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Testing Your LGBTQ I.Q. in the Workplace

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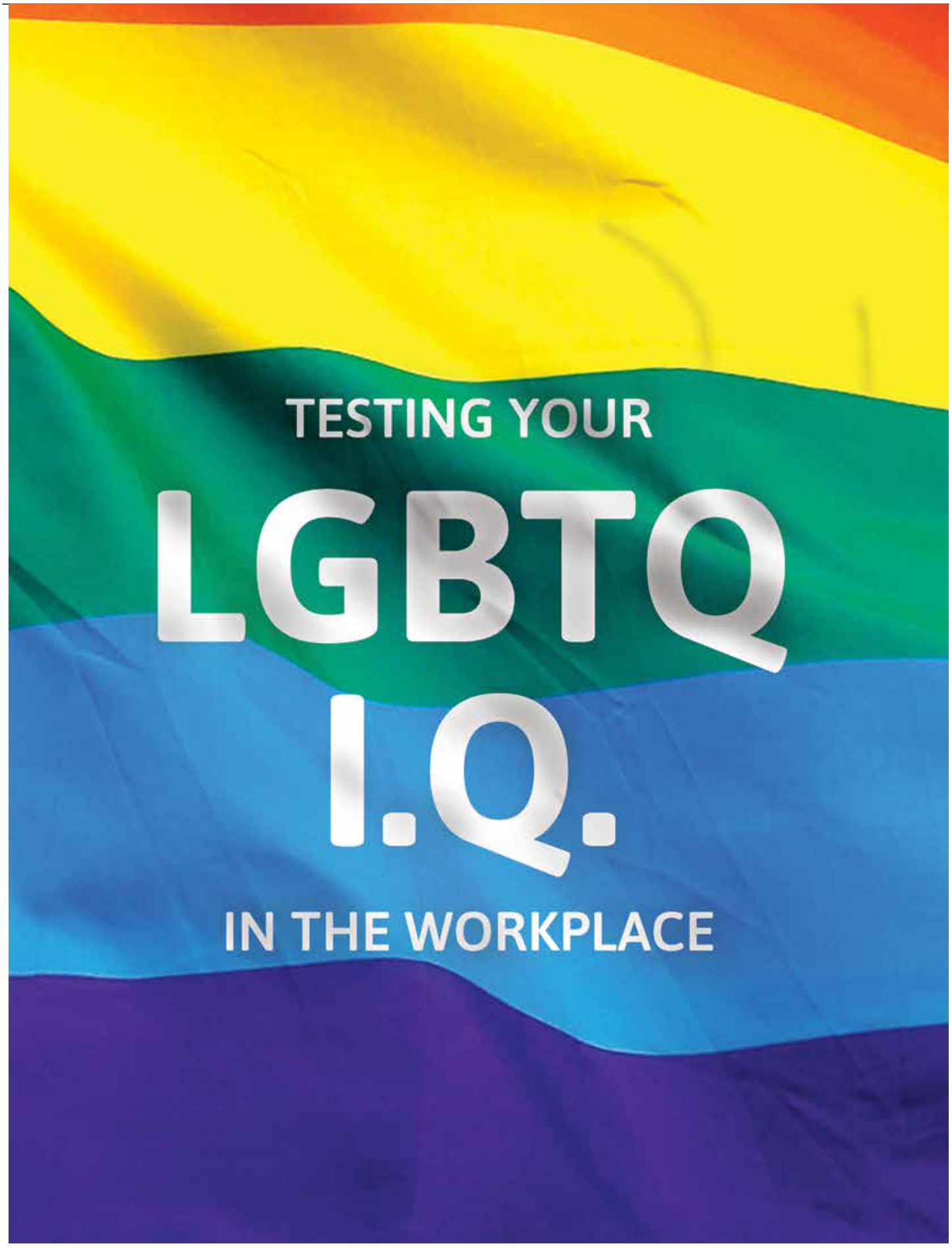
Employment and Labor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CHEAT SHEET

- ***LGBTQIA.*** The acronym LGBTQIA stands for lesbian, gay, bisexual, transgender, queer or questioning, intersex, and ally or asexual.
- ***The starting line.*** Sexual, racial, and other protected forms of discrimination by most employers was first outlawed with the passage of Title VII of the US Civil Rights Act of 1964.
- ***The dilemma.*** In the recent case *Hively v. Ivy Tech Community College*, the Seventh Circuit interpreted Title VII on the basis of sex stereotyping. This means a gay person who is viewed as being "flamboyant," is likely more protected than a person who acts or dresses "straight."
- ***The future.*** Twenty US states have already prohibited private employers from discrimination based on sexual orientation. This trend is expected to continue.

If there were a website devoted exclusively to controversial topics facing in-house counsel, its drop-down menu would be overwhelming. It would be crowded with everything from gun rights and marijuana usage to social media threats and public access arguments. Among these contentious issues, LGBTQ rights would surely make the list.

The social polarization on these topics fuels activist groups — on both sides of every debate — who are mobilizing through legislation, impact litigation, and sometimes, quite effectively, through the court of social (media) opinion. As a result, we are challenged to stay abreast of what seems like daily breaking legal news. We advise our companies or clients, who have the weighty task of establishing a corporate "position" on such topics, through an issues management program or within the context of a corporate social responsibility platform (phrases that were not common vernacular in 1964). We are often called upon to answer questions such as:

- "Do we need to reprint thousands of employee handbooks to include sexual orientation in our antidiscrimination policy?"
- "Do we really have to remodel our bathrooms so they are unisex?"
- "Does the law prohibit us from asking our employees and customers to adhere to our women/men bathroom designations?"
- "How do we support or respond to an employee who is transitioning or to another employee or customer who feels uncomfortable about that?"

Before diving into the evolution of Title VII, we should begin with an appreciation of the following related terminology as it has evolved: "LGBTQ" is an acronym for lesbian, gay, bisexual, transgender, and queer or questioning. Sometimes an "I" for intersex or an "A" for ally or asexual are added to this acronym (see sidebar below).

L

Lesbian: A woman who is emotionally, romantically, or sexually attracted to other women.

G

Gay: A person who is emotionally, romantically, or sexually attracted to members of the same gender.

B

Bisexual: A person 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.

T

Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.

Q

Queer: Term people often use to express fluid identities and orientations. Often used interchangeably with "LGBTQ."

I

Intersex: General term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't fit the typical definitions of female or male.

A

Ally: A person who is not LGBTQ but shows support for LGBTQ people and promotes equality in a variety of ways.

Asexual: The lack of a sexual attraction or desire for other people.

Gender expression: External manifestation of one's gender identity, usually expressed through masculine, feminine, or gender-variant behavior, clothing, haircut, voice, or body characteristics.

Gender identity: One's innermost concept of self as male, female, a blend or both or neither — how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.

Sexual orientation: An inherent or immutable enduring emotional, romantic, or sexual attraction to other people.

SOURCE: HUMAN RIGHTS CAMPAIGN WWW.HRC.ORG

In 2015, the Court ruled that states must recognize same-sex marriages. The Court is now deciding whether schools must allow transgender students to use bathrooms consistent with their gender identity. So, what does this changing legal landscape mean for employers?

More than 25 years ago, the US Supreme Court recognized that discrimination against employees based on “sex stereotypes” is unlawful. Nearly 10 years later, the Court made it clear that “same-sex” harassment is a form of sex discrimination in employment. In 2015, the Court ruled that states must recognize same-sex marriages. It may now decide whether schools must allow transgender students to use bathrooms consistent with their gender identity. So, what does this changing legal landscape mean for employers? To figure out where we’re heading, we first need to consider where we’ve been.

How did this happen?

Congress first outlawed sexual, racial, and other protected forms of discrimination by most employers as part of its passage of Title VII of the US Civil Rights Act of 1964, which was a watershed moment in American legal history. But this prohibition against discrimination based on sex was a last-minute amendment from the floor of the US House of Representatives. So, there is little to no record of what Congress truly meant by the phrase “because of sex” as used in Title VII. This lack of legislative history has made it more challenging for courts to determine what types of sexual discrimination are unlawful.

Over 20 years after the enactment of Title VII, the Court first declared sexual harassment in the workplace to be unlawful. More than a decade later, the Court found same-sex harassment to be covered, too.

The Supreme Court opened the door to expanded protection in its 1989 landmark decision in *Price Waterhouse v. Hopkins*. That case involved a female accountant’s challenge to her denial of a promotion. In particular, some partners said she could improve her chances for partnership if she walked, talked, and dressed “more femininely.” The Court found this evidence of “sex stereotyping” to be an unlawful form of discrimination based on gender under Title VII.

Since 1994, Congress has repeatedly considered, but never passed, the proposed Employment Non-Discrimination Act (ENDA). If it were ever enacted, ENDA would amend Title VII to prohibit discrimination by larger employers on the basis of sexual orientation or gender identity.

What’s happening now?

In light of the Supreme Court’s *Price Waterhouse* decision, federal courts have found Title VII to protect transgender individuals from employment discrimination based on sex stereotyping. As stated in a recent decision by the US Court of Appeals for the Eleventh Circuit, a person is considered transgender (or otherwise acting contrary to traditional male or female norms) “precisely because of the perception that his or her behavior transgresses gender stereotypes.” For example, the Sixth Circuit found a valid Title VII claim to be stated by a demoted police officer, who “was living as a male while on duty but often lived as a woman off duty,” and who had a reputation as a “homosexual, bisexual, or cross-dresser.”

Some federal trial courts also have extended the protection of Title VII to employees or applicants

based on their sexual orientation. For example, in November 2016, the US District Court of the Western District of Pennsylvania declared in *EEOC v. Scott Medical Center* that sexual orientation discrimination is a type of employment discrimination "because of sex" that is barred by Title VII. The court explained that "[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."

But the vast majority of federal courts, including all federal appellate courts to date, have found no Title VII coverage for employment discrimination based solely on sexual orientation. These courts have generally emphasized that it is really up to Congress (or perhaps the Supreme Court) to decide whether to create a new protected class for employees based on their sexual orientation.

The most recent federal appellate court to address this issue was a three-judge panel of the Seventh Circuit in *Hively v. Ivy Tech Community College*. That case involved an openly gay professor who claimed her employment contract was not renewed because of her sexual orientation. Dismissing that claim, the Seventh Circuit panel reluctantly acknowledged that, because "Title VII in its current iteration does not recognize any claims for sexual orientation discrimination, this court must continue to extricate the gender nonconformity claims from the sexual orientation claims." The panel further noted this "creates an uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior," the more likely a viable claim exists under Title VII.

In other words, the federal courts' interpretation of Title VII to protect transgender and other employees based on sex stereotyping, but not based on their sexual orientation, creates an odd legal dilemma. It essentially means that a gay man who is viewed as being "flamboyant" because he acts or dresses effeminately is more likely to be protected against employment discrimination under Title VII, but not one who acts and dresses like a "straight" man. This dilemma is expected to be addressed by the Seventh Circuit in its entirety, which last October decided to review the panel's decision in *Hively*.

Some US states have already chosen to address this dilemma. More than 20 states now expressly prohibit private employers from discriminating against their employees or applicants based on their sexual orientation, as well as their gender identity or expression, as reflected in the following chart:

US State/District	Bars Sexual Orientation Discrimination	Bars Gender Identity or Expression Discrimination
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes
Delaware	Yes	Yes
District of Columbia	Yes	Yes
Hawaii	Yes	Yes
Illinois	Yes	Yes
Iowa	Yes	Yes
Maine	Yes	Yes
Maryland	Yes	Yes
Massachusetts	Yes	Yes
Minnesota	Yes	Yes
Nevada	Yes	Yes
New Hampshire	Yes	No, but transgender persons diagnosed with a gender identity disorder are protected under the state's disability discrimination law.
New Jersey	Yes	Yes
New Mexico	Yes	Yes
New York	Yes	Yes, and gender dysphoria and similar gender-related conditions also are protected disabilities under state law.
Oregon	Yes	Yes
Rhode Island	Yes	Yes
Utah	Yes	Yes
Vermont	Yes	Yes
Washington	Yes	Yes
Wisconsin	Yes	No

Additional states (Louisiana and Pennsylvania) prohibit discrimination by state agencies and contractors against their employees based on their sexual orientation, gender identity, or gender expression, but those state laws don't apply to private employers other than those that contract with the state. Although the federal Americans with Disabilities Act expressly excludes "gender identity disorders not resulting from physical impairments," from its definition of "disability," some state laws also extend coverage to certain gender-related disabilities as noted in the chart above.

Sexual orientation discrimination and gender identity is now expressly prohibited by various federal agencies and contractors. For example, in July 2014, former US President Barack Obama issued an executive order barring most federal contractors from discriminating against LGBTQ employees and applicants. In late January 2017, the White House issued a statement indicating that US President Donald Trump would not rescind that executive order and further declared that the new president "continues to be respectful and supportive of LGBTQ rights, just as he was through the election." In his nomination acceptance speech, he pledged to "to protect the [LGBTQ] community from violence and oppression."

Shortly after the Supreme Court declared in 2015 that same-sex couples have the constitutional right

to marry, the US Equal Opportunity Commission (EEOC) declared that it will enforce Title VII against both public and private employers to protect LGBTQ individuals against discrimination based on their sexual orientation or gender identity. In short, it is the EEOC's position that discrimination based on sexual orientation necessarily involves treating workers less favorably because of their sex under Title VII. True to its word, the EEOC announced in 2016 its filing of two separate lawsuits for sexual orientation discrimination against private employers, including the *Scott Medical Health Center* case noted earlier.

The EEOC also reinterated that discrimination based on an employee's gender identity is a form of sex discrimination under Title VII in a brief it filed in early February 2017 in the *R.G. & G.R. Harris Funeral Homes* case. In that case currently pending before the Sixth Circuit, the EEOC has challenged the firing of a funeral home director transitioning from male to female. In light of the fact that this lawsuit was filed by the EEOC (as opposed to the transgender employee who was fired), the trial court ruled that the federal Religious Freedom Restoration Act (RFRA), which prohibits governmental actions that "substantially burden" a person's sincerely held religious beliefs, bars any possible Title VII claim brought by the EEOC, because the funeral home owner had genuine religious objections to this biological male employee dressing like a woman at work in violation of its dress code. Taking issue with that decision on appeal, the EEOC says RFRA cannot override an employee's "Title VII right to be free of workplace discrimination," and nothing in Title VII creates an exception for "sex discrimination because of her employer's religious beliefs," particularly by a for-profit employer like the funeral home at issue that employs and provides services to people with varying religious beliefs.

> The EEOC further declared that an employer cannot avoid this equal-access requirement by restricting a transgender employee to use a single-occupancy unisex bathroom, regardless of whether others may complain about their use of a common restroom.

These gender identity issues have now entered the bathrooms of workplaces and schools. The EEOC recently issued an administrative ruling that the Army's denial of an employee's equal access to a common bathroom corresponding to the employee's gender identity is sex discrimination under Title VII. The EEOC made it clear that an employer cannot condition this right on medical proof of gender reassignment surgery. The EEOC further declared that an employer cannot avoid this equal-access requirement by restricting a transgender employee to use a single-occupancy unisex bathroom, regardless of whether others may complain about their use of a common restroom. The EEOC also found that a supervisor's repeated refusal to use the transgender employee's new name and gender identity created a sexually hostile work environment.

Substantially similar guidelines for equal bathroom access by transgender workers and students have been issued by other federal agencies, including the Occupational Safety and Health Administration (OSHA), the Office of Federal Contract Compliance Programs (OFCCP), and the US Department of Education (DOE). In particular, the Obama administration issued, in May 2016, a DOE opinion letter and guidance interpreting Title IX of the US Education Amendments Act of 1972 and requiring public schools to "treat transgender students consistent with their gender identity" with respect to bathrooms and locker rooms. This DOE guidance notably conflicts with a new North Carolina state law (known as HB2) that was passed in March 2016 and restricted bathroom access of state employees and public school students to the gender listed on their birth certificate. Deferring to the DOE's guidance under federal Title IX, the Fourth Circuit ruled in *Grimm v. Gloucester City School Board* that students must be allowed to use the bathroom aligned with their gender identity. The Supreme Court decided in October 2016 to review the *Grimm* case. But in February 2017 the Trump administration withdrew the underlying DOE guidance at issue in *Grimm*.

"This is an issue best solved at the state and local level," as DOE Secretary Betsy DeVos explained. As a result, the Supreme Court decided, in March 2017, not to review the *Grimm* case after all, vacated the Fourth Circuit's prior decision, and sent the case back to the Fourth Circuit for a further determiniation under Title IX in light of the DOE guidance withdrawal.

Where are things going?

The *Grimm v. Gloucester City School Board* case, which was just remanded by the Supreme Court back to the Fourth Circuit, obviously is not an employment discrimination case under Title VII. Rather, it is an education discrimination case under Title IX. But the federal courts frequently construe Title VII and Title IX alike, because they are similar in language and purpose. So, if the Fourth Circuit were to conclude again, without the benefit of supporting DOE guidance, that students must be allowed to use the bathroom aligned with their gender identity under Title IX, then the decision in Grimm will create persuasive authority on which a transgender employee may rely to seek equal bathroom access in the workplace under Title VII. Regardless of how the Fourth Circuit rules on remand in *Grimm*, the losing side will undoubtedly seek further review and give the Supreme Court another opportunity to weigh into this dispute if the Court then wants to do so.

A television show about lawyers called *Ally McBeal*, which aired from 1997 to 2002, first introduced the novelty of unisex bathrooms in the workplace to much of America. More recently, Target announced it is going to spend US$20 million to install gender-neutral bathrooms throughout all of its

1,800 retail stores. The conversion of separate gender-specific bathrooms into unisex ones is expected to become a growing trend in the workplace, as employers attempt to avoid conflicts among employees created by the bathroom access laws and guidelines recently issued by the EEOC and OSHA.

There is no case currently pending before the Supreme Court in which the EEOC or an employee seeks expansion of Title VII to cover discrimination based on sexual orientation. The *Hively v. Ivy Tech Community College* case currently pending before the entire Seventh Circuit is a viable candidate for eventual Supreme Court review, particularly if the Seventh Circuit were to issue an opinion conflicting with other sexual orientation discrimination cases currently pending before the Second and Eleventh Circuits. But it seems unlikely in this current political environment that Congress will enact ENDA at any time in the near future in order to amend Title VII to cover discrimination based on sexual orientation and gender identity explicitly.

There is much speculation that the EEOC might change its position that Title VII, as originally drafted, bars sexual orientation discrimination on the job. This will be especially apparent after President Trump nominates two new commissioners and a new general counsel to the EEOC later this year. When the EEOC issued its 2015 administrative decision concluding that Title VII forbids sexual orientation discrimination, it notably did so in a split 3-2 vote. Victoria Lipnic, who is now the acting chair of the EEOC, was in the minority on that significant vote. The EEOC is expected to have a Republican majority after the term of Democrat commissioner Jenny Yang expires in July 2017. So, it is easy to see how these upcoming changes in the composition of the EEOC could alter its prior rulings and positions.

There also is much speculation that, even though President Trump has said he will not rescind President Obama's 2014 executive order barring discrimination based on sexual orientation and gender identity by federal contractors, that the Trump administration may create a broader exception for those contractors with sincerely held religious objections. In the meantime, the EEOC has taken a very strong stance against gender identity discrimination in the workplace, regardless of the private employer's contrary religious beliefs, in a brief filed recently in the *R.G. & G.R. Harris Funeral Homes* case pending before the Sixth Circuit.

In any event, almost half of the states already prohibit private employers from discrimination based on sexual orientation. As a result, many employers, particularly larger ones with sites in multiple states, have already adopted internal policies against discrimination based on sexual orientation, gender identity, and gender expression, and have incorporated these into their anti-harassment training. This growing trend also is expected to continue.

There are still more questions than answers for employers in light of all of these ongoing changes and challenges. But one thing is clear — as the legal landscape continues to evolve and to provide more protections for LGBTQ employees and applicants, their employers (and their inside and outside lawyers) will need to continue to adapt and modify their own policies and procedures.

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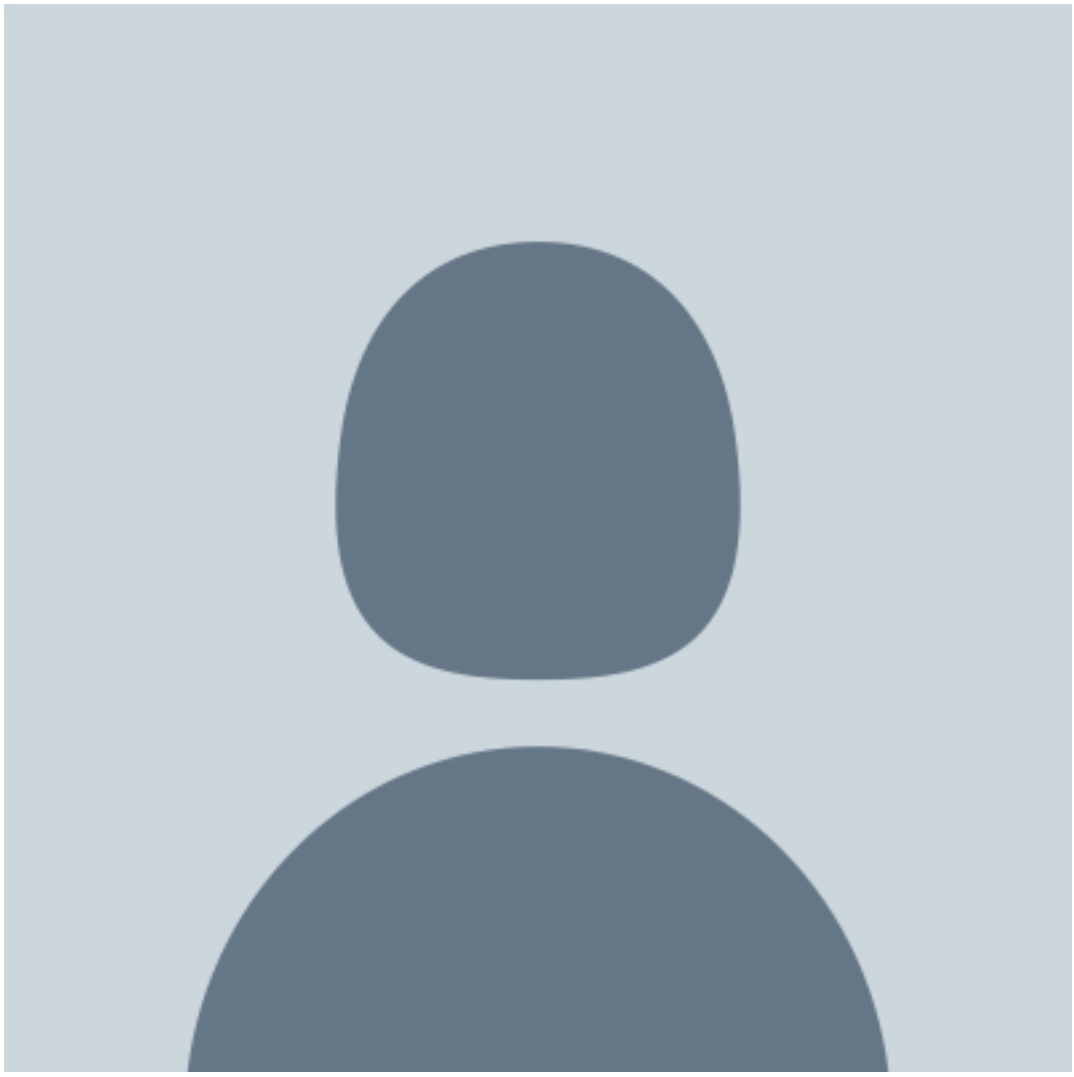
Donna L. Roberts



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She advises the company on all aspects of labor and employment, including litigation, EEOC case management, policy drafting and review, and general employment advice. In addition, she is responsible for complex business litigation and selective project management for business operations.

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