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THE *WINDSOR* BLOWING: FAST-CHANGING PROTECTIONS AT WORK FOR SAME-SEX MARRIAGE, SEXUAL ORIENTATION AND GENDER IDENTITY

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You don't need a weather man
To know which way the wind blows.

-- Bob Dylan, Subterranean Homesick Blues

I. INTRODUCTION

This country has experienced a watershed of change in its views and laws on same-sex marriage, sexual orientation and gender identity in the nine months since the Supreme Court declared the Defense of Marriage Act unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013).

In the past year alone, ten states have recognized same-sex marriage through legislation or voter-approved propositions (bringing the total to 21 states that recognize same-sex marriage or provide nearly equivalent state-level rights). And even in the "Red States" where same-sex marriage and gay rights are not generally recognized in the law, the *Windsor* decision has dramatically shifted the analysis in favor of gay rights, with federal judges in Kentucky, Ohio, Oklahoma, Texas, Utah and Virginia declaring laws against same-sex marriage in those states are unconstitutional violations of equal protection and due process rights. Justice Scalia predicted this result in his dissent in *Windsor*, opining that it is now all but "inevitable" that the

Supreme Court will soon declare state bans on same-sex marriage unconstitutional. But countervailing winds are gusting at the state level, too, where legislatures in at least ten conservative states are pushing laws that would make it lawful for a person with "sincerely held religious beliefs" to discriminate against those in same-sex marriages, as well as other lesbian, gay, bisexual and/or transgender ("LGBT") people in employment and public accommodations.

For the workplace, the shift has not been as dramatic so far, but substantial changes are taking place. To begin with, most large employers – public and private – now prohibit discrimination and harassment based on sexual orientation, including 96.8 percent of Fortune 500 companies (up from 72 percent in 2003). Gender identity protections also are expanding, up from just 3 percent of the Fortune 500 in 2000 to 57 percent now. With smaller employers, especially those operating exclusively in the 29 states that do not protect against discrimination based on sexual orientation, prohibitions against such discrimination are less common – but *Windsor*, more open-minded Millennials (the vast majority of whom support gay rights), and market forces are all prompting re-consideration of these issues in the workplace.

Regardless of whether these trends continue (and the panelists will weigh in on this), these developments present several unique issues for labor and employment counsel – management, plaintiffs' side, government and in-house. This paper reviews recent developments in state and federal laws in relation to same-sex marriage and the rights of LGBT employees, emphasizing unique and developing legal issues and trends in the workplace. Employee benefits and EEOC initiatives receive brief mention here, but are addressed more fully in related papers being submitted with this conference. We conclude with a review of practical tips and issues to keep in mind in this fast-changing area of the law.

Important note: Before plowing into the legal issues and developments, it is important to keep in mind the human perspective here. Widespread discrimination and harassment continues against employees based on sexual orientation, gender identity and expression. More than one-third (37 percent) of gay and lesbian people have experienced workplace harassment in the last five years, and 12 percent claim they lost a job because of their sexual orientation, according to one study. *See* Jennifer C. Pizer, Brad Sears, Christy Mallory, and Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012) (available at:

http://digitalcommons.lmu.edu/llr/vol45/iss3/3). For transgender people, the numbers are even more troubling. In a 2011 survey, 90 percent of transgender people reported they have experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent reporting having been discriminated against in hiring, promotion or job retention because of their gender identity. *Id.*

Whether one favors or opposes more legal protections for the LGBT community, this level of discrimination and intolerance requires serious consideration and concern.

II. STATE LAW DEVELOPMENTS

At the state level, laws that protect against discrimination based on sexual orientation, gender identity and transgender status have doubled since 2000.

A. State Laws Against Discrimination Based on Sexual Orientation

Presently, twenty-one (21) states and the District of Columbia prohibit discrimination based on **sexual orientation** (year of law's adoption):

California (1992)
Colorado (2007)
Connecticut (1991)
Delaware (2009)
D.C. (1977)
Hawaii (1991)
Illinois (2006)
Iowa (2007)
Maryland (2001)
Massachusetts (1989)
Maine (2005)
Minnesota (1993)
Nevada (1999)
New Hampshire (1998)
New Jersey (1992)
New Mexico (2003)
New York (2003)
Oregon (2008)
Rhode Island (1995)
Vermont (1991)
Washington (2006)
Wisconsin (1982)

The population of these states, combined, is roughly 138 million, which is about 44 percent of the population of the United States.

All but four of these states (Maryland, New Hampshire, New York and Wisconsin) also prohibit discrimination based on gender identity and/or gender expression.

Another 11 states have laws and executive orders that protect public employees based on sexual orientation and/or gender identity.

Good on-line resources for updates on state laws on these issues are the Human Rights Campaign website at www.hrc.org/statelaws and the National Conference of State Legislatures website at http://www.ncsl.org/research/labor-and-employment/employment-discrimination-sexual-orientation.aspx. Practical Law Company also maintains an article, "State Sexual Orientation and Gender Identity and Expression Discrimination Laws: Overview," which provides electronic links to each state's legislation. The author relied upon these sources for this compilation.

In states that protect LGBT workers, juries have shown a willingness to punish wrongdoers and award generous damages to those who are victims of unlawful discrimination. In New Jersey, for example, an Essex County jury awarded $22 million, including $15 million in punitive damages, to a former employee of YRC Worldwide Inc., who claimed the company subjected him to a hostile work environment based on his perceived sexual orientation, under that state's Law Against Discrimination. *See* http://www.law360.com/articles/295847/yrc-unit-hit-with-22m-hostile-workplace-verdict; *cf. Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 166 Cal. Rptr. 3d 676 (App. 2d Dist. 2014) (noting $160,000 jury verdict – which court reduced to $150,000 -- on hostile work environment claim by oil rig "floorhand" who alleged harassment based on anti-homosexual epithets and crude comments).

Judges, meanwhile, continue to act as gatekeepers, requiring proof that the discrimination was based on sexual orientation as opposed to other traits or conduct that cannot be linked to orientation. *See Falcon v. Continental Airlines*, 2014 BL 42297 (D.N.J. Feb. 19, 2014) (holding that the airline's requirement, pursuant to its appearance standards, that a gay flight attendant could not work until he cut off his Mohawk hairstyle did not constitute discrimination or harassment based on sexual orientation, as the plaintiff presented no evidence to show that the treatment would not have occurred "but for" his sexual orientation).

B. State Legislation on Same-Sex Marriage

On the issue of same-sex marriage, the map is similar, but changing much more rapidly, with most same-sex marriage laws being enacted in the past four years, in addition to several state court rulings legalizing same-sex marriage. Seventeen states and the District of Columbia provide marriage licenses to same-sex couples, and another three states provide equivalent state-level rights to same-sex couples. Wisconsin provides more limited spousal rights for same-sex domestic partnerships. The states with laws protecting same-sex marriages or couples (and the year of adoption) as of February 19, 2014, are:

California (2013)

Colorado (civil unions, 2013)

Connecticut (2008)

Delaware (2013)

D.C. (2010 (domestic partnerships, 2002))

Hawaii (2013)

Illinois (2014)

Iowa (2009)

Maine (2012)

Maryland (2013)

Massachusetts (2004)

Minnesota (2013)

Nevada (domestic partnerships, 2009)

New Hampshire (2010)

New Jersey (2013)

New Mexico (2013)

New York (2011)

Oregon (domestic partnerships, 2008)

Rhode Island (2013)

Vermont (2009)

Washington (2012)

Wisconsin (domestic partnerships, 2009, limited spousal rights)

A comparison to the states with anti-discrimination laws (above) shows a substantial overlap, as would be expected.

Same-sex marriage legislation, however, "goes both ways," with more states having laws against same-sex marriage than in support of it. Twenty-nine (29) states have constitutional amendments or laws that prohibit same-sex marriage, and limit marriage to one man and one woman:

Alabama (2006)
Alaska (1998)
Arizona (2008)
Arkansas (2004)
Colorado (2006)
Florida (2008)
Georgia (2004)
Idaho (2006)
Indiana
Kansas (2005)
Kentucky (2004)
Louisiana (2004)
Michigan (2004)
Mississippi (2004)
Missouri (2004)
Montana (2004)
Nebraska (2000)
Nevada (2002)
North Carolina (2012)
North Dakota (2004)
Ohio (2004)
Oklahoma (2004)
Oregon (2004)
Pennsylvania
South Carolina (2006)
South Dakota (2006)
Tennessee (2006)
Texas (2005)
Utah (2004)
Virginia (2006)
West Virginia
Wisconsin (2006)
Wyoming

An excellent resource on state same-sex marriage laws is the National Conference of State Legislatures website at http://www.ncsl.org/research/human-services/same-sex-marriage.aspx.

C. "Religious freedom" Bills Target Same-Sex Marriage

On a more cutting-edge front, and in the news of late, at least nine (9) state legislatures recently have considered or approved bills that would enable their citizens and businesses to refuse to provide services and privileges, including employment, to same-sex couples and/or gay individuals, if the refusal is based on a "sincerely held religious belief." Some of these proposed bills limit their protections to allowing those with sincerely held religious beliefs to not be forced to recognize same-sex marriage ceremonies. Other proposals are much broader and could, theoretically, allow anyone who claims a sincere religious belief to discriminate against same-sex couples, gays and other minorities. States that have considered such bills (and the bill's status as of late February 2014) include:

Arizona (approved by the legislature in 2014, but vetoed by the governor)
Idaho (bill in senate committee)
Kansas (bill is stalled in the Kansas state senate)
Nevada (introduced in 2013, bill appears dead for now)
Ohio (introduced in 2013, bill has gone nowhere)
Oregon (ballot initiative being sought)
South Dakota (bill appears dead for now)
Tennessee (bill appears to be dead for now)
Utah (compromise bills being proposed, not yet introduced)

As was evident in the Arizona case last month, even in conservative states, the public reaction to proposals that seek to endorse discrimination against same-sex couples and the LGBT community have met with fierce and vocal opposition, often supported by the mainstream media and social media campaigns. It is not clear whether this wave of support of gay rights will carry forward into legislation in the 29 states that do not prohibit discrimination against same-sex couples or LGBT workers.

Many courts have rejected arguments that sincerely held religious beliefs can justify discrimination against others due to their sexual orientation or same-sex marital status. For example, in *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012), an EAP counselor refused to provide counseling services to an employee in a same-sex relationship because of her "devout Christian" belief that it was "immoral to engage in same-sex sexual relationships." *Id.* at 1280. The court held that her discharge for refusing to provide services to the employee did not constitute religious discrimination.

Similar issues relating to the tension between claims of religious freedom and the regulation of business will be before the Supreme Court in oral argument on March 25, 2014, in *Sebelius v. Hobby Lobby Stores, Inc.* In that case, the issue is whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq. (which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest), allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by the Affordable Care Act, based on the religious objections of the corporation's owners. Many believe that if the Supreme Court rules in favor of Hobby Lobby (a retail business employing more than 13,000 people), then it could set the precedent for other

business owners with sincerely held religious beliefs to ignore state and federal anti-discrimination laws, as proposed in the Arizona bill.

D. City Laws Protect Against Discrimination

At least 200 cities and local governments have ordinances that prohibit discrimination based on sexual orientation or gender identity in the workplace. These ordinances vary widely, and tend to be less used by plaintiffs' counsel for a variety of reasons, including the fact that some do not include a private right of action.

III. THE FEDERAL LANDSCAPE ON SAME-SEX MARRIAGE & LGBT ISSUES

The federal courts have been grappling with issues relating to same-sex marriage, sexual orientation, gender identity and gender stereotyping for decades, but recent rulings and the state law developments noted above ensure that this will be a rapidly evolving area for years to come.

A. *Windsor* and the Evolution of the Supreme Court

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court held that the definition of marriage in the Defense of Marriage Act ("DOMA"), limiting federal recognition to unions between one man and one woman, was unconstitutional as a deprivation of due process and the equal liberty of persons protected by the Fifth Amendment. DOMA had applied to over 1,000 federal laws, including those relating to taxes and employee benefits. The effects of the ruling on employee benefits are addressed in a separate article.

Both the majority and dissenting opinions in *Windsor* strongly suggest that it could be just the first of many decisions to decide constitutional issues relating to same-sex marriage and sexual orientation. While Justice Kennedy's majority opinion and Chief Justice Roberts' dissent emphasize that the ruling is based, in large part, on federalism, and the states' historic and traditional role of regulating domestic relations law, much in the opinion suggests that more sweeping change is ahead in the recognition of gay rights. In a decision that is long on conclusions, but short on linear rationale, the court relies on its 2003 ruling in *Lawrence v. Texas*, 539 U.S. 558 (which held that Texas's state sodomy law was unconstitutional), to assert that, "Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.'" 133 S. Ct. at 2692. The court then concluded that:

> DOMA seeks to injure the very class New York seeks to protect [with its laws recognizing same-sex marriage]. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group.
>
> . . . The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

Id. at 2693 (internal citations omitted).

Justice Scalia's dissent is typically magnanimous, seeing the decision as an irrational power grab by a wing of the Court that is "eager -- *hungry* -- to tell everyone its view" on the motives of Congress in passing DOMA and the impropriety of the law. Scalia argues that "the Constitution does not forbid the government to enforce traditional moral and sexual norms." *Id.* at 2707. Looking to the effect of this precedent, Scalia predicts that *Windsor* pre-ordains a future Supreme Court decision outlawing any state prohibition against same-sex marriage:

> . . . the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. . . . How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

Id. at 2709.

Indeed, federal judges in six states -- Kentucky, Ohio, Oklahoma, Texas, Utah and Virginia -- have issued decisions, rooted in *Windsor*, invalidating state laws against same-sex marriage as unconstitutional. *See generally* http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/26/why-6-federal-judges-have-struck-down-state-gay-marriage-bans-in-their-own-words/ (highlighting a key holding in each case, and linking to the rulings). By one report, 19 decisions since *Windsor* have come down in favor of plaintiffs challenging same-sex restrictions as unconstitutional, including most recently the ruling in *De Leon v. Perry* on February 26, 2014, holding that the Texas Constitution's ban on same-sex marriage was unconstitutional under federal law:

> After careful consideration, and applying the law as it must, this Court holds that Texas' prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal

> protection and due process. Texas' current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason. Accordingly, the Court finds these laws are unconstitutional and hereby grants a preliminary injunction enjoining Defendants from enforcing Texas' ban on same-sex marriage.

Although the Supreme Court chose in 2013 not to rule on the issue of whether state prohibitions against same-sex marriage are unconstitutional, the issue is expected to soon percolate back to the high court through appeals of these decisions. Whether Justice Scalia's prediction that the result is "inevitable" will hold true remains to be seen, as the Court will be required to explain or ignore the substantial references in *Windsor* to federalism arguments that it is within the province of the states, and not the federal government, to determine laws relating to marriage and domestic relations. Certainly Supreme Court precedent relating to interracial marriage establishes a basis for the court to wade into this area of the law. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (holding state anti-miscegenation laws unconstitutional as violation of fundamental equal protection and due process rights).

Taking the issue a step further, if the Supreme Court rules that bans on same-sex marriage are unconstitutional -- and continues to expand the equal protection argument started in *Lawrence*, then one would expect a decision to follow, in the not-too-distant future, in which the Supreme Court determines that discrimination by the government based on sexual orientation also is unconstitutional.

B. An FMLA Issue Born of *Windsor* – Be Careful With Those 'Spouses'

Federal regulations have long defined "spouse" under the FMLA to mean "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." 29 C.F.R. § 825.102. After the DOMA was enacted, however, the Department of Labor issued an Opinion Letter in 1998 indicating that DOMA effectively limited the definition of spouse under the FMLA to only such marriages between one man and one woman.

Windsor's ruling negated that position, but left a somewhat open question as to whether the definition of "spouse" would revert to the definition in the federal regulations, or be

expanded to recognize spouses who were legally married in any state, as the federal government has done with regard to federal taxes and employee benefits.

In August of 2013, shortly after the *Windsor* ruling, the Department of Labor issued Fact Sheet #28F establishing the DOL's position that definition of "spouse" remained based on the state of residence, but expanded to include same-sex marriage: "Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee **resides**, including 'common law' marriage and same-sex marriage" (emphasis added).

This position presents challenges to the unwary employer, prompting the following four recommendations to employers and their counsel to ensure FMLA compliance:

First, employers should review and revise their FMLA policies and guidelines to comply with the revised definition.

Second, employers must be careful not to assume an employee resides in the same state in which he or she works. Since the "spouse" definition is based on where the employee resides, that state's law on same-sex marriage will control.

Third, employers who decide to be generous and provide coverage for the care of same-sex spouses, regardless of the state of residence, should realize that they are opening themselves up to a claim for 12 additional weeks of FMLA coverage in the same 12-month period, because providing leave for a same-sex spouse for an employee residing in a state that does not recognize same-sex marriage is, by definition, not FMLA leave. Therefore, any such leave would not reduce the 12-week annual entitlement to job-protected leave under the FMLA, for qualified and eligible employees. This is called the no-good-deed-goes-unpunished rule (*see also* prior decisions against employers who provided FMLA-type leave to employees in the first year of employment, only to discover that such leave did not count toward the employee's annual FMLA entitlement).

Fourth, and finally, employers and their counsel should continue to monitor this issue, as Labor Secretary Tom Perez has indicated that the DOL will take steps to implement *Windsor* "in a way that provides the maximum protection for workers and their families." This suggests that the DOL may ultimately revise the regulations to extend FMLA rights to all legally married same-sex spouses regardless of their state of residence.

C. Title VII Protects Against Sexual Stereotyping, Not Sexual Orientation

It is well-settled that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation or gender identity, *per se*. But the Supreme Court and the EEOC have opened up protections for these groups when the discrimination is based on the employee's failure to conform to gender stereotypes.

i. *Price Waterhouse v. Hopkins*

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the court held that a woman denied a partnership in an accounting firm because her appearance and conduct were deemed insufficiently "feminine," could show disparate treatment or harassment based on gender stereotypes of appearance or behavior and therefore state a claim under Title VII ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associate with their groups").

Although Hopkins' orientation was not part of the fact pattern there, the decision has allowed LGBT employees to find protection under Title VII where the harassment or discrimination is based on gender stereotyping, and not simply sexual orientation or transgender status. *See, e.g., Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

Courts continue to recognize that discrimination based on sexual stereotyping violates Title VII in cases involving gay and transgender employees. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc*., 579 F.3d 285 (3d Cir. 2009) (reversing summary judgment where jury could conclude that harassment based on employee's high voice, effeminate walk, and crossing his legs "the way a woman would sit" could be due to his not fitting the stereotypical view of how a man should look, rather than due to his homosexuality); and *Muir v. Applied Integrated /Techs., Inc*., 2013 BL 330738 (D. Md. Nov. 26, 2013) (refusing to dismiss Title VII claim by part-time worker who alleged she was terminated because she was transitioning from male to female and "did not conform to traditional gender stereotypes associated with men in society . . .").

ii. *Transgender Employees Prevail in EEOC Actions*

Transgender employees also have gained protections under Title VII, thanks in large part to the EEOC's decision in *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 25, 2012), which held for the first time that a federal employee raised a cognizable sex discrimination claim under Title VII by alleging that her employer turned her down for a job after learning that she was transitioning from male to female.

More recently, the EEOC announced that it had entered into a $50,000 settlement agreement with a South Dakota grocery store which fired a clerk after she announced her plan to transition from male to female. *See* http://www1.eeoc.gov//eeoc/newsroom/release/9-16-13.cfm?renderforprint=1. While the EEOC touted the settlement as showing that "[t]he tides have turned and the EEOC has made a very clear statement with the *Macy* ruling that transgender people are protected under Title VII," the owner of Don's Valley Market, Don Turner, seemed unconvinced and told BNA that the company did not admit wrongdoing and "I only wish that I had the funds to truly defend myself." *Grocery Store Agrees to Fork Over $50,000 on EEOC Charge by Fired Transgender Clerk*, 181 DLR A-3 (Sept. 18, 2013).

D. Same-Sex Harassment Remains a Viable Claim

Same-sex sexual harassment is actionable under Title VII. In *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998), the court held that such harassment can be "because of sex" where, for example, (1) the harasser is gay or lesbian; (2) the "harasser is motivated by general hostility to the presence of [persons of his or her own gender] in the workplace," or (3) other comparative evidence that demonstrates that members of the opposite sex were treated differently by the harasser. *Id.* at 80-81. One such form of same-sex harassment can be harassment that seeks to punish noncompliance with sexual stereotypes. *Bibby v. Philadelphia Coca Cola Bottling Co*., 260 F.3d 257, 264 (3d Cir. 2001),

In situations in which the alleged victim is gay or transgendered, a plaintiff must demonstrate that he or she is being harassed "because of . . . sex" rather than sexual orientation or gender identity. For example, in *Bibby*, a plaintiff who had been taunted about his sexual orientation and physically assaulted by a co-worker could not prevail under *Oncale*, because the evidence indicated he was being harassed because of his sexual orientation, rather than his sex.

More recently, in *Roadcloud v. Philadelphia*, 2014 BL 1739, 121 FEP Cases 550 (E.D. Pa. Jan. 6, 2014), the plaintiff, an "openly gay female," claimed her supervisor harassed her with comments based on her "perceived lack of femininity, outwards signs plaintiff had engaged in sexual contact, and plaintiff's sexual orientation." The allegations, if proven, could be sufficient to state a claim under Title VII for failure to conform to expected gender stereotypes, the court ruled.

E. Where Does It ENDA?

The proposed federal Employment Non-Discrimination Act (ENDA) was first introduced as a bill in 1994 and would provide protections against workplace discrimination on the basis of sexual orientation or gender identity. The language of the bill tracks Title VII of the Civil Rights Act of 1964, as amended. ENDA does have some exceptions not applicable to other existing civil rights laws, including that: (1) it would not apply to religious organizations; (2) it would not allow for "disparate impact" claims; (3) it would not allow preferential treatment, including quotas, based on sexual orientation or gender identity; and (4) it would not allow the EEOC to compel employers to collect statistics on sexual orientation or gender identity.

On November 7, 2013, the Senate approved the bill by a vote of 64-32, including several Republican supporters. The Republican-controlled House is seen as unlikely to approve the measure, and *govtrack.us* gives the bill a 14 percent chance of being enacted. Supporters of the bill contend that a substantial majority of the U.S. population in all 50 states supports the legislation, but there are also strong opponents.

With regard to federal employees, then-President Bill Clinton signed Executive Order 13087 on May 28, 1998, amending Executive Order 11478 to prohibit discrimination based on sexual orientation in the competitive service of the federal civilian workforce. The order also applies to employees of the government of the District of Columbia, and the United States Postal Service. However, it does not apply to positions and agencies in the excepted service, such as the Central Intelligence Agency, National Security Agency, and the Federal Bureau of Investigation.

Those in favor of greater protections based on sexual orientation and gender identity have lobbied for President Obama to sign an expanded Executive Order to extend such protections to federal contractors, which in combination with federal employees make up 22 percent of the U.S. workforce. Obama has indicated support for such an Executive Order, but has not issued one, indicating a preference for legislation.

IV. Corporate America Far Ahead of Legislatures on LGBT Protections

While legislative and judicial protections for same-sex marriage, sexual orientation and gender identity issues have been developing rapidly in the past few years, they still trail big business on these issues.

An estimated 96.8 percent of Fortune 500 companies prohibit discrimination based on **sexual orientation**, according to a recent report by Equality Forum, in collaboration with Professor Louis Thomas of the Wharton School of the University of Pennsylvania and Ian Ayres, a Yale Law School professor. Equality Forum has even "outed" the 16 "non-compliant companies" in the Fortune 500 who do not protect against sexual orientation discrimination, but they include few household names other than Exxon Mobil, DISH Network and Seaboard.

The percentage of large companies protecting employees based on sexual orientation rose from 72 percent of the Fortune 500 in 2003, and 87 percent in 2010.

On the issue of **gender identity and expression**, corporate America is also ahead of the legislatures. According to Human Rights Campaign, 57 percent of the Fortune 500 companies prohibit discrimination based on gender identity, up from just 3 percent in 2000. The numbers decline when the pool of businesses is expanded, based on 2010 data, but current numbers are not available.

V. Anti-Discrimination Policies May Support Breach of Contract Claims

When employers do adopt anti-discrimination policies over and above what the law requires, they should consider whether they are creating potential contract claims for employees, especially in states that do not prohibit employment discrimination based on sexual orientation or identity. With mixed success, employees have asserted claims that the employer policies modify the employment relationship that is otherwise "at will." *See, e.g., Grimm v. US West Communications, Inc.*, 644 N.W.2d 8 (Iowa 2002) (holding that employee handbook's prohibition against sexual orientation discrimination could constitute a contract); *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149, 1164-65 (Kan. 2000); *Johnson v. Nasca*, 802 P.2d 1294 (Okla. Ct. App. 1990); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458 (1982) (finding plausible breach of contract claim based on assurance that employee would not be terminated except for cause); and *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847 (2d Cir. 1985) (allowing breach of contract claim based on operations manual that expressly provided that seniority would be the sole factor in selecting employees for terminations stemming from job elimination or force reduction).

Employer disclaimers remain effective at thwarting claims based on policies in their handbooks, but are not completely airtight. *See generally* Effectiveness of Employer's Disclaimer of Representations In Personnel Manual or Employee Handbook Altering At-Will

Employment Relationship, 17 A.L.R.5th 1 (2006); Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge, 33 A.L.R.4th 120 (2006).

At least one plaintiff, a gay law professor, had success – albeit short-lived -- in moving his breach of contract claim past summary judgment, based on his employer's anti-discrimination policies. In *Hammer v. University of Michigan*, 120 Fair Empl. Prac. Cas. (BNA) 1747 (Dec. 3, 2013), a Michigan state court judge expressed skepticism about the University's attempt to disown any obligation from its anti-discrimination policy due to a disclaimer in the handbook. Oral argument on the point, at an earlier stage of the case, included the following exchange with defense counsel:

> *The Court*: So in other words, if you tell me that you're not going to discriminate, I can't really rely on that, if you're an employer – -
>
> *Mr. Seryak*: That's correct, judge. It's not a basis for contract – -
>
> *The Court*: And it particularly a public employer, that's just puffing?
>
> *Mr. Seryak*: Your honor, its – -
>
> *The Court*: It's a scam to get me to come to work for you?
>
> *Mr. Seryak*: Judge, when we say that this is not a contract and we say that it can be modified, that's an awfully general statement. And I submit to Your Honor that is not the basis for a contract, a damage contact. It says it's a commitment. That's our intent. But that doesn't – -
>
> *The Court*: So we can just disregard it at our whim? When we put there in writing, right there, that the University is committed to a policy of non-discrimination, equal opportunity for all persons regardless of race, sex, color, religion, creed, national origin, or ancestry, age, marital status, sexual orientation, we're just kidding? We don't really mean that?
>
> *Mr. Seryak*: We're not saying that, Your Honor.
>
> *The Court*: And the Courts in this state should sanction the disregard of that language by a publicly funded, highly respected, University?

> *Mr. Seryak*: I'm not saying that, Your Honor. I'm not going to make that – -
>
> *The Court*: Well, then what does it mean?

The University subsequently dropped the "at will" disclaimer-based defense, but ultimately prevailed in the case when the Michigan Court of Appeals issued an unpublished decision affirming summary judgment and finding that Hammer had failed to prove that his sexual orientation was a motivating factor in the decision to deny him tenure. *Id.*

VI. Practice Tips As the Law Evolves

- ***Stereotypes versus orientation and identity.*** In harassment and discrimination claims by LGBT employees, the employee and his or her counsel should seek to cast the evidence in terms of sexual stereotyping, while the defense will push for admissions, evidence and testimony that the adverse treatment was motivated by the plaintiff's sexual orientation or gender identity.
- ***Beware of FMLA errors.*** FMLA policies and practices should be reviewed and revised to ensure the employer provides leave in accordance with the law – no more and no less – and does not unwittingly grant excessive non-FMLA leave to employees in same-sex marriages.
- ***Non-discrimination policies and breach of contract.*** For employers that adopt anti-discrimination policies to protect on the basis of sexual orientation, gender identity and other categories not necessarily protected by state or federal law, the employer should consider a prominent disclaimer making clear employment remains at will and that the policy is not a binding contract. Even with such language, the employer may be subject to a breach of contract claim based on such a policy.
- ***Consider the difficulty of multi-state variations.*** Employers that operate in multiple states with different protections for LGBT employees may find it easier to administer a policy that provides the highest level of protection to all. Other employers deal with this challenge by noting in the employee handbook that the

employer provides equal-opportunity protections in accordance with state and local laws, including variations from state to state.

- ***Balance all benefits versus legal requirements.*** Many employers that have adopted anti-discrimination policies to protect LGBT employees have done so for reasons that go beyond legal mandates. Equal opportunity based on performance, recruitment and retention of a diverse pool of employees, public image, customer reactions and core values all should be considered in deciding whether to adopt such a policy. A good counselor will advise on these issues and "doing the right thing," and not just preach compliance with the bare-bone mandates of the law.
- ***Before you get married, be sure you can get divorced.*** This one is not really a labor and employment issue, but it is worth noting – a growing problem arising from the state variations in same-sex marriage law is that gay couples who live in a state that does not recognize same-sex marriage, but get married in a state that does, may find themselves unable to get divorced. In Pennsylvania, for example, which does not recognize same-sex marriage, couples often travel to neighboring states (such as New York, New Jersey and Delaware) to get married. If the marriage goes bad, however, the couple cannot get divorced in Pennsylvania, because Pennsylvania law prohibits recognition of same-sex marriages and therefore the courts have no authority to divorce the couple. Worse yet, most states that recognize same-sex marriages, with few exceptions, have residency requirements as a prerequisite for filing for divorce. Therefore, at least one member of the couple must take up residency for at least six months or a year in a state that will recognize the marriage in order to then file for divorce. Again, this is not an employment law issue, but it reflects the difficulties and contradictions created by the current mishmash of state laws on same-sex marriage. Some states that recognize same-sex marriage are considering amendments to their laws to allow for divorces by couples who married there, but do not reside in the state.