

What LGBTQ Rights Bills Would Mean For Employers

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During his presidential campaign and after taking office, President Joe Biden has supported expansion of discrimination protections for employees, including LGBTQ employees, under Title VII of the Civil Rights Act. [\[1\]](#)

Employers should take note of two pieces of legislation in particular — the Equality Act, [\[2\]](#) currently pending in the [U.S. Senate](#), and the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace, or Be Heard, Act, introduced and referred to several House subcommittees in 2019.[\[3\]](#)

If either or both of these statutes become law, employers in many states may need to adjust their policies and train managers to comply with these new laws. Even if these particular bills do not become law, these issues are likely to remain in the forefront of the workplace both legislatively and culturally.

The Equality Act

The Equality Act seeks to formally codify the holding in last year's [U.S. Supreme Court](#) ruling in *Bostock v. Clayton County, Georgia*, [\[4\]](#) and expand even beyond the high court's ruling.

In the June 2020 *Bostock* decision, the Supreme Court specifically expanded Title VII's prohibition on sex discrimination to include protections from discrimination on the basis of sexual orientation and gender identity.

While multiple states had legislation providing some manner of protection for LGBTQ employees even before *Bostock*, 27 states had not yet prohibited employment discrimination on the basis of sexual orientation or gender identity. [\[5\]](#)

The court's ruling thus expanded LGBTQ employee rights nationwide.

The proposed Equality Act would codify Bostock's interpretation of sex discrimination by explicitly adding the phrases "sexual orientation" and "gender identity" to Title VII's list of protected characteristics.

The act defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality" and "gender identity" as "the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth."

Notably, on his first day in office, President Biden signed Executive Order 13988, which directs federal agencies to review and revise agency guidance, policies and regulations to incorporate Bostock's prohibition on sexual orientation and gender identity discrimination. [\[6\]](#)

The Equality Act's proposed revisions to Title VII go further than the Supreme Court's opinion in Bostock and define protection against discrimination on the basis of sex to explicitly include sex stereotypes and sex characteristics, including intersex traits, as well as pregnancy, childbirth or a related medical condition.

Although the Equality Act does not provide specific definitions for "sex stereotypes" or "sex characteristics," the legislation provides one example of a sex stereotype that would be covered under the Equality Act: discrimination against a married same-sex couple on the basis of a sex stereotype that marriage should be between heterosexual couples.

The Equality Act additionally would expand Title VII protections to cover "perceived as" discrimination claims.

If the Equality Act is enacted, individuals may still have a claim under Title VII even if they do not identify as LGBTQ, but they experience employment discrimination where an employer assumes or perceives them as LGBTQ.

Protection from this type of discrimination has been explicitly provided in the Americans with Disabilities Act since the ADA Amendments Act of 2008, which prohibits discrimination against individuals who are regarded or perceived as having a disability, even if the individual does not in fact have such a disability.

However, Title VII has not yet included such language.

Federal district courts have reached different holdings on the question of whether discrimination claims based on perception are cognizable under Title VII, with some district courts in Illinois, Maryland, Michigan and Ohio holding that Title VII permits such claims. [\[7\]](#) Federal courts in California, Georgia, Kansas, New York, North Carolina and Tennessee, on the other hand, have held that no such claim is available under Title VII. [\[8\]](#)

If the Equality Act is passed, employers would need to account for this addition to Title VII when reviewing and revising policies and when training employees.

For example, employers may need to incorporate supplemental language into their handbooks and other policies to explain that discrimination based on actual or perceived sexual orientation or gender identity is prohibited.

Employee trainings could also be updated to explain that even if a supervisor later finds out their assumption about an employee's sexual orientation was incorrect, any discriminatory actions the supervisor may have taken based on that assumption could still expose the company and the supervisor to potential liability.

The Equality Act also adds Title VII protections for associational discrimination — prohibiting discrimination on the basis of being associated with another person of a protected category.

However, unlike the disparate district court decisions with respect to discrimination claims based on perception, many federal courts have already allowed associational discrimination claims under Title VII to proceed, particularly where the plaintiff shared a personal or familial relationship with the individual who is a member of a protected class. [\[9\]](#) The Equality Act would codify the right to bring an associational discrimination claim under Title VII.

Importantly, the Equality Act would also preclude the use of the Religious Freedom Restoration Act as a defense to a discrimination claim under Title VII.

Passed in 1993, the RFRA prohibits enforcement of federal laws that "substantially burden a person's exercise of religion." [\[10\]](#)

Some employers have unsuccessfully raised the RFRA as a defense to justify differential treatment of LGBTQ individuals. [\[11\]](#)

In *Bostock*, Justice Neil Gorsuch explicitly stated that the court's decision would not address the interaction between the RFRA and Title VII, but held open the possibility the issue could be addressed in a future case. [\[12\]](#)

Prohibiting the use of the RFRA as a defense to sexual orientation or gender identity discrimination under Title VII could significantly limit the defenses available to employers if this prohibition were upheld in the courts.

Beyond employment discrimination, the Equality Act would also expand Title VII's protections against discrimination based on sex, sexual orientation and gender identity to public accommodations, such as retail stores, transportation services and health care. Title VII's current public accommodation protections only prohibit discrimination on the grounds of race, color, religion or national origin, not sex. [\[13\]](#)

If the Equality Act is enacted, the new law could have a practical impact on employers whose employees interact with the public.

For example, passage of the Equality Act would mean that establishments such as bakeries and flower shops, which previously have been the subject of publicity concerning sexual orientation discrimination, would be covered by the law and could not refuse to provide goods or services on the basis of sexual orientation or gender identity.

Thus, if this bill becomes law, employers may need to revise policies and trainings to clarify that employees are prohibited from treating customers differently based on the customer's sexual orientation or gender identity.

The Equality Act would also prohibit the denial of access to a shared facility, such as restrooms, locker rooms or dressing rooms, on the basis that access to the facility is restricted by gender. Those provisions would likely require employee training as well.

On February 18, the [U.S. House of Representatives](#) voted to pass the Equality Act by a narrow margin.

The U.S. Senate held several hearings on the bill in March, but so far no dates have been scheduled for committee or floor vote.

Recently, however, Sens. Joe Manchin, D-W.Va, and Krysten Sinema, D-Ariz., expressed their opposition to killing the filibuster. As a result, it may be unlikely that the Equality Act as currently penned will ultimately pass in the Senate.

The Be Heard Act

President Biden has also openly expressed support for the Be Heard Act, [\[14\]](#) which, like the Equality Act, would codify and expand Bostock's ruling that Title VII sex discrimination prohibitions include sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and sex stereotypes.

Also like the Equality Act, the bill does not define "sex stereotype," though its provisions reference "[w]hether the conduct reflects stereotypes about individuals in the protected class involved" as a factor to consider in determining whether a workplace harassment has occurred.

If passed, the Be Heard Act would expand Title VII protections to all employees regardless of employer size and regardless of worker status as independent contractors, volunteers or interns.

Currently, Title VII applies only to businesses with 15 or more employees and has not applied to workers other than employees.

Certain states, such as California, Illinois and New York, have already extended anti-discrimination protections to employees and contractors of small business, but if this bill were to become law, employers operating in other states would need to revise their existing practices and policies to ensure they take account of the protections extended to a significantly wider class of individuals.

The Be Heard Act would also prohibit employers from entering into contracts or agreements with workers that contain certain nondisparagement, nondisclosure, and arbitration agreements. The bill prohibits employers from entering into predispute arbitration agreements and also prohibits post-dispute arbitration agreements unless the agreement is not made a condition of employment, the individual has been informed in writing in language an average worker would understand, and there has been a waiting period of 45 days before the employee's consent could become valid.

Further, under the proposed law, employers may not require employees to agree to, as a condition of employment, nondisclosure and nondisparagement clauses covering employment discrimination, harassment, or retaliation.

The Be Heard Act allows inclusion of these provisions in a settlement or separation agreement as long as the particular employment dispute has already occurred, the clause does not solely benefit the employer, and the worker is given at least 21 days to consider and seven days to revoke any such agreement.

The Be Heard Act was introduced in Congress's last session, but, despite Biden's past support for the bill, the bill has not yet been reintroduced in Congress since Biden took office. In light of the expansive nature of the bill and the Democrats' tenuous control of the Senate, the bill as currently drafted is likely to face challenges even if it is reintroduced.

Conclusion

Even if neither one of these bills passes in their current form, employers should nevertheless follow the trajectory of these legislative developments, which reflect both a heightened cultural focus on the civil rights of LGBTQ individuals and President Biden's commitment to significantly expand worker protections.

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[1] <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph-r-biden-jr-on-the-introduction-of-the-equality-act-in-congress/>.

[2] The Equality Act, H.R. 5, available at <https://www.congress.gov/bill/117th-congress/house-bill/5/text>.

[3] The BE HEARD in the Workplace Act, H.R. 2148, available at <https://www.congress.gov/bill/116th-congress/house-bill/2148/text>.

[4] [Bostock v. Clayton County](#), 140 S.Ct. 1731 (2020).

[5] <https://www.hrc.org/press-releases/the-human-rights-campaign-releases-annual-state-equality-index-ratings>.

[6] <https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>.

[7] See e.g., [Arsham v. Mayor & City Council of Baltimore](#), 85 F. Supp. 3d 841, 849 (D. Md. 2015) (finding valid Title VII claim of discrimination based upon plaintiff's perceived national origin); [Leonard v. Katsinas](#), No. 05-1069, 2007 WL 1106136, at *12 (C.D. Ill. Apr. 11, 2007) (Title VII claim available where defendant's "purported belief" of Plaintiff's race and national origin was based on "objective evidence"); [Eriksen v. Allied Waste Sys., Inc.](#), No. 06-13549, 2007 WL 1003851, at *6 (E.D. Mich. Apr. 2, 2007) (same); [Perkins v. Lake Cty. Dep't of Utilities](#), 860 F. Supp. 1262, 1278 (N.D. Ohio 1994) (same).

[8] See e.g., [Yousif v. Landers McClarty Olathe KS, LLC](#), No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013) ("perceived as" discrimination claims not cognizable under Title VII); [Cole v. Cobb Cty Sch. Dist.](#), 2018 WL 460127, at *6-7 (N.D. Ga. Jan. 18, 2018) (same); [Lopez-Galvan v. Mens Wearhouse](#), No. CIV. 3:06CV537, 2008 WL 2705604, at *7 (W.D.N.C. July 10, 2008) (same); [Lewis v. N. Gen. Hosp.](#), 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (same); [Sears v. Jo-Ann Stores, Inc.](#), No. 3:12-1322, 2014 WL 1665048, at *8 (M.D. Tenn. Apr. 25, 2014) (same), report and recommendation adopted, No. 3:12-1322, 2014 WL 3672113 (M.D. Tenn. July 23, 2014); [Guthrey v. California Dep't of Corr. & Rehab.](#), No. 1:10-CV-02177-AWI-BAM, 2012 WL 2499938, at *6 n.2 & *15 (E.D. Cal. June 27, 2012) (same). In an unpublished, and thus not binding opinion, the Fourth Circuit likewise affirmed a district court's holding that Title VII does not protect an individual from discrimination based upon an employer's perception of the individual having a protected characteristic. See [El v. Max Daetwyler Corp.](#), 451 Fed.Appx. 257 (4th Cir. 2011) (unpublished) (citing [El v. Max Daetwyler Corp.](#), No. 3:09CV415, 2011 WL 1769805 (W.D.N.C. May 9, 2011)).

[9] See e.g., [Hively v. Ivy Tech Cmty. Coll. of Indiana](#), 853 F.3d 339, 349 (7th Cir. 2017); [Barrett v. Whirlpool Corp.](#), 556 F.3d 502, 512-513 (6th Cir. 2009); [Holcomb v. Iona Coll.](#), 521 F.3d 130, 138-139 (2d Cir. 2008); [Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.](#), 173 F.3d 988, 994 (6th Cir. 1999); [Parr v. Woodmen of the World Life Ins. Co.](#), 791 F.2d 888, 891-892 (11th Cir.1986)..

[10] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993).

[11] [Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.](#), 884 F.3d 560, 592-597 (6th Cir. 2018), aff'd sub nom. on other grounds [Bostock v. Clayton Cty.](#), Georgia, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

[12] Bostock, 140 S.Ct. at 1754.

[13] 42 U.S.C.A. § 2000e-2(a).

[14] <https://joebiden.com/womens-agenda/> .

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