sure that you understand what it means to establish a genuine issue of material fact. Although it is the movant's burden to show the lack of a dispute over material facts, you'll need to respond to the defendant's brief fully and convincingly; after all, most employment discrimination claims do not survive summary judgment. The best way to survive summary judgment is to plan and execute the discovery phase of the litigation fully and carefully.

[3] Plaintiff's Motion for Summary Judgment

Rarely used by plaintiffs, a motion for summary judgment may be appropriate for your client where there is such strong and undisputed direct evidence of discriminatory motive that the defendant could not possibly succeed at trial, even if it were to present evidence that it was also motivated by legitimate non-discriminatory reasons. This kind of evidence is very rare, which is why most plaintiffs alleging workplace discrimination proceed under the *McDonnell-Douglas* burden shifting framework appropriate to prove discriminatory motivation through circumstantial evidence. This Practice Guide will not delve into detail in this area because a plaintiff's motion for summary judgment is so uncommon and unlikely to succeed in the absence of smoking gun evidence.

§ 2.08 Trial

At trial, you will have an opportunity to compel a judge or jury to believe your client's version of the facts and award her money for her economic and emotional losses. While this

Practice Guide is not an in-depth guide on trial practice, you should consult guides on trial practice as you prepare for trial. Telling the story of an LGBTQ person through your opening statement, the presentation of emotional testimony, and your closing argument should be an incredibly powerful experience for both you and your client. Know that every judge and juror comes to court carrying a lens shaped by his or her own personal biases and views your client through that lens.

You must compel the judge or juror to step into your client's shoes and to walk in them for the duration of the trial. Your mission is to convey a story about someone who was treated with utter disregard for her humanity and her work ethic. You must imbue in the decision maker a realization that he or she is responsible to look beyond her religious or personal convictions about the topic of homosexuality or transgender identity and decide whether your client was singled out for a reason that has nothing to do with her merit or performance. Most jurors want to believe they are fair; appeal to that sense of fairness. Also, be sensitive to the culture of the jurisdiction you are in and tailor your presentation to the local culture. You are not in the courtroom to blaze new cultural trails; you are there to help your client find justice and relief. In that way, don't preach social justice and the importance of LGBTQ rights to the judge or jury. Instead, make the trial about your client—a human being who tried her best and despite doing so, ended up in a position nobody should have to experience.

§ 2.09 Alternative Dispute Resolution (ADR) and Settlement

[1] Discussing ADR Options With Your Client

You should discuss the comparative benefits of alternative dispute resolution with your client before and/or during the course of litigation of her claims. Sometimes an early resolution may be possible for one or several of many reasons, such as that the employer has substantiated some or all of your client's claims during its investigation or because the employer doesn't have an appetite to litigate a potentially embarrassing set of facts. Regardless of how strongly you feel about the facts at your client's disposal, early resolution also presents a good opportunity for the parties to learn each other's theory of the case before deciding whether to litigate. The employer may be willing to share facts through mediation that will cause you to reassess the likelihood of success or the value of the claims. Because good reasons exist for exploring alternative dispute resolution regardless of the type of claim, this Practice Guide will only touch upon the highlights of mediation and arbitration of claims of LGBTQ discrimination.

[2] Mediation

Allegations of sexual orientation or gender-based discrimination are usually highly emotionally charged. Often, and many times understandably so, your client will be tempted to dig in her heels early on, and further litigation makes it more and more difficult to listen to the defendant's position, even when it's a reasonable one. While some may disagree, early mediation may be one tool in your shed worth exploring. Your client isn't likely to get a settlement offer anywhere near her potential damages, but the purpose of early mediation is for your client to achieve a quick and painless resolution without experiencing the emotional drain of protracted litigation, which could end up costing your client much more than she has already lost financially and emotionally. This is especially true if you and your client aren't highly confident in the quality or amount of evidence—other than your client's own account of the events—that you will be able to garner through discovery.

[3] Arbitration

You may find that your client has signed an agreement with her employer that compels her to arbitrate any employment-related disputes. While these provisions are most often found to be enforceable by courts, you will first want to determine whether the agreement is enforceable under your state's contract law. Even if it is not, you may find some benefits to arbitrating your client's claims instead of litigating them in court.

#Comment Begins

Practice Tip

When you first meet with a potential client, you should ask if your client has signed any document (employment agreement, employee handbook, or otherwise) at the commencement or during the course of his/her/their employment and have your potential client provide you with a copy of the document. Your client may not realize that the employment agreement or handbook contains a mandatory arbitration provision. Because this will impact the potential adjudication of your client's potential claims, you should learn immediately what obligations your client has incurred and understand how that will impact your advice.

#Comment Ends

You will certainly find no shortage of modern criticism of arbitration, especially among plaintiffs' advocates. Many also dislike the fact that a growing number of employers require that their employees contractually agree to resolve their employment disputes in arbitration rather than in a judicial forum. It is true that arbitration of employment disputes often does not provide as much opportunity for the parties to obtain discovery as litigation does. Additionally, an agreement to arbitrate operates as a waiver of the employee's right to jury trial. The Supreme Court also ruled in May 2018 in *Epic Sys. Corp. v. Lewis* that arbitration agreements containing class action waivers and requiring employees to individually arbitrate employment claims are lawful and must be enforced if they are indeed found to be enforceable contracts under state law.[1] This decision may result in the increased use of class action waivers by employers and could stymie employee advocates who bring class actions in order to challenge perceived systemic discriminatory practices by some employers.

However, in practice, arbitration may not actually be a disadvantage to your client, especially where the arbitral forum is a neutral one administered by large organizations like the American Arbitration Association ("AAA") and JAMS. These alternative dispute resolution organizations typically offer the parties a deep bench of experienced arbitrators from which to choose, some of which boast significant experience as plaintiffs' lawyers or employee advocates. Arbitration can also prove to be less costly than litigation and often offers the opportunity to reach final resolution of the claim(s) more quickly than litigation.

§ 2.10 Representing LGBTQ Federal Sector Employees

While this Practice Guide chiefly focuses on laws and practices governing private sector

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[1] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018).

employment, there are many dedicated LGBTQ employees among the federal workforce. It is important that you understand the basics of how to guide your client through the federal sector complaint process.

Consequently, this section endeavors to cover, generally, the federal sector complaint process for LGBTQ federal employees complaining of sex discrimination under gender stereotyping, transgender, and sexual orientation theories recognized by the EEOC. Some federal government agencies, such as the Library of Congress and others, do not use this complaint process. For agencies that do not use this process, you should research the individual agency's process, as there are varying administrative deadlines and processes for each.

There are other federal laws, regulations, and Executive Orders not enforced by EEOC that also prohibit discrimination on the basis of categories such as sexual orientation, marital status, parental status, or political affiliation. This section will not cover those in any detail.

The first step for an LGBTQ federal employee is to file a complaint. Each agency posts information about how to contact that agency's Equal Employment Opportunity (EEO) Office. You can contact an EEO Counselor by calling the office responsible for the agency's EEO complaints program. It is best that even if you or your client call the office to make contact, you journal your efforts or draft a confirmatory letter memorializing the contact.

Generally, you must contact the agency's EEO Counselor within 45 days from the day the discrimination occurred.

Usually, your client will have the initial choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If you are unable to resolve your client's dispute using these informal methods, your client may file a formal discrimination complaint against the agency with the agency's EEO office. Be wary of very tight deadlines and be ready to act: your client must file her formal complaint within 15 days from the day she receives notice from her EEO Counselor about how to file. If your client never received such a notice, memorialize that fact in writing and request the notice and/or tolling of the 15-day period to ensure that your client does not lose any rights.

After your client files her formal complaint, the agency will review the complaint and decide whether or not the case should be dismissed for some technical or procedural reason.

If the agency doesn't dismiss your client's complaint, it will conduct an investigation into your client's claims. The agency has 180 days from the date of filing of the complaint to conduct and conclude its investigation.

Upon conclusion of the investigation, the agency will issue a notice offering your client a choice between two options: (1) a hearing before an EEOC Administrative Judge or (2) issuance of a decision by the agency as to whether the discrimination occurred.

Should the agency issue a final decision finding that no discrimination occurred, or if your client disagrees with that decision, she may appeal the decision to EEOC or challenge it in a lawsuit in federal district court.

To request a hearing before an administrative law judge, your client must do so in writing within 30 days from receipt of the agency's notice of hearing rights. An EEOC Administrative Judge will conduct the hearing, make a decision, and order any appropriate relief if the judge finds discrimination occurred.

Once the agency receives the Administrative Judge's decision, it must issue a final order within 40 days indicating whether the agency agrees with the Administrative Judge's ruling and whether it will grant the relief the judge ordered. The agency must include with its final order information about your client's right to appeal to EEOC, or to file a civil action in federal district court, and the deadline for both options.

Many federal employees choose to appeal the agency's final decision to the EEOC Office of Federal Operations. Your client must file her appeal with EEOC within 30 days after receiving the final agency order.

EEOC appellate attorneys will review the entire file, including the agency's investigation, the Administrative Judge's findings, any hearing transcript, and any appeal statements.

If the agency disagrees with the Administrative Judge's decision, it may appeal to EEOC.

If your client disagrees with the EEOC's decision regarding your client's appeal, she may ask the EEOC to reconsider its decision within 30 days of receipt of the EEOC's decision, but only on the basis that EEOC made a mistake of fact or law.

Likewise, the agency also may ask EEOC to reconsider its decision.

Any decision upon a request for reconsideration is final and ends the administrative process.

If your client wishes to file a lawsuit in federal district court, she may do so at one of several junctures to conclude the administrative process and pursue judicial remedies:

□ If 180 days have passed from the day your client filed her complaint and the agency has not issued a decision and no appeal has been filed, your client may file suit; or

□ Your client may file suit within 90 days of receipt of the agency's decision on her complaint, as long as no appeal has been filed; or

□ If 180 days have passed from the day your client filed her appeal and the EEOC has not issued a decision, your client may file suit; or

□ Your client may file suit within 90 days of receipt of the EEOC's decision on your client's appeal.

CHAPTER 3 Compliance and Best Practices for Employers

SYNOPSIS

§ 3.01 Fostering an Inclusive and Welcoming Workplace

[1] Adopting Inclusive Policies and Procedures

In many states and municipalities, the law expressly prohibits discrimination in the workplace on the basis of sex, sexual orientation, and gender identity/expression. As noted elsewhere in this Practice Guide, the federal government does not currently expressly extend the same protections to the LGBTQ community. Irrespective of the lack of protections at the federal level, employers who adopt fully inclusive non-discrimination policies will be in a better position to protect themselves from claims and improve employee morale and business performance.[1]1 Indeed, adopting workplace policies that extend employment protections and benefits to LGBTQ workers is the first, best step in fostering an inclusive work environment.

Discrimination is, at its most basic, the unequal provision, administration and application of the terms and conditions of employment, including the following: hiring, selection, promotion, transfer, pay, tenure, befits, discipline, and termination.[2]2 You should ensure that employers who adopt policies governing these matters are expressly inclusive of lesbian, gay, bisexual, transgender and queer employees.

Of course, as we discuss in § 5.01 of the Practice Guide, a standard Equal Employment Opportunity (“EEO”) policy that meets best practices should expressly include these protections as follows:[3]3

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[1]1 EQUALITY ILL., CORPORATE BEST PRACTICES: A GUIDE TO LGBT-INCLUSIVE WORKPLACES IN ILLINOIS, Equality Illinois 5–6 (2015), http://issuu.com/eqil/docs/eqil_corporate_best_practices/1.

[2]2 *Id.* at 5.

[3]3 *See infra* § 5.01[2], Creating and Fostering Inclusiveness and Acceptance in the Workplace.

[*BEGIN SAMPLE POLICY*]

EQUAL EMPLOYMENT OPPORTUNITY POLICY

Acme, Inc. is an equal opportunity employer. It has been a long standing policy of our company to recognize the dignity of the individual and to be fair and impartial in all its relations with employees, applicants, interns, and contractors without regard to sex (including pregnancy, childbirth, breastfeeding or related medical conditions), race, religion, color, gender, gender identity, gender expression, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, registered domestic partner status, age, sexual orientation, military and veteran status or any other basis protected by federal, state or local law or ordinance or regulation. Acme, Inc. also prohibits discrimination, harassment, disrespectful or unprofessional conduct based on the perception that anyone has any of those characteristics, or is associated with a person who has or is perceived as having any of those characteristics.

Employees will not be retaliated against for inquiring about or discussing wages. However, Acme, Inc. is not obligated to disclose the wages of other employees.

Employees who believe they are the subject of discrimination in violation of this policy should utilize Acme, Inc.'s complaint reporting procedures outlined in this Policy Guide. No employee who is the subject of discrimination will be retaliated against for reporting a complaint in good faith, participating in an investigation into a complaint in good faith, or for reporting retaliation that occurs after a complaint is made or an investigation is conducted. An employee who makes a complaint in bad faith, however, or who intentionally or maliciously provides false information during an investigation, will be subject to disciplinary action, up to and including termination of employment.

[*END OF SAMPLE POLICY*]

Beyond simply adopting a fully inclusive EEO policy, some employers will find it valuable and important to modify existing employee handbooks and other policies to remove gender binary pronouns and gender-specific references, where appropriate. For example, rather than use "he," "she," "him," "her," etc., policies may be updated to only refer to gender neutral nouns such as "employee," "associate," or "team member." Alternatively, where a policy uses "he/she" or "him/her," employers may consider adding a gender-neutral pronoun such as "ze," "e," or "they." For example, a policy that currently reads:

"An employee who believes he/she is the subject of discrimination should report it to Human Resources immediately"

may be redrafted to read either:

"An employee who believes the employee is the subject of discrimination should report it to Human Resources immediately"

or

"An employee who believes he/she/ze/they is the subject of discrimination should report it to Human Resources immediately."

We have included a chart detailing various gender-neutral pronouns that employers may consider using in various policies and other internal publications that are distributed to employees.

In addition, employers should consider adopting measures by which applicants and employees can indicate their preferred gender pronoun usage for personnel-related matters. As we discuss below, not every employee is comfortable being "out" in the workplace, but creating an environment in which employees at least know the employer will be respectful of their identity irrespective of the decision to be "out" or not, will lead to improved employee morale. Specifically, employers should consider providing an opportunity on applications and personnel documents for LGBTQ employees who do not ascribe to gender binary societal norms to identify and disclose their gender-reference preferences.

While these changes may seem minor, simply including them in workplace policies will help make LGBTQ employees feel welcome, valued and empowered—all of which are proven to improve employee performance and productivity, and increase customer loyalty.[4]4

TABLE OF GENDER NEUTRAL PRONOUNS

Gender Neutral Pronoun Usage:[5]5

	SUBJECT	OBJECT	POSSESSIVE ADJECTIVE	POSSESSIVE PRONOUN	REFLEXIVE
FEMALE	**She**	**Her**	**Her**	**Hers**	**Herself**

[4]4 EQUALITY ILLINOIS, *supra* note 1.

[5]5 FORGE FORWARD, GENDER NEUTRAL PRONOUNS, https://forge-forward.org/wp-content/docs/gender-neutral-pronouns1.pdf.

MALE	**He**	**Him**	**His**	**His**	**Himself**
GENDERNEUTRAL	**Ze**	**Hir**	**Hir**	**Hirs**	**Hirself**
GENDERNEUTRAL ALTERNATIVE	**They**	**They**	**Their**	**Theirs**	**Themself**

Examples of how to use these pronouns:

She went to her job.
He went to his job.
Ze went to hir job.

They went to their job.

I am her co-worker.
I am his co-worker.
I am hir co-worker.
I am their co-worker.

She works for herself.
He works for himself.
Ze works for hirself.
They work for themself.

[2] No Harassment Policies

In addition to an inclusive EEO policy, a no harassment policy is essential to ensuring employees know their rights and employers can appropriately defend themselves against claims of harassment and discrimination. No harassment policies should cover both "Sexual Harassment" and "Other Harassment," and, under applicable EEOC rules and guidance, should ensure all elements of what constitutes unlawful harassment are a part of the policy. Such a policy will outline what constitutes unlawful harassment, provide an avenue of reporting harassment to at least two individuals, and disclaim a reporting employee's right to be free from retaliation as a result of the complaint and/or participation in an ensuing investigation. The following is a sample no harassment policy that includes all such elements:

[*SAMPLE POLICY*]

DISCRIMINATION, HARASSMENT AND SEXUAL HARASSMENT

Discrimination and Harassment

Acme, Inc. is committed to providing a work environment that is free from harassment and discrimination. In keeping with this commitment, Acme, Inc. maintains a strict policy prohibiting unlawful harassment or discrimination for reasons of sex (including pregnancy, childbirth, breastfeeding or related medical conditions), race, religion, color, gender, gender identity, gender expression, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, registered domestic partner status, age, sexual orientation, military and veteran status or any other basis protected by federal, state or local law or ordinance or regulation. Acme, Inc. also prohibits discrimination, harassment, disrespectful or unprofessional conduct based on the perception that anyone has any of those characteristics, or is associated with a person who has or is perceived as having any of those characteristics. This applies to all employees, including non-supervisory, supervisory, managerial personnel and any other agents of the company, contractors, interns, and third parties. Furthermore, it includes harassment in any form, including verbal, physical and visual harassment.

Any employee who engages in an unlawful discriminatory practice will be subject to disciplinary action, up to and including termination of employment.

Any employee who wants additional information about Acme, Inc.'s policy against unlawful discrimination or has a complaint about unlawful discrimination should contact her/his/hir/their supervisor, a representative of the Human Resources Department or the President.

Sexual Harassment

Sexual harassment includes, but is not limited to, making unwanted sexual advances or requests for sexual favors where either (1) submission to such conduct is made an explicit term or condition of employment; (2) submission to or rejection of such conduct by an individual is used

as a basis for employment decisions affecting such individual; or, (3) such conduct that has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Prohibited harassment includes, but is not limited to, the following behavior:

• Verbal conduct such as epithets, derogatory jokes or comments, slurs or unwanted sexual advances, invitations, comments, posts or messages;

• Visual displays such as derogatory and/or sexually-oriented posters, photography, cartoons, drawings or gestures;

• Physical conduct including assault, unwanted touching, intentionally blocking normal movement or interfering with work because of sex, race or any other protected basis;

• Threats and demands to submit to sexual requests or sexual advances as a condition of continued employment, or to avoid some other loss and offers of employment benefits in return for sexual favors;

• Retaliation for reporting or threatening to report harassment; and

• Communication via electronic media of any type that includes any conduct that is prohibited by state and/or federal law or by company policy.

Sexual harassment does not need to be motivated by sexual desire to be unlawful or to violate this policy. For example, hostile acts toward an employee because of his/her/hir/their gender, gender identity, or gender expression can amount to sexual harassment, regardless of whether the treatment is motivated by sexual desire.

Additionally, prohibited harassment is not just sexual harassment but harassment based on any protected category, as set forth in Acme, Inc.'s Equal Employment Opportunity Policy.

Employees who violate this policy will be subject to immediate disciplinary action up to and including dismissal.

[*END OF SAMPLE POLICY*]

[3] Disability and Religious Accommodation Policies

As we note in §§ 5.04, 6.02 and 6.04 of this Practice Guide, employees with disabilities and sincerely held religious beliefs must be provided reasonable accommodations, with some exceptions, that allow them to perform their essential job duties. Policies that address an employee's ability to perform his or her essential job duties with or without a reasonable

accommodation, like other policies addressed above, should be fully inclusive, and should include a process by which an employee needing an accommodation can request it. Of course, not every accommodation requested is reasonable. For example, an accommodation that poses an undue financial burden on an employer—such as requiring major structural changes to a workspace which would significantly impact the employer's financial bottom line—is considered "unreasonable" under applicable legal standards. Alternatively, an accommodation that poses a direct threat to the health or safety of the requesting employee or others is unreasonable.

#Comment Begins

Practice Tip

In counseling employers on reasonable accommodation requests, you should educate your client on what the EEOC considers a true "undue burden" on an employer. As the EEOC notes, "generalized conclusions [about what constitutes an undue burden] will not suffice to support a claim of undue [burden] … [which] must be based on an *individualized assessment* of current circumstances that show that a specific reasonable accommodation would cause *significant difficulty or expense*."[6]6 Thus, simply because a requested accommodation is expensive to implement will not obviate an employer's obligations under the ADA, and you should carefully counsel your client regarding whether it can reasonably deny such an accommodation request. Factors to consider in determining whether an accommodation would pose an undue burden include:

• The nature and cost of the accommodation needed;

• The *overall* financial resources of the facility making the reasonable accommodation;

• The number of persons employed at the particular facility;

• The effect on expenses and resources of the facility;

• The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);

• The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and

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[6]6U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002) (emphasis added). Note that this guidance was issued prior to enactment of the Americans with Disabilities Act Amendments Act of 2008, which included significant modifications to the definition of "disability" under the law. The concept of "undue hardship," however, was not significantly altered and thus as of this publication, the 2002 enforcement guidance is still effective.

• The impact of the accommodation on the operation of the facility.[7]7

#Comment Ends

Similar considerations should be assessed in determining whether an accommodation for a sincerely held religious belief is reasonable under the circumstances. Of course, a religious accommodation that impacts the ability of LGBTQ workers to perform their job duties free of discrimination and/or harassment may cause tensions among workers, which may impose complicating factors on an employer's obligations. We discuss these issues in more detail in § 6.04, *infra*.

A sample reasonable accommodation policy is as follows:

[*SAMPLE POLICY*]

REASONABLE ACCOMMODATION

Acme, Inc. will provide reasonable accommodation for the known physical or mental disabilities or for the sincerely held religious beliefs of a qualified employee or applicant, unless to do so would create an undue hardship under applicable law. Reasonable accommodation varies from case to case and is evaluated on an individual basis.

An employee who believes he/she/ze/they has a disability or sincerely held religious belief which impacts his/her/hir/their ability to perform one or more essential job-related functions should notify his/her/hir/their supervisor or a representative of the Human Resources Department, and the Company will engage in the interactive process to determine what reasonable accommodations can be made, if any.

[*END OF SAMPLE POLICY*]

§ 3.02 Handling Internal Complaints of Discrimination and Harassment

[1] Maintaining Strong and Effective Reporting Policies

Beyond simply updating employment policies to ensure they are inclusive of LGBTQ issues, employers should also maintain strong and effective reporting procedures for employees who have suffered or observed discriminatory or harassing conduct. Ensuring that an employer implements these procedures helps engender confidence in the employer's equal employment

[7]7*Id.*

opportunity mission. In the event the employer is faced with a charge or complaint of discrimination through the EEOC or in a court action, strong reporting and investigation procedures (addressed in the next section) will help demonstrate the employer had appropriate tools to correct or eliminate the complained of discrimination, a strong point of defense in any employment discrimination litigation.

There are three basic elements to an effective discrimination and harassment reporting procedure: (1) a statement that describes how an employee should report harassment, including at least two individuals to whom a report can be made, and that such a report must be made immediately; (2) a description of the investigation procedure and employee requirements under the same, including that the company will investigate promptly, but that it cannot guarantee complete confidentiality; and (3) an anti-retaliation provision. The following sample reporting and investigation procedure contains these elements:

[*SAMPLE POLICY*]

Reporting Unlawful Discrimination or Harassment

Any employee who believes he/she/ze/they has been subjected to conduct that violates Acme, Inc.'s Discrimination, Harassment and Sexual Harassment policy should immediately contact her/his/hir/their supervisor, a representative of the Human Resources Department or the President.

In addition, anyone who believes he/she/ze/they has been subjected to unlawful discrimination or harassment may file a complaint with the local office of the United States Equal Employment Opportunity Commission ("EEOC") or the [INSERT STATE FEPA]. Each federal or state office has authority to remedy violations. The nearest office can be found by visiting the agency websites at www.dfeh.ca.gov and www.eeoc.gov.[81]

Any employee who becomes aware of an incident of unlawful discrimination or harassment by any employee, contractor, customer or vendor, whether by being the subject of it, witnessing the incident or being told of it, must report it to her/his supervisor or a representative of the Human Resources Department immediately to ensure that such conduct does not continue.

Investigation

All reports of unlawful discrimination or harassment will be promptly and thoroughly investigated. Acme, Inc. will promptly investigate all reports of discrimination and harassment as discretely as reasonable under the circumstances. While any investigation will pay special

[81]Note that not every state requires inclusion of contact information for the EEOC or the state FEPA. Your client may not want to include this information in a handbook if it is not required under state law, so be sure to understand applicable state requirements and your client's desires before including such information in an employment policy.

attention to the privacy of everyone involved, Acme, Inc. cannot guarantee complete confidentiality. Employees are expected to participate in an investigation if requested to do so.

If an employee is found to have violated this policy, he/she/ze/they will be subject to disciplinary action, up to and including termination of employment. Acme, Inc. will also take any additional action necessary to reasonably and appropriately address employee concerns about unlawful discrimination or harassment.

Any employee who knowingly or intentionally provides a false report of unlawful discrimination or harassment will be subject to disciplinary action, up to and including termination of employment.

No employee will be retaliated against who makes a good faith effort to report alleged unlawful discrimination or harassment, or for participation in any investigation, proceeding or hearing conducted by the EEOC or any state agency. If an employee believes he/she/ze/they is being retaliated against, he/she/ze/they should promptly contact his/her/hir/their supervisor or a representative of the Human Resource Department, so an investigation can be conducted.

[*END OF SAMPLE POLICY*]

[2] Conducting an Investigation

In addition to maintaining policies that meet minimum requirements and foster inclusivity in the workplace, an employer should be prepared and have the tools available to it to conduct the kind of investigation promised. If you advise employers regarding their legal obligations, you may be called on to assist in or advise about an investigation. Ensuring a complete and accurate investigation occurs and that proper documentation is collected is important to ensure your client has the best defenses available to it should an aggrieved employee file an agency charge or commence some other litigation.

#Comment Begins

Practice Tip

Being deeply involved in an investigation as an attorney may complicate privilege-related issues down the line. You should be sure that your advice pertaining to your client's investigation of a complaint is limited to a few key players. In most circumstances, you should avoid conducting interviews of employees except for high-level decision-makers or in circumstances where you can ensure, under applicable state and federal laws, privilege can be maintained. For non-management-level employees, you should simply let your client's internal human resources conduct any necessary interviews and advise as necessary. Furthermore, in any interview you conduct as legal counsel, you should always inform the interviewee that you are ***not*** the interviewee's attorney, but rather that you are the attorney of the company and that any applicable privilege lies with the company and not between you and the employee. You should also inform

the employee that the company, at its discretion, can choose to waive a privilege but the employee may not, and thus confidentiality is expected. In any notes you take during the interview, including any signed and/or sworn declaration you collect from the employee interviewed, you should note that you told the employee you are not his/her/hir/their attorney and that only the company can waive applicable attorney-client privileges. If a client is not equipped to conduct its own investigation, and it is not appropriate for you as an attorney to do so for the reasons stated above, your client may also consider engaging an outside workplace investigator to conduct the investigation.

#Comment Ends

Upon receipt of a complaint of discrimination or harassment, an employer should either request that the complaining employee submit a written statement of the alleged bad conduct or the investigating employee should draft such a document. The content of a statement drafted by the investigator should be neutral in tone and objective in perspective. That is, the statement should contain dates, witness names and observed/witnessed facts that pertain to the complaint, among other pertinent details.

#Comment Begins

Practice Tip

Prior to collecting the pertinent details, the complaining employee should be reminded that, although the employer will conduct any necessary investigation discretely, confidentiality cannot be guaranteed because speaking with witnesses and the alleged bad actor is likely necessary to ensure completeness of the investigation.

#Comment Ends

After receiving the initial complaint, the investigator should determine whether the complaint, if true, violates a policy or would constitute unlawful conduct. If so, then the investigator should collect pertinent records (such as emails, performance reviews, and other personnel files) and interview key witnesses, including the alleged bad actor. When interviewing witnesses, the investigator should remind the interviewees that (i) they are obligated to provide truthful responses to the questions posed, (ii) knowingly providing false information is grounds for disciplinary action, and (iii) retaliation for either being the subject of a complaint or participating in an investigation is prohibited and that they should report any such retaliation immediately. Again, statements taken should be objective in perspective and neutral in tone to avoid any perception of bias on the part of the investigator.

All documents collected or created during the course of an investigation should be maintained in confidential files, or, if corrective action is taken in response to the complaint, in the relevant personnel files. Such documents should be maintained for a minimum of four years.

[3] Discipline

After collection of all pertinent details, the employer should determine whether and what corrective action is necessary under the circumstances and juxtaposed to the applicable employer policies and legal standards. If discipline is warranted, and the employer maintains a progressive discipline policy, you should ensure the employer follows that policy. If the employer does not have an established progressive discipline policy, then one or more of several corrective actions may be imposed on the subject of the complaint, including:

• Verbal coaching/training the problem actor

• Verbal warning

• Written warning

• Placing the problem actor on a performance improvement plan

• Removing the problem actor from the complaining employee's team or from a supervisory position over the complaining employee

• Transferring the problem actor to another facility or office location

• Suspending the problem actor without pay

• Termination

Of course, as with the collection of documents and conducting interviews, disciplinary documents should be neutral in tone and objective in perspective, meaning that only the pertinent results of the investigation upon which the disciplinary action is based should be included in any disciplinary documentation, along with an explanation of which policies were violated as a result of the bad conduct.

§ 3.03 Accommodating LGBTQ Employees with Disabilities

As we note in §§ 5.04 and 6.02 of this Practice Guide, employees living with HIV and/or who are taking prescription medication to treat symptoms of the disease are or may be "disabled" within the meaning of the ADA. Indeed, any physical and mental condition that limits one or more major life activity is considered a "disability" under the terms of the ADA, as amended.[9]1 The law also defines a disability as a record of an impairment that limits one or more major life activities, or being regarded as having such an impairment (or perceived as having a physical or mental disability, whether or not the disability limits a major life activity).[10]2 A "major life activity" includes, but is not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "major bodily

[9]142 U.S.C. § 12102(1)(a) (2009).

[10]2*Id.* § 12102(1)(b)–(c); *id.* § 12102(3)(a).

functions."[113] Such functions include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[124] In addition, even if an employee who otherwise has a disability is being treated for the disabling condition, the mitigating effects of medication, medical equipment, assistive technology, auxiliary aids, etc., do not impact whether an impairment is considered a disability; indeed, even the side effects or other impacts the mitigating measures themselves have on the employee's ability to perform the job duties need to be considered in making any decisions with respect to the employee.[135] In short, this broad definition of "disability" is intended to reach most impairments that do or could conceivably cause a disabling condition that impacts an employee's ability to perform essential job functions.

Employers who receive a request for an accommodation should, thus, be sure they have a clearly defined process in place to address the request and determine whether the employee is qualified for the position with or without an accommodation. To do so, the employer should have a system whereby they seek information from the requesting employee's medical provider that indicates (i) whether the employee has an impairment that substantially limits one or more major life activities, (ii) whether such impairment impacts the employee's ability to perform the essential job duties, and (iii) if the impairment does so impact the employee's ability to perform the job, then whether there is an accommodation the employer can provide that would allow the employee to perform those essential job duties.

#Comment Begins

Practice Tip

When counseling a client on assessing an employee's disability, be sure to remind the employer that any health information received should not include family medical history or other information that identifies an employee's genetic makeup or genetic information. Affirmatively collecting such information may violate the Genetic Information Non-Discrimination Act. Thus, any request for medical information should disclose the fact that the employer is not seeking family medical history or other such identifying information.

#Comment Ends#Comment Begins

Practice Tip

Any medical information received about an employee should not be placed in the employee's personnel file, but rather it should be kept in a separate confidential medical file that is only accessible on a need to know basis by a very limited number of individuals.

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[113] *Id.* § 12102(2)(a).

[124] *Id.* § 12102(2)(b).

[135] *Id.* § 12102(4)(e)(i)–(ii).

#Comment Ends

Once this information is collected from the employee's provider, then the employer can assess whether the requested accommodation is "reasonable" under the circumstances. If the accommodation requested is feasible for the employer to implement, then the employer should do so and should clearly document the accommodation it is providing to ensure there is no confusion between the employee and the employer as to what was agreed to.

If, on the other hand, the accommodation requested is not reasonable, then the employer must offer an alternative accommodation that it considers reasonable, to which the employee and his/her/hir/their medical provider should be provided the opportunity to review. This process is called the "interactive" process, and must be engaged in by the employer and the employee until a reasonable accommodation is identified or it is determined that no reasonable accommodation is available that would allow the employee to perform his/her/hir/their essential job functions.

Of particular importance for employers to understand is what is considered a "reasonable" accommodation. The EEOC's implementing policies state that the following are generally considered reasonable accommodations:

• Job restructuring, such as reallocating or redistributing marginal, non-essential job functions that an employee is unable to perform because of a disability, and altering when and/or how a function, whether it is essential or marginal, is performed;

• Allowing limited leave, such as permitting the use of paid or unpaid leave, to obtain medical treatment, recuperate from an illness or other disabling condition, obtaining a medical device such as a wheelchair, accessible van, etc., avoiding temporary adverse conditions at the workplace that may impact or exacerbate a disability, training a service animal, and/or receiving training related to the disability, such as reading braille or learning sign language;

• Modifying a schedule or allowing the employee to work part-time, so long as doing so does not cause an undue hardship on the employer, such as a major disruption to the employer's operations or a production slowdown;

• Modifying workplace policies that impact an employee's disability-related needs; or

• Reassignment to a vacant position with equivalent pay and benefits, so long as the employee is actually qualified for that position.[146]

This list is non-exhaustive, so upon advising a client regarding their obligations to provide reasonable accommodations, you should ensure you understand the various issues that are

[146] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 6.

involved in determining whether an accommodation request is reasonable.

§ 3.04 Ensuring the Wellbeing of Transgender Employees

[1] Health Care Benefits for Transgender Employees

[a] Introduction

Transgender employees have unique health care needs related to transitioning, including various drug treatments, hormone therapies, surgeries, and other health issues. For employers who are obligated to or who do maintain health insurance benefits for employees under the Patient Protection and Affordable Care Act (commonly called the "ACA" or "Obamacare"), there are three things to consider regarding transgender-related health care issues: (1) ACA Section 1557 regulations, (2) regulations issued by the Office of Federal Contract Compliance Programs (OFCCP), and (3) enforcement by the Equal Employment Opportunity Commission (EEOC). Under these various rules and laws, if an employer does not provide retiree medical coverage and does not have any federal contracts, the employer is not required to provide coverage for transgender reassignment services, but there is a Title VII risk for discrimination on the basis of sex.

[b] ACA Section 1557

On May 18, 2016, the Department of Health and Human Services ("HHS") under the Obama administration issued regulations under Section 1557 of the ACA, which generally prohibit group health plans from discriminating against transgender individuals with respect to health coverage. Generally, employer-sponsored health plans are only subject to Section 1557 if they receive federal funding from the HHS, such as under Medicare Part D payments. Importantly, funding from other federal departments does not trigger compliance. If an employer does not receive Medicare Part D federal subsidies, or any other type of HHS funding, then it has no current obligation to comply with Section 1557.

Under the rules, if an employer meets the federal contractor requirements under Section 1557, then the employer must comply with the following gender identity nondiscrimination requirements set forth therein with respect to their group health plan, which became effective January 1, 2017:

• The plan cannot contain a categorical coverage exclusion or limitation for all healthcare services related to gender transition;

• The plan cannot deny coverage based on gender identity or sex stereotyping; and

• The plan must treat individuals consistently with their gender identity but cannot deny coverage for treatment ordinarily or exclusively available to individuals of one gender based on an individual's identity as a gender other than their birth gender.

In December 2016, a federal court issued a nationwide injunction[151] enjoining HHS from enforcing these regulations before they ever took effect. HHS under the Trump administration has thus far refused to defend Section 1557's transgender discrimination prohibition, and has indicated that it plans to re-evaluate the Section 1557 regulations, which could mean that they will ultimately eliminate or relax these rules for qualifying employers who employ transgender employees.

However, in September 2017, a separate federal court ruled that discrimination on the basis of gender identity is a form of sex discrimination prohibited under Section 1557,[162] thus allowing transgender individual to seek recourse directly in federal court rather than relying on HHS's administrative procedures through its civil rights officer. This ruling is important for employee-side practitioners to note given the Trump administration's refusal to defend Section 1557 as written.

[c] OFCCP Regulations

The OFCCP regulations, as recently amended, prohibit discrimination on the basis of gender identity and transgender status with respect to health benefits.[173] Indeed, the OFCCP's rules governing non-discrimination on the basis of sex expressly includes gender identity as a protected characteristic, and as such, health plans that exclude certain services related to gender transitioning are discriminatory on their face. The OFCCP regulations generally apply if an employer has entered into contracts with the federal government valued at more than $10,000. So, similar to Section 1557, if an employer does not have any federal contracts meeting this threshold, the employer does not have to comply with the OFCCP regulations. Employers that do, however, cannot have group health plans that exclude health services that are specific to gender transitioning, sex reassignment, hormone therapy, etc.

[d] EEOC Enforcement

As with the EEOC's position pertaining to Title VII's coverage of other employment-related discrimination against transgender employees on the basis of "sex," the EEOC has taken the position that failure to provide health coverage for transgender reassignment services violates Title VII's prohibition on sex discrimination in the terms, conditions and privileges of employment.[184] Indeed, the EEOC has brought multiple lawsuits against employers and has issued "right to sue" letters concerning this issue, and has entered into several conciliation agreements between employers and the EEOC regarding employer health plans' exclusion of coverage for transgender-related services.[195] However, to date, no court has yet to affirm the

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[151] Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

[162] Prescott v. Rady Children's Hospital-San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).

[173] *See* 41 C.F.R. 60-20 (2016); Discrimination on the Basis of Sex, 81 Fed. Reg. 39135–37 (June 15, 2016). Importantly, the rule also protects workers of such contracts from discrimination in other aspects of the workplace, including use of bathrooms, changing rooms, showers, and similar facilities.

[184] *See What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited June 25, 2019).

[195] Consent Decree, EEOC v. Deluxe Financial Servs., Inc., No. 0:15-cv-2646-ADM-SER (D. Minn. filed

EEOC's position and award damages or otherwise issue an injunction in this context.

[2] Workplace Issues Impacting Transgender Employees

Federal civil rights laws do not currently expressly protect transgender workers from discrimination. The EEOC, however, has taken the position that discrimination on the basis of an individual's transgender status is a form of sex discrimination protected by Title VII of the Civil Rights Act of 1964.[206] As we discuss elsewhere herein, some states, too, have enacted express provisions protecting the rights of transgender workers in the workplace. Employers seeking to create an inclusive environment thus should look to these laws and applicable enforcement guidelines to ensure they are meeting current minimum legal standards. Multi-state employers may wish to adopt certain company-wide policies and procedures that are gender inclusive to limit isolation or marginalization of transgender employees.

Confidentiality and privacy are of particular importance to ensuring transgender employees are respected in the workplace. Employees in transition may want minimal publicity about or attention to their transition. This desire may stem from concerns about safety, employment security, or the stress that is associated with "coming out" and transitioning in a largely homogenous environment. Other transgender employees may want to talk about their transition with trusted coworkers or others. Employers should be careful to balance both the transitioning and/or transitioned employees' desire for privacy, or conversely the employee's desire to discuss his or her status with others, against providing an appropriate level of training and education to others in the workplace. Employers should only share information about a transitioning employee's status to others on a need-to-know basis or as expressly authorized by the transitioning employee. Questions about the transitioning employee should, at the transitioning employee's discretion, be directed to the transitioning employee or to a human resources official. However, questions pertaining to the transitioning employee's health, medical status, sexuality, gender, etc. are inappropriate and may result in harassing or embarrassing the transitioning employee. Employers should be sure to maintain an open door for transitioning or transgender employees to raise concerns about their wellbeing, interactions with coworkers and customers, and any other matters that relate to transitioning and/or transgender status in the workplace.

Use of restrooms is of particular concern to many transgender employees. Specifically, once a transgender employee begins working in the gender that reflects the employee's gender identity, the employer should allow access to restrooms, locker rooms, etc., consistent with that employee's gender identity. As an employee transitions, this may change from day-to-day or week-to-week, and employers should be flexible to allow the employee to utilize the facilities as needed. OSHA has issued a Best Practices guide to restroom access for transgender workers

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June 4, 2015) (settled); *see also* Amicus Brief of the EEOC in Support of Plaintiff and in Opposition to Defendant's Motion to Dismiss, Robinson v. Dignity Health, No. 4:16-cv-03035 YGR (N.D. Cal. Dec. 6, 2016) (Dkt. No. 43-1).

[206] *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited June 25, 2019).

which is helpful to any company employing a transgender or transitioning employee.[217]

§ 3.05 Employee Leave Rights and Obligations

[1] Introduction to the FMLA and its Eligibility Requirements

The Family and Medical Leave Act (FMLA) is a federal law that entitles eligible employees of covered employers to take unpaid leave for specified family and medical reasons.[221] Employers that are subject to the FMLA are required to provide eligible employees with up to 12 weeks of unpaid leave per year.[232] Eligible employees who take FMLA leave to care for a child, spouse, parent or next of kin who is a member of the armed services are entitled to take up to 26 weeks of unpaid leave per year.[243] The FMLA only provides unpaid leave and does not require employers to pay employees who take FMLA leave.

#Comment Begins

Practice Tip

Each company policy may vary on whether employees may use any paid annual, vacation or sick leave in conjunction with FMLA leave. Some states have state-based paid family and medical leave programs and other states require employers to allow the option for employees to use accrued paid vacation or sick leave during their FMLA leave. It is important to know and understand the applicable state law and the specific company policy when advising clients of their FMLA rights. This Practice Guide does not cover various state laws on the topic of family and medical leave, but there are other resources published by the Publisher covering these topics.

#Comment Ends

There are three main criteria for determining whether an employee is eligible for unpaid, job-protected leave under the FMLA. First, a covered employer includes all private sector employers with at least 50 employees for 20 or more workweeks during the current or preceding calendar year and all public employers (including state, local or federal government, or a public school).[254] Second, an eligible employee includes those who have worked for their employer for at least 12 months and for at least 1,250 hours during the previous year.[265] Lastly, the employee must take leave for the purpose of addressing the employee's own "serious health condition," the serious health condition of a covered family member, to care for a new child, to care for a wounded service family member, or to address particular circumstances arising from a covered

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[217] *See* OCCUPATIONAL SAFETY AND HEALTH ADMIN., BEST PRACTICES: A GUIDE TO RESTROOM ACCESS FOR TRANSGENDER EMPLOYEES 1 (2015), https://www.osha.gov/Publications/OSHA3795.pdf.

[221] 29 U.S.C.S. § 2601 (2019).

[232] *Id.* § 2612(a)(1).

[243] *Id.* § 2612(a)(3).

[254] *Id.* § 2611(4).

[265] *Id.* § 2611(2)(A).

family member's deployment or call to active duty in the armed forces.[276] While FMLA provides important protections to eligible employees and their families, the FMLA's restrictive definitions of certain terms inherently exclude LGBTQ employees and their families from the same protections.

#Comment Begins

Practice Tip

Employees who are not FMLA-eligible may still be covered by the ADA, such that an employee with a qualifying disability may be entitled to certain leave from work as a reasonable accommodation, assuming such leave does not pose an undue burden on the employer. You should be sure to understand the interplay between FMLA and ADA leave rights when advising clients on the same.

#Comment Ends

[2] Specific Definitions of the FMLA Impacting LGBTQ Employees

[a] "Spouse"

The FMLA protects leave from work to care for a "spouse."[287] However, prior to June 2013, Section 3 of the Defense of Marriage Act (DOMA) defined "spouse" as a person of the opposite sex who is a husband or a wife.[298] Because this definition applied to the FMLA, same-sex couples were prevented from exercising FMLA leave to care for their spouses. In June 2013, the Supreme Court overturned that definition of spouse under Section 3 of DOMA.[309] Between June 2013 and March 27, 2015, only LGBTQ employees who resided in a state that recognized the legality of same-sex marriages were eligible to take FMLA leave to care for a same-sex spouse. Same-sex couples who were legally married but resided in a state that did not recognize same-sex marriages were not eligible for FMLA leave. On March 27, 2015, the Department of Labor issued a new FMLA rule that defined "spouse" by looking to the law in the particular state in which the employee became married, not the state where the employee resided.[3110] This new rule allowed all same-sex couples who were married to take FMLA leave to care for each other, but still prevented same-sex couples who were unable to get married in their states to take protected leave under the FMLA.

In June 2015 when the Supreme Court found state laws banning same-sex marriage unconstitutional, all same-sex married couples presumably became eligible for FMLA leave.[3211]

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[276] *Id.* § 2612(a).

[287] *Id.* § 2612(a)(1)(C).

[298] 1 U.S.C.S. § 7 (2019).

[309] United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675 (2013).

[3110] 29 C.F.R. § 825.122(b) (2018).

[3211] Obergefell v. Hodges, 135 S. Ct. 1039 (2015).

Today, all employees who are legally married to another person of the same sex are eligible to take FMLA leave to care for their spouse. However, same-sex partners who are in a domestic partnership or civil union are currently not covered under the FMLA.[33]12 The Department of Labor has stated that expanding the definition of spouse to include domestic partnerships or civil unions is beyond the scope of their authority.[34]13

[b] "Son or Daughter" and "Parent"

The FMLA also extends protected leave to care for a son or a daughter.[35]14 The FMLA defines "son or daughter" to mean "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis."[36]15 The key issue related to unmarried LGBTQ parents is the term "loco parentis," which refers to someone who acts in the place of a parent. In June 2010, the U.S. Department of Labor clarified that FMLA's definition of "son or daughter" broadly includes children who have no biological or legal relationship to the parents who are raising them.[37]16 Whether an employee stands in loco parentis such that the employee's child falls under the definition of "son or daughter" in the FMLA is ultimately a question of fact.[38]17 The FMLA defined standing in loco parentis as including those who assume the day-to-day responsibilities of caring for or financially supporting the child.[39]18 At the same time that the Department of Labor clarified the definition of "son or daughter," it also clarified that one does not need to provide *both* day-to-day care and financial support in order to stand in loco parentis to a child.[40]19 Moreover, in the same interpretation, the Department of Labor stated, "an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child."[41]20 Similarly, an adult child can take FMLA leave to care for his or her LGBTQ parent who is not biologically or legally related if that parent stood in loco parentis when the employee was under 18.[42]21

That said, LGBTQ parents have a variety of parental-like relationships in which they may otherwise legally be entitled to FMLA leave, including surrogacy, adoption and fostering. Because state law generally determines the legal status of parental-child relationships, you should be sure to understand those laws when advising clients on their leave-related rights. For example,

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[33]12 80 Fed. Reg. 9989, 9991 (Feb. 25. 2015).

[34]13 *Id.*

[35]14 29 U.S.C.S. § 2612(a)(1)(C) (2019).

[36]15 *Id.* § 2611(12).

[37]16 U.S. DEP'T OF LABOR, US DEPARTMENT OF LABOR CLARIFIES FMLA DEFINITION OF SON AND DAUGHTER (2010), https://www.dol.gov/opa/media/press/WHD/WHD20100877.htm.

[38]17 *See* Martin v. Brevard Cty. Pub. Sch., 543 F.3d 1261, 1266 (11th Cir. 2008) (finding that the plaintiff-employee created a genuine issue of material fact on whether he stood in loco parentis to his granddaughter when he provided substantial financial support and care).

[39]18 29 C.F.R. § 825.122(c)(3) (2018).

[40]19 U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2010-3 (June 22, 2010), https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm.

[41]20 *Id.*

[42]21 29 U.S.C. § 2611(7), (12) (2019).

some same-sex couples may elect surrogacy to have children, in which one of the spouses donates sperm or eggs, which is then carried by a surrogate birthmother. At birth, the donating parent may be legally presumed as the parent, whereas the non-donating parent must engage in a legal process whereby they will obtain legal parental rights over the child. You should understand the interplay between state and federal laws on legal parental rights, as well as applicable leave laws, to properly advise your clients on such rights.

[c] "Serious Medical Condition"

The term "serious medical condition," as defined in the FMLA, includes any period of incapacity or treatment connected with patient care, such as an overnight stay, in a hospital, hospice, or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such in-patient care or continuing treatment by a health care provider which includes any period of incapacity.[43]22 The key issue related to this definition is the ambiguity as to whether treatments and conditions associated with a person's medically-supervised gender transition qualifies as "serious medical condition" under the FMLA. Gender transition related care or health needs that require an overnight stay likely qualify for FMLA leave, as it would fall under inpatient care. However, serious health conditions that do not involve overnight stay in a healthcare facility will still qualify if it is an illness, injury, impairment, or physical or mental condition resulting in period of incapacity for more than three consecutive calendar days and involving either (a) treatment two or more times by health care provider or (b) treatment by healthcare provider on one occasion which results in regimen of continuing treatment.[44]23

As such, any gender transition related care that requires an employee to be out of work for three consecutive calendar days may also qualify as a serious medical condition under the FMLA, entitling eligible transgender employees to protected leave under such circumstances. The determination of a "serious health condition" is a question of fact, and there is currently a lack of case law to rely on for guidance on its application to transgender employees, or their parents, children, or spouses.

[3] Returning from FMLA Leave

The FMLA also protects employees who are on leave from losing their jobs,[45]24 seniority,[46]25 or employer-provided health insurance.[47]26 While an employee is on FMLA

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[43]22*Id.* § 2611(11).

[44]23Rodriguez v. Smithfield Packing Co., 545 F. Supp. 2d 508, 520 (D. Md. 2008).

[45]24 29 U.S.C. § 2614(a)(1)(A).

[46]25*Id.* § 2614(a)(1)(B).

[47]26*See* Ryl-Kuchar v. Care Ctrs., Inc., 565 F.3d 1027 (7th Cir. 2009) (finding that the employer violated the FMLA when the defendant-employer retroactively cancelled the plaintiff-employee's health insurance after she went on FMLA leave); Tornberg v. Bus. Interlink Servs., 237 F. Supp. 2d 778 (E.D. Mich. 2002) (holding that the employer violated the FMLA when the defendant-employer retroactively terminated the plaintiff-employee's medical coverage without notice); *see also* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT (FMLA) 3 (2016), http://www.nationalpartnership.org/research-library/work-family/fmla/guide-to-fmla.pdf; *but cf.* Salser v. Clarke Cty. Sch. Dist., 802 F. Supp. 2d. 1339 (M.D. Ga. 2011) (holding that the defendant-employer did not violate the FMLA when they continued to pay plaintiff-employee's healthcare premiums and

leave, the employer must continue to pay for health insurance coverage as if the employee was going to work as usual. However, if the employee does not return to work after reaching the limits of 12 weeks of FMLA leave, the employer has the option to discontinue payments towards the employee's health insurance. Additionally, if the employee advises the employer that he/she/ze/they does not intend to return to work, then the employer can also stop making payments towards the employee's health insurance plan.

It is important to note that an employer can require the employee to pay back the money that the employer paid to maintain the employee's health insurance during the FMLA leave. However, this cannot be required if the employee did not return the work due to circumstances that are beyond his/her/hir/their control, including an FMLA-qualifying medical condition. In addition, if the employee's job is eliminated while on FMLA leave, then the employer is entitled to terminate health insurance payments on behalf of the employee at the time employment is terminated.

[4] Filing a Claim

The statute of limitations for a FMLA violation is generally two years from the date of the last event constituting the alleged violation for which the lawsuit is brought.[48]27 However, it can be three years if the employer knew of or recklessly disregarded its duties under the FMLA.[49]28 State family and medical leave laws may provide longer statute of limitations periods. It is important to note that if the U.S. Department of Labor files a lawsuit on an employee's behalf, then that employee can no longer file his/her/hir/their own lawsuit. Remedies that may be available include recovery of lost employment wages and benefits, and under certain circumstances, liquidated damages.

[5] Paid Sick Leave Rights

No federal law currently requires private employers to provide paid sick leave to employees, but many states and municipalities have adopted such rules. Furthermore, federal contractors, however, may be required under Executive Order 13706 and Department of Labor regulations to provide some amount of paid sick leave to their workers.[50]29 Under the applicable federal contractor rules, four major categories of contractors are covered, including:

• Procurement contracts for construction covered by the Davis-Bacon Act;

• Service contracts covered by the McNamara-O'Hara Service Contract Act;

• Concessions contracts, including any concessions contracts excluded by the McNamara-O'Hara Service Contract Act; and

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maintained her health insurance benefits during her leave).

[48]27 29 U.S.C. § 2617(c)(1).

[49]28 *Id.* § 2617(c)(2).

[50]29 Exec. Order No. 13,706, 80 Fed. Reg. 54,697 (Sept. 7, 2015).

• Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.[51]30

Subcontracts of a covered contract are also covered, assuming they fall within one of the covered contract types above. Moreover, among some other narrow exceptions, these federal rules do not apply to employees of a contractor who do not actually work on the contract subject to the Department of Labor's paid sick leave rules, or employees who work under a collective bargaining agreement ("CBA") that was ratified as of September 30, 2016 and terminates on the earlier of January 1, 2020 or the date the CBA terminates, and provides at least 56 hours of paid time that can be used for reasons related to the employee's sickness or health care.[52]31

For employees that are covered, employers must allow such employees to accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, up to a maximum of 56 hours annually. Exempt employees are presumed to work 40 hours in a work week for purposes of accrual. Unused time must be allowed to carry over from one year to the next, but employers can cap the total number of hours of accrued paid sick time to 56 hours at any point in time. Finally, employees are not entitled to a payout of accrued but unused sick leave upon termination of employment, but employees who are terminated and return to work within 12 months of the termination are eligible to have their unused paid sick bank reinstated at the level it was prior to the termination.

Federal contractor employees can use accrued sick leave for a variety of absences, including those that result from:

• physical or mental illness, injury, or medical condition of the employee;

• obtaining diagnosis, care, or preventive care from a health care provider by the employee;

• caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or need for diagnosis, care, or preventive care described above; or

• domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described above or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee in engaging in any of these activities.

This rule is incredibly inclusive of LGBTQ workers, and thus employers and employees

[51]30 29 C.F.R. § 13.3 (2019).
[52]31 *Id.* § 13.4.

should take an expansive view of the coverage provided under the law.

In addition to federal contractors, many states and municipalities require private employers to provide paid sick leave for their employees. For example, the City of Chicago and Cook County have adopted ordinances that require employers who have employees that work within the jurisdictional limits of the City or County for at least 80 hours in any 180-day period to provide sick leave that accrues at a rate of 1 hour for every 40 hours worked in a benefit year, up to a total of 40 hours per year for non-FMLA reasons. Employees who do not use all accrued sick leave in a benefit year are entitled to carry over up to half of that time into the next benefit year, but, importantly, may also carry over up to an additional 20 hours of time for FMLA-reasons only. In such a scenario, it is conceivable that the employer will be obligated to provide up to 60 hours of paid sick leave each benefit year to its eligible employees. Like the federal contractor requirements, the Chicago and Cook County paid sick leave ordinances are inclusive of LGBTQ employee needs.

Between 2006 and 2016, nearly 50 states and municipalities have adopted paid sick leave rules governing at least some workers within their jurisdictions. Paid sick leave rules are constantly changing and being updated. As such, attorneys for employers should review and understand the rules applicable to clients those rules cover, and should do so regularly given the frequency with which the rules are changing and being adopted.

§ 3.06 Separation Agreements and Other Termination Issues

[1] The At-Will Employment Doctrine

All employment relationship come to an end, either through termination, voluntary separation, retirement, layoff, a business closing, or death of the employee. As in any separation scenario, there are various considerations to determine how the employer can legally separate an employee and avoid the risks associated therewith. While this Practice Guide does not address employee benefits, executive compensation and/or retirement-related matters that may be associated with employees who have written employment agreements, or participate in an employer-sponsored retirement savings, pension or other benefit plan, attorneys who represent employers or employees who are subject to such agreements and plans should be sure they understand all applicable consequences of termination, including in terms of severance payments due, tax consequences flowing therefrom, and liability associated therewith.

In employment scenarios that do not involve such agreements or plans, employers and employees should consider a variety of other issues when ending an employment relationship. Of course, most states are “at-will” employment states, meaning that employers and employees may terminate the employment relationship for any reason or no reason at all, and with or without advance notice. There are several exceptions to this rule, including for some public sector employees and employees who work under a collective bargaining agreement (indeed, employers under those arrangements may usually only terminate employees for “just cause” in connection with a violation of certain workplace rules and only after an employee is given adequate notice of the violation and a chance to appeal a termination decision through a formalized appeal process), but for purposes of this Practice Guide, we focus on terminations under the at-will employment

doctrine.

Because an employer can terminate employment with or without any reason in an at-will employment relationship, no employee has an expectation of continued employment. As such, the rights for employees are limited in at-will relationships, and employers are generally free to do as they wish in making termination decisions, as long as such a decision does not violate the law or some other public policy.

#Comment Begins

Practice Tip

Notwithstanding the presumed at-will nature of employment in most jurisdictions in the United States, employer statements, policies and/or actions can, in some circumstances, create in employees an expectation of continued employment. As such, when advising employers, you should ensure that any written policies, agreements or other documents clearly and plainly state that nothing in that written document nor any communications, written or oral, to the employee about employment alters the at-will nature of the employee's employment.

#Comment Ends

However, because an employer cannot terminate an employee in violation of the law or some public policy, an employee may have a claim under one or more federal, state or local laws governing the employment relationship if the employer does, in fact, terminate the employment relationship on a prohibited basis. For example, an employer who terminates a gay male employee over the age of 40 because the employer is disgusted by the employee's relationship with another man, likely violate state laws that protect employees on the basis of their sexual orientation, may violate federal law under Title VII in certain jurisdictions where a circuit court has recognized sexual orientation as a protected characteristic under that law's prohibition of discrimination on the basis of sex, but likely has not violated state or federal laws on the basis of that employee's age.

[2] Separation Agreements

Even where an employer makes a perfectly objective and legal decision to terminate an employee's employment, the employer may wish to offer a severance payment in exchange for a release of claims. Employers sometimes offer severance as a general rule to all employees who are terminated for reasons other than violation of workplace policies or some unlawful conduct, while other employers may only do so in circumstances where it suspects an employee may be litigious or file a charge or complaint of discrimination. In any case, employers that do offer severance in exchange for a release should ensure their release includes an explicit reference to all laws, both statutory and common laws at the federal, state and local level, from which the employer is seeking a waiver. In jurisdictions that have separate employment protections for LGBTQ workers, the release should include an express waiver of the laws, regulations or ordinances extending such protections. The employer should also ensure it includes a statement

indicating that the waiver does not include a release of claims which cannot be released as a matter of law (such as workers' compensation laws) and a disclaimer that, notwithstanding the employee's release of claims, the employee still has a right to file a charge of discrimination with the EEOC or a FEPA and to participate in such agencies' investigations, but that the employee has no right to monetary recovery from the same.

#Comment Begins

Practice Tip

Employees who are separated and over the age of 40 have additional rights under the Older Worker Benefits Protection Act[531] to extended consideration and revocation periods for their waiver of age-related claims. While this Practice Guide is does not address these rights, you should be sure you review applicable legal standards to ensure your client understands its obligations to older employees under the same, as a failure to meet the minimum requirements could result in nullification of the entire waiver of claims contained in the separation agreement.

#Comment Ends#Comment Begins

Practice Tip

Employees subject to a layoff may also have extended notice period rights under the Worker Adjustment and Retraining Notification ("WARN") Act[542] and similar state laws. Depending on the size of the layoff in comparison to the workforce, you should advise employers about such extended notification requirements as well as the public official notification requirements under such laws. Other resources from the Publisher are available that address WARN-related matters.

#Comment Ends

[3] Continuing Health Benefits

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), employers are required to provide workers the right to choose to continue group health benefits provided by their employer-sponsored group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events.[553] The U.S. Department of Labor's web page has detailed descriptions of employer and employee rights and obligations.

COBRA generally requires that group health plans sponsored by employers with 20 or

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[531] 29 U.S.C. § 621 (2019).

[542] *Id.* § 2102.

[553] *See* 19 U.S.C. §§ 1161–69.

more employees in the prior year offer employees and their families the opportunity for a temporary continuation of health coverage in certain instances where coverage under the plan would otherwise end. Notice of continuation coverage rights and obligations must be provided by the employer and/or its plan administrator within 14 days of notification of the termination (or other qualifying event) so that the employee can elect, within 30 days following notification, whether or not to continue on the employer's group health plan. The employee can elect to continue coverage at the employee's cost for payment of all applicable premiums. Other more detailed resources pertaining to COBRA continuation coverage are available from this Publisher.

Transgender employees requiring continued health coverage for their transition-related health care needs should be particularly aware of their rights under COBRA, and, in circumstances where loss of coverage could subject the employee could subject them to significant health risks, they should explore whether assistance with the costs of continued coverage under the employer's group health plan should be sought. Where an employer offers some sort of severance benefit, it may be more advantageous to transgender employees to seek more health coverage-related severance rather than a cash payout. Attorneys advising separated transgender employees should be sure they help their clients navigate these issues.

CHAPTER 5 Cultural Sensitivity for Employers and Lawyers Engaging with LGBTQ Employees

SCOPE

This chapter serves as a guide for having culturally sensitive engagements with LGBTQ employees by providing background and understanding of different orientations and identities, and presenting various talking points. Cultural sensitivity can be promoted by management and practiced at an individual level.

SYNOPSIS

§ 5.01 The Importance of Cultural Sensitivity in the Workplace

[1] Work Environment and Retaining Talent

Data shows that when employees feel valued, they are more productive, more loyal, and are less likely to bring complaints against their employers and co-workers.[1] In turn, employers that create such an environment are rewarded with an improved bottom line, productivity and efficiencies. Creating and maintaining an environment that is both respectful and sensitive to the diverse issues a workforce brings to the workplace is thus important to a successful business, but it can be difficult to achieve in practice.

Cultural sensitivity when engaging with LGBTQ employees, applicants, contractors and others is, perhaps, uniquely challenging for employers because oftentimes sexual orientation and gender identity, unlike race or color, is unseen and is not otherwise outwardly apparent. How can an employer create an inclusive and culturally sensitive environment if it does not otherwise know if its workforce includes LGBTQ employees? After all, many employees do not disclose their sexual orientation or gender identity at work (*see* § 5.01[3], *infra).* And, when there are no

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[1] Decreasing employee engagement has led to a decrease in productivity and clinical burnout. Jim Clifton, The World's Broken Workplace, Gallup (June 13, 2017), at http://www.gallup.com/opinion/chairman/212045/world-broken-workplace.aspx?g_source=EMPLOYEE_ENGAGEMENT&g_medium=topic&g_campaign=tiles.

LGBTQ workers in a workforce, does it really matter whether an employer promotes inclusiveness? These, among many other questions and issues faced by employers, are common and important to address in order to create an inclusive workplace.

Promoting and practicing cultural sensitivity and creating an inclusive work environment results in greater worker productivity and talent acquisition and retention. This is particularly true for LGBTQ individuals, who report staying with a job longer and performing better when they know that the workplace is inclusive of LGBTQ employees.[2] Moreover, LGBTQ allies are also becoming more conscious about the policies and environment that employers maintain.[3] Indeed, one in four employees—and not specifically LGBTQ employees—report that they have stayed at a job because the environment was inclusive of LGBTQ employees.[4] Thus, employers that actively promote a culturally sensitive work environment are more likely to attract and retain talent, whether LGBTQ or otherwise. And, of course, employee retention improves worker efficiencies, builds workforce morale and trust in the employer, reduces the likelihood of discrimination or other claims, and saves employers time and expense of recruiting new talent.

Despite the importance of being culturally sensitive when engaging with LGBTQ employees, doing so is not always intuitive. Around 70% of non-LGBT workers believe that talking about sexual orientation or gender identity in the workplace is unprofessional.[5] Yet, conversations with LGBTQ employees that involve topics regarding their sexual orientation or gender identity are prevalent. One in four openly LGBTQ employees have been made to feel uncomfortable at work by non-LGBTQ co-workers discussing something related to their personal sexual orientation or gender identity.[6] Even individuals who consider themselves allies are often culturally insensitive to the point where LGBTQ individuals feel uncomfortable or unwelcome.[7] Thus, if employers and employees are intentional in their engagement of LGBTQ workers, an inclusive and productive environment can be achieved through proper training, manager buy-in, reward and discipline, where appropriate.

[2] Creating and Fostering Inclusiveness and Acceptance in the Workplace

Creating a culturally sensitive and inclusive environment requires concerted and persistent effort on the part of employers. Some employers may find that, as part of an overall diversity promotion initiative, inclusion of LGBTQ-specific issues in training programs is an effective way to promote cultural sensitivities. Further, ensuring that policies and procedures account for matters of importance to LGBTQ employees serves to demonstrate the import an employer places on an inclusive work environment. Although doing so certainly involves time and resources,

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[2] Deena Fidas, et al., *The Cost of the Closet and the Rewards of Inclusion*, Human Rights Campaign, May 2014, at 23.
[3] *Id.*
[4] *Id*.
[5] *Id.*
[6] *Id.*
[7] Carlos Maza, *Call yourself an LGBT ally? Here's how to actually be one*, Wash. Post, June 9, 2016, https://www.washingtonpost.com/news/soloish/wp/2016/06/09/call-yourself-an-lgbt-ally-heres-how-to-actually-be-one/?utm_term=.8b18129d7626.

including legal resources, the goodwill generated by taking such actions is likely to outweigh the costs involved in implementing any such measures. To improve inclusiveness in the workplace, employers should consider the following:

• Implement a fully inclusive non-discrimination policy: While most employers have an equal employment opportunity (EEO) policy in an employee handbook, or recite it on an application or in onboarding paperwork, some have not had legal counsel or a human resources professional review their policies in years. Attitudes toward the LGBTQ community have changed drastically in the last decade, and so have best practices with respect to non-discrimination policies. Moreover, if an employer is accused of discrimination, the first thing (and, sometimes, the only thing) the employer points to in disputing the charge is its EEO/non-discrimination policy as evidence of its commitment to ensuring fair employment practices. If your client's EEO or non-discrimination policy does not cover sexual orientation, gender identity and gender expression, you should suggest revising it to prohibit discrimination and promote equal employment on these grounds. It not only serves to demonstrate a full commitment to fair employment practices, but it will send a signal to employees that you value their contributions, irrespective of these characteristics. A sample inclusive EEO policy is provided below.

• Add or improve diversity training programs: Many employers find it valuable and consistent with their corporate culture to integrate diversity and inclusion training programs into their regular employee onboarding and annual training schedules. Some employers do it as part of their annual or semi-regular harassment or sensitivity training, while others provide diversity training as a separate program altogether. Implementing a fully inclusive training program, or reviewing existing training programs, to ensure they cover LGBTQ issues will help set the tone from management that the employer's values and commitments include LGBTQ interests.

• Encourage the creation of an LGBTQ-specific employee resource group (ERG): ERGs are prevalent in large corporations and law firms, and provide support and information for LGBTQ employees and their managers, supervisors, and executives. Mid-size and smaller companies may also consider allowing employees to form ERGs, which encourages employee participation and interaction with company-sanctioned associations. The function of ERGs ranges from basic support for those struggling with coming out at work, to social networking, to advocacy and workplace activism. All of these activities serve to create greater employee engagement and are likely to improve morale. Creating an ERG can be as simple as providing a space during lunch or before or after work for employees to congregate and discuss issues important to the LGBTQ community, or as elaborate as providing funding and other resources for LGBTQ pride events or community activities outside working hours. Employers that allow ERGs should consider the impact the ERG will have on productivity and workplace engagement in determining the level of support and resources it will afford the group. ERGs may consider opening membership to allies, too, as an effort to bolster participation in events, meetings and activities, and to gain greater influence with decision-makers. Finally, if an employer has an existing ERG that includes gay, lesbian and/or bisexual employees, it

should consider updating its title and mission to include transgender employees as well as those who are queer and questioning, even if it is unaware of any employees who identify as such. Doing so sends a message to customers, clients, vendors, and applicants that the company values diverse experience inclusive of transgender and gender non-conforming issues.

Attorneys who provide counseling to clients should propose these and other ideas as simple, inexpensive, and important changes that can be made to create a more inclusive and diverse workplace.

[3] Being Out at Work

For LGBTQ individuals, the decision to "come out"[8] at work is deeply personal and often a difficult one that, in some circumstances and in some states, can lead to significant adverse consequences, including harassment, marginalization, exclusion, embarrassment and even termination of employment. Many LGBTQ individuals report fear of losing their job and fear of discrimination, and over half of LGBT workers have not come out at work.[9] It is important that employers, when assessing the makeup of their workforce, are mindful of this.

Workplace environments where LGBTQ individuals feel the need to hide are not conducive to workplace productivity. The hiding of one's identity has effects on the LGBTQ employee on a personal level and a work level. In contrast, a work environment and employer-employee relationship where LGBTQ individuals feel comfortable being out at work is highly beneficial. Employers can combat employees' fear of coming out and encourage job satisfaction by creating an environment that is culturally sensitive where LGBTQ employees feel comfortable being themselves.

Furthermore, presumptions about an individual's sexual orientation or gender identity should not be made absent clear intent on the part of a worker to disclose the same to co-workers and management. Such presumptions have the potential to create issues in the workplace, including fear for one's safety, disengagement, isolation, lower productivity, diminished morale, and possible claims of discrimination or harassment.

Although presumptions about an individual's gender identity or sexual orientation should be avoided, encouraging and fostering an inclusive environment will give LGBTQ employees the tools they need to come out if and when they want to.

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[8]The phrase "coming out," as used throughout this Practice Guide, is a colloquial term that is familiar to most within the LGBTQ community to mean the open declaration or disclosure of one's sexual orientation or gender identity.

[9]Deena Fidas, et al., *The Cost of the Closet and the Rewards of Inclusion*, Human Rights Campaign, May 2014, at 2.

§ 5.02 Sexual Orientation and Cultural Sensitivity

[1] Lesbian Women and Gay Men

A lesbian woman is "a woman who is emotionally, romantically or sexually attracted to other women."[1] A gay person is "a person who is emotionally, romantically or sexually attracted to members of the same gender."[2] Around 87% of Americans say they know someone who is gay or lesbian.[3] Significant strides towards acceptance of individuals outside of societies' heteronormative stereotypes regarding gender and sexuality have been made in recent years.[4] Yet, despite this progress and the clear prevalence of gay and lesbian employees in America's workforce, culturally insensitive interactions are frequent in the workplace. Many times, correcting such interactions is a matter of understanding boundaries when interacting with gay and lesbian employees. Employers may consider training managers how to address such matters as they arise in the workplace to reduce unintended marginalization of LGBTQ workers.

When engaging with gay, lesbian, and bisexual employees, it is important to be conscious of heterosexism in one's conversation. Heterosexism is the "marginalizing of LGBTQ persons while praising and normalizing heterosexual people."[5] Acceptance of gay, lesbian, and bisexual employees is shown through having genuine conversations and respecting them as individuals. Encounters that seek to show acceptance by linking their lifestyle to LGBTQ stereotypes or one's own heteronormative experience is actually, in many circumstances, offensive or, at the least, off-putting. LGBTQ workers are unique in that they must constantly "come out" to co-workers, superiors, subordinates, clients, customers, vendors, etc. each time a heterosexist interaction occurs. While isolated instances of heterosexism are unlikely to cause a broader conflict in the workplace, over time such instances can make LGBTQ workers feel isolated or offended leading to the creation of workplace conditions that rise to the level of a hostile work environment. Thus, proper sensitivity training in the workplace, including training on reporting and correcting inappropriate heterosexist behavior, will help reduce employers' exposure to harassment claims from their LGBTQ workers.

Below are several talking points aimed at illustrating and correcting heterosexist language that you and your clients should consider when developing sensitivity training for employees:

Talking Points:

> **Relationships:** Recognize that same-sex couples exist. If you see an employee wearing a wedding band, this does not

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[1] Glossary of Terms, Human Rights Campaign, https://www.hrc.org/resources/glossary-of-terms.
[2] *Id.*
[3] Pew Research Center, *A Survey of LGBT Americans*, June 13, 2013, http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/.
[4] Pew Research Center studies shows that the overall opinion of gay men and lesbian women has seen an almost 20% favorable change in the United States. Bruce Drake, *How LGBT Adults See Society and How the Public Sees Them*, Pew Research Center, June 25, 2013, http://www.pewresearch.org/fact-tank/2013/06/25/how-lgbt-adults-see-society-and-how-the-public-sees-them/.
[5] Ronald Wheeler, *About Microaggressions*, 103 B.U.L. Rev. 2, 326 (May 20, 2016), *available at* https://www.bu.edu/law/files/2016/05/LLJ_108n2_08_wheeler.pdf.

necessarily mean they are married to someone of the opposite sex. While interest in a co-worker's personal life outside of work is natural for most people, being actively conscious of diversity in the makeup of personal relationships will help avoid needless workplace friction. For example, heterosexist workplace conversations include asking a lesbian woman, "How long have you and your husband been together?" or a gay man, "Is your wife here with you?"[6] Rather than conversing in gender-specific and/or gender normative terminology (*e.g.*, Do you have a boyfriend/girlfriend/husband/wife?), using generalized and neutral terminology can achieve the same friendly workplace discussion (*e.g.*, Are you in a relationship?).

Families: Not all couples with children are heterosexual couples, and not all homosexual couples have or want children. Indeed, homosexual couples may adopt children, have natural born children through surrogacy and/or sperm or egg donation, and they may have children from prior relationships with someone of the opposite sex. Thus, if you see an employee with a child, do not assume that the employee is in a heterosexual relationship or that the children are adopted, natural born or even the biological or adoptive children of the employee. Additionally, if you know of a homosexual couple with children, being conscious of inappropriate inquiries into the employee's life that tend to marginalize the employee's family dynamic will help eliminate ostracizing behavior. When engaging with LGBTQ employees do not ask questions like, "Who is the mother/father?" and "How did having a child with your partner work?" and "How are your kids treated at school with two moms?" Rather, treat same-sex couples and families as you would any other family. Compliment them, but avoid insensitive and extraneous commentary on the fact that they are a same-sex couple with a child.

Lifestyle: Sexual orientation is a significant part of a gay or lesbian person's identity. But you should not assume that it is the all-controlling factor in their life and lifestyle. Do not assume certain facts about their lifestyle simply because of their sexual orientation or gender identity. Questions like "What gay clubs do you like?" or "Where do you live in Boystown?" are inappropriately presumptive.[7] While the LGBTQ individual might very well enjoy gay clubs or live in a specific neighborhood, this line of questioning seems to indicate that there is nothing else to their identity other than being gay or lesbian. Furthermore, it assumes that because they are LGBTQ, you are able to plug in stereotypes to understand their identity.

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[6] *Id.* at 325.

[7] *Id.* at 327.

[2] Bisexual Persons

A person is bisexual when the person is "emotionally, romantically or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree."[8] Research on bisexuals in the workplace and points of discrimination is lacking. However, be aware of contributing to bisexual invisibility. It is important to treat the sexual orientation of bisexuals just as legitimately as other orientations.[9] Many bisexual individuals do not come out as bisexual. And many are in relationships with the opposite sex. It is important to remember that simply dating someone of the opposite sex does not equate to that person being heterosexual. In fact, bisexuals make the largest group within LGBT America.[10] Many bisexuals conceal their identity. However, as noted above, concealment of identity contributes to dissatisfaction and overall unhappiness. It is important to create a workplace where bisexuals know that they can come out at work and be happier and safe from discrimination, regardless of whether they make the decision to be out at work or not.[11]
#Comment Begins

Practice Tip

When engaging with someone, be it client or employee, who is bisexual, recognize that bisexuality is a legitimate sexual orientation. Treating people who come out as bisexual in the workplace like they are going through a phase or following a trend is insensitive to their identity and simply not true. Thus, the same talking points noted above should be utilized when training a workforce on sensitivity toward bisexual employees.

#Comment Ends

§ 5.03 Gender Identity and Cultural Sensitivity

[1] Transgender and Gender Non-Conforming Persons

Gender identity is a person's internal sense of being male, female, some combination of male and female, or neither male nor female.[1] One's gender identity may be the same as or different than the sex assigned at birth, and may or may not be expressed outwardly. Gender expression, by contrast, is the external appearance of one's gender identity, which can be expressed through behavior, clothing, haircut, voice, style, etc., and "which may or may not conform to socially defined behaviors and characteristics typically associated with being either

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[8] Glossary of Terms, Human Rights Campaign, https://www.hrc.org/resources/glossary-of-terms.
[9] Ann E. Tweedy and Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 Wm. & Mary J. Women & L. 699, 705 (2015), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1411&context=wmjowl.
[10] Anna Brown, *5 Key Findings About LGBT Americans*, Pew Research Center, June 13, 2017, http://www.pewresearch.org/fact-tank/2017/06/13/5-key-findings-about-lgbt-americans/.
[11] Tweedy and Yescavage, *supra*, at 705-06.
[1] Glossary of Terms, Human Rights Campaign, https://www.hrc.org/resources/glossary-of-terms.

masculine or feminine."[2] Understanding these two terms, and the differences between them, is important for attorneys counseling clients on either policies and practices in the workplace or understanding a client's position with respect to the work environment.
#Comment Begins

Practice Tip

If you represent a company that is revising or implementing an EEO policy or some other fair employment practice, you should ensure that both the terms "Gender Identity" and "Gender Expression" are included in the policy due to the important differences between them. While most states and the federal government do not currently protect either gender identity or gender expression under the law, there is judicial precedent indicating that gender non-conforming expression in the workplace is protected.[3]

#Comment Ends

Transgender individuals are people who have a gender identity that is different from what is culturally expected from someone of the sex that they were born.[4] Gender identity is not indicative of sexual orientation. The Human Rights Campaign explains, "Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc."[5] The same goes for individuals who are gender non-conforming. Being gender non-conforming simply means that the individual does not necessarily fit into the traditional gender binary that society has created.[6]

It is essential to learn the preferred pronoun and name of a transgendered person. While it is important to ask for a preferred pronoun or name that a transgender or gender non-conforming person goes by, it is not appropriate to bombard transgender and gender non-conforming individuals with questions about their gender identity and/or expression. Questions regarding medical transitions and sexual activity are not likely topics that transgender and gender non-conforming people want to discuss with co-workers. According to the National Center for Transgender Equality, many transgender people have expressed feeling uncomfortable discussing the following topics: 1) their birth name or photographs from before they transitioned, 2) what hormones they are/aren't taking, 3) what surgeries they have/haven't had, 4) and questions related to sexual relationships.[7] This is not an exhaustive list. Just like any individual, it is important to be respectful of private information.
#Comment Begins

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[2] *Id.*
[3] *See* Chapter 1, § 1.02[1][a], *supra*.
[4] Glossary of Terms, Human Rights Campaign, https://www.hrc.org/resources/glossary-of-terms.
[5] *Id.*
[6] *Id.*
[7] National Center for Transgender Equality, *Supporting the Transgender People in Your Life: A Guide to Being a Good Ally*, July 9, 2016, http://www.transequality.org/issues/resources/supporting-the-transgender-people-in-your-life-a-guide-to-being-a-good-ally.

Practice Tip

Training employees to be sensitive to gender non-conformity is just as important as training regarding sexual orientation and heterosexism. The National Center for Transgender Equality provides the following points to consider before asking a gender non-conforming or transgender person a question that might be sensitive:

- Why do I want to know this information? Curiosity can often lead to questions that are insensitive and hurtful.

- Would I feel comfortable if someone asked these questions of me? Transgender and gender non-conforming people deserve the same amount of respect for privacy as anyone else. Questions probing into their lives simply because of their gender identity are not culturally sensitive.

- Would I ask this question of a non-transgender person in a similar situation? Simply because they have a different gender identity than what has been normalized should not result in them deserving less respect.[8]

Another common way in which people are culturally insensitive, is in the way they express their support of a transgendered or gender non-conforming person. Statements such as "You look like a real woman!" or "You would look less trans if …" are hurtful for individuals and perpetuate a type of gender stereotype that does not acknowledge their identity.[9]

#Comment Ends

[2] Intersex Persons

Intersex persons are persons who have reproductive or sex organs that do not necessarily fit into the traditional "male" or "female" definitions. The Intersex Society of North America explains:

> A person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types … . Or a person may be born with mosaic genetics, so that some of her cells have XX chromosomes and some of them have XY.[10]

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[8] National Center for Transgender Equality, *Questionable Questions About Transgender Identity*, Sep. 2, 2016, http://www.transequality.org/issues/resources/questionable-questions-about-transgender-identity.
[9] National Center for Transgender Equality, *Supporting the Transgender People in Your Life: A Guide to Being a Good Ally*, July 9, 2016, http://www.transequality.org/issues/resources/supporting-the-transgender-people-in-your-life-a-guide-to-being-a-good-ally.
[10] Intersex Society of North America, *What is intersex?*, 2008, http://www.isna.org/faq/what_is_intersex.

While there are not explicit legal protections based on intersex status, a similar legal framework as to gender identity and expression should be considered in understanding such individual's rights and protections. Furthermore, being sensitive to the nature of an individual's gender status, regardless of express legal protections, is important in creating an inclusive and non-discriminatory workplace.

§ 5.04 Employees with HIV and AIDS

Misconceptions regarding HIV and AIDS can result in a hostile environment for gay individuals regardless of whether they are HIV positive or not. Rightly or wrongly, HIV and AIDS is considered by some to be a "gay issue."[1] While the HIV/AIDS epidemic struck the gay community particularly hard and in a very public way in the 1980s and 1990s, it is not a solely gay issue.[2] Indeed, HIV/AIDS affects gay and straight people everywhere. Unfortunately, many people still do not have an understanding of what HIV is. This ignorance can often result in the stereotyping of gay individuals and the stigmatization of HIV/AIDS positive individuals.

Beyond stereotyping, of course, is the fact that HIV/AIDS is a qualifying disability under the Americans with Disabilities Act (ADA). The ADA defines a disability as (i) an impairment that limits one or more major life activities, including major bodily functions such as the functions of the immune system, (ii) a record of such an impairment, or (iii) being regarded as having such an impairment.[3] For individuals living with HIV/AIDS, often all three of these prongs can be triggered, thus creating significant protections for workers. Persons living with HIV may not have recognizable symptoms.[4] However, regardless of whether an HIV+ worker is symptomatic or asymptomatic, the worker has physical impairments that substantially limit one or more major life activities or major bodily functions and are, therefore, protected by the law. As are persons who are discriminated against because they are regarded as having HIV. For example, because HIV/AIDS is closely associated with gay men, there could be a misconception among some workers that a gay co-worker is necessarily HIV+. Regardless of the truth of their belief, regarding a gay co-worker as HIV+, and then acting upon that belief in an adverse manner or harassing the worker because of the belief, is unlawful and triggers protections for that worker under the ADA. Similarly, the ADA protects workers who suffer discrimination because they have a known association or relationship with an HIV+ individual.

An understanding of HIV/AIDS can often help combat negative assumptions and discrimination. Ensuring that employees' health information is protected and kept confidential (except on a need-to-know basis) will also help reduce the likelihood of discriminatory conduct in the workplace.

#Comment Begins

Practice Tip

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[1] GLAAD, *HIV/AIDS*, https://www.glaad.org/resources/ally/13.

[2] *Id.*

[3] 42 U.S.C. § 12102(1).

[4] Human Rights Campaign, *What Do I Do? A Handbook to Understanding Health & HIV*, http://www.hrc.org/whatdoido.

If you learn of an employee or a client's HIV/AIDS status, understand that it means the virus exists in his or her system. Do not confuse their positive status with meaning illness, disability, or imminent death. Because of developments in treatments for HIV, many HIV+ individuals lead happy and healthy lives free from the negative effects of the virus.

#Comment Ends

§ 5.05 Microaggressions and Culturally Sensitive Language

[1] Microaggressions in the Workplace

It is important to be mindful of microaggressions in the workplace and the negative impacts they have on LGBTQ workers and the workplace environment as a whole. Microaggressions are "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional of unintentional, that communicate hostile, derogatory, or negative … slights and insults toward the target person or group."[1] In the workplace, microinvalidations are a common form of microaggressions that LGBTQ individuals experience. Microinvalidations are "behavior that minimizes the psychological thoughts, feelings and experiences of targets."[2]

Microaggressions are a form of discrimination. Regardless of whether these aggressions rise to the level of unlawful harassment, such behavior can be used as evidence of illegal discrimination. The cultural sensitivity discussed in this chapter is essential to fighting these microassaults in the workplace and will go toward limiting liability resulting from homophobic and transphobic conduct.

[2] Culturally Sensitive Language

Language that is homophobic, biphobic and transphobic is a pervasive form of microinvalidations. This type of language has damaging effect on the morale of the individual it targets.[3] To foster an environment of acceptance and high employee morale and productivity, homophobic language must be stopped in the same manner one would stop racist or sexist commentary in the workplace. Homophobic, biphobic, and transphobic language only reinforces negative perceptions of workers' sexual identities and can create a hostile and intimidating workforce. Many times, this language is used as a type of normative saying without actual intent to hurt the other individual. It is important to be conscious of the language used in the workplace.

#Comment Begins

Practice Tip

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[1] Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 Psych. Pub. Pol. and L. 54, Feb. 2011, at 56.

[2] Wheeler, *supra*, at 325.

[3] Stonewall, *Homophobic, biphobic, and transphobic language materials*, http://www.stonewall.org.uk/get-involved/education/secondary-schools/homophobic-language-materials.

Using common words that describe LGBTQ people and their identities (*e.g.*, gay, lesbian, transgender, bisexual, queer, etc.) appropriately in the workplace can foster a feeling of inclusiveness, and should thus not be eliminated from the work environment. Such appropriate use can come in the following forms:

1. Words that individuals use or would use to describe themselves are acceptable. (i.e., gay, lesbian, bisexual).

2. Words or phrases that wrongly imply an individual's membership of a group and/or refer that particular group in a derogatory way are wrong (i.e., that's so gay, you're so gay).

#Comment Ends