

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

AS 18.80.220 & Title VII of the Civil Rights Act

LGBTQ+ EMPLOYMENT DISCRIMINATION GUIDE

Introduction

Alaska Statutes 18.80 and Title VII of the Civil Rights Act of 1964 prohibit discrimination because of an “individual’s ... sex”

Sex discrimination involves treating someone unfavorably because of that person’s sex, including the person’s sexual orientation, gender identity, or pregnancy. This fact sheet briefly explains sex discrimination in general, and what *Bostock v. Clayton County* means for LGBTQ+ workers (and all covered workers) and for employers across Alaska. This publication in and of itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law.

In *Bostock v. Clayton County*, -US-, 140 S. Ct. 1731, 207 L.Ed 218 (2020), the Supreme Court clarified that the Title VII definition of “sex” encompasses LGBTQ+ status as a protected class for employment.

The Alaska Supreme Court previously adopted a broad view of AS 18.80 and incorporated the larger Title VII framework for Alaska discrimination claims. Therefore, under Alaska law, “sex” includes sexual orientation and gender identity in employment discrimination claims.

◆ AS 18.80 and Title VII: Sex Discrimination & Work Situations

The law prohibits discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

◆ Sex Discrimination & Harassment

It is unlawful to harass a person because of that person’s sex, including the person’s sexual orientation, gender identity, or pregnancy. Harassment may include “sexual harassment” such as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. However, harassment does not have to be of a sexual nature, and may include offensive remarks about a person’s sex, including the person’s sexual orientation, gender identity, or pregnancy.

For example, it is illegal to harass a woman by making offensive comments about women in general.

Both the victim and the harasser may be any sex, and the victim and harasser may be the same sex or a different sex. Although the law does not prohibit minor teasing,

offhand comments, or isolated incidents that are not frequent or serious, harassment is illegal when it is so frequent or severe it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim’s termination or demotion.) The harasser can be the victim’s supervisor, a supervisor in another area, a co-worker, a subordinate, or someone who is not an employee, such as a client or customer.

◆ Sex Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of sex, may be illegal if it has a negative impact on the employment of people of a certain sex and is not job-related or necessary to the operation of the business.

◆ Sexual Orientation and Gender Identity (SOGI) Discrimination

In *Bostock v. Clayton County*, the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII’s prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”

For example, if an employer fires an employee because she is a woman who is married to a woman, but would not do the same to a man married to a woman, the employer is taking an action because of the employee’s sex because the action would not have taken place but for the employee being a woman.

Similarly, if an employer fires an employee because that person was identified as male at birth but uses feminine pronouns and identifies as a female, the employer is acting against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male. The Court also noted that its decision did not address various religious liberty issues, such as the First Amendment, Religious Freedom Restoration Act, and the exemptions Title VII provides for religious employers.

◆ SOGI Discrimination & Work Situations

The law prohibits sexual orientation and gender identity discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

◆ SOGI Discrimination & Harassment

It is unlawful to subject an employee to a hostile work environment due to harassment based on sexual orientation or gender identity. Harassment may include offensive or derogatory remarks about sexual orientation (e.g., being gay or straight). Harassment may also include offensive or derogatory remarks about a person's transgender status or gender transition. Although accidental misuse of a transgender employee's preferred name and pronouns does not violate state and federal human rights law, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

While the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not frequent or serious, harassment is unlawful when it is so frequent or severe that it creates a hostile work environment or when it results in an adverse employment decision (such as termination or demotion of a victim). The harasser may be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee, such as a client or customer.

◆ SOGI Discrimination & Employment Policies/Practices

Generally, an employer covered by state and federal law is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers are also not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.) Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.

◆ SOGI Discrimination & Retaliation

It is illegal for an employer to retaliate against, harass, or otherwise punish any employee for:

- opposing employment practices the employee reasonably believes to be discriminatory;
- filing an ASCHR or EEOC charge or complaint, or;
- participating in any investigation, hearing, or other

proceeding connected to AS 18.80.220 or Title VII enforcement.

Retaliation is anything that would be reasonably likely to discourage workers from protesting discrimination.

◆ SOGI Discrimination Outside of the Workplace

Bostock was limited to Title VII and employment. The Alaska State Commission for Human Rights does not have jurisdiction over LGBTQ+ discrimination claims outside of the employment context. People with fact-specific questions should contact their local/municipal human rights office and/or the EEOC and/or a private attorney for assistance.

1. Does Alaska State and Federal Human Rights law protect all workers?

AS 18.80.220 and Title VII protect job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees. Employers with fewer than 15 employees are not covered under Title VII; however AS 18.80.220 requires an employer to have only 1 employee for it to apply. State and federal law protect employees regardless of citizenship or immigration status. State and federal law generally does not apply to individuals who are found to be independent contractors. Determining whether someone is an employee, or an independent contractor is a fact-specific inquiry.

2. Do AS 18.80.220 and Title VII law apply to all employers?

AS 18.80.220 applies to private-sector employers with 1 or more employees, state and local government employers with 1 or more employees, unions, and employment agencies. Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, and to the federal government as an employer. Title VII also applies to unions and employment agencies.

Additionally, AS 18.80.220 applies in whole or in part to some Alaska Native employers on a case-by-case basis. Title VII and AS 18.80 do not apply to federally recognized tribes. However, private employers are covered even if they operate on a tribal reservation or other trust lands. (cont. page 3)

3. Do AS 18.80.220 and Title VII protect employees who work in places where state or local law does not prohibit employment discrimination based on sexual orientation or gender identity?

Yes. Federal law and Title VII apply nationwide and protect employees from discrimination based on sexual orientation or gender identity regardless of state or local laws. State law (AS 18.80) applies throughout Alaska regardless of local ordinances.

4. What kind of discriminatory employment actions do AS 18.80.220 and Title VII prohibit?

State and federal human rights law includes a broad range of protections. Among other things, employers cannot discriminate against individuals based on sexual orientation or gender identity with respect to:

Hiring, firing, furloughs or reductions in force, promotions, demotions, discipline, training, work assignments, pay, overtime or other compensation, fringe benefits, and other terms, conditions, or privileges of employment.

Discrimination also includes severe or pervasive harassment. It is unlawful for an employer to create or tolerate such harassment based on sexual orientation or gender identity. Further, if an employee reports such harassment by a customer or client, the employer must take steps to stop the harassment and prevent it from happening again.

5. Are non-LGBTQ+ job applicants and employees also protected against sexual orientation and gender identity discrimination?

Yes—employers are not allowed to discriminate against job applicants or employees because the applicants or employees are, for example, straight or cisgender (someone whose gender identity corresponds with the sex assigned at birth). State and federal human rights law prohibits harassment and other forms of discrimination based on sexual orientation or gender identity.

6. Could an employer's discriminatory action be justified by customer or client preferences?

No. Generally, an employer covered by AS 18.80.220 and Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived

customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

7. Is an employer allowed to discriminate against an employee because the employer believes the employee acts or appears in ways that do not conform to stereotypes about the way men or women are expected to behave?

No. Whether an employer knows an employee's sexual orientation or gender identity, employers are not allowed to discriminate against an employee because that employee does not conform to a sex-based stereotype about feminine or masculine behavior. For example, employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways.

8. May a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?

No. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.

9. Does an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?

Yes. Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. Whether an employer may deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity is an open question of law in Alaska because there is no statute or controlling judicial opinion that applies in this state. However, it is the Commission's policy to accept sex-based discrimination complaints for investigation when an employer forces a transgender employee to use a bathroom, locker room, or shower not of the employee's gender identity because this could potentially constitute and/or contribute to a hostile work environment. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, and refuses to allow all men (including transgender men) to use the men's facilities, and all women (including transgender women) to use the women's facilities, the employer may be subject to investigation and could face liability for sex-based discrimination.

10. Could use of pronouns or names in the workplace that are inconsistent with an individual's gender identity be considered harassment?

Whether using pronouns and/or names that are inconsistent with an individual's gender identity is considered workplace harassment in Alaska is an open question of law because there is no statute or controlling judicial opinion that applies in this state. However, unlawful harassment can sometimes include unwelcome conduct that is based on sex. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex (including gender identity), thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. Accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII or the Alaska Human Rights Act, however intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee, or *any* employee, could contribute to an unlawful hostile work environment. Therefore, it is the Commission's policy to accept sex-based discrimination complaints for investigation when an employee is subjected to pronouns or a name that is inconsistent with the employee's gender identity because this could amount to a hostile work environment. An employer who intentionally misuses an employee's name or pronouns, or allows or tolerates these actions in the workplace by supervisors or co-workers, may be subject to investigation and could face liability for sex-based discrimination.

11. If a job applicant's or an employee's rights have been violated, what can the applicant or employee do?

An individual must file an ASCHR charge within 300 days of the most recent alleged violation in order to take further legal action. Therefore, it is best to begin the process early.

12. If I contact ASCHR, the EEOC, my local human rights agency, or file a charge or complaint of discrimination, could I be fired?

It is unlawful for an employer to retaliate against, harass, or otherwise punish any employee for:

- opposing employment practices the employee reasonably believes to be discriminatory;
- filing an ASCHR or EEOC charge or complaint; or,
- participating in any investigation, hearing, or other proceeding connected to state or federal human rights law enforcement.

Retaliation is anything that would be reasonably likely to discourage workers from making or supporting a charge of discrimination.



Were you the victim of discrimination? Need to file a complaint? Looking for guidance on a discrimination issue? Contact the Alaska State Commission for Human Rights: (907) 274-4692, or (800) 478-4692, or hrc@alaska.gov, or humanrights.alaska.gov; or the U.S. Equal Employment Opportunity Commission at (800) 669-4000 or www.eeoc.gov

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