



Compliance Hurdles with Proposed Anti-Discrimination Legislation

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Democratic House Speaker Nancy Pelosi has taken up the mantle of the Equality Act, a law that would ban discrimination based on sexual orientation and gender identity in a broad swath of federal anti-discrimination laws. Although the bill has failed to pass for years, Speaker Pelosi has indicated that it is a priority to pass in 2019. Virtually every major business and corporation in the United States, including major financial institutions like Ally Financial, Bank of America, Capital One, Synchrony Financial, and Zillow, has either signed on to support the legislation^[1] or has adopted internal policies that ban discrimination based on these characteristics (or both).^[2] Having a level playing field is a good thing. Unfortunately, there are some unique aspects of the legislation for online platforms and creditors that will create compliance hurdles if the legislation, which has the full support of the Democratic Party, becomes law.

Two aspects of the legislation will create some difficulty.^[3] First, the Equality Act expands the definition of “public accommodation.” The United States has long banned discrimination in public accommodations based on protected characteristics – race and religion being two of the most significant. The Civil Rights Act mandated that all persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the grounds of race, color, religion, or national origin. Banning discrimination in public accommodations is crucial for the free movement of people in the United States, and it is particularly crucial for commerce. Given the long and brutal history of racist laws banning black people from public spaces, such protections were necessary to the growth of our country.^[4] Public accommodations have generally been construed to mean establishments where the public is invited to come and stay (and spend money), like a store. Now, the Equality Act wants to amend the Civil Rights Act to expand the definition of public accommodations to include “online retailers or service providers.” Neither of these terms is defined in the Equality Act. Further, proposed amendments to the rules of construction further provide that a reference to an “establishment” in the Civil Rights Act of 1964 will now include an individual whose operations affect commerce and who is a provider of a good, service, or program, and that an “establishment” is not limited to a physical facility or place. These provisions are new and would apply to all protected classes under the Civil Rights Act, not just lesbian, gay, bisexual and transgender (“LGBT”) people.

The aim of these provisions seems clear – do not discriminate in your product offers online. The issue, of course, is online retailers, being online, do not see the customer in front of them. Their customer is some nameless, faceless person entering keystrokes on a computer, tablet or mobile

phone. This begs the question – does online discrimination happen? Do online retailers discriminate against people based on a protected class now? A 2014 White House report entitled “Big Data: Seizing Opportunities, Preserving Values,” suggests that they do.[5] The report noted that the availability and use of big data has led to discrimination in pricing, services, and opportunities. So, for example, one study found that web searches involving black-identifying names (e.g., “Jermaine”) were more likely to display ads with the word “arrest” in them than searches with white-identifying names (e.g., “Geoffrey”). The White House report includes a host of data justifying protections based on race; there are no examples of discrimination against LGBT people cited in the report.

The second amendment in the Equality Act with which online platforms – particularly those that offer credit – need to concern themselves is the expansion of the Equal Credit Opportunity Act (“ECOA”) to ban discrimination in credit based on sexual orientation and gender identity. The ECOA imposes specific duties on creditors, including the obligation not to discriminate on a prohibited basis and to provide adverse action notice to credit applicants who have been denied credit. This seems like good business, given that sexual orientation and gender identity do not seem like reasonable bases on which to discriminate. Indeed, there is precedent for this. In 2000, the U.S. Court of Appeals for the First Circuit ruled in *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) that a man who appeared at a bank branch wearing a dress stated a cause of action under the ECOA for sex discrimination when the bank declined to provide him with an application for credit. That case was subsequently settled. The problem with the Equality Act, however, is that it wholly lacks a coherent definition of “sex” or “gender identity” that online platforms and creditors can reference to structure policies to prohibit unlawful discrimination.

Under the Equality Act, the term “gender identity” means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth. “Gender” is not defined, and looking at the proposed definition of “sex” is also not helpful; the new definition of “sex” includes a sex stereotype, pregnancy, childbirth, or a related medical condition, and sexual orientation or gender identity.

Based on these definitions, “gender identity” is some aspect of sex that is separate from a “sex stereotype.” So, under the Equality Act, there are characteristics of sex that are not sex stereotypes that connect to “identity, appearance, mannerisms” or other characteristics (and that are called “gender”). Both of these definitions are as clear as mud and will create compliance difficulties for online platforms and creditors. Presumably, discrimination based on sexual orientation and gender identity must be a pressing public policy issue to justify the passage of this legislation. For example, news reports document that transgender people have been denied access to their credit accounts or have had negative interactions with creditors. In one case, a transgender man reported that a large national bank declined to open a bank account for him because of his transition;[6] another transgender man reported his bank would not speak to him when the bank could not verify he was the account holder.[7] In a case in the United Kingdom, a transgender woman criticized NatWest after she was told she could not change her title on her bank account without a gender recognition certificate. The person was repeatedly told by staff that she could not have her title changed from Mr. to Ms. or Miss without official documentation of a gender change.[8] In Ireland, the Irish Equality Tribunal awarded transgender woman Deirdre O’Byrne €5,000 compensation after it ruled AIB discriminated against her. In October 2010, in accordance with the declarations on her change of name of deed poll, she approached the bank to inform them of her change of name. The bank changed her name and gender on her credit card but told her to close down her “cashesave” account. The Equality Tribunal found she had been discriminated against on gender

grounds and has ordered the bank to review its policies in relation to people who change their name. O’Byrne changed her name by deed poll and had no surgeries to “become a woman.”[9] In some of these news reports, the bank responded to the allegations of discrimination by stating that they had overarching concerns about data security, privacy, and fraud. It will remain to be seen how creditors impacted by these potential amendments to the ECOA will balance fraud concerns with the mandate against discrimination.

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[1] See “Business Coalition for the Equality Act” at <https://www.hrc.org/resources/business-coalition-for-equality> (retrieved February 26, 2019).

[2] See “LGBT Equality at the Fortune 500” at <https://www.hrc.org/resources/lgbt-equality-at-the-fortune-500> (retrieved February 26, 2019).

[3] For purposes of this article, we rely on the prior version of this bill, H.R. 2282 (115th Congress).

[4] For further reading, see “A Brief History of Jim Crow,” Constitutional Rights Foundation, at <http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow> (retrieved February 26, 2019).

[5] Executive Office of the President, “Big Data: Seizing Opportunities, Preserving Values,” (May 2014) available at https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf. The interim progress report is also available at https://obamawhitehouse.archives.gov/sites/default/files/docs/20150204_Big_Data_Seizing_Opportunities_Preserving_Values_Memo.pdf.

[6] J. Volentine, “Transgender man claims Chase Bank discriminated against his gender.” (January 5, 2017) available at <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/transgender-man-claims-chase-bank-discriminated-against-his-gender>.

[7] Yes on 3, “Boston Man’s Story Shows The Discrimination Transgender People Experience in Public Places in Massachusetts,” available at <https://www.freedommassachusetts.org/boston-mans-story-shows-the-discrimination-transgender-people-experience-in-public-places-in-massachusetts/>.

[8] Pink News, “NatWest refuses to change trans woman’s title from Mr,” available at https://genderidentitywatch.com/wp-content/uploads/2015/05/natwest-refuses-to-change-trans-woman_s-title-from-e28098mr_-c2b7-pinknews.pdf.

[9] Deirdre O’Byrne v. AIB, The Equality Tribunal, DEC-S2013-015 (December 2, 2013).

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