



LGBTQ Legal Trends Update

The Employer's Toolkit



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LGBT Protections & Title VII of the Civil Rights Act

- Title VII does NOT explicitly provide protection on the basis of sexual orientation or gender identity.
- Title VII provides that it shall be unlawful for employers:
 - (1) 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, because of such individual's...sex.

(Emphasis Added.) 42 U.S.C.A. § 2000e-2

“Because of ... Sex”

- Not defined by Congress in the statute.
- Subject to varying interpretations by courts, federal agencies and states/localities
- Evolving meaning
 - Early cases, courts adopted plain language definition
 - Today, many courts are applying a broader definition

Terminology: LGBT

- an acronym used to describe the lesbian, gay, bisexual, and transgender community.
- The first three letters (“LGB”) refer to sexual orientation.
- The last letter (“T”) refers to gender identity.

Sexual Orientation and Gender Identity

- Sexual Orientation
 - “Sexual orientation as a concept cannot be defined or understood without reference to sex.” (American Psychological Association)
 - Includes an individual’s attraction to others and may be conventionally classified as heterosexual, gay, lesbian, or bisexual
- Gender Identity
 - It describes a person's, internal, personal sense of being a man or a woman (or someone outside of that gender binary).
 - Transgender individuals have sexual orientation.

LGBT Discrimination in the Workplace

- **Sexual Orientation Discrimination:** terminating, demoting, failing to hire, or otherwise treating an individual differently with respect to terms and conditions of employment because of his/her sexual orientation
- **Gender Identity Discrimination:** terminating, demoting, failing to hire, or otherwise treating an individual differently with respect to terms or conditions of employment because of the sex with which individual identifies



Business Impact of LGBT Supportive Policies

- Costly to defend claims
- LGBT discrimination is an EEOC priority
- Potential damage to company's brand reputation
- Compliance with state and local laws
- Attract and retain talent

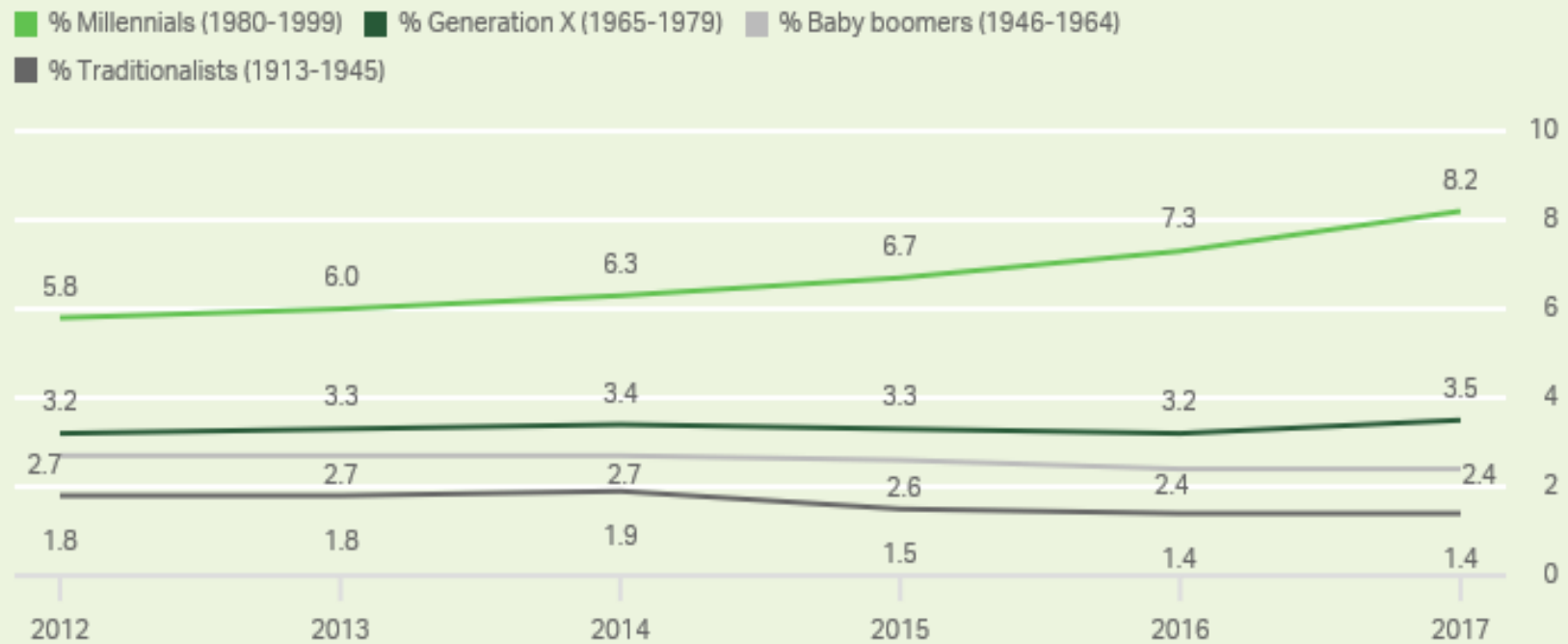




Facts And Figures

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Percentage of Americans Identifying as LGBT, by Birth Cohort



GALLUP DAILY TRACKING

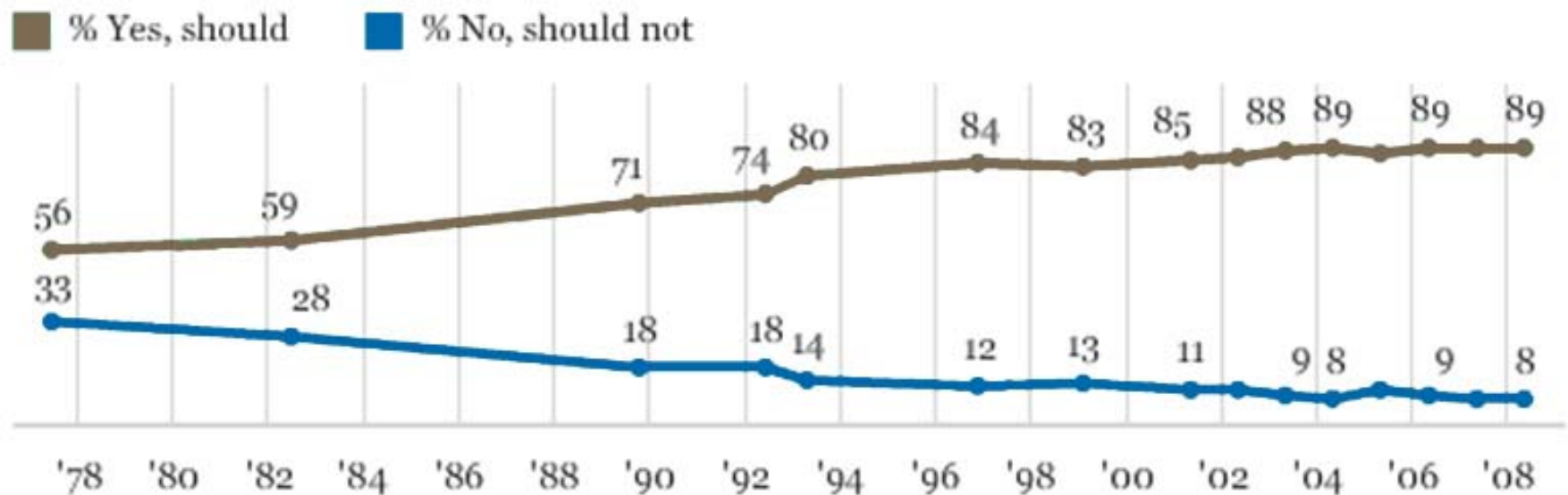


4.6% and higher 4.1% - 4.5% 3.6% - 4.0%
3.1% - 3.5% 2.0% - 3.0%



Best Practices: Gallup Values and Beliefs Poll

“As you may know, there has been considerable discussion in the news regarding the rights of homosexual men and women. In general, do you think homosexuals should or should not have equal rights in terms of job opportunities?”





Best Practices: LGBT Protections at Fortune 500 Companies

- 89% prohibit discrimination on the basis of sexual orientation
- 66% prohibit discrimination based on gender identity
 - Up from only 3 companies in 2000



Facts and Figures

- **53%** of LGBT employees have **not** disclosed their sexual orientation or gender identity in the workplace
- **35%** of LGBT employees feel compelled to lie about their personal lives while at work
- **20%** of LGBT employees report looking for a job specifically because the work environment is not inclusive

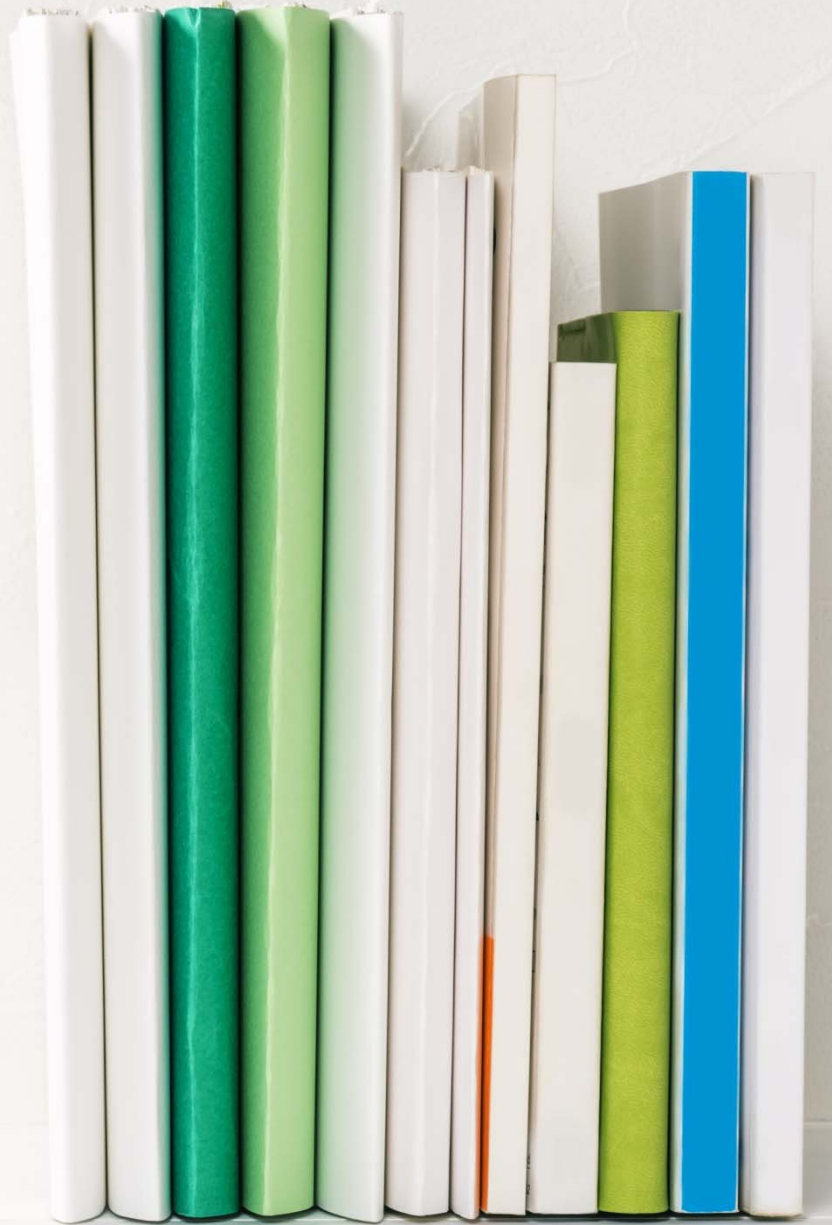
Facts and Figures



- **9%** of LGBT employees have left jobs because the environment was not inclusive
- **26%** of LGBT employees reported staying in a job because the environment was accepting
- Employee engagement suffers by up to **30%** because of a non-inclusive environment.

Workplace Protections

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The Shift: Landmark U.S. Supreme Court Decisions

- ***Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)**
 - Female employee told she needed to “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry” and “go to charm school.”
 - Holding: discrimination “because of sex” includes adverse employment decisions based on an employee’s non-conformance with sex-stereotypes
 - “gender must be irrelevant to employment decisions”

The Shift: Landmark U.S. Supreme Court Decisions

- ***Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)**
 - Same-sex sexual harassment is discrimination under Title VII.
 - “Statutory prohibitions often go beyond the principle evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

Masterpiece Cakeshop: **Notable for What it Does Not Say**

- ***Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n***, 138 S. Ct. 1719 (2018)
 - Bakery owner and operator and devout Christian told a same-sex couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriage
 - failed to address underlying question of whether a company owner or employee can lawfully claim an exemption from laws prohibiting discrimination on the basis of sexual orientation based on sincerely held religious beliefs

Federal Agency Protections: EEOC and Enforcement Protections for LGBTQ Workers

- Commission takes the position that LGBTQ-related sex discrimination on the basis of sexual orientation or gender identity is prohibited under Title VII
- EEOC obtained approximately \$6.4 million in monetary relief for individuals in voluntary resolutions of LGBT discrimination charges under Title VII since data collection began in 2013.

Federal Agency Protections: EEOC and the Federal Workforce

- ***Macy v. Holder*** (EEOC 2012)
 - Mia Macy, a former male police detective who contends she was denied a job as a ballistics technician with the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "Agency") on account of her decision to become a woman
 - EEOC found that a claim of discrimination based on gender identity is cognizable under Title VII
 - Implications for those states without explicit gender identity protections.
 - Confirmed the trend in court decisions and gives the EEOC's "stamp of approval"

Federal Agency Protections: EEOC and the Federal Workforce

- ***Baldwin v. Department of Transportation*** (EEOC 2015)
 - Male employee worked as a Supervisory Air Traffic Control Specialist for the U.S. Department of Transportation in Miami.
 - He filed a formal EEO complaint with the Federal Aviation Administration after he was not selected for a permanent position, allegedly because he is gay.
 - EEOC's decision did not address the merits of the claim of discrimination, but it did broadly announce that claims of sexual orientation discrimination fall within the purview of Title VII.

Federal Agency Protections: EEOC and the Federal Workforce

- *Lusardi v. McHugh* (EEOC 2015)
 - Male-to-female transgender woman was told to use a unisex bathroom.
 - “Mis-gendering” a transgender employee with the wrong name and pronoun can create a hostile work environment.
 - Denying a transgender employee use of the restroom consistent with their gender identity is sex discrimination.
 - Stems from an administrative appeal and is not binding on private employers.

Federal Agency Protections: EEOC Prevails in its First Ever LGBT Case

- ***EEOC v. Scott Medical Health Center, P.C.***, (W.D. Pa., Civ. No. 2:16-cv-00225-CB)
 - A gay male employee, was subjected to harassment because of his sexual orientation.
 - During his one month of employment, his supervisor made derogatory remarks about his sexual orientation and personal relationships.
 - The employee reported the harassment to the CEO, the CEO responded “[the supervisor’s] just doing his job.”
 - Awarded \$55,000



Recent Employment Law Decisions: Federal Court Rulings Growing in Favor of LGBTQ+ Employees

- *Hively*– Sexual orientation covered under Title VII (Seventh Circuit; 2017)
 - Professor alleged that that Ivy Tech Community College declined to promote her and ended her part-time teaching contract because she is lesbian
- *Zarda* – Same (Second Circuit; 2018)
 - Skydiving instructor claimed he was fired from his job for failing to conform, as a gay man, to certain male gender stereotypes
- *Harris Funeral Homes* – Gender Identity Covered under Title VII (Sixth Circuit; 2018)
 - Funeral director alleged a religious owner of a funeral home violated Title VII by terminating her employment after she conveyed her intent to transition from male to female



Recent Employment Law Decisions: Federal Court Rulings Growing in Favor of LGBTQ+ Employees

- Americans with Disabilities Act (“ADA”) and the Rehabilitation Act expressly exclude transvestism, transexualism, and gender identity.
- **Case: *Blatt v. Cabela’s Retail, Inc.* (2017)**
 - Judge refused to dismiss the lawsuit from a former employee who claimed she was fired because of her sex and disability and ruled that the ADA protects people with gender dysphoria
 - Opinion marks the first time a court has ruled that transgender people are not categorically barred from seeking relief from discrimination under the ADA.

Understanding Restroom Access: Federal Guidance from Agencies and Presidential Administrations

- *A Guide to Restroom Access for Transgender Workers* (OSHA, June 2015)
 - Built upon the EEOC's decision in *Lusardi v. Dep't of the Army* (EEOC; March 2015)
- *Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964* (EEOC, May 2016)
- 2016 - Obama administration issues guidance that, under Title IX, schools receiving federal money may not discriminate based on a student's transgender status (rescinded by Trump administration in 2017)

Understanding Restroom Access: Protection Granted in Title IX Cases

Whitaker v. Kenosha Unified School District (7th Cir.; 2017)

- Holding that a school engages in sex discrimination in violation of Title IX when it excluded a transgender boy from the boys' restroom

G.G. v. Gloucester County School Board (4th Cir.; 2017)

- Same initial outcome as *Whitaker*.
- SCOTUS granted review but ultimately sent back to lower court prior to argument due to Trump administration's recession of Obama-era guidance

Understanding Restroom Access: Protection Granted in Title IX Cases

Dodds v. US Department of Education (6th Cir. 2016)

- A federal district judge in Ohio ordered a school district to treat a transgender female student “as the girl she is.”
- Court specifically directed the district to allow her to use the girls’ restroom and to use female name and pronouns when referring to her.
- The court said it was settled law in the 6th Circuit that discrimination based on transgender status was prohibited under federal civil rights statutes.

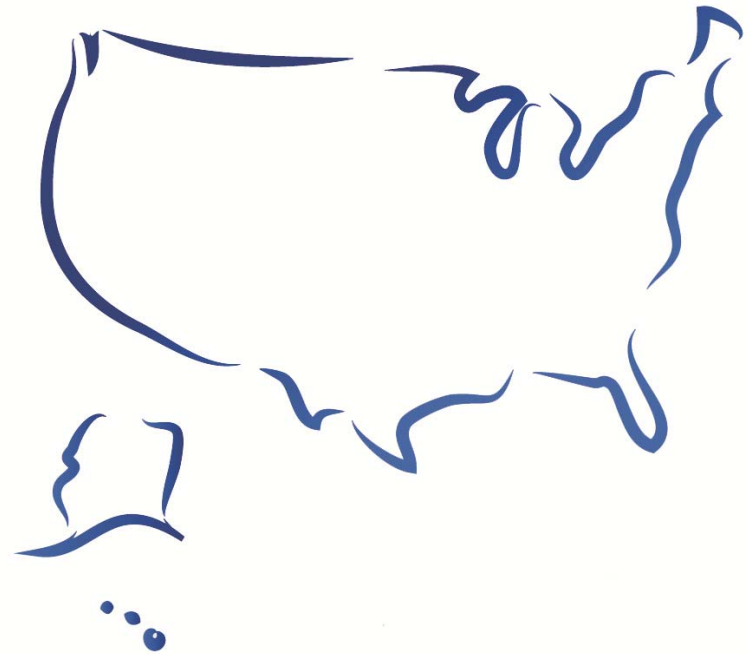
Legislative Efforts

- **Employee Non-Discrimination Act** (would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity by employers with at least 15 employees)
- **Equality Act of 2017** (would amend the Civil Rights Act of 1964 and the Fair Housing Act to bar anti-LGBT discrimination)

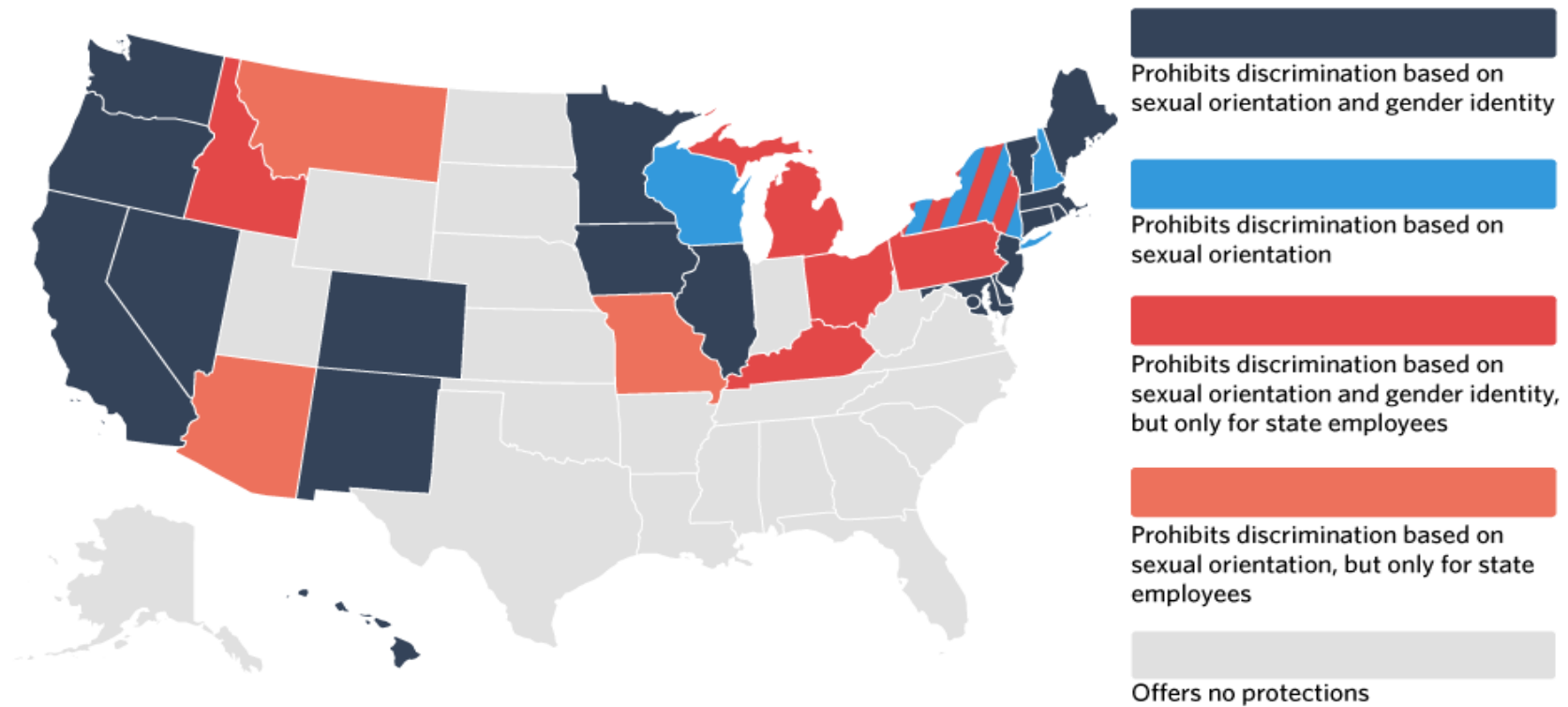
Executive Branch Protections:

Current federal law includes explicit prohibitions on employment discrimination based on sexual orientation or gender identity:

- Executive Order No. 11478 – applies to federal employers
- Executive Order No. 11246 - applies to federal contractors



State Laws: A Patchwork of Protection



Best Practices



Potential Minefields for Employers

- Hiring Process
- Restroom Access
- Transitioning Employees
- Religious Conflicts (“Uncomfortable Colleagues”)
- Co-Worker Harassment
- Pronoun Issues
- Request for Reasonable Accommodation

Best Practices

- Promote an inclusive workplace culture.
- Review the company's EEO statement and non-harassment policy.
- Make decisions based on employee's knowledge, skills and abilities.

Best Practices

- Enforce the company's workplace harassment policy.
- Review policies generally for gender neutrality.
- Develop a transition plan.
- Conduct training
 - Anti-Discrimination and Harassment
 - Unconscious Bias



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