Replacing the Good Ol’ Boy Work Environment

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I. LGBT – By the Numbers

The collection of data regarding the number of LGBT individuals in the United States has significantly increased in the past ten years as the issue of LGBT Has gained attention. According to Gary Gates, one of the leading research analysis of LGBT demographics at The Williams Institute, an estimated 3.5% of adults in the U.S. identified as lesbian, gay, or bisexual in 2011, and an additional .3% reported being transgender—an amount equal to around 9 million LGBT Americans or the population of the State of New Jersey. https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. A follow-up study conducted in June 2016 revealed double the number of individuals – approximately .6% of adults in the United States or 1.4 million individuals – reported being transgender. https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-ADults-Identify-as-Transgender-in-the-United-States.pdf.

The National Center for Transgender Quality and the National Gay and Lesbian Task Force conducted a similar survey in 2011 devoted to the lives and experiences of transgender people in the United States. Nearly 6,500 transgender and gender non-conforming people participated in the survey, which led to the following alarming findings:

- 78% of those who expressed a transgender identity or were gender non-conforming in grades K-12 reported harassment, 35% reported physical
assault, and 15% were forced to leave their K-12 settings or higher education because harassment was so severe

- 41% of participants reported attempting suicide compared to 1.6% of the general population, with attempted suicide rates rising for those who:
  - Lost a job due to bias (55%)
  - Were harassed/bullied in school (51%)
  - Had low household income or were the victim of physical assault (61%) or sexual assault (64%)

- Participants experienced unemployment at twice the rate of the general population

- 90% of those surveyed reported experiencing harassment, mistreatment or discrimination at work or took actions to avoid it, such as hiding who they were

- 47% reported experiencing an adverse job outcome, such as being terminated, not hired or denied a promotion because they were transgender or gender non-conforming

- 26% reported they had lost a job due to being transgender or gender non-conforming and 50% were harassed at work

- 78% who transitioned from one gender to another reported they felt more comfortable at work and their job performance improved, despite high levels of mistreatment
II. Terminology – Is it “LGBT” or “LGBTQIA”?

Many people are unfamiliar with terminology used to describe sexual orientation and gender expression/gender identity or feel discouraged from talking about these issues because they are afraid of saying the wrong thing—particularly when acronyms and issues evolve quickly. The following is a list of terms and meanings to help make conversations easier and more productive inside and outside of the workplace:

- **LGBT**: Lesbian, Gay, Bisexual, Transgender
- **LGBTQIA**: Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual
- **Lesbian**: a woman who is sexually attracted to a woman
- **Gay**: a man who is sexually attracted to a man
- **Bisexual**: someone who is sexually attracted to both women and men
- **Transgender**: someone whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth
  - **Transgender Man**: a person who currently identifies as a man (i.e. a person who has transitioned or is in the process of transitioning from female-to-male “FTM”)
  - **Transgender Woman**: a person who currently identifies as a woman (i.e. a person who has transitioned or is in the process of transitioning from male-to-female “MTF”)

- **Queer**: an umbrella term for those who wish not to categorize sex, sexuality or gender, often used synonymously with “LGBT”
- **Intersex**: someone who is born with reproductive or sexual anatomy that doesn’t fit the typical male or female definitions
- **Asexual**: someone who does not experience sexual attraction
- **Transition**: the time when a person begins living as the gender with which they identify rather than the gender they were assigned at birth. This process can be social (dressing, using names and pronouns to be socially recognized as another gender) or physical (modification of their bodies through medical and/or surgical interventions)
- **Gender dysphoria**: Clinically significant distress caused when a person’s assigned birth gender is not the same as the one which they identify. According to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM), it is a clinical term (formerly “gender identity disorder”) intended to better characterize the experiences of affected children, adolescents, and adults
- **Gender Identity**: a person’s internal sense of being male, female, or something else. Since gender identity is internal, it is not necessarily visible to others
- **Gender Expression**: how a person represents or expresses one’s gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics
- **Questioning**: a term used to describe someone who is in the process of exploring their sexual orientation or gender identity
• **Transphobia**: the fear and hatred of, or discomfort with, transgender people


**III. The Current Administration’s Present LGBT Position**

As with other issues, messaging from President Donald Trump’s Administration has been mixed with respect to the President’s support for and continuation of legal protections to LGBT workers, particularly those put in place by his predecessor President Barack Obama. In 2014, President Obama issued two Executive Orders, Nos. 13672 and 13673. Executive Order 13672 expressly prohibited federal contractors from discriminating on the basis of gender identity or sexuality. Executive Order 13673 (a/k/a the “Fair Pay and Safe Workplaces” order) provided an enforcement mechanism by requiring federal contractors receiving federal contracts in excess of $500,000 to demonstrate that they had complied with a set of 15 federal or state labor laws over the previous three years.

While the White House announced publicly in late January 2017 it would leave President Obama’s two Executive Orders in place, President Trump revoked the enforcement order, No. 13673, on March 27, 2017. The anti-discrimination Order remains in place and does not require No. 13673 to enforce it, but LGBT advocates have argued that eliminating the Order by which the government ensures that federal contractors are complying with anti-discrimination laws renders the anti-discrimination Order toothless and more difficult to enforce.
IV. LGBT Developments at the EEOC

A. THE EEOC’s New Strategic Enforcement Guidance

According to data released by the EEOC for Fiscal Year 2015, the EEOC received a total of 1,412 charges of discrimination that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status, representing an increase of approximately 28% over the total LGBT charges filed in Fiscal Year 2014 (1,100).

In its Strategic Enforcement Plan for the years 2017 to 2021, the EEOC reaffirmed its commitment to pursuing discrimination and harassment claims on behalf of LGBT workers under Title VII’s sex discrimination provisions and specifically identified “protecting lesbians, gay men, bisexuals, transgender (LGBT) people from discrimination based on sex” within one of its six National Substantive Area Priorities. Again, while Title VII does not explicitly include sexual orientation or gender identity as protected categories, the EEOC has taken the position that discriminating against an employee on those bases is tantamount to discriminating against that employee based on sex. See e.g., Jameson v. U.S. Postal Service, EEOC Appeal No. 0120120821 (May 21, 2013) (an employer’s intentional misuse of a transgender employee’s new name and pronoun may be unlawful sex discrimination/harassment); Complainant v. Dep’t of Veterans Affairs, EEOC Appeal NO. 0120133123 (April 16, 2014) (an employer’s failure to revise its personnel records pursuant to an employee’s change in gender identity constituted unlawful sex discrimination; Lusardi v. Dep’t of the Army, EEOC Appeal No. 0120133395 (March 27, 2015) (an employer’s restrictions on a transgender woman’s ability to use a common female restroom facility constitutes disparate treatment).
The Proposed Guidance is the first revision to its workplace harassment guidance since the 1990s. The Proposed Guidance prominently includes Sex Stereotyping, Gender Identity, and Sexual Orientation as sub-categories of sex-based harassment that it considers to be prohibited by law. In its discussion of sex-based harassment, the EEOC distinguishes between the terms “sex” and “gender,” describing some sex-based harassment as “devoid of sexual interest” that may include “remarks unrelated to sex but still motivated by the targeted employee’s gender.” See Proposed Enforcement Guidance, https://www.regulations.gov/document?D=EEOC-2016-0009-0001. The Proposed Guidance defines Sex Stereotyping, Gender Identity, and Sexual Orientation as follows:

**Sex Stereotyping:** Sex-based harassment includes harassment based on an individual's non-conformance with social or cultural expectations of how men and women usually act. This includes harassment based on gender-stereotyped assumptions about family responsibilities.

**Gender identity:** Sex-based harassment includes harassment based on gender identity. This includes harassment based on an individual's transgender status or the individual's intent to transition. It also includes using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner.

**Sexual orientation:** Sex-based harassment includes harassment because an individual is lesbian, gay, bisexual, or heterosexual.
The Proposed Guidance includes the following example of LGBT harassment:

Keith and his colleagues work in an open-cubicle style office environment, and they frequently make derogatory comments about gay men and lesbians. John, who is openly gay, overhears the comments on a regular basis, even though they are not directed at him. Under such circumstances, the conduct is facially discriminatory and subjects John to discrimination based on sexual orientation (which is a form of sex discrimination), even though he was not specifically targeted by the comments.

B. The New EEOC Chair’s Stance on LGBT Issues and Harassment

Upon taking office in January 2017, President Trump named Victoria Lipnic as acting chair of the EEOC. Ms. Lipnic is currently the only Republican EEOC Commissioner. She co-chaired the Select Taskforce on the Study of Harassment in the Workplace that led to the Proposed Guidance on Harassment and, in public comments made in February 2017, Ms. Lipnic indicated that harassment is an issue that she cares about. She also stated that the EEOC is exploring new and/or additional approaches to harassment prevention, including bystander intervention training similar to that used on college campuses to combat sexual violence.

Ms. Lipnic also publicly confirmed that she and her colleagues remain committed to the EEOC’s central mission of enforcing anti-discrimination laws. While there was widespread concern that the EEOC would withdraw from litigation of a critical
transgender discrimination/religious freedom case after President Trump won the Presidential election, the EEOC proceeded with the litigation and filed an appeal in the Sixth Circuit Court of Appeals in February 2017. In the appeal, the EEOC urged the Court to overturn a Michigan district's court's decision allowing a funeral home to fire a transgender employee over her sexual identity based on the Religious Freedom Restoration Act. The case is *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, C.A. No. 16-2424, in the U.S. Court of Appeals for the Sixth Circuit.

**C. EEOC LGBT Litigation**

In addition to filing amicus briefs and resolving various LGBT cases in the past few years, the EEOC filed two additional sex discrimination lawsuits in 2016 in North Carolina and Pennsylvania under Title VII within months of the EEOC’s issuance of new Proposed Enforcement Guidance on Unlawful Harassment:

- *EEOC v. Bojangles Restaurants, Inc.* (E.D. N.C., Civ. No. 5:16-cv-00654). Here, the EEOC sued Bojangles Restaurants, a North Carolina corporation operating a chain of fast food restaurants, alleging that it discriminated against Charging Party Jonathan Wolfe, a transgender woman, by subjecting her to a hostile work environment because of her gender identity. The EEOC alleges that Wolfe was repeatedly subjected to offensive comments about her gender identity and appearance, in particular belittling comments by managers.
demanding that she engaged in behavior and grooming practices that are stereotypically male.

- **EEOC v. Scott Medical Health Center, P.C. (W.D. Pa., Civ. No. 2:16-cv-00225).** In this case, the EEOC sued Scott Medical Health Center, a provider of pain management and weight loss services, alleging it discriminated against Charging Party Dale Baxley when it subjected him to harassment because of his sexual orientation and/or because he did not conform to the employer’s gender-based expectations, preferences, or stereotypes. The EEOC also alleges a claim for constructive discharge due to the employer’s failure to take action to stop the harassment after Charging Party complained. The EEOC alleges that Charging Party’s immediate supervisor knew that Charging Party was gay and frequently directed anti-gay epithets and other vulgar epithets based on sex stereotypes at Charging Party.

**D. Social Media As a Conduit for and Evidence of Workplace Harassment and Discrimination**

The Proposed Guidance dedicates a section to social media’s effect and contribution to unlawful harassment. The ubiquity of social media and the increase in the online presence of anti-LGBT groups and pro-LGBT groups seemingly justifies the inclusion of such discussion in the Proposed Guidance. According to a study released in late February 2017 based on data gathered by the Southern Poverty Law Center, LGBT hate groups account for 7 of the 29 most-followed hate groups on Twitter – nearly 25%.
https://www.safehome.org/resources/hate-on-social-media/. The same study ranked anti-LGBT hate groups third based on the average number of tweets per hate group.

The Proposed Guidance provides the following examples of non-work conduct through private social media accounts that can still affect employees in the workplace and contribute to employer liability:

- **Tammy S. v. Dep’t of Def.,** EEOC Appeal No. 0120084008 (concluding that complainant was subjected to sex-based harassment creating a hostile work environment, including harasser’s personal website, which was announced during a training class at work and was viewed and discussed by many employees in the workplace)

- **Knowlton v. Dep’t of Transp.,** EEOC Appeal No. 0120121642 (reversing dismissal of harassment claim and finding that a co-worker’s private Facebook post that included racist comments about a co-worker contributed to a racially hostile work environment where other co-workers saw the comments and discussed them at work)

In addition to LGBT-specific cases, courts also regularly consider evidence posted on employee private social media accounts in other harassment and discrimination cases. The two biggest employment law issues involving social media used to be “ownership” of accounts and to what extent employers could use social media information in hiring decisions. But the legal issues surrounding social media have evolved and multiplied. Courts now regularly allow social media information to be
discovered in litigation and are using social media evidence to impute liability to employers:

- **Yancy v. U.S. Airways**, No. 11-30799, 469 F. App’x 339 (5th Cir. Apr. 4, 2012) A female employee sued her employer for harassment based in part on her male co-worker’s posting a photograph on Facebook that depicted plaintiff leaning over a desk, exposing part of her underwear. Based on the totality of evidence, including that the company had investigated and taken appropriate remedial measures when plaintiff complained, and that she herself had made social media postings of a more graphic nature, the Circuit Court upheld the dismissal of the claim on summary judgment.

- **Meng v. Aramark Corp.**, No. 12-cv-8232, 2015 U.S. Dist. LEXIS 36278 (N.D. Ill. Mar. 23, 2015) A food service director, who complained that graphic sexual images of her drawn on a bathroom wall had been a topic social network sharing for a month and who lost her job soon after complaining, will take her sexual harassment and retaliation claims to a jury. The court found it significant that the supervisor knew workers were passing around cell phones to view the posts but blew off the employee’s complaints. The fact that the drawings were shared on Facebook during work also supported a finding that the alleged harassment was severe enough to create a hostile environment.

- **Verga v. Emergency Ambulance Serv.**, No. 12-CV-1199 (DRH)(ARL), 2014 U.S. Dist. LEXIS 161512 (E.D.N.Y. Nov. 18, 2014) A court found a triable issue on whether a male EMT was fired in retaliation for reporting
sexual harassment by a male coworker or because he refused to sign a
letter agreeing to attend anger management after he wrote Facebook
posts (the same day the coworker touched him near his crotch)
threatening “the mother f***er who thought today was a joke” and stating
he would “knock [that individual’s] f***ing teeth out, break [his or her] jaw
[and] every bone in [his or her] left arm.” The employee claimed he told
HR he was willing to do the training but refused to sign the letter because
it purported to exonerate the company for the harassment.

- **Espinoza v. Cnty. of Orange**, No. G043067, 2012 WL 420149 (Ct. of App.,
Fourth Dist., Div. 3, Cal., Feb. 9, 2012). A jury found an employer liable to
an employee for disability harassment where his coworkers had posted
offensive social media blogs about his “claw” hand (a birth defect by which
he had only two fingers). On appeal, the employer argued that it did not
maintain the blog site at issue and that it could not determine that the
postings (which were made anonymously) actually came from its
employees during the investigation into plaintiff’s internal complaint. The
court denied the appeal and upheld the jury’s verdict for plaintiff,
reasoning there was sufficient evidence for the jury to impute responsibility
to the employer for the offensive blog posts because the harassing
employees had accessed the blog site using the employer’s computers
and their blogs discussed workplace issues.

The evidence does cut both ways, however:
•  **Gelpi v. AutoZoners, LLC**, No. 5:12CV0570, 2014 U.S. Dist. LEXIS 38477  
  (N.D. Ohio Mar. 24, 2014) Judge Benita Pearson ruled that Gelpi welcomed the sexually open nature of the workplace conversation based on her long history of Facebook and other social media posts reflecting sexual jokes, sexual banter and sexual references. While Gelpi may have indeed been offended by sexual discrimination within her workplace, her discrimination case was undermined based on her social media history of welcoming behavior and conversation of a sexual nature.

While employers are not legally required to monitor employee private social media, the opinions above demonstrate that an employer does have a duty to redress complaints of harassment or discrimination that are known to the employer if the harassment begins to seep into the workplace and may be held liable if they fail to take prompt action. See also e.g. **Amira-Jabbar v. Travel Services, Inc.**, 726 F.Supp.2d 77 (D. P.R. 2010) (granting employer’s motion for summary judgment against employee’s harassment claim; employer’s remedial action – instructing its I.T. department to block all employees’ access to Facebook on work computers after allegations of Facebook-based harassment were raised – constituted a prompt and appropriate response to employee’s hostile work environment complaint). Employers should be cautioned, however, to consult with counsel prior to taking action in order to determine whether the alleged “harassment” may be deemed activity protected by the NLRA. See e.g. **Hispanics United of Buffalo, Inc. v. Ortiz**, No. 3-CA-27872 N.L.R.B. (Sept. 2, 2011) (ordering reinstatement of employees terminated for Facebook posts discussing a co-
worker that were not sufficiently harassing to lose the protection of the Act and related to criticisms of a co-employee’s job performance).

V. The Recent Federal Circuit Split on Whether Title VII Protections Extend to LGBT Workers

The legal landscape surrounding anti-LGBT discrimination is rapidly changing. Within the last two years at least two federal courts issued contradictory decisions within thirty days of each other that have created a sharp circuit split on the issue of whether discrimination against LGBT individuals is prohibited under Title VII.

The first decision was issued by the 11th Circuit Court of Appeals on March 10, 2017 in the case Evans v. Georgia Regional Hospital. Plaintiff Evans is a lesbian security officer who sued Georgia Regional Hospital alleging she endured hostility and harassment in the workplace in violation of Title VII. Plaintiff claimed she was denied equal pay, harassed, physically assaulted and targeted for termination on the basis of her sex and for failing to adhere to “traditional womanly” stereotypes. Plaintiff identified with the male gender and wore a male uniform, had a male haircut, and wore men’s shoes. She alleged she was discriminated against because of her sexual orientation and gender non-conformity, and retaliated against after she complained to her employer about the alleged discrimination. In a 2-1 decision, a panel for the 11th Circuit issued a convoluted decision affirming the district court’s dismissal of her claim and holding that sexual orientation discrimination is not actionable under Title VII. The Court did, however, reverse the district court’s order dismissing Plaintiff’s claim that she was discriminated against for failing to conform to gender stereotypes, remanding it back to the lower court with instructions to grant her leave to amend that claim. The panel held that the lower court erred because gender nonconformity is not “just another way to
claim discrimination based on sexual orientation,” but rather constitutes a separate avenue for Title VII relief. Plaintiff’s counsel has indicated an intent to seek rehearing by the full panel at the Eleventh Circuit. The Eleventh Circuit has jurisdiction in Alabama, Florida and Georgia.

The Seventh Circuit Court of Appeals issued a contradictory opinion on April 4, 2017 in *Hively v. Ivy Tech Community College*, holding that discrimination on the basis of sexual orientation is a form of sex discrimination and unlawful under Title VII. Plaintiff Hively, an openly lesbian adjunct professor at Ivy Tech, alleged she was repeatedly denied consideration for full-time teaching positions and her part-time contract was not renewed based on her sexual orientation. Hively filed suit under Title VII. The district court dismissed her lawsuit, finding that sexual orientation is not a protected class under Title VII. While a Seventh Circuit panel affirmed the District Court’s dismissal, the ruling issued by an *en banc* panel of all active judges of the Seventh Circuit overruled its previous cases and reversed the dismissal. The court held that “a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.” While the Seventh Circuit would not address whether the EEOC’s position on the issue was entitled to deference, Chief Judge Diane Wood, author of the principal opinion, noted that Congress had not expressly rejected the EEOC’s position, first announced in 2015. The Seventh Circuit has jurisdiction over Illinois, Indiana and Wisconsin.

This circuit split may very well put the issue squarely before the Supreme Court.
VI. Nationwide LGBT Anti-Discrimination Laws

Currently, there is no all-encompassing federal law that protects employees from discrimination or retaliation on the basis of sexual orientation or gender identity. Congress has repeatedly failed to pass the Employment Non-Discrimination Act (ENDA), which includes sexual identity and gender provisions.

By the end of 2016, at least 22 states, plus Washington D.C. and Puerto Rico had passed legislation banning discrimination based on sexual orientation, and all except two of these states also outlaw discrimination based on gender identity or expression in employment, housing, and public accommodations. https://www.aclu.org.

VII. “Bathroom Bills” and Guidance from Federal Administrative Agencies

A. North Carolina’s HB2

The State of North Carolina has been at the center of national debate over state legislation regulating access to restrooms since March 23, 2016, when the North Carolina General Assembly passed, and then-Governor Pat McCrory signed into law, House Bill 2 (a/k/a The Public Facilities Privacy & Security Act). The law eliminated previously-enacted anti-discrimination protections for LGBT people and restricted access and use of restrooms and changing facilities to the sex of a person as listed on their birth certificates. In North Carolina, only people who undergo sex reassignment surgery can change the sex on their birth certificates; therefore, the Bill prevented transgender people who had not or could not alter their birth certificates from using the restroom consistent with their gender identity. The legislation also changed the
definition of sex in the state's anti-discrimination law to “the physical condition of being male or female, which is stated on a person's birth certificate.” HB2 went even further by prohibiting municipalities in North Carolina from enacting anti-discrimination policies.

Litigation quickly followed. The ACLU of North Carolina filed suit against the state five days later, alleging that HB2 violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. On May 9, 2016, the United States Department of Justice sued Governor McCrory, the North Carolina Department of Public Safety, and the University of North Carolina system, stating that HB2 violates Title VII of the Civil Rights Act, Title IX of the Education Amendments of 1972, and the Violence Against Women Act. On the same day, the Governor and legislative leaders filed two separate lawsuits against the Department of Justice to defend the law.

Days later, on May 13, 2016, the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) issued guidance to schools under direction from President Obama. The guidance summarized schools’ Title IX obligations regarding transgender students and explained how the U.S. Department of Education and U.S. Department of Justice evaluate a school’s compliance with its obligations. One obligation listed in the letter was providing transgender students access to sex-segregated activities and facilities consistent with their gender identity. The letter defined gender identity as “an individual’s internal sense of gender,” and stated that “a person's gender identity may be different from or the same as the person’s sex assigned at birth.” This Guidance extended public school obligations not only to North Carolina, but nationwide.
Public outcry and reaction by big business were swift. PayPal cancelled its plans for a 400-job, $36 million expansion in Charlotte. Bruce Springsteen cancelled his concert in Greensboro. The NBA announced that it would relocate the 2017 All-Star Game and a week of events around it from Charlotte. The NCAA announced its intent to move seven planned championships in 2016-2017 to another state because of HB2 and later increased pressure on the State by threatening to withhold championship events from the state through the year 2022.

After President Trump’s inauguration, the Department of Education and the DOJ withdrew President Obama’s 2016 guidance in late February 2017, adding fuel to the fire. Due the change in position by the Trump Administration, the United States Supreme Court declined to hear oral arguments as scheduled in late March 2018 on a case that had been filed by a 16-year old transgender boy, Gavin Grimm, who was prohibited from using male restroom facilities at his public High School in Virginia.

In addition to President Trump’s election, North Carolina elected a new Governor, Democrat Roy Cooper, who brokered a return to the status quo and the repeal by the North Carolina legislature of HB2 in late March 2017. The Associated Press recently released estimates of North Carolina’s financial losses totaling at least $4 billion due to the enactment of HB2.

**B. Pending Nationwide Bathroom Bills**

In the 2017 legislative session, state legislators in 16 states (Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wyoming) have introduced legislation that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities on the basis of a definition of sex or gender consistent with sex
assigned at birth or “biological sex.” Thirteen of these legislators introduced legislation specifically addressing school restrooms. Legislation introduced in South Dakota, Virginia and Wyoming failed to pass, and legislation is pending in 13 other states. Two other states, Oklahoma and New Jersey, still have bills pending from the 2016 legislative session. Certain Ohio lawmakers publicly proposed introducing bathroom bill legislation in May 2016, but none has been introduced. Governor Kasich publicly threatened to veto any such legislation if it passed.

North Carolina remains the only state to have passed a restrictive bathroom bill, but Maryland passed a protective bathroom bill in 2014, The Fairness For All Marylanders Act, which adds “gender identity” to that list of protected classifications and prohibits discrimination on the basis of gender identity in employment, housing, credit and other licensed services, and places of public accommodation, including restrooms.

C. EEOC’s Bathroom Ruling

As referenced above, the EEOC has made its position clear. In *Lusardi v. Dep't of the Army*, supra., the EEOC held that:

1. a federal agency that denied an employee equal access to a common bathroom/facility corresponding to the employee’s gender identity discriminated on the basis of sex;
2. the agency could not condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and
3. the agency could not avoid the requirement to provide equal access to a common bathroom/facility by restricting a transgender employee to a single-
user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

D. OSHA’s Guide to Restroom Access For Transgender Workers

In 2015, the Occupational Health and Safety Administration (OSHA) also weighed in on the national debate regarding transgender bathroom usage when it issued OSHA Sanitation Standard 1910.141, which is intended to protect employees from adverse health effects when toilets are unavailable, including urinary tract infection and bladder issues. See https://www.osha.gov/Publications/OSHA3795.pdf. Because transgender employees may be hampered in their ability to use the restroom of their choice at work, possibly resulting in health issues, OSHA has taken the position that the employee – not the employer – should determine the most appropriate bathroom for him or her to use. Similar to the EEOC’s ruling in Lusardi, OSHA has also indicated that an employer may not require a transgender employee to use a segregated facility designed just for him or her. The Guidance also explains that employers should not ask employees to provide medical or legal documentation of their gender identity in order to gain access to gender-appropriate facilities. Most expect that this guidance will soon also be revoked by the Trump Administration.