

PUERTO RICO PROHIBITS SEXUAL ORIENTATION WORKPLACE DISCRIMINATION

NEW PROHIBITIONS; NEW REQUIREMENTS; NEW CHALLENGES

Puerto Rico recently approved a law prohibiting sexual orientation and gender identity discrimination in most public and private sector workplaces. Law No. 22 of May 29, 2013.

In doing so, Puerto Rico joins sixteen other states and the District of Columbia that have enacted statutes prohibiting *both* sexual orientation and gender identity discrimination in public and private sector employment.

Employers may be surprised to learn the new law also creates new compliance, employee orientation and training protocols on employment discrimination. These new obligations go beyond prohibiting sexual orientation and gender identity discrimination.

A brief discussion of the new law follows.

Covered Employers

First, Law No. 22 declares the Commonwealth of Puerto Rico maintains as *public policy* the rejection and prohibition against sexual orientation and gender identity discrimination in the public and private sector workplace.

The law, however, does not cover the legislative or the judicial branches of government. Further any church, religious or faith-based group, including affiliated educational institutions, whose creeds, dogmas or occupational requirements *are in direct conflict with the interests protected by Law No. 22* are exempted from its application. Exactly how this will be determined is unclear.

Labor organizations and joint employer/union training/apprentice programs are equally prohibited from discriminating against members or participants on the basis of sexual orientation and gender identity.

Individuals Protected

Law No. 22 prohibits discriminating in workplace opportunities or decisions due to an individual's "sexual orientation" or "gender identity."

It seems the term "*sexual orientation*" was intended to be limited to "homosexuality," "heterosexuality" or "bisexuality." However, the legislator chose not to rely on these commonly used terms. Rather, "sexual orientation" is defined as a person's capacity to feel "emotional, affective *or* sexual" attraction towards persons of the same, different or both genders.

The potential impact of using the conjunctive term "*or*" in this definition is unclear, particularly since at an early stage of the legislative process the conjunctive term "*and*" was deemed more appropriate. As finally approved, it could be argued that "emotional" or "affective" attraction suffices to merit protection.

"*Gender identity*" is frequently defined as "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

Law No. 22, however, also prefers not to follow this commonly used definition. Rather, it defines "gender identity" as "the manner in which the person identifies him/herself; how he/she recognizes him/herself, with regard to gender, which may correspond or not to the biological or assigned gender at birth." Here again, the legislator's deviation from more commonly used statutory language may give rise to unforeseen evidentiary difficulties in court since it is not limited to *perceivable* appearances or forms of conduct.

More significant is the final version of the enacted bill which eliminated the prohibition of discrimination on the basis of a person's "*perceived*" sexual orientation or gender identity.

By eliminating this broader scope of the protected group, it would appear a claimant cannot merely allege the adverse action was caused by the employer's "perception" of his/her "sexual orientation" or "gender identity." Instead, the claimant may be required to prove he/she is *actually a member* of the protected group (homosexual, heterosexual or bisexuality).

What Acts Are Prohibited?

Law No. 22 leaves undisturbed the prohibitions contained in Puerto Rico's general workplace anti-discrimination statute, Law No. 100 of June 30, 1959, as amended. Accordingly, all forms of employment and pre-employment bias are forbidden, including discrimination in hiring, discharge, promotion, layoff and recall, compensation and fringe benefits, classification, training, apprenticeship, referral, union membership, and other "terms, conditions, or privileges of employment."

Likewise, employers are not allowed to "limit, segregate, or classify" employees in ways that "deprive or tend to deprive" them of job opportunities or "adversely affect" their employment status due to their "sexual orientation" or "gender identity."

For example, it would appear that Law No. 22 will require employers to ensure, among others, that group health coverage cover transition-related conditions and permit access to restrooms in accordance to the employee's gender identity.

Dress & Appearance Codes

Employers frequently require male and female employees to follow gender specific dress and grooming codes. On occasion these policies have been challenged alleging sexual orientation or gender identity discrimination. For example, lesbian female workers have challenged employer rules requiring them to use makeup, lipstick or other traditional female appearances. In other occasions, transgender and transsexual employees have challenged policies that prohibit them from dressing like members of the opposite sex.

Generally, such challenges have been unsuccessful and courts have found different arguments to sustain the validity of gender based dress and appearance codes.

Several state laws that have prohibited sexual orientation and gender identity workplace discrimination have expressly maintained the validity of such dress and appearance codes. A bill pending before Congress, the "Employment Non-

Discrimination Act" (ENDA; H.R. 1755/S. 815), specifically states employers would not be prohibited from requiring employees to adhere to reasonable dress or grooming standards, as long as the employer permits employees who have undergone gender transition to comply with the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.

Law No. 22, however, does not contain similar language protecting the validity of employer dress or grooming standards. In the absence of such protective language, local employers may soon encounter challenges to their existing dress and grooming policies and need to decide how to address such demands.

New Compliance and Training Obligations

Article 18 of Law No. 22 requires employers to develop anti-discrimination protocols on *compliance, education and employee training*, pursuant to rules that will soon be dictated by the Puerto Rico Department of Labor and Human Resources and the Central Labor Advisory and Human Resources Administration Office.

Employers are alerted to these upcoming mandates, particularly since Law No. 22 grants these two agencies the authority to impose compliance, education and employee training standards *for all types* of prohibited employment discrimination. Accordingly, employers are advised to review their anti-discrimination policies and training programs to ensure compliance with these new mandates.

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