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## Legislative Update: Hawaii and Illinois pass Same-Sex Marriage Legislation; ENDA passed by the U.S. Senate

By Maria Tavano

November has been a very active month for legislation directly affecting the rights of gay, lesbian, bisexual or transgendered individuals, and employers should take note of these developments.

A week ago, Hawaii became the 15th state to legalize same-sex marriage and is scheduled to start issuing same-sex marriage licenses on December 2, 2013. Earlier this month, the Illinois state legislature passed legislation legalizing same-sex marriage and Governor Quinn has announced he will sign the bill on November 20 (today). For employers with employees in these states, this may mean changes in how certain employee benefits, such as health insurance coverage and COBRA continuation practices, are handled.

On the federal level, on November 7, 2013, the U.S. Senate passed the Employment Non-Discrimination Act (ENDA) with a final vote of 64-32. ENDA would prohibit covered employers, employment agencies, and labor unions from using an individual's actual or perceived sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotion, or compensation. The bill defines sexual orientation as "homosexuality, heterosexuality or bisexuality." Gender identity is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an

individual, with or without regard to the individual's sex at birth." ENDA would not be applicable to small businesses with less than 15 employees, religious entities exempt from Title VII's prohibition on religious discrimination or the military.

ENDA is modeled on existing civil rights laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, and provides for many of the same procedures and similar, but somewhat more limited, remedies as those statutes. Pursuant to the bill, an unlawful employment practice is established "when the complaining party demonstrates that sexual orientation or gender identity was a motivating factor for any employment practice, even though other factors also motivated the practice." A report by the Senate Committee on Health, Education, Labor and Pensions accompanying the bill provides that the Committee expressly rejected the "but for" standard applicable to claims brought pursuant to the Age Discrimination in Employment Act.

ENDA would create federal causes of action for disparate treatment and retaliation claims; however, it would not permit disparate impact claims. Thus, under ENDA, an employer would not be required to justify a facially neutral policy that may have a disparate impact on employees due to their sexual orientation or gender identity. Consistent with Title VII and the ADA, ENDA would also prohibit associational discrimination. ENDA also does not abrogate an employer's right to establish a reasonable and otherwise lawful dress and grooming policy, provided that an employer who has been put on notice of an employee's gender transition allows the employee to dress or groom pursuant to the standard the employer applies to the sex to which that employee has transitioned or is transitioning. Finally, ENDA prohibits quotas based on sexual orientation or gender identity and would not allow the Equal Employment Opportunity Commission to compel employers to collect or report statistics on employees' sexual orientation or gender identity.

Currently, 21 states and the District of Columbia already have state legislation that prohibits employment discrimination on account of sexual orientation. Seventeen of those states and the District of Columbia also include gender identification as a protected characteristic. Further, many of the 29 states without state-wide legislation have cities and counties that have passed similar anti-discrimination measures. As a result, the vast majority of medium-sized and larger employers, especially multi-state employers, already expressly prohibit discrimination on account of sexual orientation and gender identity. In fact, according to a report by the Washington Post, almost ninety-seven percent of all Fortune 500 companies already prohibit discrimination on account of sexual orientation and/or gender identity. Accordingly, ENDA, even if enacted, may not mean major changes

for many employers. However, employers who recognize protections in their anti-discrimination policies for sexual orientation but not for gender identification may want to consider extending protection for the latter in light of this seeming legislative trend.

While most commentators do not expect that ENDA will make its way through the current U.S. House of Representatives, employers should take note that this recent Senate vote is the first time that the bill has passed either chamber of Congress since its introduction in the 1990s. The current legislation should serve as a reminder that employers should monitor closely the ever changing legislation landscape to ensure their policies, training materials and employee benefits are in compliance with federal, state and local laws.

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