

LGBT, Religion, and Diversity in the Nonprofit Workplace

Thursday, December 11, 2014, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

Panelists

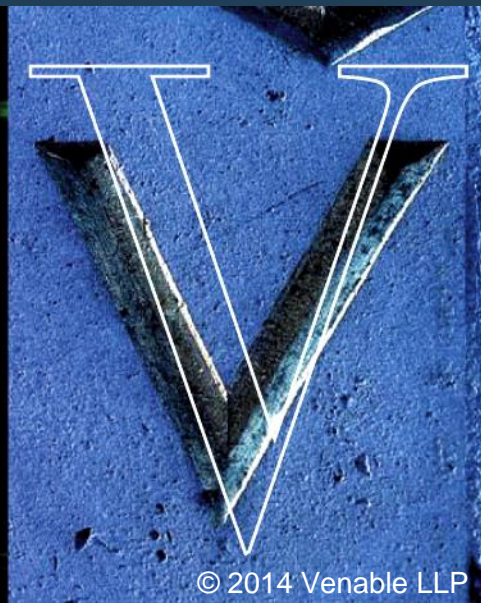
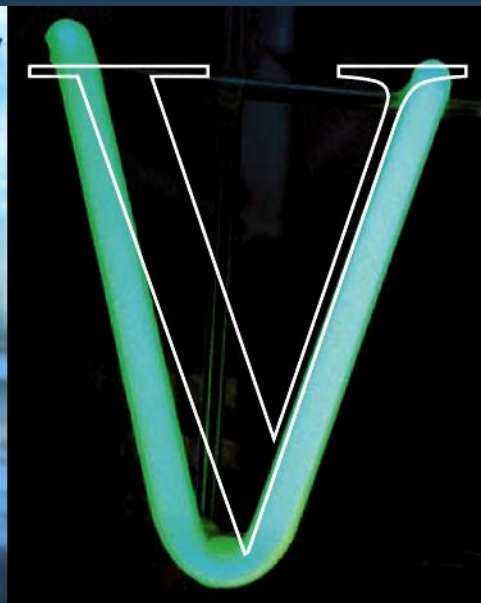
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Agenda

- Employee Challenges to Diversity Policies
- LGBT Employees and the Nonprofit Workplace
- Employee Benefits for Same-Gender Spouses
- Healthcare Coverage for Gender Reassignment Surgery



Employee Challenges to Diversity Policies

The Story of Mr. B – The Facts

- Mr. B is a Christian who believes that the Bible is divinely inspired.
- Because the Bible requires that he treat others as he would like to be treated, Mr. B values and respects all other employees as individuals.



The Story of Mr. B – More Facts

- He never has, nor would he, discriminate against another employee due to differences in belief, behavior, background, or other attribute.
- However, his religious beliefs prohibit him from approving, endorsing, or esteeming behavior or values that he believes are repudiated by Scripture.



“A Summary of Our Business Philosophy”

“Each person is charged with the responsibility to fully recognize, respect, and value the differences among all of us.”



The Certificate of Understanding

***“...that you will abide by our
employment policies and practices.”***



Mr. B's Objection

- “I believe it's wrong...to attempt to persuade me to fully respect and fully value any differences that are contrary to God's word.

- **In order for me to comply with this diversity statement in the company handbook, I would have to deny my faith...”**



The HR Manager's Response

No “philosophical debates”



What Happened?

- Mr. B refused to sign.
- Mr. B was fired.
- Mr. B sued.



Mr. B's Legal Theory

Religious Discrimination Based on Failure to Accommodate



Company's Burden

- Offered a reasonable accommodation

OR

- Unable to reasonably accommodate employee's religious needs without undue hardship



The Judge's Reaction

- The policy was “ambiguous”
- The company failed to communicate with Mr. B about:
 - The intent of the language
 - His concerns about the policy



The Result: Mr. B Wins

- Back pay
- Pension contribution
- Emotional distress
- Front pay
- Total: \$146,269



The Story of Mr. J.

- Mr. J goes to work as an engineer
- Intro to company handbook:
 - “It is important that you read, understand, and comply with all of the provisions of this handbook.”
 - Handbook has EEO policy
 - Handbook Acknowledgment: Employee responsibility “to know and to understand the Company’s policies and procedures”



The Story of Mr. J (cont.)

- Mr. J is told to read and sign acknowledgment
- Mr. J reads
- Mr. J does not sign
- Mr. J works for 17 months
- Company revises handbook, insists he sign



The Story of Mr. J (cont.)

- Mr. J: Signing would violate firmly held religious beliefs
- “If I sign it, it basically states that I gave my stamp of approval on things that the Lord looks at as immoral. Signing it would mean I must comply with sin.”



The Story of Mr. J (cont.)

- Mr. J signs the acknowledgment ***with reservations***
- “Within God’s law”
- His “signature is subject to change at the sole discretion of the signer.”



The Story of Mr. J (cont.)

- HR refused to accept
- “Sign it that you understand and you will abide by the rules of our company while working for us.”
- Mr. J: “Just couldn’t do it”
- Company: Refusal might subject company to liability if Mr. J ever violated EEO policies



The Story of Mr. J (cont.)

- “Sign it or else” – “No” – “You’re fired”
- Mr. J: religious discrimination
- Possible accommodations:
 - Allow him not to sign
 - Allow him to sign with reservations
 - Have witnesses acknowledge his receipt
- * Trial court: Summary judgment for employer



The Story of Mr. J (cont.)

- The Court (Judge Brogan): Refusal to sign meant he wanted to be allowed to discriminate based on sexual orientation
- Dissent (Judge Donovan): Insufficient information whether actual conflict between policy and his belief, and if possible accommodation



The Story of Mr. J (cont.)

- Judge Donovan (cont.): Maybe Mr. J was talking about beliefs, not conduct.
- “There is an obvious distinction between conduct and belief. **Like Mr. B**, all that Mr. J asked is that he not be forced to endorse views contrary to his religion as a condition of continued employment.”



The Story of Mr. J (cont.)

- Judge Donovan: “I shall not discriminate on the basis of...”
- He was terminated for beliefs, not conduct



Other Stories



Morals of the Stories

- Is it employee *conduct* or *belief*?
- Does a real conflict exist?
 - If so, can an accommodation resolve the conflict?
 - Does your policy identify a mechanism for raising such questions?
 - Are the people responsible for your policy trained on how to respond?



LGBT Employees and the Nonprofit Workplace

LGBT – Consider if you will....

- Joe, who is “straight,” complains to you that Walt, who also is “straight,” privately makes comments about their bodies and sex lives. Problem?



LGBT – Consider if you will....

- Loretta from marketing comes in your office, announces that “his” name is now “Larry,” and then walks into the men’s restroom. Problem?



LGBT – Consider if you will....

- Hank from accounting comes to work in a mini-skirt and full make-up. He does not shave his beard. He is scheduled to make a presentation to your Board that morning. Problem?



LGBT – Consider if you will....

- Joanne presents herself at work as a “straight” woman. A supervisor, Margaret, sees her in a restaurant holding hands with and kissing a woman. Margaret tells co-workers that Joanne is a lesbian. Problem?



LGBT – The Terminology

- Sexual orientation
 - An individual’s physical/emotional attraction to the same or opposite gender
 - L – lesbian
 - G – gay
 - B – bisexual
 - Heterosexual/straight

- Gender identity
 - An individual’s innate, deeply-felt psychological identification as being male or female
 - May not correspond to the individual’s biology or designated gender at birth



LGBT – The Terminology

- Gender expression
 - The manner in which a person publicly displays or signals masculinity or femininity
 - How one “looks, acts, and dresses”
 - Hair, clothes, shoes, jewelry, makeup
 - Speech, behavior, movement
 - Gender reassignment surgery
 - May be an extension of gender identity
- Sexual orientation is distinct from gender identity



LGBT – The Terminology

- Transgender person
 - A person whose gender self-identity is different from the gender they were assigned at birth
- Not always binary (male **or** female)
 - Can be a function of gender stereotypes



LGBT – The Statistics

- 2013 Department of Health and Human Services Sexual Orientation Survey
 - Over 5 million adults identified as gay or lesbian (1.6%)
 - Over 2 million adults identified as bisexual (0.7%)
 - Over 3.5 million adults identified as “I don’t know,” “something else,” or “NOYB” (1.1%)

- Transgender – no formal, reliable statistics
 - Definitional problem
 - Not “out”
 - Estimates from 1 million to several million (0.3% to ?%)



LGBT – Federal Law

- No comprehensive federal law that expressly prohibits private sector employment discrimination based on sexual orientation or gender identity.

But.....

- E.O. 13672 applies to federal government contractors
 - Sexual orientation and gender identity protected
- Same-gender harassment can violate Title VII
 - Sexual orientation/gender identity irrelevant
- Gender stereotyping under Title VII
 - Potential for “quasi” gender identity and sexual orientation claims
 - EEOC ruling



LGBT – State and Local Laws

- Over 20 states and the District of Columbia prohibit employment discrimination based on sexual orientation, gender identity, or gender expression
- Dozens of local government ordinances
- Some have exceptions for religious organizations



LGBT – Prohibited Actions

- Laws generally cover all aspects of the employment relationship, including:
 - Hiring
 - Compensation
 - Evaluations
 - Promotion
 - Demotion
 - “Environment” claims
 - Discipline
 - Termination
 - Severance pay



LGBT – Remedies

- Remedies include:
 - Reinstatement
 - Money
 - Back pay
 - Front pay
 - Emotional distress
 - Punitive damages
 - Attorneys' fees



LGBT – “Environment” Claims

- Hostile work environment
 - Unwelcome severe or pervasive conduct based on a person’s protected status that a reasonable person would consider hostile or abusive

- Overt harassment
 - Slurs – verbal or email
 - Off-color jokes, comments, pranks
 - Teasing and mocking appearance and voice
 - Improper pronouns or name (he/she)
 - Sexual overtures (sarcastic)
 - Threats
 - Physical abuse



LGBT – “Environment” Claims (cont.)

- Subtle actions
 - Ostracizing
 - Questioning or interrogating
 - Gossip or rumors
 - Denial of mentoring or training
 - Limited customer or client contact
 - Dress code enforcement
 - Restroom assignments



LGBT – Risk Avoidance

- Revise policies/practices to include protections
 - EEO commitment
 - Harassment/complaint procedure
 - Dress codes, *etc.*
- Train staff and management
- Prompt action if complaint or awareness of potential problem
 - Investigation
 - Remedial action
 - Document process
- Confer with legal counsel



LGBT – Now what about....

- Joe
- Loretta
- Hank
- Joanne



Employee Benefits for Same-Gender Spouses

What Is DOMA?

- The Defense of Marriage Act was enacted in 1996. It did two things:
 1. Allowed states to refuse to recognize same-gender marriages performed under the laws of other states (Section 2)
 2. Defined marriage for all federal law purposes as only a legal union between one man and one woman and spouse as a person of the opposite gender who is a husband or wife (Section 3)



United States v. Windsor (133 S. Ct. 2675)

- On June 26, 2013, the U.S. Supreme Court declared Section 3 of DOMA unconstitutional
- *Windsor* was an estate tax refund request, but the ruling has significant implications for employer-sponsored benefit plans
- There are more than 200 Internal Revenue Code provisions and regulations that include the term “spouse,” “marriage,” “husband,” and/or “wife”



State Laws

- Same-gender marriage is legal in: AK, AZ, CA, CO, CT, DE, HI, ID, IL, IN, IA, KS, ME, MA, MD, MN, MT, NE, NJ, NH, NM, NY, NC, OK, OR, PA, RI, SC, UT, VA, VT, WA, WI, WV, WY, and the District of Columbia
- Same-gender marriage is still prohibited in: AL, AR, FL, GA, KY, LA, MI, MS, MO, NE, ND, OH, SD, TN, TX

As of 12-4-2014



Retirement Plan Implications

- Right to survivor annuities, including pre-retirement survivor benefits
- Spousal consent rights
- Spousal rollover rights
- QDRO rights
- Delay of required minimum distribution until deceased participant would have been 70 ½
- Safe harbor hardship withdrawals for unreimbursed medical, post secondary education, and funeral expenses



Health and Welfare Implications

- Tax-free health plan coverage – no more imputed income
- Special enrollment and status change rights under cafeteria plans
- COBRA – independent spousal election rights/qualified beneficiary status
- Qualified tuition reduction for spouses - Sec. 117(d)
- Dependent care expenses
 - Higher dollar limits for married couple
 - Care of spouse's child qualifies
- Medical flexible spending accounts – coverage of spouse claims/tax free reimbursement



IRS Revenue Ruling 2013-17

- For federal tax purposes:
 - The Place of Celebration Rule: A same-gender marriage sanctioned under the laws of the state or territory in which it was performed will be recognized, even if the married couple lives in a state that does not recognize same-gender marriage.
 - A same-gender (or opposite-gender) couple is not considered married by virtue of entering into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law (but not classified as a marriage under the laws of that state).



IRS Revenue Ruling 2013-17 (cont.)

- For federal tax purposes (cont.):
 - “Marriage” includes two individuals of the same gender, provided those individuals are lawfully married under state law (or the laws of a territory or foreign jurisdiction).
 - The terms spouse, husband and wife do not include individuals in a registered domestic partnership, civil union or other relationship not denominated as a marriage under state law



Impact on Qualified/403(b) Retirement Plans – IRS Notice 2014-19

- Operational compliance
 - Retirement plans should have begun operating in compliance with *Windsor* as of June 26, 2013 (the date of the decision)
 - Could have recognized same-gender spouses before June 26, 2013, for all or only certain designated purposes
 - From June 26, 2013, to September 16, 2013 – either place of celebration or place of domicile rule
 - On and after September 16, 2013 – only place of celebration rule



Impact on Qualified/403(b) Retirement Plans – IRS Notice 2014-19 – (cont.)

- Plan amendments
 - Generally required if:
 - Plan terms are inconsistent with the *Windsor* decision
 - Plan chooses to apply the *Windsor* decision before June 26, 2013
 - IRS encouraged “clarifying” amendments regardless of current plan terms
 - Required or clarifying amendments should be adopted by the later of (i) the close of the plan’s remedial amendment period, or (ii) December 31, 2014
 - 403(b) plans not required to be amended until IRS designates deadline in the future



Family & Medical Leave Act (FMLA)

- The FMLA provides certain leave rights to eligible employees, permitting them to attend to family matters (e.g., qualifying events related to a spouse's military leave) and serious health conditions (e.g., to care for a spouse with a serious health condition).
- Following the *Windsor* decision, the DOL issued guidance initially adopting the “place of domicile” rule for FMLA purposes.



Family & Medical Leave Act (FMLA) (cont'd)

- On June 20, 2014, the DOL proposed new rules that would adopt a place of celebration rule – which would allow eligible employees in legal same-gender marriages to take FMLA-protected leave to care for a same-gender spouse with a serious medical condition, regardless of whether the couple resides in a state where same-gender marriage is recognized.



Action Steps

1. Check plan documents and SPDs to see if definition of spouse needs to be amended
2. No requirement to seek out information about employee's marital status, but consider sending a reminder of need to keep personnel records and beneficiary designations current
3. Check open enrollment and other communication materials for needed changes



Action Steps (cont.)

4. Stop imputing income where know of same-gender marriage
 - Response to claim for benefits
 - Review handbooks – no references to DOMA and check references to spouse

5. Check FMLA policy to ensure that it is not outdated (e.g., remove any DOMA references)



Action Steps (cont.)

6. Develop or confirm the existence of your FMLA approval process, and make certain that this process does not discriminate against same-gender couples by placing any extra burdens on them.
7. Continue to monitor for changes in the law, new guidance and clarifications.



Healthcare Coverage for Gender Reassignment Surgery

Gender Reassignment Surgery

- *O'Donnabhain v. Commissioner*
(134 T.C. 34 [2010])
 - Expenses for gender reassignment surgery and hormone therapy to treat gender identity disorder are tax deductible
 - IRS acquiesced in November 2011
- No federal laws that require employer-provided health care plans to cover gender reassignment surgery
- Several states have adopted laws or policies that prohibit categorical exclusions of transition-related care including gender reassignment surgery (CA, CO, CT, IL, MA, OR, VT, WA, and DC)



Gender Reassignment Surgery (cont.)

- More plans are expressly covering gender reassignment surgery and other transition procedures
- Issues remain about what is medically necessary versus cosmetic
- Issues with respect to plans that do not expressly cover or exclude such coverage
 - The extent to which such procedures are covered
 - Denials based on:
 - Not medically necessary
 - Experimental
 - Cosmetic



Questions?

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