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Efforts to address workplace discrimination now at federal level

On Nov. 7, the U.S. Senate passed the Employment Non-Discrimination Act of 2013 (ENDA) by a vote of 64-32. ENDA is a bill that would prohibit workplace discrimination on the basis of sexual orientation and gender identity.

The bill is currently in the U.S. House of Representatives, but as of early December, there was no indication that the House was going to vote on ENDA in the immediate future. If the House passed ENDA, President Barack Obama has made clear that he will sign the bill.

According to the bill, one of the purposes of ENDA is "to address the history and persistent, widespread pattern of discrimination on the bases of sexual orientation and gender identity by private sector employers and local, state and federal government employers."

ENDA would make it unlawful for covered employers to refuse to hire an applicant, discharge an employee or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of the individual's actual or perceived sexual orientation or gender identity.

The proposed law would also prohibit covered employers from segregating or classifying applicants or employees in any way that would deprive the individual of employment or otherwise adversely affect the status of the individual as an employee, because of the individual's actual or perceived sexual orientation or gender identity.

ENDA would cover federal, state and local government employers and private sector employers with 15 or more employees.

ENDA would also cover employment agencies and labor organizations. The law would make it unlawful for employment agencies to refuse to refer for employment, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender

identity of the individual.

Labor organizations would be prohibited from: 1) Excluding from membership, or otherwise discriminating against, any individual because of the actual or perceived sexual orientation or gender identity of the individual; 2) limiting, segregating or classifying a member or applicant, or failing or refusing to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment, or would limit such employment or otherwise adversely affect the status of the individual as an employee or as an applicant for employment, because of such individual's actual or perceived sexual orientation or gender identity; and 3) causing or attempting to cause an employer to discriminate against an individual on the basis of sexual orientation or gender identity.

The bill defines "sexual orientation" as "homosexuality, heterosexuality or bisexuality." The term "gender identity" means "the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

Notably, ENDA contains a religious exemption. According to the bill, one of the purposes of ENDA is "to reinforce the nation's commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom."

To that end, ENDA would not cover religious corporations, associations, educational institutions or societies that are currently exempt from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964.

The proposed bill would not allow for the filing of disparate impact claims (where employers can be liable due to the discriminatory impact of neutral policies or practices even where there is no intent to discriminate). Only disparate treatment claims may be brought under ENDA.

The bill also includes language addressing the governing



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standard of proof. A complaining party bringing a claim under ENDA would be able to establish an unlawful employment practice by demonstrating that sexual orientation or gender identity was a "motivating factor for any employment practice, even though other factors also motivated the practice." Thus, it appears that the more rigorous "but for" standard of proof will not apply to ENDA claims.

In addition, the bill contains an anti-retaliation provision that makes it unlawful for a covered entity to discriminate against an individual because such individual: 1) opposed any practice made an unlawful employment practice by ENDA; or 2) made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under ENDA.

Currently, under federal law,

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discrimination in employment is prohibited based on the following classifications: race, color, religion, sex, national origin, age, disability, pregnancy, citizenship, veteran status and genetic information.

The fate of ENDA in Washington, D.C., is not certain. However, the Equal Employment Opportunity Commission has taken the position that discrimination against an individual because that person is transgender (i.e., gender identity discrimination) is discrimination because of sex and, thus, is covered under Title VII.

The EEOC has also taken the position that claims by lesbian, gay and bisexual individuals alleging "sex-stereotyping" can state a sex discrimination cause of action under Title VII.

In addition, the prohibition of discrimination in employment on the basis of sexual orientation and gender identity is being addressed at the state and local level. Currently, 21 states (and the District of Columbia) prohibit discriminatory employment practices based on sexual orientation and/or gender identity in the private sector.

The Illinois Human Rights Act prohibits discrimination on the basis of sexual orientation in employment and real estate. That act includes the term "gender-related identity" in its definition of sexual orientation.

Likewise, the city of Chicago Human Rights Ordinance and Fair Housing Ordinance ban discrimination based on sexual orientation and gender identity.

Under Chicago law, "gender identity" means the actual or perceived appearance, expression, identity or behavior of a person as being male or female, whether or not that appearance, expression, identity or behavior is different from that traditionally associated with the person's designated sex at birth."

The Cook County Human Rights Ordinance also prohibits discrimination in employment based on an individual's sexual orientation and gender identity.

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