

**Testimony of  
Lawrence Z. Lorber**

**before the U.S. House of Representatives  
Committee on Education and Labor  
Subcommittee on Civil Rights and Human Services**

**Hearing on H.R. 5—The Equality Act**

**April 9, 2019**

**Introduction**

Chair Bonamici, Ranking Member Comer, members of the Subcommittee, I am pleased to be invited to testify before you today on H.R. 5, the Equality Act.

My own background may be relevant to my comments on this legislation. I have been a labor law practitioner for over 40 years starting in the Solicitor's Office at the Department of Labor. I am currently a Counsel in the law firm of Seyfarth Shaw LLP. In 1975 I was appointed by Secretary of Labor John Dunlop as a Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs, OFCCP, which enforces the various non-discrimination and affirmative action laws applicable to government contractors. In that capacity, the first regulations enforcing section 503 of the Rehabilitation Act were issued as well as the first comprehensive review of the E.O. 11246 regulations was undertaken. In private practice, I have represented and counseled employers on various issues relating to equal employment matters. In 1989 I was asked to represent various employer groups with respect to the consideration and ultimate passage of the Americans with Disabilities Act, and in 1991 I was counsel to the Business Roundtable during the consideration of the Civil Rights Act of 1991. In 1995 I was honored to be appointed as a Member of the first Board of Directors of the Office of Compliance, which enforces the Congressional Accountability Act, applying 11 employment and labor laws to the Congress. I was counsel to the employer coalition which engaged in the unique process of negotiating and recommending what became the Americans with Disabilities Act Amendments Act in 2008. I have been management co-chair of the federal legislation committee of the Labor Section of the ABA. Over the years I have been asked to testify on various employment issues being considered by the Congress.

**H.R. 5**

My purpose here today is not to recommend whether this Committee or the Congress should ultimately decide to pass this legislation but rather to offer comments on the latest version, and highlight issues which may warrant the attention of this Committee as it examines the legislation. While I do bring extensive experience as an employment

law practitioner, I am not testifying today on behalf of my law firm, clients or other affiliations.

At the outset, it should be noted that prior to the introduction of H.R. 5, several congresses considered the Employment Non-Discrimination Act (“ENDA”) which addressed the issues raised by the Equality Act as they pertained more specifically to employment. Insofar as I am an employment attorney, I will generally restrict my comments to the employment portions of the Equality Act although because of its breadth, some provisions not specifically directed at employment will nevertheless implicate employment issues.

As I will highlight, H.R. 5 does contain several significant changes from prior versions of the Employment Non-Discrimination Act (“ENDA”) which should be closely examined as they represent potentially far reaching changes in accepted employment law and may well have significant impact upon employers and employees. And as I will discuss, H.R. 5 seems to be a sparsely drafted legislation which essentially adds further protected classes into various laws without describing with any specificity how these amended statutes are to be interpreted. This represents a significant and unfortunate change from the previous versions of ENDA.

As a preliminary matter, it should be noted that without categorizing one or another of the laws as necessary or superfluous, there are probably more and different employment laws impacting upon the workplace, including federal, state and local than apply in other regulated areas. Some cover the same areas but have different administrative or enforcement procedures. Others include overlapping federal, state and local requirements but differ in scope, procedure or administration. And still others overlap within the same jurisdiction, so that one federal law implicates another. And it should be noted that the greatest single area of growth in federal civil litigation involves employment and labor law. While this plethora of employment related laws does cause some confusion, it also represents a conclusion that different characteristics of protected groups may require different responses. So as early as 1964 when Congress passed the Civil Rights Act, it understood that the Equal Pay Act, passed one year before should remain an independent statute with its own procedures and remedies. And Congress debated whether simply to include age as an additional protected classification under Title VII but instead decided that the rules and developing procedures under Title VII may not have been appropriate to include age discrimination so the ADEA was passed. Similarly, in 1989 Congress addressed the unique intricacies impacting discrimination on the basis of disability and passed the ADA rather than amending Title VII and it also considered discrimination on the basis of genetic discrimination and passed GINA rather than amending either Title VII or the ADA.

Therefore the Congress should be cautious in simply adding additional protected classifications to Title VII without closely examining how the new law will interact with existing laws so that newly designated individuals in protected classifications and employers who must implement these new protections fully understand their rights and responsibilities. And as I will note in this testimony, there are sections in H.R. 5 which

themselves implicate other federal laws and can serve to create a degree of confusion or lead to contrary interpretations. To that end, I would note that it was the lack of specificity and definition in the original Americans with Disabilities Act which led to confusing judicial and regulatory results and which resulted in the ADAAA which had to clarify definitions of disability and related sections of that law. Thus may I suggest that the Committee carefully weigh the impact of H.R. 5 and its requirements on how the regulated community must adopt to its proscriptions and how the protected community will understand their rights.

## **Section 7**

Section 7 of H.R. 5 would amend Title VII of the Civil Rights Act of 1964. Unlike the various versions of ENDA which had been previously introduced<sup>1</sup>, H.R. 5 and Section 7 merely adds additional protected classifications to Title VII including sexual orientation and gender identity without discussing how the amended act should be interpreted. Title VII is a complex statute which has evolved with statutory amendment, judicial decision and regulatory enhancement. For example, protected groups covered by Title VII are included in an annual report filed by employers designated as the EEO-1. This form requires that employees be categorized by race, gender and ethnicity and included in various designated job groups. H.R. 5 is silent as to whether employers may request employees to set forth their sexual orientation or gender identity or in fact whether the EEOC will require that such record keeping commence. It would seem to be an imperative that the legislation address the issue of record keeping and reporting of an individual employees in the new protected category. To this end, ENDA specifically prohibited the EEOC from requiring employers to collect statistics on the sexual orientation or gender identity of employees.<sup>2</sup>

Another key factor is whether claims under H.R. 5 can be brought under the disparate impact theory of discrimination. Title VII was amended in 1991 to include disparate impact, or unintentional discrimination as a cognizable theory of discrimination.<sup>3</sup> Disparate impact, otherwise described as unintentional discrimination occurs when a policy or practice of an employer may be deemed to detrimentally impact an applicant or employee. This is in contrast with disparate treatment theory of discrimination where it is shown that the employer intentionally treated an applicant or employee adversely because of their protected classification. There are also two different remedial responses. Disparate treatment can trigger compensatory or punitive damage relief as well as back pay. Disparate impact does not include compensatory or punitive damages.<sup>4</sup> Previous versions of ENDA did not include a disparate impact cause of action.<sup>5</sup> And it was not only the previous versions of ENDA which excluded disparate impact causes of action. The Genetic Information Nondiscrimination Act expressly

---

<sup>1</sup> See e.g. S.811 (2012), H.R. 3017 (2009),

<sup>2</sup> Section 9, S. 815 (2013)

<sup>3</sup> 42 U.S.C. § 2000e-2(k).

<sup>4</sup> 42 U.S.C. § 1981a

<sup>5</sup> S. 811, § 8(a)(1) (2011)

excluded the theory of disparate impact from being cognizable under that law.<sup>6</sup> This was not done to denigrate genetic non-discrimination protections but rather because the law prohibited the collection or retention of genetic information<sup>7</sup> and without such information it was not possible to bring a disparate impact case. Insofar as disparate impact discrimination requires significant records of individuals who are members of the protected class to compare with the general employee or applicant population, the added protected categories in H.R. 5 will not lend themselves to support a disparate impact analysis. Thus, the simple inclusion of the new protected categories into Title VII without explaining the disparate impact will not apply raises significant issues.

Consistent with this comparison to Title VII protections, H.R. 5 establishes as a new protected category Gender Identity. Gender Identity is defined as “the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.”<sup>8</sup> While gender identity may be viewed as a manifestation of an individual’s sexual orientation as set forth in section 1101(a)(5), gender-identity, as defined in the bill does not seem to relate to any discernable innate characteristic or sexual orientation. Rather, as used in section (a)(2) it appears to relate to actions or representations of an individual perhaps related to sexual orientation or perhaps not. Nor is there a requirement that an individual who establishes a different gender identity maintain that selection. So that gender identity may describe a condition, it does not describe an innate or immutable characteristic. Indeed, title VII now prohibits discrimination against an individual based upon mannerisms or sexual characteristics<sup>9</sup>. And there is a host of cases and statutes which prohibit discrimination on the basis of appearance. Thus gender identity, as contrasted with sexual orientation stands as an independent protected classification not grounded in any discernable characteristic or status which is the basis for all of the non-discrimination legislation. And in particular, the discussion regarding disparate impact applies with great force to the inclusion of gender identity as a protected characteristic.

The discussion of gender identity leads to a much larger issue with respect to implications H.R. 5 would have with respect to employment law and the obligations of employers to comply with the law and the notice to the members of the newly created protected class to understand their rights. When Congress previously considered the issues related to covering sexual orientation in the workplace, the draft legislation was clear as to what was required and what was not required. In the absence of such clarity in H.R. 5, perhaps these examples would serve to raise issues for the consideration of this Committee and the Congress:

- Prior versions of ENDA in both the House and the Senate do not require or permit employers to grant preferential treatment to an individual because of the

---

<sup>6</sup> 42 U.S.C. § 2000ff-7(a).

<sup>7</sup> 42 U.S.C. § 2000ff-2(b)

<sup>8</sup> H.R. 5. § 1101(a)(2)

<sup>9</sup> *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989)

individual's sexual orientation or gender identity.<sup>10</sup> H.R. 5 is silent as to whether there can be preferences with respect to the new protected class.

- Prior versions of ENDA in both the House and the Senate did not require employers to build new or additional facilities<sup>11</sup>. H.R. 5 is silent as to any obligation of an employer to construct such facilities. However, section 9 of H.R. 5, section 1101 (b)(2) provides that individuals shall not be denied access to shared facilities in accordance with their sexual identity.<sup>12</sup> As noted above, unlike sexual orientation or even individuals who have undertaken gender transition procedures, sexual identity as defined is exceedingly amorphous and absent notification as to that status it would be exceedingly difficult for an employer to understand its obligations with respect to access to certain facilities.

- Prior versions of ENDA expressly prohibited the EEOC or the Department of Labor from requiring employers to collect statistics on the sexual orientation or gender identity of employees. H.R. 5 is silent as to whether employers will be compelled to collect this data.

- Prior versions of ENDA permitted employers to require reasonable dress and grooming standards so long as an employee who has notified their employer that they have undergone or are undergoing gender transition is allowed the opportunity to follow the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning. H.R. 5 is silent as to whether employers can establish reasonable dress and grooming standards.

### Other Considerations

These and other instances involving lack of clarity or unworkability should be further examined. In addition to the instances where the blanket amendment of Title VII to include sexual orientation and gender identity does need clarification and perhaps reconsideration, there are other aspects of H.R. 5 which also raise issues. As noted in this testimony and elsewhere, H.R. 5 not only simply amends Title VII, it also undertakes to amend other laws to include the categories listed in H.R. 5. While perhaps understandable to reflect the intent to make clear that these new protected classes should be recognized, this legislative effort is not being written on a clean slate and some consideration should be made to not further encumber the understanding and precedent of existing law. So for example, Section 6 would amend Title VI of the Civil Rights Act to include sex (including sexual orientation and gender identity). While it is well known that the only section of the 1964 Civil Rights Act which prohibited discrimination on the basis of sex was Title VII, it is also known that in 1972 Congress attempted to remedy this by passing Title IX of the Education Amendments of 1972<sup>13</sup>. The question must be addressed as to whether the precedents long established under Title IX will apply to this

---

<sup>10</sup> H.R. 3017 § 4(f)(1) 2009, S.811 § 4(f)(1) 2011

<sup>11</sup> H.R. 3017 § 8(a)((4) 2009, S. 811 § 8(a)(4) 2011

<sup>12</sup> Section 9, S. 815 (2013)

<sup>13</sup> 20 U.S.C. §§ 1681-1689

new section of Title VI. How will the laws be interpreted. This is a critical question since Title IX has long been the source of precedential changes. And as with other questions, addressing gender identity in the context of federal programs and grants is vitally important.

So too, section 1107 of H.R. 5 provides that the Religious Freedom Restoration Act<sup>14</sup> (“RFRA”) will not serve as a defense to a claim under H.R.5. While clarity is important in drafting legislation, it is also important to understand the purposes of related legislation so that the interplay between statutes is not unnecessarily complicated. RFRA was introduced as HR 1308 in 1993 with 170 bipartisan co-sponsors. Then Representative Schumer was the chief House sponsor and the chief sponsor in the Senate was Senator Kennedy. The bill passed 97-3 in the Senate and by voice vote in the House. It was clearly designed to ensure that there was no governmental impediment placed on the free exercise of religious beliefs and was a legislative counterpoint to the First Amendment. However, H.R.5 does not seem to recognize the purposes of RFRA insofar as it effectively strikes RFRA in consideration of all of the provisions of H.R. 5. In fact, H.R. 5 simply incorporates these new protected classes into Title VII and summarily relegates RFRA into a footnote without any application. It should be noted however, that while Title VII itself has contained exemptions for religious organizations and permits such organizations to prefer co-religionists with respect to hiring and certain other employment decisions,<sup>15</sup> and expressly permits religious educational institutions at all levels to prefer co-religionists when hiring<sup>16</sup>, recent case law seems to severely reduced the reach of these exemptions without reference to RFRA.<sup>17</sup> Thus, there are two federal statutes, both in effect except that one will be in effect unless it is not. Rather than attempting to rationalize these statutes, H.R. 5 seems to create a preference for one over the other.

## **Conclusion**

I believe that the issues I have raised are appropriate as this Committee works its way through this legislation. I would note that my own experience in dealing with employers is that the concern is to attract and retain the most competent, efficient and productive employees without regard to personal characteristics and which do not have anything to do with a person’s sexual orientation. It is hoped that the Committee will focus on this and work constructively to craft a statute consistent with sound employment policy and sound public policy.

Thank you.

---

<sup>14</sup> 49 U.S.C. § 2000bb

<sup>15</sup> 42 U.S.C. § 2000e-1(a)

<sup>16</sup> 42 U.S.C. § 2000e-2e(2)

<sup>17</sup> *Hively v. Ivy Tech* 853 F.3d 339 (7th Cir 2017); *Zarda v Altitude Express* 883 F.3d 100 (2nd Cir 2018);