

2021 Has Been A Record-Breaking Year for Anti-LGBTQ Legislation. How Does This Impact Corporate Counsel?

On June 15, 2020, a conservative-leaning United States Supreme Court issued a historic decision, ruling that the 1964 Civil Rights Act protects gay, lesbian and transgender employees from discrimination based upon sex. Specifically, a 6-3 majority held that an employer cannot fire someone just for being homosexual or transgender. Yet in 2021, more than 250 anti-LGBTQ bills have been introduced across the country, many of which have been signed into law or are awaiting governors' signatures.¹ Our state of Tennessee may end up leading the nation in the most anti-LGBTQ bills passed into law.

So, what do these bills say and purport to do? One of the bills Governor Lee recently signed into law bans transgender youth from playing middle school and high school sports. The expressed concern is that transgender girls whose assigned sex at birth was male would have an unfair advantage. Governor Lee said he endorsed the bill because allowing transgender students to play girls' sports would "destroy women's sports" and "ruin the opportunity for girls to earn scholarships." Yet when asked to identify a single instance in Tennessee where such participation has caused problems, House Speaker Cameron Sexton admitted there may not actually be transgender students participating in school sports, but the state was being "proactive." Put another way, it appears that this law created a solution to a non-existent problem. A recent PBS/NPR/Marist poll showed that respondents ranked the importance of banning transgender people from participating in sports as the least important, as compared to other policy issues, with between 1% and 3% prioritizing the issue. Yet, similar laws were introduced in more than 20 states in 2021 and were passed in Arkansas and Mississippi.

In May 2021, Governor Lee signed four additional anti-transgender bills into law. The first, House Bill 1182/Senate Bill 1224 (Public Chapter 453), requires that any Tennessee business that allows transgender people to use the restroom of their gender identity must post the following message on all restrooms and on each public entrance to the building: "This facility maintains a policy of allowing the use of restrooms by either biological sex, regardless of the designation of the restroom." The law even specifies the size, color and font design required in the signage. The second, House Bill 1233/Senate Bill 1367 (Public Chapter 452), requires schools to provide reasonable accommodations for non-transgender students so that they do not have to share a bathroom or changing facility with a transgender student. These two

¹ April 21, 2021 Human Rights Campaign Press Release.

“bathroom bills” are the first to be enacted since North Carolina House Bill 2 in 2016. House Bill 529/Senate Bill 1229 (Public Chapter 281) requires parents to be notified 30 days in advance of any curriculum that discusses gender identity or sexual orientation in the classroom, and allows parents to opt students out of the class and mandates that the school offer another curriculum for those students. This law is not limited to sex education classes. Rather, it will also impact teachings on important literary and historical events, including American jurisprudence. All three of these laws go into effect July 1, 2021. Additionally, Governor Lee has approved legislation that bans gender-confirming hormone treatment to youths before they enter puberty (Senate Bill 126/House Bill 1027). This law is effective immediately. Such bans have been opposed by several medical and child welfare groups, including the American Academy of Pediatrics and the American Medical Association.

The question is, how does corporate America, including corporate Tennessee, respond to these bills and laws? Here in Tennessee, multiple corporations with a local presence emphatically declared their opposition to such legislation by signing an open letter to the state of Tennessee. On a larger scale, more than 90 major U.S. corporations have stood up and spoken out against anti-transgender legislation being proposed in states across the country.

These businesses warn that anti-LGBTQ laws, such as those described above, may cost Tennessee a significant amount of economic harm, should pro-LGBTQ+ corporations decide to no longer do business in the state. Tennessee Democrats and Republicans all agree that Tennessee has had a successful business climate. However, as Tennessee House Representative Mike Stewart, a Nashville Democrat, noted, “[m]ost people that bring jobs here can take those jobs to other states, there are other states competing for every single job we get and to create this sort of climate of hatred is the opposite of what the business community is looking for.” Governor Lee, on the other hand, says that it is up to the Tennessee legislature to make laws, not businesses, adding that economic sanctions, such as Major League Baseball (“MLB”) pulling its All-Star game out of Atlanta in reaction to its new voting law, is “political theater.”

Yet, the potential consequences are real, and not just “political theater.” The MLB All-Star game typically generates tens of millions of dollars in revenue for the host cities, none of which will go to Atlanta now. Similarly, the National Basketball Association refused to hold its 2017 All-Star game in North Carolina due to its “bathroom bill.” The Associated Press projected that the 2016 North Carolina bathroom bill could have cost the state \$3.76 billion over 10 years, had it not been repealed. And when Texas introduced a bathroom bill in 2017, the potential fallout

was staggering. The Texas Association of Business estimated possible lost revenue of \$8.5 billion, while risking 185,000 jobs in the process, due to the National Collegiate Athletic Association (“NCAA”) and professional sporting event cancellations, a ban on taxpayer funded travel to those states, cancellations of movie productions, and businesses moving projects out of state. That bill did not become law.

How do anti-LGBTQ laws impact corporate counsel? Employees and prospective employees want to work for a company, and live in a community, where they and their families feel comfortable and safe. The Tennessee anti-LGBTQ laws do not engender such feelings for many, whether LGBTQ or otherwise, which can lead to employee dissatisfaction and turnover, or serve as a determining factor whether or not to accept employment. Moreover, because LGBTQ status is a protected category under federal law, anti-LGBTQ sentiment (or nonchalance toward inclusion) within the corporate ranks can lead to litigation, which is expensive and can cause reputational harm, as well as significant business disruption.

What can corporations and corporate counsel do to ensure their employees, LGBTQ or not, feel safe, valued, and included? One way is to look at current company policies and practices and align them with company values and the applicable laws. Another is to take action in response to the anti-LGBTQ laws, by, for example, condemning such laws internally and publicly, and even imposing economic harm such as declining to locate corporate headquarters in states with these laws or moving conventions or events to locations where such laws do not exist. Many companies have or are starting affinity groups, which promote connectivity for LGBTQ and their allies. And, finally, hold people at every level of the company accountable for their words and actions. We are in the 21st century, and inclusiveness is the name of the game in corporate America.