

Senate Considers Non-Discrimination Act (ENDA)

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On October 28, 2013, Senate Majority Leader Harry Reid (D-Nev.) announced that the United States Senate may in the very near future vote on the Employment Non-Discrimination Act (ENDA), which would prohibit workplace discrimination on the basis of sexual orientation and gender identity. As this is written on the afternoon of November 4, ENDA stands only one vote short of the 60 needed to eliminate the possibility of a filibuster. If Senator Reid can obtain the 60 votes necessary for cloture, ENDA will receive its first "up or down" Senate vote and given the chamber's Democratic majority, seems likely to pass. While ENDA appears to face an uphill battle in the Republican-dominated House of Representatives, where Speaker John Boehner (R-Oh.) has already expressed his opposition to the measure, the impending vote nonetheless presents an opportunity to remind employers that state and local laws in Maryland and the District of Columbia, but not Virginia, already prohibit discrimination on the bases of sexual orientation and gender identity.

Title VII of the Civil Rights Act of 1964, the main federal employment discrimination legislation, prohibits discrimination based on the protected bases of race, color, religion, sex, national origin, age or disability. While the Equal Employment Opportunity Commission (EEOC) and some courts have interpreted Title VII's prohibition of sex discrimination to apply to discrimination based on sexual orientation and gender identity, this broad interpretation has not been universally accepted.

Even though Title VII does not explicitly prohibit discrimination on the basis of sexual orientation or gender identity, employers in Maryland and the District of Columbia can still run afoul of state and local law for actions taken against employees on the basis of sexual orientation or gender identity. Under Maryland state law, it is an unlawful employment practice to discriminate against an employee based on the employee's sexual orientation. Although discrimination on the basis of gender identity is not prohibited on a statewide basis, both Montgomery County and Howard County, which rank first and fifth in the state by population, prohibit discrimination on the basis of gender identity under local law. Under the District of Columbia Human Rights Act, discrimination based on both sexual orientation and gender identity or expression is explicitly prohibited. The Virginia Human Rights Act, on the other hand, does not prohibit discrimination on the bases of sexual orientation or gender identity.

While much of the attention in employment law is focused on Title VII and other federal laws, the examples of sexual orientation and gender identity illustrate how an employer's obligations are sometimes broader under state law. Regardless of ENDA's prospects for passage in the U.S. Senate or House, employers doing business in Maryland and the District of Columbia should ensure that hiring, firing, and other employment decisions do not unlawfully take into account the employee's sexual orientation or gender identity in order to avoid potential liability under state or local law.