

Insights, News & Events

HOUSE PASSES FEDERAL LGBTQ ANTI-BIAS LAW; WHAT'S NEXT FOR THE EQUALITY ACT?

Insights
Mar 2, 2021

The U.S. House of Representatives just passed a landmark bill that aims to amend several federal laws to prohibit discrimination on the bases of sexual orientation and gender identity. The Equality Act, passed on February 25 by a vote of 224-206, previously passed the House in 2018 only to stall in the Senate. If passed by the Senate this time around, the law would go further than simply codifying the recent Supreme Court decision holding that “sex” includes a person’s sexual orientation and gender identity for purposes of Title VII. It would also add protections against discrimination and segregation on the bases of sex, sexual orientation, and gender identity for purposes of accommodations and education. What do businesses need to know about this development?

Isn't This Already the Law?

The crux of this congressional proposal might seem familiar to some. That’s because [the Supreme Court recently found that Title VII’s prohibition of sex discrimination in the workplace also prohibits discrimination on the bases of sexual orientation and gender identity](#) in June 2020. The Equality Act would codify this holding by explicitly adding “sexual orientation” and “gender identity” to the definition of “sex” in Title VII itself. It would also amend Title VII to

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clarify that, when sex is a bona fide occupational qualification, individuals are recognized as qualified in accordance with their gender identity.

The Equality Act's Reach Beyond Employment

Unlike the Court's ruling, however, this bill would impact more than just employment. In addition to Title VII, the Equality Act would also expand "sex" to include sexual orientation and gender identity in the Civil Rights Act's prohibitions against sex discrimination under Title II (public accommodations); Title III (public facilities); Title IV (public education); Title VI (federal assistance); and Title IX (DOJ Intervention). It would further amend the Civil Service Reform Act, the Fair Housing Act, the equal Credit Opportunity Act, and federal law related to jury selection. It would similarly allow the Department of Justice to intervene in equal protection actions related to sexual orientation or gender identity.

Moreover, the Equality Act would add sex (including sexual orientation and gender identity) as a protected category in various prohibitions against discrimination and segregation under Title II (public accommodations); Title III (public facilities); and Title VI (federal assistance).

The current version of the bill would also prevent use of the Religious Freedom Restoration Act (RFRA) (which you may remember from [the Supreme Court's 2014 Hobby Lobby case](#)) as a defense against enforcement of the Civil Rights Act. This would likely not impact the ministerial exception to the law, however, which is limited to religious employers. The Court upheld [a broad standard for the ministerial exception](#) just last summer.

What Happens Next?

The Equality Act will move to the Senate next. While the Senate Majority leader is a co-sponsor of the bill, it will require 60 votes in support to be filibuster-proof. It is unclear if it will pass that hurdle or whether the Democratic majority would be willing to dismantle the

filibuster over this piece of legislation. President Biden has already issued a statement in support of the bill, so he would certainly sign the Equality Act into law if it passes the Senate.

What Employers Should Be Doing To Prepare

Following last year's decision related to Title VII, you should have already updated policies and trainings related to the prohibitions against discrimination on the basis of harassment and discrimination. If non-religious employers have resisted these changes intending to rely upon the RFRA, you should be prepared to change course should the Equality Act pass the Senate. If you have any positions for which "sex" is a bona fide occupational qualification, you should further be prepared to make certain that those positions are open to transgender individuals who identify with the applicable sex.

You should also evaluate any policies you have related to accommodations and evaluate if you have any spaces that are currently segregated on the basis of sex. If so, you want to begin initial steps to determine what you may need to do address any issues that could arise should the bill get signed into law.

The Senate may amend the Equality Act to secure passage, and as always, state and local laws may come into play as well. Fisher Phillips will continue to monitor the legislation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information.

If you have questions about how to best prepare for compliance with the Equality Act should it pass, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

