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Any ENDA In Sight?

Law360, New York (February 10, 2010) -- Nearly 50 years after the passage of the Civil Rights Act of 1964, and 35 years after legislation that would have prohibited discrimination based on sexual orientation as a matter of federal law was first introduced in Congress by then-New York Democratic Representatives Bella Abzug and Ed Koch, employers can discriminate against — and employees can harass — lesbian, gay, bisexual and transgender colleagues with impunity both as a matter of federal law and in a majority of states.

Repeated attempts since 1974 to get such legislation through Congress have all failed. The closest proponents have come to passing such a law was in the waning days of the Bush administration, in November 2007, when a version of the legislation that controversially did not purport to protect the transgendered from discrimination passed the House of Representatives on a 235-184 vote — or perhaps during the Clinton administration, in 1996, when similar legislation got out of committee only to lose by one vote on the floor of the Senate.

On June 24, 2009, Rep. Barney Frank, D-Mass., reintroduced legislation — the “2009 Employment Non-Discrimination Act” (“2009 ENDA”) — in the 111th Congress. As written, the bill would amend Title VII of the Civil Rights Act to prohibit discrimination on the basis of both sexual orientation and gender identity as a matter of federal law.

2009 ENDA had 114 original cosponsors, including at least five Republican “Main Street Partnership” members. On Aug. 5, 2009, Sen. Jeff Merkley, D-Ore., introduced companion Senate “2009 ENDA” legislation — S. 1584 — with 38 original co-sponsors including both Republican Senators from Maine. As of Dec. 14, 2009, S. 1584 had 44 co-sponsors.

With solid Democratic majorities in both the House and Senate following the 2008 election, and President Obama’s campaign pledge to sign the legislation, hope was high in LGBT communities that ENDA would pass Congress before the end of 2009.

Though committee hearings were held on both bills — in the House of Representatives on Sept. 23, 2009, and in the Senate, on Nov. 5, 2009 — by early December, it had become obvious to proponents of the legislation that Congress was simply too busy attending to the health care bill to work on 2009 ENDA. 2009 ENDA would become 2010 ENDA — at best.

Currently leading the congressional charge in favor of ENDA are Sen. Tom Harkin, D-Iowa, chairman of the Senate Health Education Labor and Pensions Committee, and Rep. George Miller, D-Calif., chairman of the House Education and Labor Committee.

In December 2009, Sen. Harkin went on record indicating that his committee would be voting on ENDA “sometime” in 2010. Conservatives in the Senate, however, are reportedly threatening to filibuster the legislation, and pushing for further weakening of protections afforded sexual orientation and gender identity minorities in

comparison to those afforded other protected classes based on race, sex, religion and national origin under federal law.

For example, even as currently drafted, the proposed legislation — unlike other current federal proscriptions — does not prohibit “facially neutral” business practices with otherwise unjustified disparate impacts on sexual orientation or gender identity minority groups. Moreover, unlike the situation with race and sex, the EEOC is prohibited from collecting any statistics on sexual orientation or gender identity.

For his part, after a postponement in December 2009, Rep. Miller committed to “marking up” the House version of ENDA in January 2010. Rep. Miller has been quoted as indicating that the language in the bill that is still being “ironed out” in the House of Representatives relates to attorneys fees and whether plaintiffs claiming job bias based on gender identity can also make parallel claims of “sex” discrimination under Title VII.

If passed, ENDA would constitute the first major expansion of federal civil rights law since the passage of the ADA in 1990. For this reason alone, it bears close monitoring.

With Sens. Christopher Dodd, D-Conn., and Byron Dorgan, D-N.D., recently announcing that they will not seek re-election, and the airwaves crackling with rumors of impending Democratic doom in the November midterm elections, whether Democrats will have enough momentum to push ENDA through the Capitol once and for all in 2010 is increasingly unclear. As always, only time will tell.

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