

Federal Legislation to Bar Discrimination Based on Sexual Orientation or Gender Identity Passes in the U.S. House, Is Under Consideration in the Senate

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On February 25, 2021, the U.S. House of Representatives passed a measure that, if enacted, will impose far-reaching federal statutory prohibitions against discrimination in employment, health care, housing, public accommodations, public education, credit, and federal jury service on the basis of sex, gender identity, and sexual orientation.

The Equality Act (H.R. 5/S. 393) would amend numerous sections of the Civil Rights Act of 1964 and other federal statutes to make discrimination based on sex — defined in the measure to include actual or perceived LGBTQ status — expressly unlawful across a variety of contexts. It also would expand existing law to provide a cause of action for associational discrimination, as well as discrimination based on an individual’s actual or perceived race, color, religion, or national origin. It has implications not only for public services but also for educational institutions and other organizations that are the recipients of federal funds.

The Equality Act is not to be confused with the Employment Non-Discrimination Act (ENDA), which was first introduced in the early 1990s (and reintroduced as recently as in 2013) to prohibit workplace discrimination on the basis of sexual orientation and gender identity. The ENDA was much narrower than the Equality Act and would not have amended the Civil Rights Act or extended its protections beyond the employment context. In contrast, the Equality Act would extend LGBTQ nondiscrimination rights well beyond employment, while at the same time expanding existing legal rights already provided under the Civil Rights Act.

Didn’t the Supreme Court Just Resolve This Issue Last Term?

Yes, but only in part. In June of last year, the U.S. Supreme Court ruled in *Bostock v. Clayton County* that workplace discrimination because of sexual orientation or gender identity is a form of sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. In doing so, the Supreme Court resolved long-standing disagreements among the lower federal courts regarding whether Title VII, which does not expressly include LGBTQ status as a protected characteristic, may be interpreted as barring workplace bias on that basis.

Nevertheless, *Bostock* still only applies to discrimination in the employment context — and even then, only to covered employers with at least 15 employees and their employees (excluding independent contractors). As noted above, the Equality Act would go further, by extending nondiscrimination protections to contexts well beyond just employment.

Major Provisions

Described more fully below are the Equality Act’s major provisions.

Definitions and General Rules of Construction

The Equality Act would add or expand several key definitions of terms contained in the Civil Rights Act. It would amend the statutory definition of “sex” to include:

- A sex stereotype;
- Pregnancy, childbirth, or a related medical condition (which was added to the statute in 1978 with the passage of the Pregnancy Discrimination Act);
- Sexual orientation or gender identity; and
- “Sex characteristics, including intersex traits.”

“Sexual orientation” is defined simply as “homosexuality, heterosexuality, or bisexuality.” “Gender identity” under the bill is “the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.” The Equality Act would make it unlawful to discriminate based on an actual

protected characteristic *as well as* “a perception or belief, even if inaccurate, concerning the race, color, religion, sex (including sexual orientation and gender identity), or national origin, respectively, of the individual.”

The Equality Act also would limit the application of the federal Religious Freedom Restoration Act (RFRA) to claims brought under it. The RFRA was enacted in 1993 as a means of curtailing the federal government’s ability to “substantially burden” a person’s exercise of religion. The RFRA applies to all federal laws enacted after November 16, 1993, “unless such law explicitly excludes such application by reference to this chapter.” The House-approved bill specifies that the RFRA “shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.”

Nondiscrimination in Public Accommodations

Title II of the 1964 Civil Rights Act currently provides, “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of *race, color, religion, or national origin*.” Sex discrimination is not included.

The Equality Act would amend this provision to add sex (including sexual orientation and gender identity) as a legally protected characteristic — making LGBTQ discrimination in public accommodations — such as at a restaurant — a violation of federal law. The bill specifies further that, “with respect to gender identity, an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual’s gender identity.”

The bill would expand the list of places of public accommodation considerably to include any:

- Stadium or other place of or establishment that provides exhibition, entertainment, recreation, exercise, amusement, public gathering, or public display;
- Establishment that provides a good, services, or program, including a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency or funeral parlor, or establishment that provides health care, accounting, or legal services; and
- Train service, bus service, car service, taxi service, airline service, station, depot, or other place of or establishment that provides transportation service.

It also would construe the term “establishment” broadly to include any individual “whose operations affect commerce and who is a provider of a good, service, or program” (e.g., a cake shop) and not be limited to a “physical facility or place” (i.e., may include online vendors or service providers).

Discrimination by Federal Funds Recipients, Including Educational Institutions

As currently written, Title VI of the Civil Rights Act provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The Equality Act would amend this section as well to include specific nondiscrimination protections based on sex, sexual orientation, or gender identity. It would also amend Titles III and IV of the Civil Rights Act, which outlaw segregation in public facilities and public education, by adding sex, including sexual orientation and gender identity, as a legally protected characteristic.

A proponent of the bill in the House is quoted in the congressional record as saying that “it is not Congress’s intention to alter in any way Title IX or the scope or availability of its exemptions as they currently stand.” Nevertheless, some have raised concerns that the bill may adversely affect women’s sports and undermine Title IX protections.

Employment Discrimination Protections under Title VII

Although Title VII already bars discrimination on the basis of sex, which the Supreme Court in *Bostock* held includes LGBTQ status, the Equality Act would amend Title VII to make that protection explicit. It would make a number of other significant changes as well.

For example, the Equality Act would alter the bona fide occupational qualification (BFOQ) defense to limit the exclusion of individuals based on their gender identity. Section 2000e-2(e) (1) of Title VII provides:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees...on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...

The Equality Act would amend that language to read:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees...on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, *if, in a situation in which sex is a bona fide occupational qualification, individuals are recognized as qualified in accordance with their gender identity.*

Outlook

Versions of the Equality Act have been introduced in both chambers of Congress since as early as 2015, including in 2019 when it passed in the House but was not taken up in the Senate. As noted above, the current version of the bill has passed in the House and is awaiting action in the Senate. Given the razor-thin Democratic majority in the Senate, its passage there is very possible, though not guaranteed. Although the measure has the backing of Democrats and several business organizations, congressional Republicans and a number of religious and other groups are opposed.

Whether this particular measure passes or fails, it is important to keep in mind that at least 23 states and the District of Columbia long have had laws on the books barring discrimination because of sexual orientation and/or gender identity, and many organizations prohibit anti-LGBTQ bias in their programs as a matter of policy. Federal government contractors and subcontractors subject to Executive Order 11246 also are barred from discriminating in employment based on LGBT status.

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