The Equality Act: Summary of Key Provisions and Potential Implications for Employers

DATE: February 26, 2019

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Background

In the past several Congresses, legislators have repeatedly introduced the Equality Act ("Act"), a bill that aims to extend existing civil rights law to explicitly prohibit discrimination against LGBT Americans. The bill is currently pending introduction in the 116th Congress, and is expected to attract broad support.

Federal courts are largely split on whether existing civil rights laws, many of which prohibit discrimination on the basis of sex, protect individuals from discrimination based on sexual orientation and gender identity. *Compare e.g., Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017); *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. Dec. 31, 2016). The Act seeks to resolve the matter by amending a broad swath of federal civil rights laws to clarify that "sex" includes "sexual orientation and gender identity." The Act would also expand the protections in several other civil rights laws (which do not currently include "sex" as a protected category) by inserting in such laws an express reference to "sex" and clarifying that "sex" "includes sexual orientation and gender identity."[1] (*See e.g., Draft Bill*, Section 6, amending Section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d).)

The draft Act begins with several pages of Congressional findings designed to explain and justify the revisions that follow. The draft Act also, under these Congressional findings, details the effects of discrimination on LGBT individuals, including discrimination in housing, credit-worthiness, and public accommodation, and states that any discrimination involving programs or organizations that receive federal funding is "particularly troubling and inappropriate."

[1] The draft Act also adds a definition of "sex" applicable to a broad swatch of civil rights laws that would effectively prohibit discrimination on the basis of pregnancy. *See Draft Bill*, Section 9, amending Title XI of the Civil Rights Act of 1964 to add a new section 1101: "definitions and rules."

Key Provisions of the Act

Following is a summary of key provisions of the Act (note that not all provisions of the Act are described below[2]:

- **Definition of "Sex"** – The Act amends numerous federal civil rights laws that include "sex" as a protected category, by adding to the definition of "sex" the phrase "sexual orientation and gender identity." For certain other federal civil rights laws that do ***not*** include "sex" as a protected category, the Act amends such laws to include an express reference to "sex" as a protected category (and to include "sexual orientation and gender identity" under the definition of "sex").[3]
- **Employment Nondiscrimination** – The Act amends Title VII of the Civil Rights Act of 1964 to ban discrimination based on sexual orientation or gender identity by employers with 15 or more employees. Furthermore, it would require employers to recognize gender identity if sex is a bona fide occupational qualification for a given job and would extend the expanded definition of sex to rules governing federal employment.

Groom Comment: The Act's changes in this respect would appear to resolve the current circuit-court split regarding the ability of employers to discriminate in the employment setting based on an individual's sexual orientation or gender identity. The practical effect is that some employers would likely need to revisit employment terms as well as benefit plans (including plans' rules regarding eligibility, benefits, and exclusions) to ensure compliance with the expanded federal employment nondiscrimination rules.

- **Elimination of Religion-Based Exemptions** – The Act prohibits discrimination against LGBT individuals even where the alleged discriminatory action is based on religious or moral objections. Specifically, the Act provides that the Religious Freedom Restoration Act of 1993 ("RFRA") does not provide any defense with regard to discrimination against LGBT individuals.

Groom Comment: RFRA has been used in recent years by numerous commercial entities to argue against having to provide certain services as well as employment and/or benefits (such as gender reassignment surgery for transgender individuals) to LGBT individuals. The Act's proposed change would seem to make it much more difficult, if not impossible, for RFRA-covered entities to use RFRA as basis for treating LGBT individuals differently than others.

- **Federal Funding** – The Act amends Section 601 of Title VI the Civil Rights Act of 1964 to explicitly bar sex discrimination by entities receiving federal funds, including sexual orientation and gender identity.

[2] The draft Act also includes provisions extending sex, sexual-orientation and gender-identity-based protections to desegregation of public facilities; desegregation of public education; housing; Equal Credit Opportunity; jury selection; and education.

[3] For example, Section Section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (federal financial assistance); section 301(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000b(a) (public facilities); Section 201 of the Civil Rights Act of 1964 (42 U.S.C. 2000a) (public accommodations).

Groom Comment: This revision would affect health insurance issuers through Section 1557 of the Affordable Care Act ("ACA"), which makes this law applicable to health insurance entities receiving federal funding.[4] The change would also effect companies or other entities receiving other forms of federal financial assistance. (Please note that federal financial assistance generally does not include payment amounts under federal contracts.)

- **Public Accommodations** – As well as expanding the definition of "sex," the Act also expands the categories of public accommodations to include a larger group of settings and clarifies that an "establishment" need not be a physical space.

Groom Comment: While we would expect implementing regulations to play an important role in clarifying what specifically would be required of commercial/public entities regarding their provision of public accommodations, it is quite conceivable that the Act would result in these entities having to provide accommodations specific to the LGBT community, including, for-example, providing gender-neutral restrooms or otherwise allowing transgender individuals to choose which restroom – men's or women's – to use.

Key Implications

In general, the Act extends the explicit protection of a broad swath of American civil rights laws to cover sexual orientation, gender identity, and pregnancy. In certain contexts, several courts have already found that existing civil rights law protects these individuals (*see, e.g., Hively, supra*); several states already mandate similar protections (for example California and New York regarding employment); and many employers and benefits service providers have already adjusted policies that were arguably discriminatory. In many ways, the Act would reflect what is already in other forums.

That said, the Act would make several important changes. Perhaps most importantly for employers, as noted above, the Act's employment-related provisions would bring clarity to current disputes and litigation over discrimination regarding gender identity and sexual orientation in the context of employment – including in the provision of health insurance and other benefits. Some employers would likely need to revisit their employment practices as well as their benefit arrangements (including rules regarding eligibility, benefits, and exclusions) to ensure compliance with the expanded nondiscrimination provisions.

Furthermore, the Act would bring about significant changes for religious (and certain other) employers that believe that being forced to accommodate LGBT individuals violates their religious or moral beliefs. These organizations, including religious groups and religiously-affiliated universities and hospitals, have repeatedly pushed for greater legal protections for themselves, and they have found a willing partner in the Trump Administration. The Act, as described above, would appear to make it difficult, if not otherwise impossible for

[4] Currently, Title VI does not cover sex discrimination, so the prohibition against sex discrimination in the ACA is grounded in Title IX. The Act, by amending Title VI, would appear to create an alternate ground for prohibiting sex discrimination under the Affordable Care Act.

these organizations to discriminate against LGBT individuals even based upon a religious or moral objection. This change may not have major implications for most employers, but it would have a large impact on organizations with religious affiliations – for example, religion-affiliated universities or hospitals. For these groups, the Act would result in a significant curtailment of RFRA, and we suspect they would use all efforts to oppose the legislation.