

## Proposed Federal Legislation Would Prohibit Employment Discrimination Based on Sexual Orientation and Gender Identity

**For more information regarding this or any other employment-related issue, please contact your Vorys attorney or a member of the Vorys Labor and Employment Group by calling 614.464.6400.**

Current federal law prohibits employment discrimination based on race, sex, religion, national origin, age, and disability.

However, the proposed Employment Non-Discrimination Act of 2009 (“ENDA”), introduced by Ted Kennedy (D-Mass.) in the Senate on August 5, 2009, would add sexual orientation and gender identity to the list of protected classes.

As defined by the ENDA, “sexual orientation” means homosexuality, heterosexuality, or bisexuality. “Gender identity” means the gender-related identity, appearance, or mannerisms of an individual, without regard to the individual’s designated sex at birth.

If passed in its current form and signed by President Obama, the ENDA would make it unlawful for an employer to terminate, refuse to hire, or otherwise discriminate against any employee because of the employee’s actual or perceived sexual orientation or gender identity. In addition, the ENDA’s restrictions extend, like existing law on other forms of discrimination, to employment agencies and labor unions.

However, the proposed ENDA would not cover all potential employment relationships. Like other discrimination laws, it would not protect a volunteer who receives no compensation. Moreover, the ENDA would not apply to an organization that is exempt from the religious discrimination provisions of Title VII.

The ENDA would preserve certain employer rights. For example, an employer could enforce a policy, including a sexual harassment policy, and take adverse action against an employee, if the policy is uniformly applied to

all individuals regardless of actual or perceived sexual orientation or gender identity. Also, nothing in the ENDA would prohibit an employer from restricting access to shared shower or dressing facilities on the basis of gender identity or requiring employees to adhere to reasonable dress or grooming standards.

However, an employer would be required to provide reasonable access to adequate facilities consistent with an employee’s gender identity to an employee who has undergone or “is undergoing” gender transition. An employer must also allow any such employee to adhere to the dress or grooming standards that apply to the gender to which the employee has transitioned or is transitioning. Unfortunately, as proposed, the ENDA does not further define “is undergoing” gender transition, thus leaving open the question of precisely when an employer’s obligation under this provision might arise.

At least 20 states already prohibit employers from discriminating on the basis of sexual orientation or gender identity, and if signed into law, the ENDA would extend this protection to all states. A similar bill is pending in the House, and President Obama has previously expressed support for expanding anti-discrimination employment laws to include sexual orientation and gender identity.

Given the support for the ENDA and the prevalence of state laws prohibiting sexual orientation or gender identity discrimination, pro-active employers should consider policies aimed to reduce bias claims based on sexual orientation and gender identity, update and modify policies to ensure full compliance, and train employees regarding such policies.

---

This client alert is for general information purposes and should not be regarded as legal advice.