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Cleveland Already Prohibits Discrimination Based on Sexual Orientation and Gender Identity

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Laws prohibiting discrimination on the basis of sexual orientation are being considered on the federal level (versions of the Employment Non-Discrimination Act of 2009, or "ENDA," have been introduced in the House and Senate), and on the state level (Ohio H.B. 176). As it turns out, the City of Cleveland has already passed ordinances prohibiting employment discrimination on the basis of sexual orientation or "gender identity or expression" (which means the "gender-related identity, external presentation of gender identity through appearance, or mannerism or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth").

Anti-discrimination laws work by establishing "protected classes" of people, and prohibiting discrimination against people in those classes. Race, sex, religion, disability, and age are typical protected classes, but, as we see with sexual orientation issues, different jurisdictions can add various distinctions at different times. For example, one of the issues around ENDA, the federal law, is whether "gender identity" will be part of the protected class. The exemptions from the laws also differ: the proposed federal law contains an exemption for religious organizations; Ohio's proposed law exempts religious groups and employers with fewer than 15 employees; the new Cleveland rule (the only rule discussed here that is actually in effect) exempts (1) employers with fewer than 4 persons (not counting family members), (2) religious organizations "whose membership or services are limited to persons of a single religious faith [sic]," (3) religious educational institutions, (4) private social or fraternal societies, and (5) "any type of employment where religion, religious creed or nationality would usually and normally be considered an essential qualification for employment." The Cleveland ordinance also requires employers to provide reasonable access to adequate facilities (e.g., bathrooms and showers) that are not inconsistent with an employee's gender identity, which is established either at the time of initial employment or upon notification to the employer that the employee has or is undergoing gender transition.

New laws reflect changing social attitudes, but also drive them. Early anti-discrimination legislation set brother against brother. Today, employment lawyers with long experience remember a time when employers treated charges of race discrimination with great seriousness, yet pooh-poohed sex discrimination plaintiffs. These days, of course, sex discrimination and harassment are both treated seriously. We might expect the same social evolution with gay rights. A recent NYT article (http://www.nytimes.com/2009/12/03/nyregion/03analysis.html?_r=1) noted that same-sex marriage supporters have been disappointed by recent setbacks in state-by-state efforts to codify the freedom to marry, but also recognized the trend of smaller, positive changes, including local nondiscrimination ordinances.

In light of the new law, Cleveland employers should amend their policies and train supervisors to account for the new protected classes, and, in doing so, have the chance to be ahead of the curve.

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