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Labor and Employment Alert: Michigan Civil Rights Commission Decides That State Law Prohibits Sexual Orientation Discrimination

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Michigan's Elliott-Larson Civil Rights Act prohibits discrimination "because of sex" and applies to all employers who employ at least one person. The act does not expressly prohibit discrimination on the basis of sexual orientation or gender identity, and efforts to amend the act to prohibit discrimination on those bases have stalled in the state legislature for years.

On May 22, 2018, the state's Civil Rights Commission decided that discrimination "because of sex" now also includes sexual orientation and gender identity discrimination. To reach this conclusion, the commission eschewed the usual notice-and-comment rulemaking that government agencies typically use to adopt rules. Instead, the commission simply voted to issue an "interpretative statement."

According to the director of the Michigan Department of Civil Rights, beginning on May 23, "the department will begin processing complaints of sex discrimination based on sexual orientation and gender identity." This reinterpretation "opens the doors for people to make the argument that they've been discriminated against. We're letting them into the judicial system, into the system of justice, and now they're going to have to make their case."

It is unclear what legal significance the commission's "interpretation" holds. It is neither a statute nor a rule. Further, it is likely that the commission's interpretation will be challenged. Last September, the Michigan Attorney General informed the commission that it lacked the legal authority to reinterpret the Civil Rights Act in this manner. Employers, however, should be aware that this interpretation represents the commission's enforcement position.

Note that the federal Sixth Circuit Court of Appeals (which has jurisdiction over Kentucky, Michigan and Ohio) has not interpreted Title VII of the federal Civil Rights Act to prohibit discrimination on the basis of sexual orientation or gender identity. However, the Court **recently held** that Title VII prohibits discrimination based on transgendered and transitioning status.

Contact your Vorys lawyer if you have questions about equal employment opportunity and discrimination.

