

Supreme Court's Decision on LGBTQ Discrimination Has Impact on Arizona Employers

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The U.S. Supreme Court today ruled that the ban on discrimination based on “sex” in the Civil Rights Act of 1964 prohibits discrimination against gay, bi-sexual and transgendered persons. The 6-3 decision was written by Justice Neal Gorsuch, the first appointee of President Trump, and joined by Chief Justice John Roberts and the Court’s four liberal members.

The decision should lead employers to take several steps to reduce their risk of claims, and the decision also has some special implications for Arizona businesses.

Steps Employers Should Take Now

Employers should review their employment handbooks, manuals and policies to make sure that their policies on nondiscrimination and anti-harassment cover sexual orientation and transgendered persons, along with the protection of employees based on age, race, gender, national origin, color, religion and disability. If not, handbooks and policies should be updated to include LGBTQ protections.

Employers should incorporate LGBTQ protections into their anti-harassment training programs. Now would be a good time to conduct refresher training on respectful treatment at work, as comments by coworkers can lead to hostile work environment sexual harassment claims. It is possible that employees may now bring claims based on comments that were made in the past, which people previously tolerated because they did not think that they had legal rights and protections. The Supreme Court just ruled that these rights and protections do exist.

Effects of the Supreme Court’s Decision on Arizona Law

This decision leaves several open questions and special considerations for Arizona employers. The most important of these is whether the protection of LGBTQ persons will apply under the Arizona Civil Rights Act.

The Supreme Court’s decision interprets the federal Civil Rights Act of 1964. The Arizona Civil Rights Act’s employment provision, passed in 1974, was patterned after the federal law. When deciding cases under the Arizona Civil Rights Act, courts traditionally look to what the interpretation was of the federal Civil Rights Act in 1974 to determine the intent of the Arizona Legislature when it enacted the state law.

This decision by the U.S. Supreme Court was not based on legislative intent when Congress passed the law in 1964, as Congress certainly did not intend to cover LGBTQ persons at that time (as most courts have ruled when addressing this issue during the past 50+ years). Instead, the Supreme Court found that the prohibition on discrimination based on “sex” applies to sexual orientation and transgendered persons. The Court reasoned that LGBTQ status is a matter of “sex.”

The Arizona Civil Rights Act also prohibits discrimination based on “sex,” not merely “gender.” It is therefore possible that courts may in the future interpret the Arizona Civil Rights Act to prohibit discrimination based on LGBTQ status. Why does this matter if the federal law now covers LGBTQ discrimination? There is a unique provision in the Arizona law that has expanded coverage for sexual harassment that may now be triggered due to today’s Court decision.

The federal and Arizona Civil Rights Acts both generally apply only to those businesses that employ 15 or more employees (measured by the number of employees during 20 or more weeks of the current or preceding calendar year). There is a special provision of the Arizona Civil Rights Act that applies to all employers, even very small employers, in prohibiting sexual harassment. Therefore, it is possible that small employers in Arizona could face claims in the future for offensive work environment harassment or tangible job action harassment based on the treatment of LGBTQ employees by coworkers or even customers.

Some Additional Insights and Commentary about the Supreme Court’s Decision

This Supreme Court decision had some very unusual aspects to it that may be of interest. Two different agencies of the federal government filed briefs with the Court taking opposition positions. The Justice Department opposed extending protection to LGBTQ persons. The Equal Employment Opportunity Commission (EEOC) filed a brief arguing that the 1964 law covers LGBTQ persons. The EEOC is not part of the President’s cabinet, but is an independent agency governed by Commissioners appointed to staggered terms over successive Administrations.

Usually, courts try to decide cases interpreting statutes by determining the legislative intent at that time that Congress or the State Legislature passed the laws at issue. That did not occur in today’s case. There is virtually

no legislative history regarding the prohibition on discrimination based on sex in the Civil Rights Act of 1964 because the ban on sex discrimination was added to the legislation late in the legislative process by southern segregationists who were attempting to add a “poison pill” that would cause more Congressmen and Senators to vote against the bill!

The Supreme Court’s decision departs from the exercise of determining the intent of Congress at the time the law was passed. Instead, it is based on applying the words of the statute to the conditions that exist today.