

(Informal) Survey Says: Most Employers Not Waiting For Courts To Decide Whether Title VII Covers Sexual Orientation

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As we have discussed [here](#) and [here](#) at Currents, one of the hotly contested employment litigation issues of our decade is whether Title VII's prohibition on discrimination "because of sex" prohibits discrimination on the basis of sexual orientation. Sex discrimination was an afterthought when Title VII was passed in 1964, added late in the Congressional process (reportedly added by opponents who thought it would cause Title VII to fail), and it is unquestioned that Congress was not thinking about sexual orientation at the time. Since that time, small judicial steps have set the table for the current debate that has been hot and heavy in 2017:

- The federal Court of Appeals for the 7th Circuit (Illinois, Indiana, Wisconsin) became the highest court to hold that Title VII does prohibit discrimination on the basis of sexual orientation.
- We wait to hear whether the U.S. Supreme Court will review *Evans v. Georgia Regional Hospital*, a case reaching the opposite conclusion in the 11th Circuit (Alabama, Florida, Georgia).
- The 2nd Circuit (Connecticut, New York, Vermont) has heard argument on and will decide the issue in the *Zarda v. Altitude Express*

While this is unquestionably a hot litigation issue, it does not seem to be a hot issue for most employers on a day to day basis. Last week I presented on the above-mentioned cases to a group of senior Ohio management-side lawyers. When I got done talking about the cases, we asked ourselves – is anybody dealing with this on a day to day basis with their clients, advising on what policies should say, or how these cases might affect an employment decision. The answer was a resounding "no." Most of the group's collective clients include sexual orientation in their discrimination policy, some as a matter of corporate culture and values, some as a matter of practicality in light of the many [states](#) and municipalities prohibiting sexual orientation discrimination (and not wanting to different policies in different locations). In other words, while we await a judicial answer, much of corporate America has already decided.

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