

Employment Discrimination and LGBT Seniors

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For lesbian, gay, bisexual, and transgender (LGBT) seniors, finding, keeping, and advancing in good jobs can be a challenge. LGBT seniors may confront both age-related bias and anti-LGBT bias in the workplace, which can leave them even more vulnerable than those of their counterparts who share, and therefore face discrimination based on, only one of those characteristics. Legal protections against workplace discrimination based on age, sexual orientation, and gender identity have expanded dramatically in many places across the United States, and LGBT seniors can access these legal tools to protect their rights in the workplace.

FEDERAL LEGAL PROTECTION

Sexual orientation and gender identity or expression

Currently, no federal law explicitly prohibits discrimination based on either sexual orientation or gender identity in private-sector (non-government) employment. In some cases, however, federal laws that prohibit sex discrimination protect LGBT employees. For example, if you experience discrimination or harassment because you do not conform to stereotypes about your gender, or you experience sexual harassment, you may have a claim of sex discrimination in violation of Title VII of the Civil Rights Act of 1964.¹ Title VII applies to private employers with 15 or more employees, as well as to federal, state and local governments.

Additionally, federal courts have been increasingly applying Title VII's prohibition on workplace sex discrimination to bar discrimination against transgender employees. The U.S. Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal anti-discrimination laws, issued a ruling in April 2012, concluding and explaining that gender identity discrimination is a prohibited form of sex discrimination.²

For public sector (government) employees, additional protection against sexual orientation and gender identity discrimination exists. For example, federal employees are protected against anti-LGBT discrimination by Executive Order 13087 and the Civil Service Reform Act.³ In addition, *all* public sector employees have protection against discrimination under the Equal Protection Clause of the Fourteenth Amendment, which prohibits government employers from purposely discriminating against someone without sufficient justification; a person's

sexual orientation, or gender identity, are not legally sufficient justification for denying equal employment to LGBT workers.

While advocates have made tremendous strides in protecting LGBT employees under these existing laws, passage of the federal Employment Non-Discrimination Act would go further by explicitly and unmistakably prohibiting workplace discrimination against LGBT workers across the country.

Age

Federal law does explicitly prohibit discrimination based on age, in both public and private employment. The Age Discrimination in Employment Act (ADEA)⁴ forbids workplace discrimination against people who are age 40 or older. Under the ADEA, private employers with 20 or more employees, and federal, state and local government employers, are prohibited from discriminating against a person over 40 because of age in any aspect of employment – including hiring, firing, job assignments or promotions, layoffs, compensation and benefits, and training. The ADEA also protects against age-based harassment, and ensures that an employer cannot use an employee's age as a basis for discrimination in providing life insurance, health insurance, disability benefits, pensions, and retirement benefits.

STATE AND LOCAL LEGAL PROTECTION

Sexual orientation and gender identity or expression

The laws of twenty-one states and the District of Columbia explicitly prohibit workplace discrimination based on sexual orientation, the laws of 17 states and the District of Columbia explicitly prohibit discrimination based on gender identity or expression. Hundreds of cities, towns, and counties – in those states, and in others – also have adopted similar protections. These laws vary widely in the scope of their protections and the size of employers to which they apply, but generally prohibit discrimination in hiring, promotion, firing, and other terms and conditions of employment. One significant limitation is that most of these state and local laws do not require equal treatment

¹ 42 U.S.C. §2000e, *et seq.*

² See *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

³ See EEOC, *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, at <http://www.eeoc.gov/federal/otherprotections.cfm>.

⁴ 29 U.S.C. §§ 621-634.

in providing certain types of employment-related benefits, and cannot be used to require, for example, an employer to provide benefits to a same-sex partner. For more information about the anti-discrimination laws in your state, visit <http://www.lambdalegal.org/states-regions>.

Age

Most states also have laws explicitly prohibiting age discrimination. Many state and local laws are even more protective of older workers than the ADEA. For example, some state laws may apply to employers with fewer than 20 employees, may protect workers in different age ranges, including people who are younger than 40, or may provide steeper penalties for their violation, including compensatory and punitive damages, which are not available under the ADEA. For more information, contact your state's human rights agency, a list of which can be found at <http://www.justice.gov/crt/legalinfo/stateandlocal.php>.

TAKING LEGAL ACTION

Enforcing federal antidiscrimination laws begins with filing a complaint with the EEOC or with a state or local agency that has been certified to accept and process such complaints. You must file a complaint within 180 days of the discriminatory incident and cannot file directly in court without exhausting the process at the EEOC first. If state or local antidiscrimination laws apply, those provisions may have a different deadline for filing a charge with a state or local human rights agency – or, by contrast, may not require filing an administrative charge with an agency before filing a lawsuit in court. The type of job you have, who your employer is, and whether you are subject to a contract or collective bargaining agreement can also affect the legal tools at your disposal. Because the specific laws and procedures are different from state to state, town to town, or even employer to employer, and because these issues can be more complicated than they seem, it is important to contact an attorney. For more information or a referral to an attorney in your area, contact Lambda Legal's Help Desk at <http://www.lambdalegal.org/help> or 1-866-542-8336.