

# Compliance Steps For Cos. After Mich. LGBTQ Bias Ruling

By **Sean Crotty and Michael Dauphinais** (August 15, 2022)

While courts often interpret Michigan's Elliott-Larsen Civil Rights Act to track Title VII of the federal Civil Rights Act, the ELCRA protects more than just employment.

The ELCRA protects against discrimination in employment, housing, real estate, public service, and places of public accommodation, including restaurants, hotels, event venues, and all other businesses and facilities open to the public.

The Michigan Supreme Court's recent decision in *Rouch World LLC v. Department of Civil Rights* expanded the ELCRA's prohibition on discrimination based on sex to discrimination based on sexual orientation.

This decision creates new issues for employers and may require them to reexamine their policies, standards and employee training to ensure compliance.

## The Rouch World Holding

In a 5-2 decision, the Michigan Supreme Court held that a Michigan event venue that denied a same-sex couple's request for wedding services violated the ELCRA's prohibition of discrimination "because of ... sex."<sup>[1]</sup>

The event venue, along with a hair removal clinic that declined to provide services to a transgender woman, had sued the Michigan Department of Civil Rights in the Michigan Court of Claims seeking a declaratory judgment that the ELCRA's protection did not extend to sexual orientation or gender identity.

The MDCR moved to dismiss the claims, but the trial court held that it was bound by a 1993 Court of Appeals decision in *Barbour v. Department of Social Services*. The *Barbour* decision tracked then-current federal case law interpreting Title VII to conclude that the ELCRA did not protect sexual orientation.<sup>[2]</sup>

Thus, the trial court allowed the sexual orientation claim against the MDCR to proceed.

Because the *Barbour* case did not involve gender identity discrimination, and there was no Michigan precedent on that issue, the trial court considered the hair removal clinic's gender identity issue separately.

Based on the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County*, the trial court held that, when a person discriminates against "someone who 'identifies' with a gender different than the gender that he or she was born as, then that is dissimilar treatment on the basis of sex," which the ELCRA prohibits.

The *Bostock* decision was a landmark U.S. Supreme Court decision holding that an employer violates Title VII if it fires a person "for being homosexual or transgender" as discrimination based on sex.<sup>[3]</sup>

The trial court thus dismissed the hair removal clinic's claims related to gender identity, but



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allowed the event venue's claims regarding sexual orientation to proceed.

The MDCR appealed the trial court's ruling, and the hair removal clinic did not cross-appeal.

The Michigan Supreme Court held in favor of the MDCR, reversing the Court of Claims as to the sexual orientation claim and allowing the decision as to the gender identity claim to stand.

The court overturned the Barbour decision that had bound the trial court, noting that subsequent developments in the law have called into question its validity.

The Barbour decision relied on federal cases interpreting Title VII as intending "to place women on an equal footing with men," rather than regulating discrimination based on sexual orientation.[4]

Given that the Bostock decision overturned those federal cases, the court noted that federal precedent now interpreted Title VII to protect employees from discrimination based on sexual orientation and gender identity as part of the ban on discrimination based on sex.[5]

Quoting Bostock, the court held that "sexual orientation is 'inextricably bound up with sex,'" because a person's sexual orientation is generally determined by reference to their own sex.[6]

Thus, because the wedding venue would not have denied the same-sex couple's request had one of the individuals been a man, the wedding venue based its denial of services on sex.

Finally, the court made no holding about the extent to which an individual's sincerely held religious beliefs might affect an analysis, as that issue had not yet been adjudicated in the lower courts and was not before the court.

### **What Should Michigan Businesses and Employers Do Now?**

While many Michigan employers have already changed their employment policies post-Bostock, Michigan businesses should take a second look at three areas after the Rouch World decision: hiring, employment policies and public-facing practices.

#### ***Hiring***

Employers should reevaluate their hiring practices to ensure that there are no potential discrimination concerns with regard to sexual orientation or gender identity.

For example, based on current U.S. Equal Employment Opportunity Commission guidance, employers cannot refuse to hire someone because customers or clients would prefer to work with people who have a different sexual orientation or gender identity.

Similarly, employers cannot filter LGBTQ applicants or assign hires to certain positions, stores or geographic locations. This includes when an employer actually knows about an individual's sexual orientation or gender identity, but also includes discrimination based on nonconformity with sex-based stereotypes.

One particular area of concern involves names that are inconsistent with an individual's gender identity.

The EEOC held in 2015 in *Lusardi v. McHugh* that intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.[7]

Relevant to the application process, employers should consider determining an applicant's updated name and pronouns and not use, or require the applicant to use, a legal name — sometimes referred to as a deadname — as appropriate.

### ***Employment Policies***

Employers should also reevaluate their policies and practices toward employees once they commence employment. While the same principles regarding applicants apply to employees post-hire, the EEOC has also issued post-Bostock guidance that is informative in the post-Rouch World landscape.

For example, the EEOC has advised that employers may not deny an employee equal access to bathrooms, locker rooms or showers that correspond with their gender identity.

While employers may choose to have separate bathrooms, locker rooms and showers for men and women, the EEOC has taken the position that transgender men should be allowed to use the men's facilities and transgender women should be allowed to use the women's facilities.

Similarly, the EEOC has advised that prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.[8]

And, to provide additional context to the names issue noted above, while accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong pronouns and deadname could be considered as part of a hostile work environment, exposing the employer to liability.

Employers should also review their benefit plans and other policies for compliance post-Rouch World. Certain benefits may allow for designation of alternate beneficiaries, and the definition of those eligible may need to be revised.

For example, if a bereavement leave policy allows for leave to be taken to attend the funeral of a nonmarried, heterosexual partner's relatives, that policy should be revised to allow for leave to be taken to attend a same-sex partner's relative's funeral. This could also apply to leave taken to care for such a relative, or other forms of leave.

Employers may also need to evaluate wellness benefits and other health care benefits for compliance with gender identity coverage and requirements.

### ***Other Public-Facing Requirements***

Finally, given the breadth of the ELCRA as opposed to Title VII's focus on employment, Michigan businesses that are places of public accommodation should evaluate their public-facing policies as well.

The ELCRA defines "place of public accommodation" to include

a business, or an educational, refreshment, entertainment, health or transportation facility, or institution of any kind, whether licensed or not, whose goods, services,

facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.[9]

Post-Rouch World, event venues should cease any decisions to host or not host events based on sexual orientation.

Places of public accommodation should also review many of the areas applicable to employers above to ensure protection against ELCRA claims.

For example, places of public accommodations may want to review their policies for bathrooms, locker rooms or other facilities that may be tied to gender identity.

Similarly, businesses may want to ensure that services are provided without regard to sexual orientation or gender identity; e.g., a restaurant should not decline to offer an anniversary dinner promotion to a same-sex couple, all else being equal.

## **Conclusion**

Michigan businesses and employers should continue to monitor the legal developments and review their policies and practices for compliance, especially in light of the Rouch World decision.

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[1] MCL 37.2302(a).

[2] *Barbour v Dep't of Social Servs* , 198 Mich App 183, 185; 497 NW2d 216 (1993).

[3] *Bostock v Clayton Co* , 590 US \_\_\_, \_\_\_; 140 S Ct 1731, 1741; 207 L Ed 2d 218 (2020).

[4] *DeSantis v Pacific Tel & Tel Co* , 608 F2d 327 (CA 9, 1979).

[5] *Bostock*, 590 US at \_\_\_; 140 S Ct at 1741.

[6] *Id.* at 1742.

[7] *Lusardi v Dep't of the Army* , EEOC Appeal No. 0120133395 (Apr. 1, 2015).

[8] *Macy v Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

[9] MCL 37.2301(a).