

PUBLICATION

Federal Legislation Introduced To Ban Sexual Orientation and Gender Identity Discrimination

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Legislation was introduced in both the U.S. Senate and House of Representatives this summer to prohibit job discrimination on the basis of an employee's actual or perceived sexual orientation and gender identity.

Under both the Senate (S. 1584) and House (H.R. 2981) versions of the Employment Non-Discrimination Act of 2009, which are substantially similar to one another, an employee's sexual orientation and gender identity would be subject to protected status similar to that already afforded race, gender, religion, national origin, color, age and disability. The Act would be enforced by the EEOC, and any claims under the Act would be subject to the same mandatory administrative process set forth for claims under Title VII.

In addition to forbidding discrimination based on an employee's homosexuality, heterosexuality or bisexuality, the Act's protections would extend to employees who have adopted the gender-related identity, appearance, mannerisms or other gender-related characteristics of the opposite sex. Thus, subject to certain restrictions listed below, the Act would protect a man who dresses like and adopts the mannerisms of a woman, and vice-versa. The Act would also protect employees from discrimination based upon the actual or perceived sexual orientation and gender identity of people with whom they associate. Finally, the Act would include an anti-retaliation clause barring employers from discriminating against an employee who has opposed any act made unlawful under the Act or who has participated in an investigation under the Act.

Notwithstanding these prohibitions, the Act would also include several exceptions. First, it would not apply to religious organizations, the U.S. Armed Forces or veteran's service organizations. Second, the Act would not prohibit an employer from enforcing universal rules and policies that do not intentionally violate the Act, such as reasonable dress and grooming standards for the workplace, provided that an employee who has undergone or is undergoing gender transition be permitted to follow the standards set forth for the gender to which the employee has transitioned or is transitioning.

Employers would also have the right to deny employees access to shower or dressing facilities of the opposite gender when being seen unclothed in such facilities is unavoidable, so long as the employer provides reasonable access to other adequate facilities. Employers would not be required to construct new or additional facilities to accommodate an employee's gender identity. The Act would not require employers to treat an unmarried couple in the same manner as it would a married couple for purposes of employee benefits. Finally, the Act would not apply to disparate impact claims. In other words, an employer could not be held liable for a non-discriminatory policy that has the unintended effect of causing discriminatory treatment.

Both the Senate and House bills are currently in the early stages of the legislative process, where they are pending before committees. As such, they will be subject to revision before they reach the respective floors. Many observers credit the bills with a greater than even chance of becoming law during this session.

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