

## Ending LGBT Bias

***Employment discrimination based on sexual orientation is persistent in both the private and public sector, according to a new study. As Congress hears testimony on a federal bill banning such bias, HR leaders should be proactive in prohibiting conduct that does not promote inclusiveness. But, as one expert notes, such bias "is often in the ears of the listener, and not as often in the heart of the speaker."***

By Michael O'Brien

As Congress debates passage of the Employment Non-Discrimination Act of 2009, which would prohibit discrimination based on sexual orientation and allow for lawsuits seeking damages, a comprehensive new study finds a "widespread and persistent pattern of unconstitutional discrimination on the basis of sexual orientation and gender identity against state government employees."

The report, prepared over a two-year period by The Williams Institute at the UCLA School of Law in Los Angeles, with the assistance of 10 different law firms, also finds there is "no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments, compared to the private sector and other public-sector employees."

Brad Sears, executive director of the Williams Institute, presented the findings during a recent hearing of the House Education and Labor Committee on the Employment Non-Discrimination Act of 2009.

"Our findings clearly demonstrate that discrimination against members of the LGBT community is persistent and occurs at all levels of government," Sears said at the hearing. "This is exactly the kind of data that was presented to support passage of earlier civil rights legislation, and Congress should act now to ban discrimination on the basis of sexual orientation."

The study notes that sexual orientation is not related to workplace performance, according to many legal scholars and 15 federal and state courts, including the Montana Supreme Court's 2004 decision that found "there is no evidence that gays and lesbians do not function as effectively in the workplace or that they contribute any less to society than do their heterosexual counterparts."

Despite this, the 2008 *General Social Survey* – an annual survey by the National Opinion Research Center at the University of Chicago that monitors social change within the United States – found that one in five LGB public-sector employees reported being discriminated against on the basis of their sexual orientation, according to the report by the Williams Institute.

The Williams Institute report also notes that, "in total, over 67 specific examples of employment discrimination on the basis of sexual orientation or gender identity by public employers have been presented to Congress from 1994 to 2007, including discrimination involving 13 state employees, 28 local employees and 26 federal employees."

Marjorie Jobe, an author and attorney with the Jobe law firm in El Paso, Texas, says the report's findings are not surprising.

"Despite the movement of companies toward adopting anti-bias policies in the workplace, it takes a long, long time for laws and regulations to change culture and bias," she says.

Phillip Maltin, a partner in the Los Angeles-based law firm of Gordon & Rees, says the report's conclusion is "obvious, and one to which a good-hearted, right-minded person would likely come."

"But," he adds, "my experience in representing employers in discrimination, harassment and retaliation lawsuits is that today's human resources professionals are well-trained and sensitive (often oversensitive) to the nuances of language that could prompt claims for discrimination. Discrimination based on sexual orientation is often in the ears of the listener, and not as often in the heart of the speaker."

"Also, the law requires employees almost always to make their claims based on circumstantial evidence, not on direct evidence of discrimination. Thus, the law at once provides too much and too little protection against this kind of pernicious mentality," Martin says.

If the legislation does pass into law, Jewelle Johnson, head of the diversity committee at Atlanta-based law firm Fisher and Phillips LLP, says the definition of sexual orientation discrimination will likely be categorized either as disparate treatment, hostile work environment or quid pro quo harassment.

"For example, disparate treatment cases would involve failure to hire or promote, cases where an applicant is passed over for a position because of his or her sexual orientation," she says. "There may be other situations where insults and anti-gay jokes may be severe and pervasive enough to create a hostile working environment."

Shanti Atkins, president and CEO of ELT, an ethics and training provider based in San Francisco, says the proposed legislation, if passed, could induce a major shift in focus on sexual orientation and gender identity that will seriously impact employers and

workplaces nationwide.

"Twenty-one states have now passed legislation that prohibits employment discrimination on the basis of sexual orientation, with 13 also covering gender identity. But currently, there is no federal law providing these critical protections," she says.

Atkins says that if and when ENDA passes, "many employers will need to support a seminal cultural shift within their workplaces, and as importantly, will need to make major updates to their policies and their training programs."

But if ENDA does pass into law, the Williams Institute doesn't anticipate a flood of complaints, according to a previous report that states: "Sexual-orientation complaints will not overwhelm government agencies; the average annual number of sexual orientation complaints for all states stands at just over 1,200 versus race and sex complaints at 11,500 and 13,800, respectively."

Regardless of how many complaints the new legislation may inspire, Johnson of Fisher & Phillips says "employers wishing to promote diverse work environments should take a proactive stance and prohibit any conduct that does not promote inclusiveness, including slurs, inflammatory comments and jokes and bullying – regardless of whether an employee fits into a legally protected category."

Jobe agrees, saying that "companies and their human resource departments should address this discrimination category now and implement the protections ahead of time so that their practices cannot be a landmark case establishing the new constitutional or regulatory protections.

"It is a risk hiding in the shadows right now," she says.

Johnson at Fisher and Phillips says ENDA "will eventually pass into law, but no time soon. Although President Obama has stated that he is in support of the legislation, the scheduled November markup of the bill has been postponed and is not anticipated to be rescheduled until 2010."

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