

Employment Non-Discrimination Act Passes its First Test in the Senate

Article By:

Jonathan Sokolowski

The U.S. Senate recently passed the **Employment Non-Discrimination Act (“ENDA”)** (S. 815), a bill which would prohibit employers with 15 or more employees from discriminating against individuals on the basis of their sexual orientation or gender identity. The ENDA passed by a vote of 64-32, but faces a tenuous future as it heads to the U.S. House of Representatives.

The ENDA would make it unlawful for employers to fail or refuse to hire, to discharge, or to otherwise discriminate against any individual with respect to the terms and conditions of employment, on account of such individual’s (actual or perceived) sexual orientation or gender identity. The ENDA also prohibits employers from retaliating against employees due to their opposition of an employment practice made unlawful by the act, or for participating in an investigation, or filing a charge under the act. Finally, employers would be prohibited from discriminating against an individual based on the sexual orientation or gender identity of any person with whom the individual associates.

The ENDA would not apply to religious organizations and would not prohibit an employer from requiring an employee to adhere to “reasonable dress or grooming standards.” However, an employer must permit an employee who has undergone a gender transition, or is about to do so, to adhere to the same dress or grooming standards that apply to the gender which the employee has transitioned, or will be transitioning to.

In order to prove that an employer took a prohibited action under the ENDA, a plaintiff need only demonstrate that “sexual orientation or gender identity was a motivating factor for any employment practice, even though other factors also motivated the practice.” The ENDA permits successful plaintiffs to avail themselves of the same remedies applicable to Title VII claimants, including damages and attorneys’ fees.

Despite the bill’s passage in the Senate, Speaker of the House, John Boehner, has stated that he is opposed to the ENDA and is unlikely to bring the bill up for a vote in the House of Representatives. Accordingly, the prospects for the ENDA to be passed into law in the near future are uncertain.

Conclusion

Irrespective of whether or not the ENDA is ultimately enacted, employers must be aware of the

jurisdictions they are operating in as numerous states and local governments already prohibit employment discrimination on the basis of sexual orientation and/or gender identity. In New York, for example, the State Human Rights Law prohibits discrimination on the basis of sexual orientation, while the City Human Rights law provides that discrimination on the basis of both sexual orientation and gender identity is unlawful. Additionally, as previously reported [here](#), the Equal Employment Opportunity Commission held last April that discrimination against transgender individuals constitutes sex discrimination in violation of Title VII.

Employers should review their current Equal Employment Opportunity and non-discrimination policies to ensure compliance with applicable state and local laws concerning sexual orientation and gender identity. Furthermore, employers are always well advised to base all employment decisions on legitimate, non-discriminatory business reasons.

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