

Federal Protections for Sexual Orientation and Gender Identity on the Horizon

*Mark A. Fahleson, Esq.
Rembolt Ludtke LLP*

Most Nebraska employers understand that they cannot discriminate against applicants or employees based upon their race, color, sex, religion, national origin, age or disability under federal law, and that our state law adds marital status to this list of protected classes. However, under federal law and Nebraska law, sexual orientation and gender identity are not protected classes. Employers need to understand that this could soon change on the federal level.

For the last 32 years legislation has been introduced in Congress seeking to prohibit sexual orientation discrimination in employment. Traditionally known as the Employment Nondiscrimination Act, or "ENDA," this legislation now appears to be gaining traction, in part due to the fact that 19 states and the District of Columbia have adopted legislation prohibiting job discrimination based on sexual orientation. A hearing was held before a subcommittee of the Education and Labor Committee of the U.S. House of Representatives on September 5, and the legislation (H.R. 2015) is expected to be considered by the entire House before the end of the year.

Unlike prior versions of this legislation, the latest version of ENDA seeks to add a new protected class for actual or perceived "gender identity." The term "gender identity" is defined by the legislation as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." Many commentators agree that this definition is exceptionally vague and problematic. For example, based upon the proposed definition, it appears that an employee can self-identify what their gender is, and that this subjective declaration can change an unlimited number of times without notice to the employer. This provision also requires an employer to accommodate an employee undergoing or having undergone gender transition with respect to restroom and showering facilities. However, there is no requirement for the employee to provide advance notice to the employer of the gender transition so that adequate time exists for the employer to provide the required accommodation.

Employment/Labor Law Practice Group

David J. A. Barga
dbarga@remboltludtke.com

Britt J. Ehlers
behlers@remboltludtke.com

Mark A. Fahleson
mfahleson@remboltludtke.com

Sarah S. Pillen
spillen@remboltludtke.com

Rembolt Ludtke LLP Attorneys at Law

1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
Fax: 402 / 475-5087
402 / 475-5100

125 South 6th Street
Seward, NE 68434
Fax: 402 / 643-3969
402 / 643-4770

www.remboltludtke.com

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Currently, some 12 states and a number of municipalities bar workplace discrimination on the basis of “gender identity.” As one might suspect, adding federal protections for “gender identity” is very controversial, leading House Democrat leaders to considering removing all provisions relating to “gender identity” before the bill is considered by the full House.

Other provisions in this latest version of ENDA are also problematic. For example, Section 4(e) of H.R. 2015 prohibits adverse employment actions being taken against “an individual based on the actual or *perceived* sexual orientation or gender identity of a person with whom the individual *associates or has associated*.” Thus, in addition to protecting individuals based on their actual or perceived sexual orientation or gender identity, the legislation protects individuals who presently associate or *at some point in time* associated with that individual.



OBSERVATIONS: I was honored to be invited by the House Health, Employment, Labor and Pensions Subcommittee to testify on this legislation on September 5th. My testimony was as an employment law practitioner who spends the bulk of his day answering questions from clients about how to navigate the myriad employment laws and regulations that employers must deal with on a daily basis. In my testimony, I stated that ENDA, in its current form, would add yet another layer of confusion for small and medium-sized employers. Given that a number of states and municipalities have already adopted sexual orientation and gender identity protections, and the majority of Fortune 500 companies have voluntarily adopted similar protections, I questioned whether a broad, new federal remedy (to be enforced through more costly litigation) was necessary at this time.

“Sexual orientation” and “gender identity” will not be the last proposed additions to the protected classes. It is anticipated that prohibitions against “appearance” and “obesity” (both already somewhat protected under the ADA) discrimination are also on the horizon. Employers are encouraged to stay informed on legislative efforts to add additional protected classes on the federal, state and local level, and to weigh in with their elected representatives when they feel it is appropriate.

Fahleson is a partner with the Lincoln-based law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or mfahleson@remboltludtke.com. This article is provided for general informational purposes only and should not be construed as legal advice. Those requiring legal advice are encouraged to consult with their attorney.

