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Corporate *Update*

The Sexual Orientation Non-Discrimination Act

On Dec. 17, New York state enacted the Sexual Orientation Non-Discrimination Act, or SONDA. The act, which takes effect on Jan. 17, amends the New York State Human Rights Law to prohibit discrimination based on actual or perceived sexual orientation in the areas of employment, housing, public accommodations, education and credit.¹ In enacting SONDA, New York becomes the 13th state to prohibit discrimination on the basis of sexual orientation in the private sector, joining California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin, as well as the District of Columbia.²

The addition of SONDA to the State Human Rights Law has long been heralded as a necessary step toward equal treatment of gays and lesbians throughout New York State. However, practitioners should be aware of important distinctions between SONDA and the various local anti-discrimination statutes that predate it.³ Specifically, the civil rights laws of New York City and other cities and counties continue to afford greater protection than SONDA in certain key respects. A number of these distinctions are noted below.

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EMPLOYMENT LAW ISSUES



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Gender Identity

Despite last-minute efforts to amend SONDA to include protection for “gender identity and expression,” the legislation as enacted does not explicitly define transgender individuals as a protected class. To date, only Minnesota and Rhode Island prohibit discrimination based on gender identity by statute on a statewide basis.⁴ Although at least one federal court has opined that transgender individuals may be protected under the State Human Rights Law’s existing prohibition of “sex” discrimination, this issue has not been addressed by any New York state court.⁵

In response to this uncertainty, New York City amended its Human Rights Law in April 2002, expanding the definition of “gender” to include actual and perceived sex, as well as “gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance,

behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.”⁶ Thus, New York City’s law expressly protects transgender individuals, as do the laws of Suffolk County, Rochester, Buffalo, and numerous other jurisdictions around the country.⁷

Civil Remedies

SONDA entitles a plaintiff claiming discrimination on the basis of sexual orientation to institute a private action for legal and equitable relief under the State Human Rights Law.⁸ However, it should be noted that state law, unlike the New York City Human Rights Law, does not permit plaintiffs to recover punitive damages except in cases of housing discrimination.⁹ In addition, whereas the New York City Human Rights Law authorizes an award of attorneys’ fees to a prevailing party in a private action, attorneys’ fees are not available under the State Human Rights Law.¹⁰

Domestic Partnership

In enacting SONDA, the State Legislature explicitly provided that “[n]othing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist” under federal or state law. New York State has thus reserved the issues of domestic partnership, same-sex marriage and civil

unions for another day.¹¹

Meanwhile, numerous localities have established domestic partner registries, including New York City, Westchester County, and the cities of Albany, Ithaca and Rochester. The benefits available to registered domestic partners vary by jurisdiction. New York City's domestic partner legislation, for example, provides registered domestic partners with visitation rights in city-owned hospitals and nursing homes, as well as succession rights to apartments under city jurisdiction. In addition, in September 2002, New York City expanded its definition of domestic partnership to include same-sex or opposite-sex couples that have legally registered their status in another jurisdiction, including couples whose otherwise legal partnership is not recognized by the state of New York.¹²

Employee Benefits

Although SONDA prohibits employment discrimination based on sexual orientation, it does not address the issue of employee benefits. Such benefits are regulated by the Employee Retirement Income Security Act of 1974, or ERISA, which generally preempts state and local legislation concerning most employee benefits for private sector employees.¹³

Nonetheless, New York employers are free to offer domestic partner benefits to their unmarried employees. Indeed, New York State and New York City each provide health insurance benefits to the domestic partners of their respective employees.¹⁴ Private employers are increasingly providing domestic partner benefits, including health insurance and other ERISA benefits, as part of a broader commitment to eliminating discrimination based on sexual orientation and marital status. Where applicable law does not provide for a domestic partner registry, an employer typically requires a covered employee to complete an affidavit or statement of

domestic partnership attesting to the duration and financial interdependence of his or her relationship with a domestic partner.¹⁵

Moreover, a number of municipalities, including San Francisco, Los Angeles, Seattle, and Minneapolis, require private employers with whom they contract to provide domestic partner benefits. At least one court has upheld such requirements with regard to benefits that are not covered by ERISA, such as family and medical leave and bereavement leave, and has observed that a city acting as a market participant has a legitimate interest in applying its non-discrimination laws to those with whom it contracts, as long as the city is not "exercising more power than an ordinary consumer could exercise."¹⁶

In this regard, the New York City Council is currently considering an "Equal Benefits Bill," which would require companies having contracts with New York City valued at over \$100,000 to certify that they do not discriminate between employees with domestic partners and employees with spouses in providing benefits.¹⁷ Given the vast number of companies that do business with New York City, the Equal Benefits Bill, if enacted, could have significant ramifications for domestic partnership benefits nationwide.

The enactment of SONDA, which was first introduced in the New York State Legislature in 1971, represents an important step toward equal protection for gay men and lesbians. Nonetheless, New York City and other localities continue to provide greater civil rights protections than New York State in certain critical areas, and to be at the forefront in this rapidly developing area of the law.

(3) N.Y.C. Admin. Code §8-101 et seq.

(4) Minn. Stat. Ann. §363.01 subd. 45; R.I. Gen. Laws §28-5-6(14) (Supp. 2001).

(5) *Rentos v. OCE-Office Sys.*, No. 95 Civ. 7908 (LAP), 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996) (declining to dismiss postoperative transsexual's claim of discrimination on the basis of sex under the New York State Human Rights Law and the New York City Human Rights Law). But see *Maffei v. Kolaeton Indus Inc.*, 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup. Ct. N.Y. Co. 1995) (finding that transsexual plaintiff was protected by New York City Human Rights Law's pre-2002 prohibition of gender discrimination).

(6) N.Y.C. Admin. Code §8-102(23) (2002).

(7) Suffolk County Resolution No. 802-2001, §2(G) (defining "gender" to mean "both the biological and social characteristics of being female or male") (2001). The city of Rochester forbids discrimination against transgender individuals in public and private sector employment and public accommodations. Rochester Mun. Code, Ch. 63 (2001). The city of Buffalo also prohibits discrimination based on gender identity, but its local ordinance is limited to public sector employment. Buffalo City Code §35-12 (2002).

(8) N.Y. Exec. Law §297(9).

(9) *Thoreson v. Penthouse Int'l Ltd.*, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 981-82, 606 N.E.2d 1369 (N.Y. 1992); N.Y.C. Admin. Code §8-502(a).

(10) N.Y.C. Admin. Code §8-502(f); *McGrath v. Toys "R" Us, Inc.*, No. CV-01-3071 (CPS), 2002 U.S. Dist. LEXIS 22610 (E.D.N.Y. Oct. 16, 2002) (awarding \$193,551 in attorneys' fees under the New York City Human Rights Law to prevailing transsexual plaintiffs); *New York City Board of Educ. v. Sears*, 83 A.D.2d 959, 960, 442 N.Y.S.2d 23, 25 (2d Dep't 1981) (vacating award of attorneys' fees under the State Human Rights Law).

(11) Legislation seeking to prohibit same-sex marriage has been introduced in the New York State Legislature annually since 1996, but has failed to advance.

(12) N.Y.C. Admin. Code §§3-240(a) & 3-245 (2002).

(13) 29 U.S.C. §301 et seq.

(14) In the absence of a statewide domestic partnership registry, New York State employees have been permitted to register their domestic partnerships and obtain benefits pursuant to applicable collective bargaining agreements since 1995.

(15) Unlike benefits for married couples, domestic partner benefits generally are taxable, because domestic partners are not considered "spouses" under applicable tax law (although they may be considered "dependents" in certain cases). Specifically, Internal Revenue Service Publication 501 (2002) notes that for purposes of determining one's filing status, "marriage means only a legal union between a man and a woman as husband and wife."

(16) *Air Transport Ass'n of Am. v. City & County of San Francisco*, 992 F. Supp. 1149, 1180-81 (N.D. Cal. 1998), *aff'd in part*, 266 F.3d 1064 (9th Cir. 2001). See also *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001).

(17) N.Y.C. Council Int. No. 271 (2002).

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(1) N.Y. Exec. Law §290 et seq.

(2) Eight states prohibit discrimination based on sexual orientation in the public sector: namely, Colorado, Delaware, Illinois, Indiana, Montana, New Mexico, Pennsylvania and Washington.