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Labor and Employment Alert: Expanding Title VII: Sexual Orientation, Gender Identity and Transgender Discrimination

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Led by the Equal Employment Opportunity Commission (EEOC), federal agencies are beginning to focus on sexual orientation, gender identity and transgender discrimination. While the proposed federal Employment Non-Discrimination Act, which has been introduced in every Congress since 1994, is unlikely to gain traction in the new Republican-controlled Congress, the EEOC and Department of Labor (DOL) have made lesbian, gay, bisexual and transgender (LGBT) issues an enforcement priority.

On September 25, 2014, the EEOC filed a pair of lawsuits against companies alleging discrimination against transgender employees. Both lawsuits cite violations of Title VII of the Civil Rights Act of 1964, which provides protection against sex discrimination. This signifies the first time that the federal government has used Title VII to target private companies for LGBT discrimination. Additionally, in October, the EEOC filed an amicus brief urging the U.S. Court of Appeals for the Seventh Circuit to reconsider its decision in *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014), that Title VII does not bar sexual-orientation discrimination.

The filing of these lawsuits marks the culmination of a recent push by the EEOC to focus on LGBT discrimination. The EEOC's current strategic enforcement plan, extending through fiscal year 2016, makes it an agency priority to expand Title VII's sex discrimination coverage for LGBT individuals.

In April 2012, the EEOC issued a landmark decision in *Mia Macy v. U.S. Atty. Gen. Eric Holder*, ruling for the first time that discrimination against transgendered employees was covered by the sex discrimination provisions of Title VII. The case concerned discrimination against a federal employee based on transgender status.

The EEOC has advanced a gender-stereotyping theory of sex discrimination first articulated by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Rather than focus on sexual orientation discrimination per se, the EEOC has focused on gender-

stereotyping arguments where, for example, an employee is penalized for behavior or mannerisms not conforming to traditional gender norms.

The EEOC is not alone in its recent focus on LGBT issues. In July, President Obama signed an executive order explicitly barring government contractors from discriminating against employees on the basis of sexual orientation or gender identity. In August, the DOL's Office of Federal Contract Compliance Programs issued a directive targeting employment bias on the basis of gender identity and transgender status. The DOL directive cited both Title VII and the EEOC's holding in *Macy* as authority.

There are some obstacles to the EEOC's broad vision of Title VII, however, including the Seventh Circuit's recent ruling. The EEOC's opinion in *Macy*, for example, was that a federal executive decision is not entitled to deference by the courts (as opposed to an agency rule). As such, its precedential value may prove minimal. Nevertheless, the EEOC appears poised to target LGBT issues for the foreseeable future. Since January 2013 alone, the agency has received more than 800 charges alleging discrimination based on sexual orientation or transgender status.

The results of the September lawsuits will provide a significant indicator of the judiciary's willingness to adopt the EEOC's expansive vision of Title VII. Regardless of the outcome, employers should expect an increase in the EEOC's scrutiny of discrimination claims relating to LGBT individuals. Given this, employers should take this opportunity to consult their Vorys attorney to review their employment policies and practices relating to sexual orientation, gender identity/expression and transgender issues.