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LGBT Rights: Supreme Court Delays, But Corporate America Has Already Moved On

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The U.S. Supreme Court is taking its time in determining whether or not Title VII of the Civil Rights Act covers sexual orientation and gender identity as protected classes. However, much of corporate America has already made its own decision that LGBT traits should be protected in their policies and practices.

Eventually, the Supreme Court will settle the issue of whether Title VII applies to sexual orientation. 2018 saw two major holdings that challenged the traditional position that Title VII does not cover sexual orientation or gender identity. In *Altitude Express v. Zarda*, the Second Circuit reversed its previous precedent and [ruled that sexual orientation is a protected class under Title VII](#). In *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, the Sixth Circuit ruled that a [transgender plaintiff was protected under Title VII](#) on the basis of gender identity. Conversely, in *Bostock v. Clayton County, Georgia*, the Eleventh Circuit held that Title VII does not cover sexual orientation.

The Supreme Court has repeatedly delayed in deciding whether to hear these cases, recently rescheduling their consideration from the Court's January 4 conference to its January 11 conference, and there is no clear indication when the Court will make a final decision whether to accept the cases. In the meantime, a circuit split on Title VII's coverage of LGBT traits will remain in place.

However, employers are not waiting around on the Court's decision to draft increasingly inclusive policies. According to Bloomberg Law, 91 percent of Fortune 500 companies prohibit discrimination based on sexual orientation and 83 percent forbid discrimination based on gender identity. In some cases, companies are practicing what they preach and are not making the argument that Title VII is inapplicable to sexual orientation or gender identity, even in jurisdictions where such an argument might prevail.

For example, in *Wittmer v. Phillips 66*, currently pending in the Fifth Circuit, a transgender job applicant claims she was not hired because of her gender identity. Phillips 66 declined to argue that Title VII does not cover gender identity, even though such an argument might prevail, and has instead focused its defenses on the specific facts of the case. The company's spokesman stated that Phillips 66 is an equal opportunity employer, and it prohibits discrimination based on sexual orientation or gender identity.

Employers are increasingly aware that their appearances and reputations will take a hit if they make an argument against equality, even if such an argument is legally defensible in some jurisdictions.

We will keep you updated once the Court determines whether it will take up this issue in the current term. However, your company may have already decided that a policy of inclusion is what works best for your business.