

Pride at Work: 2023 Litigation Hot Spots

By Michelle E. Phillips & Christopher M. Repole

June 7, 2023

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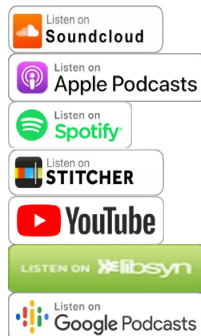
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Details

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It's Pride Month, and with key pieces of legislation impacting sexual orientation and gender identity issues pending in Florida, Tennessee, Texas, and before the United States Supreme Court, employers need to understand the employment implications of these bills.

Jackson Lewis P.C. · Pride at Work: 2023 Litigation Hot Spots



Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast We Get Work focused solely on workplace issues. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? It's pride month and with key pieces of legislation impacting sexual orientation and gender identity issues pending in Florida, Tennessee, Texas, and before the United States Supreme Court organizations need to understand the employment implications of these bills. On this episode of We get work, we explore the effect of current litigation on LGBTQ plus workplace issues. Our hosts today are Michelle Phillips, a principal in the White Plains office of Jackson Lewis and Chris Repole and Eugenia Fowlkes, a principal and an associate respectively in the New York City office.

When Michelle counsel's clients, she speaks from personal experience and has dedicated her practice to advising clients on race, gender, ethnic, intergenerational, interfaith, LGBTQ plus, and other inclusion issues. She also conducts internal investigations concerning senior management, litigates discrimination cases and conducts training programs, unemployment discrimination, unconscious, unconscious bias, sexual harassment, and sex

stereotyping. Chris has significantly benefited from the guidance of excellent workplace mentors, including out professionals and allies. He presents and publishes articles on various labor and employment topics, particularly emphasizing issues involving LGBTQ plus employees. Eugenia represents employers in pre-litigation claims, litigation as well as preventative advice and counseling. In addition to her practice Eugenia is an adjunct law professor at Benjamin N. Cardozo School of Law, where she teaches a first year lawyering and legal writing course. Michelle, Chris and Eugenia, the question on everyone's mind today is what are the latest state bills and legislation that may affect the LGBTQ plus community and how does this impact my organization?

Michelle Phillips:

Welcome everybody and happy Pride. We're very excited to be recording today. We're going to be walking you through some legal updates in Florida, Texas, and Tennessee, and at the Supreme Court and I'm incredibly excited to be co-presenting with Chris Repole, who is been issued the 40 best LGBTQ plus lawyer under 40 from the National Lesbian and Gay, Bisexual, Transgender, Queer Plus Bar Association. And Eugenia we're so happy that you're able to be involved in this podcast and that you joined us back in September, also in the New York City office. And I understand you're a rockstar in your own right and that you teach a legal writing course at Cardozo. So I'm afraid to send you something in writing now because I know that you're going to review it, but still very excited to have both of you to give this legal update with me.

And my name is Michelle Phillips and I'm the founder and co-chair along with Chris of OPAL, which is out professionals and allies in law, which is our LGBTQ plus affinity group. It's also a great practice area. A lot of people come to us with LGBTQ plus questions, transitioning issues, training issues, so enough about us. But I would like to get a little background. Chris, why don't you just introduce yourself so they can learn more about your background.

Chris Repole:

Yeah, absolutely. And thanks Michelle and Eugenia for working with me on this and for the Jackson Lewis team that's helping to put it together. I am a partner in the firm's labor relations group focusing mostly on traditional labor law, but I also do a lot of work in employment law generally, particularly on issues impacting LGBTQ plus employees. And as Michelle mentioned, I'm co-chair of the firm's out professionals group. And because we work at such a large firm focusing on all aspects of labor and employment law, one of the great things about what I do is that while I do work on labor law issues a lot of my time, I get a lot of flexibility to take on really interesting cases when they come up.

And increasingly, for better or worse, some of the issues that have been coming up the most recently have been issues around LGBTQ plus employees in part because of the legislation that's getting passed. So that's becoming a bigger and bigger part of my practice. I'm also an out attorney. I've been out the entire time. I've worked at Jackson Lewis and Jackson Lewis has been absolutely great and supportive in that regard. So as we approach Pride Month, I wanted to mention that and highlight it as well.

Michelle Phillips:

Yeah, I mean, that's amazing. I mean, for me, as practicing for 35 years, it's unbelievable to me that you have been out the entire time that you've been here. And I think it's just an evolution in the workplace where you want to be at a place where you can be who you are and you can be recognized for who you are. And that's also why Eugenia, I'm so glad that you're able to be in our firm and a part of this podcast. And if you could just give us a little bit about your background, that would be awesome.

Eugenia Fowlkes:

Absolutely. So I've been practicing for a handful of years now, and luckily I've been out the entire time, and I think that's because of the legacy that generations passed before me kind of laid out. And so I'm forever grateful for that. And I think that Jackson Lewis is just a really good fit.

Ultimately, this is where I ended up, and it was because of the community. So my practice is particularly in litigation, working with Title VII, ADA, 80EA, so age discrimination claims and some legal advice and counsel. But a lot of it has to do with working with individuals and employers who are trying to get around how to comply with the law for these protected characteristics. So this is really topical, not only because I identify as lesbian, but it's topical because this is the work that I do and I'm happy to do it.

Michelle Phillips:

Yes, that's awesome. So why don't we get a little bit into the law, and I'm just going to talk a little bit about what's going on in Florida. As many of you know last March and April of 2022, Governor DeSantis passed two key pieces of legislation. One was the Stop Woke Act, and the other was the Don't Say Gay law.

The Stop Woke Act prohibits employers with 15 or more employees from requiring employees to attend training that ex spouses, promotes, advances, inculcates or compels an employee to believe that by virtue of their race, color, sex, or national origin, that they're inherently racist or sexist or oppressive. I refer to this as just don't make people feel too guilty law. If it's anything that makes you a little uncomfortable as to the ways in which you discriminate, that's a problem. But that law is right now been enjoined. It's before the 11th circuit, but some troubling things about that law is there's basically a right of action for employees. They can sue and they can recover back pay compensatory damages, punitive damages, up to 100,000. So that law is in a state of flux. It's also about the chilling effect of these laws, particularly with the Don't Say Gay bill, which was passed in March of last year.

Initially when it was passed, the legislation only covered kindergarten through third grade. And as recently as the week of May 15th, 2023, the legislation was changed to be kindergarten through 12th grade. And basically what that says is that you can't teach about sexual orientation and gender identity. You can't talk about any topic that could run a foul. This particular legislation gives parents the

right to bring a suit against a school district if they believe their children were given inappropriate instruction in violating the bill. And that's problematic because first of all, the law doesn't very clearly define sexual orientation and gender identity. So now we're getting into things like if someone's in drag, is that a violation of the law? Like they're not specifically addressing sexual orientation or gender identity, but this law also is having a chilling effect.

So for example, people are peeling, schools are starting to peel down rainbow safe space stickers from windows because they're worried that this might run afoul of this legislation. And this legislation is also being tested in court, but it's all about, there's over 400 LGBTQ plus bills that have been tried to pass in the legislation. Now, that's not unique for 2023. That's actually been the case for a number of years now. The difference is in the past, organizations such as HRC were able to stop the legislation and what's happening now is the legislation is getting through. So we want to tell you more about what's going on in the different areas. Chris do you want to address the legislation in Tennessee?

Chris Repole:

Yeah. And I think, Michelle, you really teed it up nicely that these are kind of case studies that we're giving you, but this is part of a trend and the numbers are increasing each year. And so that's, for those of us that are part of the LGBTQ plus community, alarming in and of itself, but it's also concerning for employers. Right. Because one of the things that you'll see in the Tennessee legislation and that Michelle highlighted in the Florida legislation is that there are ambiguities, there's a lot of room for interpretation, and there's a lot of potentially unintended consequences that we think we're going to see for employers and for the public at large. And the same is true in the Tennessee legislation. So I'm just going to highlight two pieces of legislation that have implications for employers, but there is a lot more in Tennessee. Tennessee has been groundbreaking in the sense that it's been introducing and passing more of this legislation.

To Michelle's point, it's always been introduced, but more is getting passed. Senate Bill 1440 is the prime example. It was passed into law and signed by the governor in May. It is now the law in Tennessee. It deals with gender markers and gender changes on official documents, government documents. Prior to the law, transgender people in Tennessee could change their gender markers on identity documents, think driver's licenses, birth certificates, including those documents, but not limited to them. They needed to go through certain steps like providing proof of the surgery or court order. That was the lay of the land prior to this legislation getting passed. Now, the bill that was passed and went into law took away that right. It defines sex in state law to mean sex assigned at birth, and it uses the word immutable, meaning it cannot be changed under the law.

And it's interesting, the proponents of the law said that, and this is really interesting for those of us that deal with these issues all the time, that this is explicitly not targeted towards transgender people or LGBTQ plus individuals, whereas opponents of the law, the HRC, the ACLU, many other groups have said, of course this has to do with transgender people and the LGBTQ community. The implications of the law, I think we're still finding those out.

Clearly if a person wants to change their gender on a government document, whether it's a driver's license, a birth certificate, potentially health insurance forms that rely on other government documents that would be prohibited, that is something that the law is very clear, cannot be done anymore. That has clear implications for employers, right, that may have employees who are transitioning. The employer is effectively required to use the government issued form.

But this is another theme that we'll talk about a little bit. In the Florida legislation, the Tennessee legislation, Eugenia will talk about this as well, employers are in many cases, looking for ways to go beyond the prohibition and to try and work within it for those employees that may be transitioning. It's not clear whether an employer wants to have its own form, for example, that's not a government form that allows the employee to choose other or to change their gender on that form, whether that's something that would be permitted. It seems that under Senate Bill 1440, that it just applies to government documents. But that's one of those ambiguities that is still out there that employers are going to have to work through.

1440 is currently the law. Many do expect that there will be legal challenges to it, particularly because recently within the past couple years, the Supreme Court, as listeners will know, issued its Bostock decision that prohibited employment discrimination under Title VII. Many have said that this law is in violation of the principles of Bostock, and even the proponents of Senate Bill 1440 said, well, they have been on record to say there may be a problem between this law and federal law, but we'll deal with those issues when they come up, including a lot of federal funding to state institutions that might be challenged now because this legislation arguably violates federal rules. So we're keeping an eye on this.

There probably will be legal challenges. Just really quickly, I want to talk about Senate Bill one, which also was passed into law in Tennessee. It deals with healthcare context and it prohibits healthcare providers from performing on minors or administering to minors any procedure that would change in some way the minor's sex. So we're talking gender-affirming care. This law explicitly prohibits that care from being provided. This has employment implications because clearly if an employee has a child that wants to have this sort of coverage, a health insurance company would not be able to cover that care because it is now prohibited in Tennessee. And so that's something that obviously has employment implications. This law is currently subject to legal challenge. Families and a doctor have sued the state over the ban on gender-affirming care, arguing that it violates the Constitution's equal protection clause as well as the Affordable Care Act.

And so I believe that that challenge is still pending. The federal government has intervened in the case, and within the next couple days or weeks, we expect to see whether the challenge will result in an injunction, in a permanent stay in the law. I highlighted these two because they have employment implications, because they have been in the news. But as we said in this section, and as Michelle said before, these are just examples of similar laws that are getting passed across the country. So hopefully this provides listeners a sense of the

basics and we're keeping an eye on the challenges.

Michelle Phillips:

Yeah. Thank you, Chris. That's a really good review of both what the law says and the current status of it and the employment implications relating to that. Eugenia, do you want to talk a little bit about what's happening in Texas?

Eugenia Fowlkes:

Lots happening in Texas, and Michelle, to your point earlier, I actually looked up the number of anti-LGBTQ bills on state dockets. As of this morning, there are 470 in just 2023 alone. So Texas is not an outlier here. One of the things that I wanted to mention that there's a big case before the Supreme Court that I'll probably be speaking more about in detail, but very quickly, one of the things that Texas introduced, or at least Governor Abbott introduced was a memo, this February 2023 memo that he wrote technically to the Employee Retirement System of Texas. But he was claiming more broadly that state agencies should not be allowed or should not be imposing DIA initiatives or using taxpayer money on DEIA initiatives.

He claimed that these initiatives illegally discriminate against certain demographics, and he claims that it should be prohibited. It's a one-page memo. There's not much guidance on it, and it really just, there's not much else that we can really say about this because there's no response, at least from the agencies themselves. But more specifically, I think the bigger issues that I have my eye on is at least this case that's before the Supreme Court Braidwood Management versus the EEOC. Now, this has already been argued before the Supreme Court, and the decision should be coming down by June, before July, certainly, and I always have mixed feelings about Pride Month for this very reason, because you have Pride Month, you're celebrating, but you know that it's a very active month for SCOTUS decisions. So I'm always real nervous about this month, but we should be hearing more about it.

So a little bit about this case. This is as background, and Chris mentioned this before, the 2020 decision from the Supreme Court of Bostock, it determined that LGBTQ plus employees are protected from the workplace under the Civil Rights Act of 1964, Title VII. And so the EEOC has issued guidance interpreting Bostock, and in order to ensure that workplace non-discrimination protections were in place. And so Braidwood Management is a Texas-based management services company, and the owner says he does not want to employ gay or transgender people on religious grounds. He filed this suit in federal court, and he filed it as a class action. So he's purportedly bringing this on behalf of all similar members. So this really means that it's for private employers across the country is technically what he's bringing this class for. What he's saying is that he does not want to be, he wants to have the ability to object on religious grounds, to object with complying with these workplace non-discrimination protections.

Now, it's interesting because when this was an oral argument in the Fifth Circuit Court of Appeals, Judge Wilson, who's on the panel of the Court of Appeals in

the Fifth Circuit said, at least suggested that there was some hesitancy about what Braidwood Management was arguing here. It would in effect offer private businesses, this blanket religious exception from claims of workplace LGBTQ plus bias by a federal anti-discrimination agency. And so it's interesting because now we're having to think about what's going to happen after the fact, whatever the decision may be, but what are the processes that would have to be put in place if there has to be a religious objection carved out? We don't know. And what we can say for now is that we'll have to wait until a decision comes down from the Supreme Court, but it's unfortunately a significant case that will impact a really big decision that we've just been celebrating from Bostock. And so we'll see what happens with that in a couple of weeks.

Michelle Phillips:

Well, great. That's a good review. And I think what we're talking about more globally is this tension between what's going on at the federal level with the EOC, under the Biden administration and what's going on at a state level. It's almost like a state's rights issue, but I think for employers, you still need to follow the EOC guidelines. You still need to follow Bostock. I don't recommend for our clients that you should change your policies simply because in Florida, Texas, or Tennessee, there are these attempts to carve out from those protections, whether those attempts are based on religious grounds or other grounds. You should, at this point, we recommend that you stay the course. And also because, and this just goes to on a personal level with your employees, you have a lot of LGBTQ plus employees and allies, and it's important as we enter Pride Month that you show your support for those employees, and you can do that in a number of different ways.

You can do that by having Pride events. You can do that by reissuing your gender transition guidance. You can do that by doing training, which not only covers all forms of harassment and discrimination, but also specifically addresses gender identity issues, sexual orientation issues, non-binary, making sure you're uncovering the full depth of the LGBTQ plus community. I am seeing an increase in non-binary claims, misgendering claims, anti-gay bias, anti-trans bias. And so that's the thing to keep in check that employers need to enforce your non-discrimination policies. And when employees make comments that run afoul of these laws to enforce those laws and to set the tone in the workplace that your company is an inclusive workplace, and that you don't exclude anyone based upon someone's gender identity or sexual orientation. Chris, is there anything else you want to say just in terms of best practices for employers?

Chris Repole:

No, I think that's absolutely right Michelle and I'll say that that tension has always been there, right, between state and sometimes even federal law. That's arguably discriminatory and how employers deal with their employees on a day-to-day basis, and these legislations in Tennessee and Florida and other places, just using the Tennessee example as one, even if the government says that official documents can't have changes in sex, which is the term that they use in

that legislation in Tennessee, that doesn't stop an employer from, for example, allowing people to put their pronouns in their signature blocks, just to take a really specific example. That's one way that employers can continue to try and be inclusive and to try and be an ally in the face of this type of legislation.

Michelle Phillips:

Eugenia, any further thoughts before we bring this wonderful opening of Pride to a close?

Eugenia Fowlkes:

I'm going to let yours and Chris's wisdom stay for the rest of this podcast. So that's my mic drop there.

Michelle Phillips:

Well, thank you both. I mean, it's a pleasure. If anyone has any questions on anything that we covered, feel free to contact Chris, contact Eugenia, contact myself, and we'd be happy to assist you in really, truly creating that LGBTQ plus inclusive work culture where people can be who they are and they can bring their whole selves to the workplace. Thank you, Chris. Thank you, Eugenia.

Chris Repole:

Thank you, Michelle. Thanks.

Alitia Faccone:

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