5 FAQs on the Equality Act and Employment Nondiscrimination

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ast week, the U.S. House of Representatives passed the Equality Act, a bill that would amend federal law (including Title VII of the Civil Rights Act of 1964) to prohibit discrimination on the basis of sexual orientation and gender identity.

These frequently asked questions on the legislation consider the chances that the Equality Act will pass Congress, its potential impact on current law, and employer best practices in light of broader discrimination protections.

Q: What are the key points employers should know about the current version of the Equality Act?

A: The bill passed by the House and ready for the Senate’s consideration would amend federal law to prohibit discrimination on the basis of sexual orientation and gender identity in employment, as well as in housing, public accommodations, public education, federal funding and programs, and the jury system (including addressing the issue of peremptory challenges to LGBTQ jurors). Notably, the U.S. Chamber of Commerce and other trade associations and business groups have expressed support for the Equality Act per their letter of March 13, 2019. These groups, however, were careful to note that their backing of the Equality Act was specific to the proposed amendments to Title VII to provide employment nondiscrimination protections based on sexual orientation and gender identity. These groups lauded the proposed Title VII changes as a “sensible approach” to complement businesses’ ongoing promotion of inclusion and equal opportunity, but also as a practical measure to enable them to recruit and retain the most talented employees.

Q: What are the chances of the Equality Act’s passing both chambers?

A: The bill passed the House, 236–173, with the support of nearly every Democratic representative. Moreover, several Republicans in the House also cast their votes in its favor. In all likelihood, however, the bill will die in the Senate, as it is not a high priority for Majority Leader Mitch McConnell (R-KY), who is laser-focused on confirming judges (President Trump’s 40th circuit court nominee was confirmed recently) and other nominees. Senator McConnell’s secondary focus is likely to be on “must-pass” legislation, such as government funding measures and the renewal of vital programs and the like, with his third and final focus being on Republican priorities. After these priorities, little legislative room will remain for the Equality Act.

Q: How has the business community’s support for such a law changed since earlier versions of this bill were introduced?
Compared to the level of business support for the Employment Non-Discrimination Act (ENDA), which was introduced in nearly every session of Congress for the past 20-plus years, along with previous iterations of the Equality Act, more of the broader business community endorses the current version of the Equality Act. Over the years, ENDA gained backing from many individual companies, but the national business associations stayed neutral. Now, many of these national associations are affirmatively supporting the Equality Act (or at least its Title VII provisions). This is occurring because (1) more and more members of these national groups are recognizing and advocating for these protections, so the associations are reflecting these changes, and (2) as new people have transitioned into leadership roles in these national associations, they are personally supportive of the proposed changes.

Q: Would the Equality Act still have an impact if the Supreme Court of the United States rules in favor of the U.S. Equal Employment Opportunity Commission (EEOC) in R.G. and G.R. Harris Funeral Homes v. EEOC?

A: The issues in Harris, which the Supreme Court agreed to hear in April 2019, don’t go nearly as far as the employment provisions and other federal protections contained in the Equality Act. Harris primarily focuses on whether Title VII’s prohibition on discrimination because of sex includes gender identity and protects transgender/transiting employees and applicants. The Equality Act encompasses sexual orientation in addition to gender identity and far surpasses employment-specific issues, including discrimination based on both sexual orientation and gender identity in public housing, juries, and public accommodation. It is possible that the Supreme Court’s review could implicate sexual orientation, but the Equality Act of 2019 as introduced is far broader than the issues that the Supreme Court is likely to address.

Q: What workplace compliance and best practice tips do you recommend to employers when it comes to LGBT rights in the workplace?

A: Employers will likely want to thoroughly understand the laws of their cities, counties, and states of operation and, of course, comply. These laws and ordinances may cover sexual orientation and/or gender identity and/or gender expression—all three unique and standalone but potentially overlapping attributes. Due to the patchwork quilt of laws and differences among them, employers may consider developing a knowledge base and adopting a compliance mindset. It may be appropriate to review and update training modules to maximize inclusivity messaging and realistic scenarios consistent with the laws in your jurisdiction(s) of operation and elect to comply at the highest level. The reality is that many employers have elected to be maximally inclusive and amend their policies in the absence of clear and consistent federal law and, by supporting the Equality Act of 2019, are asking Congress to reflect this operational reality in federal law.

The author of this article was previously quoted on this topic in SHRM Online.