

VSHRM October 2009 Legislative Update

Sexual Orientation Bias Bill Faces Challenges

Legislation that would prohibit workplace discrimination based on sexual orientation and gender identity stands a good chance of passing Congress in 2009, sources familiar with the issue say. However, the bill, known as the Employment Non-Discrimination Act (ENDA), faces several hurdles and strong opposition—particularly to a provision to outlaw employment discrimination for a person’s gender identity or transgender status.

Rep. Barney Frank, D-Mass., introduced the latest version of the legislation ([H.R. 3017](#)) in June 2009, and Sen. Jeff Merkley, D-Ore., followed several weeks later in introducing the bill ([S. 1584](#)) in the Senate. The legislation has strong support with 159 co-sponsors in the House and 39 senators signing up to sponsor the bill.

Debate on ENDA was set to resume on Sept. 23, 2009, when the House Education and Labor Committee was scheduled to hold a hearing on the measure. Supporters of the bill have expressed optimism about the bill’s chances of passing Congress and being signed into law. President Barack Obama has indicated that he supports ENDA and has urged Congress to pass it.

While the Democrats’ control of both houses of Congress does improve ENDA’s chances of passing, the controversial gender identity and transgender provisions of the bill could prove to be a major stumbling block, sources say. The House of Representatives approved a version of the legislation in November 2007. It did not include the provision offering transgender and gender identity protections for workers.

Frank and other sponsors of the bill had agreed to remove the controversial provisions after support for the original proposal began to fade. The House action marked the first time that ENDA passed in either house of Congress. The measure, however, stalled in the Senate. Political observers suggest that the latest version of ENDA could face a similar fate.

Frank was roundly criticized by gay rights advocacy groups in 2007 for agreeing to strike the transgender and gender identity provision. Several gay rights groups withdrew their support for the compromise legislation, and these same groups have vowed to do the same if the provisions are removed from the latest version of ENDA.

Frank has said that he will continue to push for ENDA to pass and that he believes that the bill can clear both houses with all the provisions intact.

“I am encouraged that we are going to be able pass ENDA this year and do what we weren’t able to do a couple years ago and that is pass a fully inclusive bill,” Frank told reporters. “I urge people to keep lobbying. You can now take for granted that there will be a vote on the floor of the House of Representatives almost certainly this calendar year on a fully inclusive ENDA.”

Conservative Democrats, known as Blue Dogs, might be the key to the bill's passage. The bill appears to have enough votes to pass the House, observers say, but Republican leaders said they will oppose the bill and push their Blue Dog counterparts to join them.

According to political observers, some of the conservative and moderate Democrats could feel stretched by the health care reform efforts and might not be willing to support another issue being pushed by the more liberal and progressive members of Congress.

Some of the most moderate and conservative Democrats might not be willing to support the current version of ENDA, observers say.

Several employer groups, including the Society for Human Resource Management, voiced support of the 2007 version of ENDA before it passed the House. However, concerns over enforcement and definition issues included in the gender identity and transgender provisions have led many groups to remain neutral on the latest version of the bill.

The foregoing is adapted in large part from Bill Leonard, who is senior writer for SHRM.

SHRM Newsletter of 9/29/09

Proposed Amendments to FMLA Abound

The Family and Medical Leave Act (FMLA) has been a target for expansion for years, and 2009 has been no exception, with numerous proposals to make FMLA leave available to more workers and for more conditions. Since the FMLA actually was amended in 2008 to further expand its scope in a defense authorization package signed into law by President George W. Bush, some Capitol Hill observers are betting that it won't take another 15 years for the FMLA to be amended again.

Balancing Act of 2009

Introduced by Rep. Lynn Woolsey, D-Calif., on June 25, 2009, the 262-page Balancing Act consolidates proposed changes to the FMLA from various other bills into one proposal, **H.R. 3047**, which has been referred to committee.

Incorporating provisions from the proposed Domestic Violence Leave Act (**H.R. 2515**), Family and Medical Leave Enhancement Act (**H.R. 824**), Family and Medical Leave Insurance Act (**H.R. 1723**) and Healthy Families Act (**H.R. 2460**), the bill's proposed changes to the FMLA would extend coverage to numerous employees not currently protected by the law. It would expand coverage of the FMLA to employers with 15 or more employees.

Provide 12 weeks of *paid* leave for all workers to care for a family member, bond with a new child, recover from a serious illness or deal with an exigency arising from the deployment of a family member of the military.

Create a Family and Medical Leave Insurance Fund—funded by employers and employees, each paying premiums equivalent to 0.2 percent of each worker's earnings. Employers with

fewer than 20 employees would pay a 0.1 percent premium.

Require up to seven days of paid sick leave per year on an accrual basis. Employees would earn one hour of paid sick leave for every 30 hours worked to a maximum of 56 hours.

Allow employees to take "parental involvement" leave to participate in their children's and grandchildren's educational and extracurricular activities and "family wellness" leave to allow employees to take family members to regular medical appointments and to assist elderly relatives.

Extend FMLA protections to workers to address issues related to domestic violence and sexual assault of themselves and family members.

Permit care for a domestic partner, child of a domestic partner, same-sex spouse, parent-in-law, adult child, sibling or grandparent if that person has a serious health condition.

Create a program to raise awareness about telecommuting.

Casey described the Balancing Act as the "big daddy leave proposal," adding that, "it can be kind of scary" to look at exactly all that it proposes. Casey has clients that have hovered beneath the FMLA's current 50 employee worksite threshold in order to avoid FMLA requirements. Other employers that must comply with the FMLA have, she said, "been hamstrung by intermittent leave for months on end."

Lisa Horn, manager, health care, for the Society for Human Resource Management, said that "HR 3047 is not going anywhere—it has been referred to four to five House committees," and, she noted, it basically encompasses all of the leave bills introduced in the House.

With all that Congress already has on its plate in 2009, Horn said, "other than the Healthy Families Act (HFA), which is included in the Balancing Act, I don't see any other portions of this bill moving in this Congress. And, I don't think you will see HFA or any other leave items attached to health care reform—it is already too complex and controversial. They don't need to make matters worse by tacking on one of these provisions."

Strategize Now

But proposals to amend the FMLA are likely to continue to be put forward, and that some of them eventually might be signed into law. Employers, particularly employers not currently covered by the FMLA, should strategize now about what they would do if the FMLA were expanded. How, for example, would employers manage to adjust their budgets if they suddenly were required to provide paid leave?

And what if the FMLA is expanded to cover smaller employers—who would be the in-house FMLA expert?

Employers are only just beginning to sort through the last round of amendments to the FMLA. Horn noted that "HR professionals are generally concerned about expanding the FMLA because of the challenges many still encounter with the current FMLA framework." She said that "even with the regulatory improvements effective in January 2009, members continue to experience challenges with FMLA implementation, particularly with the implications of sporadic, unscheduled, intermittent leave and with determining what conditions qualify as a serious health condition."

Significant portions of the foregoing are the advice of Allen Smith, J.D., who is SHRM's manager of workplace law content. (source 9/16/2009 SHRM Newsletter)

