

CLIENT ALERT THE FEDERAL SECOND CIRCUIT COURT OF APPEALS FINDS THAT SEXUAL ORIENTATION IS PROTECTED BY TITLE VII.

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On February 26, 2018, the United States Court of Appeals for the Second Circuit (which governs New York, Connecticut, and Vermont) held that sexual orientation is covered by Title VII of the 1964 Civil Rights Act. *Zarda v. Altitude Express, Inc.* In doing so, the Second Circuit, overruled its previous decisions, including *Christiansen v. Omnicom Group, Inc.*, 859 F.3d 195 (2nd Cir. 2017). The Second Circuit now has joined the Seventh Circuit, *Hively v. Ivy Tech Community College* 853 F.3d 339 (7th Cir. 2017), in holding that sexual orientation is a protected category under Title VII. The Second Circuit, which covers Connecticut, New York and Vermont, and the Seventh Circuit, which covers Illinois, Indiana and Wisconsin, are still in a minority on the issue. The nine other Federal Circuit Courts of Appeals that have considered the issue found that sexual orientation is not covered by Title VII. The most recent to do so was the Eleventh Circuit Court of Appeals in *Evans v. Georgia Memorial Hospital, et al.* 850 F.3d 1248 (11th Cir. 2017), cert. denied 138 S. Ct. 558 (2017).

However, since 2015 the EEOC has taken the position that Title VII's prohibition of sex discrimination forbids any employment discrimination based upon gender identity and sexual orientation, regardless of local or state laws or court decisions to the contrary. The EEOC has been very aggressive in enforcing its position, and many suits have been filed around the country asserting the same position as the EEOC. Additionally, there are a number of states with laws prohibiting discrimination based upon sexual orientation. Given the split in the Federal Circuit Courts of Appeals and the EEOC's position, the United States Supreme Court will probably decide the issue at some point.

The Fifth Circuit Court of Appeals (which governs Texas law) has not yet found sexual orientation is covered by Title VII. In the meantime, employers need to be aware of this split in the circuits and of the trend to find sexual orientation to be covered by Title VII and be prepared for possible investigations and litigation involving LGBT issues.