

## REAL ESTATE

# Movements in LGBT Discrimination Laws

By Andrew Lieb and Michelle E. Phillips

In the wake of the U.S. Supreme Court's June 26 same-sex marriage decisions in *United States v. Windsor* and *Hollingsworth, et al. v. Perry*, pressure has increased to expand protections under federal, state and local legislation regarding sexual orientation, gender identity and gender expression in the context of employment and housing.

In the employment area, the Senate Health, Education, Labor and Pensions ("HELP") Committee has approved a bill, ENDA (the Employment Non-Discrimination Act), that would prohibit employers from discriminating against employees on the basis of sexual orientation or gender identity. After S. 815 passed, Committee Chairman Senator Tom Harkin said, "I think society is there and the things that have happened in the Supreme Court show we're ready to move on in a way we haven't moved on in the past." According to the annual Out & Equal Workplace Survey on Workplace Culture conducted by Harris Interactive, "74% of voters believe that employees should be judged on their work, not their sexual orientation or gender identity."

ENDA would amend Title VII of the Civil Rights Act to prohibit "covered entities" and employers with at least 15 employees from discriminating against employees on the basis of sexual orientation or gender identity. "Covered entities" means an employer, employment agency, labor organization or joint labor-management committee. Corporations, associations, educational institutions or societies exempt from the religious discrimination

provisions of Title VII are exempt from ENDA.

Unlawful employment practices include: a) failing or refusing to hire or discharging or otherwise discriminating against an individual regarding the compensation, terms, conditions or privileges of employment because of the individual's actual or perceived sexual orientation or gender identity; b) limiting, segregating or classifying employees or applicants in any way that would deprive or tend to deprive an individual of employment or otherwise adversely affecting the status of the individual as an employee because of the individual's actual or perceived sexual orientation or gender identity; c) retaliating against an individual for opposing an unlawful employment practice, making a charge, testifying, assisting or participating in an investigation, proceeding or hearing under ENDA.

In the housing area, the U.S. Housing and Urban Development (HUD) enacted regulations, called the Equal Access to Housing HUD Programs, "to ensure that HUD's core housing programs are open to all eligible persons, regardless of sexual orientation or gender identity" back in 2012. According to Secretary Shaun Donovan, "With this historic rule, the Administration is saying you cannot use taxpayer dollars to prevent Americans from choosing where they want live on the basis sexual orientation or gender



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identity."

Unlawful housing practices include: a) owners and operators failing to make HUD-assisted housing, or housing whose financing is insured by HUD, available without regard to the sexual orientation or gender

identity of an applicant for, or occupant of, the dwelling, whether renter- or owner-occupied; b) lenders using sexual orientation or gender identity as a basis to determine a borrower's eligibility for FHA-insured mortgage financing; c) owners and operators of HUD-assisted housing or housing insured by HUD asking about an applicant or occupant's sexual orientation and gender identity for the purpose of determining eligibility or otherwise making housing available.

However, the dichotomy between Federal and State law remains confusing for both employers and landowners/operators of housing. While federal employment law does not explicitly protect gender identity and gender expression, 17 states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington) and the District of Columbia include gender identity and/or gender expression in their employment non-discrimination statutes. Moreover, in housing, while the rights of LGBT individuals are somewhat protected by HUD's regulations, sexual orientation

and gender identity are not protected classes within the federal Fair Housing Act, but there are approximately 21 states and the District of Columbia that prohibit discrimination against LGBT individuals.

In addition, the Equal Employment Opportunity Commission has stated that as part of its latest Strategic Enforcement Plan it is committed to investigating "emerging" issues, including "utilizing Title VII of the Civil Rights Act to protect members of the LGBT community."

As David Kilmnick, the Chief Executive Officer of The Long Island GLBT Services Network put it, "folks need clarity to understand that Federal Laws are just one piece of the puzzle when looking at laws and legislation that protect the rights of our communities. Some states and local governments can afford us even greater protections against discrimination. We need to be knowledgeable about all of these and find where the maximum protection lies and enforce from that perspective and angle."

We must be prepared to advise our clients; employers, landowners and property operators should understand local and state laws that protect the rights of LGBT individuals. Moreover, with the advent of the post-*Windsor* federal regulations and guidances, a trend continues on the federal level to grant protection for LGBT individuals. Our job as counselors at law is to ensure that our clients are fully apprised as to the ever-changing employment and housing laws.

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