

## State & Local Nondiscrimination Laws

### *What the Supreme Court's Bostock Decision Means & Opportunities for Further Action*

On June 15, 2020, the Supreme Court delivered a landmark decision on employment nondiscrimination that will provide critical protections for LGBTQ workers across the United States. *Bostock*<sup>1</sup> was a case challenging workplace discrimination against LGBTQ people brought under Title VII of the Civil Rights Act of 1964. The Court held that “[a]n employer who fires an individual merely for being gay or transgender defies the law.”<sup>2</sup> The Court confirmed that discrimination based on “sex” necessarily prohibits discrimination against LGBTQ workers, reasoning that an employer cannot discriminate against an individual because of their sexual orientation or gender identity without also discriminating against them because of their sex.

While *Bostock* marks a milestone for LGBTQ rights, it is important to note that Title VII only deals with *employment* discrimination and only applies to businesses that have fifteen or more employees. As such, there is still significant room for states and localities to extend greater nondiscrimination protections to LGBTQ individuals and other groups. For example, to augment the protections provided under *Bostock*, states and localities can enact nondiscrimination laws that:

- **Prohibit discrimination in places of public accommodation and housing:** States and localities can extend Title VII’s protections to prohibit discrimination in places of public accommodation, such as retail stores, bakeries, hotels, etc. In addition, state and local nondiscrimination laws can expand prohibitions against discrimination in other areas such as housing.
- **Prohibit discrimination against employees of small businesses:** Title VII only applies to businesses with fifteen or more employees.<sup>3</sup> State and local nondiscrimination laws can extend employment nondiscrimination protections to smaller businesses as well.
- **Prohibit discrimination against independent contractors:** States and localities can also prohibit discrimination against independent contractors. This can be especially important to ensure that businesses in the “gig economy,” which often misclassify employees as independent contractors, are covered by nondiscrimination laws.
- **Prohibit discrimination against other classes of individuals:** Title VII prohibits employment discrimination because of “race, color, religion, sex, or national origin.”<sup>4</sup> States and localities may also want to explicitly prohibit discrimination based on other classes or characteristics, such as uniformed service, caregiver status, or status as a victim of domestic violence, stalking, and sex offenses.
- **Create additional enforcement mechanisms:** To bring a nondiscrimination claim under Title VII, workers must first file a claim with the Equal Employment Opportunity

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<sup>1</sup> The Supreme Court accepted and consolidated three cases—*Bostock*, *Zarda*, and *Harris Funeral*—but for clarity, this memo refers to the case and decision as *Bostock*.

<sup>2</sup> *Bostock v. Clayton County*, 590 U.S. \_\_\_, 2020 WL 3146686 at \* 18 (2020).

<sup>3</sup> 42 U.S.C.A. § 2000e(b).

<sup>4</sup> 42 U.S.C.A. § 2000e-2(a)(1).

Commission (EEOC) within 180 days of the most recent discriminatory actions<sup>5</sup> (or within 300 days if the EEOC has a work-sharing agreement with a local Fair Employment Practice Agency).<sup>6</sup> After that, the EEOC will either investigate the complaint or issue the worker a “right to sue” letter that allows them to bring a claim against their employer in court. State and local nondiscrimination laws can extend the time to file a nondiscrimination claim, establish their own investigatory and enforcement commissions, and/or give workers a private right of action to bring their own case against their employer directly to court, without waiting for the EEOC’s determination.

*Bostock* undoubtedly represents a huge victory for LGBTQ rights in the United States, but it does not mark the end of the fight for LGBTQ equality. As these examples demonstrate, there is still room for states and localities to create greater legal protections for LGBTQ individuals, and there is still good reason to strongly resist state laws that limit local authority to enact nondiscrimination ordinances.<sup>7</sup>

For more information on the *Bostock* decision or on how states and localities can enact further nondiscrimination protections, please reach out to:

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<sup>5</sup> 42 U.S.C.A. § 2000e-5.

<sup>6</sup> U.S. Equal Employment Opportunity Commission, *Time Limits for Filing a Charge*, <https://www.eeoc.gov/time-limits-filing-charge> (last accessed July 6, 2020).

<sup>7</sup> Three states—Tennessee; Arkansas; and North Carolina, where most of the nondiscrimination preemption law is set to sunset on Dec. 1, 2020—have preempted local nondiscrimination ordinances that create protected classes not covered under state law, such as gender identity and sexual orientation. *Bostock* does not lift these limitations, leaving localities in these three states unable at this time to extend LGBTQ protections in the ways described in this memo.