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Expert Analysis: What's Ahead For LGBTQ Rights Legislation

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The U.S. House of Representatives passed the Equality Act (H.R. 5 – 116th Congress) on May 17, 2019, mostly along party lines — the resolution passed with a 236 to 173 vote, with only 8 of the “aye” votes cast by Republicans. The Equality Act would amend various civil rights laws, including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and other laws regarding employment with the federal government, to explicitly include sexual orientation and gender identity as protected characteristics.

The legislation would, in part, usher in the following changes:

- An amendment to Title VII of the Civil Rights Act, which already prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin,” to include “sexual orientation and gender identity” in the definitions of “sex” in 42 U.S.C. § 2000e-2.
- An amendment to the portion of the Civil Rights Act, Title II, which prohibits discrimination or segregation “in places of public accommodation.” Title II of the Civil Rights Act already prohibits discrimination “on the ground of race, color, religion, or national origin,” 42 U.S.C. § 2000a(a), but the Equality act would add the protected category of sex, which specifically includes sexual orientation and gender identity in the definition.
- An expansion of the definition of “public accommodation” in 42 U.S.C. § 2000a(b) (this is different from the definition of “public accommodation” in other parts of the Civil Rights Act, such as the definition in Title III at 42 U.S.C. § 12181(7) related to disability discrimination) to include retail stores, banks, transportation services, and health care services.

Therefore, as a practical matter, if the Equality Act became law, it would prohibit discrimination on the basis of sexual orientation and gender identity in employment (in addition to the protections already contained in Title VII), in addition to preventing such discrimination in housing, places of public accommodation (expanded to explicitly cover additional types of businesses and services), public facilities and education, federal funding and programs, and in juries.

The United States Chamber of Commerce and over 40 other prominent trade and business groups provided their support for the Equality Act in a letter, dated March 13, 2019, to the party leaders of each house of Congress. The letter was careful in noting that the groups’ support for the Equality Act was

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Law360 | June 13, 2019

addressed to the legislation's amendments to Title VII, and stated that "[a]mending the Act to include protections based on sexual orientation and gender identity is a sensible approach to ensure consistency with other protected classes."

As the House Judiciary Committee Report on the Equality Act explains, the Equality Act is partially in response to the U.S. Supreme Court identifying "limits to state public accommodation laws that seek to protect sexual minorities from discrimination when those laws were applied in a manner that was in tension with the First Amendment rights of religious or moral objectors."¹

In an effort to address this "tension with the First Amendment," the Equality Act contains a provision prohibiting the use of the Religious Freedom Restoration Act of 1993² — which passed both houses of Congress nearly unanimously and which states, in part, that "Government shall not substantially burden a person's exercise of religion" absent a showing that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest" — as a basis for a defense or claim in response to the enforcement of any of the civil rights statutes amended by the Equality Act. Critics of the Equality Act, including the president, have argued that it would prevent people with sincerely held religious beliefs or moral objections from expressing their views about sexuality and gender identity in their businesses or other "places of public accommodation."

To these critics, the law would infringe their rights of the "free exercise" of religion and of expression guaranteed by the First Amendment. In response, some Republican lawmakers have promised to introduce another bill that would offer additional LGBTQ protections, but would build in religious exemptions absent from the Equality Act.

Other critics have focused on some of the potential unintended consequences of the Equality Act. For example, some education and athletic groups have warned that the Equality Act's amendment of the definition of "sex" in the Civil Rights Act would apply to all amendments to that law, including Title IX.

Title IX often requires educational institutions — e.g., schools, colleges, the NCAA and the Olympic Committee — that receive federal funding to provide equal programs and opportunities for members of the different sexes. Therefore, these groups caution, a sports team could not treat a transgender woman different from a woman who is not transgender on the grounds that the former has a male body, and who would ostensibly have a competitive advantage.

The bill was referred to the Senate Judiciary Committee on May 20, 2019, where it still sits.

While the House passing the Equality Act is a big victory for advocates of the law, including LGBTQ groups, the legislation faces much tougher odds in the Senate. However, even if the Equality Act does not pass the Senate, the U.S. Supreme Court has already agreed to take up three cases that will likely decide, in part, whether anti-LGBTQ discrimination in the workplace is already prohibited by existing civil rights laws. In the consolidated cases of *Altitude Express Inc. v. Zarda* and *Bostock v. Clayton County, Georgia*, a skydiving instructor and a child welfare services coordinator claimed they were fired based on their sexual orientation.

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Law360 | June 13, 2019

In those cases, the Supreme Court will consider whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination “because of ... sex” encompasses discrimination based on an individual’s sexual orientation. Also, in *R.G. & G.R. Harris Funeral Homes v. U.S. Equal Employment Opportunity Commission*, the Supreme Court will consider whether Title VII bars discrimination against transgender people based on either their status as transgender or sex stereotyping under the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, which indicates that a company cannot discriminate based on stereotypes of how a man or woman should appear or behave.

The next year is poised to produce some watershed moments for the rights of LGBTQ people in the workplace, places of public accommodation and elsewhere.

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Notes

¹ H. Rept. 116-56, at 10; see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (holding that state civil rights commission violated the First Amendment’s Free Exercise Clause when it found that a baker who refused to make a wedding cake for a same-sex couple violated state anti-discrimination law because the Commission displayed a clear and impermissible hostility toward the sincere religious beliefs motivating the baker’s objection); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that the constitutional right to freedom of association permitted the Boys Scouts of America to exclude LGBTQ persons from membership notwithstanding state law prohibiting discrimination on the basis of sexual orientation in public accommodations).

² 42 U.S.C. § 2000bb et seq.

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