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EEOC Formally Includes Sexual-Orientation Discrimination as Part of “Sex Discrimination” Under Title VII; Michigan Treasury Issues Guidance on Same-Sex Spousal Benefits

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The Equal Employment Opportunity Commission has issued a formal decision in a federal sector case finding that discrimination based on sexual orientation is a form of illegal “sex discrimination” under Title VII of the Civil Rights Act of 1964. The case, *Complainant v. Foxx*, E.E.O.C., No. 0120133080, issued July 16, 2015, found that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.” Title VII applies to employers with 15 or more employees.

While the EEOC decision does not carry the force of law, it indicates how the agency will address claims of sexual orientation discrimination, and it can have persuasive effect when courts consider private sector lawsuits involving alleged sexual orientation discrimination. So far, however, the Sixth Circuit Court of Appeals, the federal court of appeals that hears cases from Michigan federal courts, has consistently ruled that “sexual orientation is not a prohibited basis for discriminatory acts under Title VII.” It remains an open question as to whether the Sixth Circuit, or any other court, will reverse itself based on the EEOC position.

The Sixth Circuit has held that Title VII does protect transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender. The new EEOC ruling, however, goes a step beyond acting in accordance with a gender stereotype and expressly finds that sexual orientation discrimination is sex discrimination under Title VII.

It is also important to recognize that based on the new EEOC ruling and in the wake of the United States Supreme Court’s decision legalizing same-sex marriage, this area of the law is in flux. Courts and administrative agencies are quickly adopting

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new rules that will force new compliance mandates on employers. For instance, on July 16, 2015, the Michigan Treasury issued guidance clarifying taxation of benefits for same-sex spouses. Employers in Michigan should stop applying state income tax withholding to the portion of employee wages that is used to pay premiums for a same-sex spouse. Further, an employee with a same-sex spouse may wish to file a new W-4 changing the number of deductions, marital status, and possibly adding a spouse's dependents. Employers are encouraged to contact counsel with any questions in this quickly-changing area of law.