What Does the High Court's LGBTQ Ruling Mean for Employee Benefits?

By Lisa Nagele-Piazza, J.D., SHRM-SCP
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The U.S. Supreme Court recently ruled that employers can't terminate workers based on their lesbian, gay, bisexual, transgender or queer (LGBTQ) status, and employers should understand that the ruling provides employment protections beyond being fired.

The ruling is significant, said David Garland, an attorney with Epstein Becker & Green in New York City. The decision makes clear (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-title-vii-scope-of-protection.aspx) that "sex" discrimination under Title VII of the Civil Rights Act of 1964 includes sexual orientation and gender identity.

Title VII prohibits an employer from discriminating against workers based on protected characteristics with respect to terms and conditions of employment, including hiring, firing, laying off, training or disciplining.

"An employer may not discriminate with respect to benefits provided to any group of similarly situated workers that includes members of a protected class," Garland noted. "That would be particularly true with respect to health care coverage, parental leave and similar emoluments."

SHRM RESOURCE SPOTLIGHT

Overcoming Workplace Bias (www.shrm.org/ResourcesAndTools/Pages/overcoming-workplace-bias.aspx)

Employers should thoroughly review their application, hiring and ongoing work processes to look for issues that may relate to these areas, said Randy Coffey, an attorney with Fisher Phillips in Kansas City, Mo. The review should include health plan coverage and procedures, leave and insurance benefits, and any other areas in which LGBTQ employees conceivably might be affected or treated differently from other employees, he said.

Workplace Protections

Under Title VII, employers are prohibited from discriminating against workers because of their color, national origin, race, religion or sex. The act makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."
The Supreme Court held in its landmark ruling, *Bostock v. Clayton County, Ga* (https://d2qwohl8lx5mh1.cloudfront.net/8hVHe52Cq4sPdF0wEaTaCQ/content)., that an employee's "homosexuality or transgender status is not relevant to employment decisions." Federal appeals courts had disagreed on whether Title VII's ban on discrimination based on sex included LGBTQ status, but the high court found that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The decision focused on unlawful terminations, which were the subject of the cases before the court, but the ruling extends to all employment actions that are protected under Title VII.

"The Supreme Court's decision not only prohibits an employer from refusing to hire or discharging an employee based on LGBTQ status, but also prohibits treating employees differently in the spectrum of compensation, terms or conditions of employment because of the individual's LGBTQ status," explained Amy Blaisdell, an attorney with Greensfelder, Hemker & Gale in Chicago and St. Louis.

Of course, Garland noted, employers will still be able to defend such discrimination claims in the same ways they have defended against other Title VII discrimination charges. In the event that an employee can make a viable, initial claim of discrimination—or prima-facie case—the employer will then have the opportunity to show nondiscriminatory reasons for the employment action.

"As is the case generally with respect to Title VII, it is a best practice not only to be fair but to document employee-related decisions, furnish accurate evaluations, and maintain and publicize anti-discrimination policies," Garland said.

Employers should note that Title VII applies to employers with at least 15 employees, though many state and local anti-discrimination laws that protect LGBTQ workers apply to smaller employers.

Scope of the Ruling

"There are definite health and benefit considerations for employers stemming from the court's ruling," Blaisdell said. For example, LGBTQ employees may rely on the case to argue that employers are required to offer medical plans providing transgender medical benefits to them.

"Yet, many faith-based employers decline coverage for such services on the basis that covering transgender benefits would conflict with moral and religious teachings," she said. "This push and pull between individual rights and religious liberties was left unresolved by the court's decision."

Jay Dade, an attorney with Polsinelli in Kansas City, Mo., said he would caution anyone from drawing legal conclusions past the issues addressed by *Bostock*—that is, those of employment. However, he noted, employers are always free to offer protections beyond those provided by applicable laws and many provide employment protections to LGBTQ employees through workplace policies.

"The court also made it a point to note that these cases did not require the court to address concerns about religious conviction," added Jason Plowman, also an attorney with Polsinelli in Kansas City, Mo. On that point, the court specifically noted that "how these doctrines protecting religious liberty interact with Title VII are questions for future cases" because "none of the employers before us today represent in this court that compliance with Title VII will infringe their own religious liberties in any way."

The intersection of these two sets of protections will almost certainly be a focus of future litigation related to sexual orientation and gender identity, along with how the *Bostock* ruling applies or does not apply in other contexts, Plowman said.

For instance, the U.S. Department of Health and Human Services (HHS) announced a final rule (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/hhs-final-rule-rolls-back-health-care-protections-for-transgender-workers.aspx) on June 12, three days before the *Bostock* decision, that eliminated anti-discrimination protections based on gender identity in health care and health insurance that the agency said were unenforceable and exceeded the prior administration's authority.

"The Supreme Court ruling does not directly impact the recent HHS rule," noted Jeffrey Smith, an attorney with Fisher Phillips in Cleveland. That's because the HHS interpretation is based on Section 1557 of the Affordable Care Act, while the Supreme Court was interpreting provisions of Title VII.

"That said, it does demonstrate a shift in the legal landscape, and it may be harder for HHS to continue to enforce the interpretation it has just released," Smith added.

Coffey said employers should expect a wave of litigation over the "outer reaches" of the *Bostock* decision. "There is no question that there will be many new filings alleging discriminatory failures to hire, harassment and hostile work environment claims, and discriminatory termination, all based on the sexual orientation, transgender status or gender identity of applicants and employees."

Review Policies

For many employers, the *Bostock* decision will reinforce their policies prohibiting discrimination (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/lgbtq-inclusion-in-the-workplace-updating-policies-and-training.aspx?_ga=2.153098109.459041687.1592793505-531657784.1592793505) in employment on the basis of sexual orientation and gender identity, said Lori Armstrong Halber, an attorney with Reed Smith in Philadelphia and Princeton, N.J. Other employers will need to amend their policies immediately to include sexual orientation and gender identity within the classes protected from discrimination in their workplace.

"All employers would be best served by taking the opportunity to educate and train their employees on their anti-discrimination and anti-harassment policies and to focus some of that training on LGBTQ bias," she said.