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## Q&A

# Federal agency expands protected groups in hiring

*Q&A talks employment law with Christopher Brown, a named partner in the Westport law firm of Begos & Horgan LLP. His practice concentrates on employment law and foreclosure defense. He has been litigating cases for 17 years, representing employees, officers and business co-owners and employers in employment matters.*

**Q: The U.S. Dept. of Labor has changed its equal employment statement to include gender identity and pregnancy as protected categories. What does that mean in terms of hiring?**

A: Currently, there is no federal or Connecticut law making gender identity a protected class, which means there is no federal or Connecticut law precluding employment discrimination on the basis of gender identity. Even though no law requires it, an employer can voluntarily choose not to discriminate on the basis of gender identity. This is what the U.S. Department of Labor has chosen to do. I would expect that the change to the Department of Labor's equal employment statement will result in the department hiring more transgenders because it will encourage more transgenders to apply and discourage those who make the hiring decisions from declining to hire them. I don't think adding pregnancy as a protected class will have much of an effect because pregnancy is already a protected class under federal law.

**Q: The change to the statement only affects the Department of Labor but what are the ramifications? Will there be a dominoes effect among other federal agencies?**

A: I would expect other federal agencies, and the more liberal states, to follow suit. The Department of Labor is not the first in any event. The federal Office of Personnel Management has listed gender identity as a protected

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class since January 2010. Massachusetts' Governor Patrick recently signed an executive order precluding state agencies from discriminating against transgenders. Many jurisdictions, including Connecticut, are considering bills to make it unlawful to discriminate on the basis of gender identity.

**Q: How binding are equal employee statements? How difficult are they to enforce or measure compliance?**

A: I don't think equal employee statements are intended to be binding. I think they are intended to be public relations statements. Employers are looking to attract and retain people that make a positive contribution to the enterprise regardless of whatever other characteristics they might have. As for enforcement, if the class is protected by law, the affected person can use the usual mechanisms, which include proceedings before an agency (EEOC or in Connecticut, the CHRO) and possibly a court. If the class is not protected by law, the affected person might be limited to whatever mechanism the employer provides.

**Q: The equal employee statement also includes disciplinary practices. Does this mean there is discrimination in discipline against certain classes of people?**

A: Discrimination can exist in every facet

of employment, including employee discipline. In fact, "disciplining" an employee can be a guise for discrimination. For example, assume that a biased supervisor wants to discharge an employee solely because of the employee's race. Everyone in America, including the supervisor, knows you can't do that. So, the supervisor instead invents a reason to "discipline" the employee, perhaps more than once, until the supervisor feels that the invented discipline justifies discharge or the employee becomes so frustrated that he quits. That's unlawful discrimination.

**Q: The National Gay and Lesbian Task Force said with this change the federal government is doing what smart employers in the private sector have been doing for years. Why does the public service lag behind the private sector in this area?**

A: I can't speak to whether private employers have "for years" had policies precluding gender identity discrimination. If there is a lag by government agencies, I suspect it's for political reasons. Some constituencies might not appreciate liberal employment policies. If those constituencies support the administration that's in power, the agencies will be reluctant to go against the grain.

**Q: Are there broad classes of people still left unprotected by equal employment statements? Or is it a case of needing to get more employers to embrace the philosophies of existing employment statements?**

A: As I said, I don't think employment statements are intended to "protect" employees or potential employees. They are tools to attract and retain good employees. I'm sure there are other classes that have not been included. Perhaps they will be if employers come to understand that they can improve the enterprise notwithstanding societal perceptions. ■