

CLIENT ALERT

The House Passes the Equality Act (Yet Again)

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On February 25, 2021, the U.S. House of Representatives, voting largely along party lines, passed the Equality Act, a bill that if enacted into law would significantly expand the rights of LGBTQ individuals. Specifically, the bill would amend Title VII of Civil Rights Act, as well as other statutes, to explicitly prohibit discrimination based on sexual orientation and gender identity. While President Biden has expressed public support for the Equality Act, it faces an uphill battle before the U.S. Senate, at least as it is currently constituted, because it expressly limits the degree to which the Religious Freedom Restoration Act (RFRA) can be used to defend against claims of unlawful discrimination against gay, lesbian, transgender and bisexual individuals.

What Does the Equality Act Cover?

While the Equality Act has been introduced several times before, and passed in the House back in 2019, the legal landscape has since changed with the Supreme Court's 2020 decision in *Bostock v. Clayton County*, which extended Title VII's protections against sex discrimination to lesbian, gay, and transgender Americans. Rather than include the gender identity and sexual orientation under the umbrella of "sex," as the Supreme Court did in *Bostock*, the Equality Act would enshrine nondiscrimination prohibitions relating to sexual orientation and gender identity into law and would significantly expand the protections against discrimination, including harassment, on these bases. Specifically, the Equality Act would cover discrimination in employment, housing, education, credit, federally funded programs as well as expand the definition of "public accommodations," which would apply to hotels, restaurants, retail stores, banks, gas stations, transportation services, and health care, accounting and legal services. In addition, the Equality Act expressly provides that where sex is a bona fide occupational qualification (BFOQ) for a position, employees will qualify for such a position based on their gender identity, rather than on their biological sex.

The Limitation of Religion as a Shield Against Discrimination Claims

The Equality Act explicitly states that the Religious Freedom Restoration Act (RFRA), which became law in 1993, cannot be used to challenge the Act's provisions or be used as a defense to a claim of unlawful discrimination under the Act. While the Equality Act would limit religion as a defense to discrimination claims, businesses would still retain certain faith-based defenses. For example, religious schools and houses of worship could continue to rely on the "ministerial exemption" which provides an affirmative defense to the application of federal discrimination laws, such as Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disability Act, to claims involving the employment relationship between a religious institution and its ministers or others who perform vital religious duties at the core of its mission.

The Likely Road Ahead

The Equality Act faces an uncertain path in the U.S. Senate, as it will be unlikely to pass as currently written. A few Republican Senators, including Mitt Romney and Susan Collins have already indicated they would not support the legislation if offered in its

present form. And the bill is unlikely to garner the 60 votes in the Senate that would be necessary to overcome a filibuster. Accordingly, there remains much to be done before the Equality Act becomes law.

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