

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

U.S. HOUSE OF REPRESENTATIVES

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Chair Bonamici, Ranking Member Comer, and members of the Subcommittee, it is an honor to testify in front of you today on the workplace provisions in H.R.5, the Equality Act. My name is Patrick Hedren, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM).

The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers very much appreciate your interest in, and support of, the manufacturing economy. We also believe that equal opportunity is a key pillar of our great democracy—one that allows every individual to pursue his or her own American Dream based on his or her talents and qualifications. Manufacturers and the business community have made great strides already in providing non-discrimination protections for our LGBT employees, even in places where state law may not otherwise require them. There is still further to go, however, and manufacturers believe now is the right time for Congress to act to help our country get there.

In our view, amending the Civil Rights Act of 1964 to include explicit protections based on sexual orientation and gender identity is the right approach. It is sensible and would be less burdensome from a business or economic perspective than other alternative methods. Indeed, a federal standard would actually help manufacturers—many of which already provide these protections—by changing public expectations, enabling manufacturers to better attract and retain a talented workforce.

Moreover, prohibiting this discrimination is simply the right thing to do.

Overview

The NAM is the nation's largest industrial trade association and the voice for more than 12.8 million men and women who make things in America. We represent more than 14,000 manufacturers, of which upwards of 90 percent are small or medium-sized. Indeed, 98.6 percent of manufacturers have 500 or fewer employees, and three-quarters of manufacturing firms have fewer than 20.

Manufacturing has long been the backbone of the American economy. This remains true today. According to the most recent data, manufacturers in the United States contribute \$2.35 trillion to the economy annually (which equates to 11.4 percent of GDP). For every \$1.00 spent in manufacturing, another \$1.89 is added to the economy, the highest multiplier effect of any economic sector. Moreover, the average manufacturing worker in the United States earned \$84,832 annually in total compensation, compared to \$66,847 for all non-farm workers.

According to the NAM's most recent quarterly outlook survey, from Q1 of 2019, today's manufacturing sector is strong, confident, and optimistic. For the ninth quarter in a row, manufacturers reported record optimism—with an average of 91.8 percent saying they were positive about their own company's outlook, compared to an average of 68.6 percent across 2015 and 2016. Thanks to this optimism, manufacturers are growing, investing, and creating jobs. Paradoxically, however, they are also finding that a longstanding problem affecting the industry—namely, the ability to attract the right talent for unfilled jobs—has grown even more difficult. The same survey I mentioned showing record optimism also found 71.3 percent of manufacturers expressing worry about their ability to attract and retain the workforce they'll need moving forward. There are nearly half a million unfilled jobs in the sector today and, according to a recent study undertaken by the Manufacturing Institute (the education and workforce partner of the NAM) and Deloitte, about 2.4 million jobs could go unfilled by 2028.

At the same time, the needs and demographics of the American workforce continue to change. Today's world is one where talent has many choices, and manufacturers can only benefit by making the sector a more welcoming, equitable and

attractive place to work. The good news is, they are. As explored in another recent Manufacturing Institute study, a white paper released jointly with PwC late last year, manufacturers are working hard to lead the way in creating a more welcoming and accommodating workplace. For manufacturers of all sizes, diversity and inclusion (D&I) programs are no longer viewed as a “nice to have” but rather as a top priority for their businesses.

Attracting talented employees is a multi-faceted effort, but manufacturers have known for years that an inclusive workplace with meaningful LGBT protections helps them hire and retain the best possible workforce. To be fully effective, however, non-discrimination protections must extend beyond the employer-employee relationship. For example, many of our members operate programs that rotate their best employees through various roles in different parts of the country. We have heard repeatedly from our members that their best and brightest LGBT employees are likely to decline roles in areas where they feel unsafe because of their orientation or identity. Even *non*-LGBT employees are often reluctant to relocate to areas that lack meaningful and complete protections, particularly when their children or other family members might not feel accepted or protected from bias.

The NAM has for years recognized the importance of talent to the success of our sector, as well as the value of clear and affirmative protections for LGBT individuals under federal law. To that end, the NAM Board of Directors voted unanimously in 2016 to affirm manufacturers’ support for the principle of equal treatment in all personnel matters without regard to sexual orientation or gender identity as part of our official policy positions—in addition to support for the positive, responsible, and consistent efforts of government to support equal opportunity. Creating fair and equal conditions in the workplace is quite literally part of our mission.

In short, manufacturers have led the way already in providing their employees with fair and meaningful protections against sexual orientation- and gender identity-based discrimination. Partly, this is because talented employees demand it. Partly, this is because employers understand the importance of creating an environment in which the very best people can succeed based on merit.

There is, however, also a much broader side to this discussion. Namely, manufacturers believe that discrimination of any kind is antithetical to the values we work to uphold every day: free enterprise, competitiveness, individual liberty and equal opportunity. These are the four pillars that underpin what makes manufacturing strong. These are the values that help make our country great. They are also the animating rationale behind our support of this legislation.

In March, the NAM joined with over 40 other industry associations—representing a truly stunning breadth of the American economy—in supporting the Equality Act. And the number of industry associations in support continues to grow. As the letter states:

The undersigned trade and professional associations support provisions in the Equality Act that amend Title VII of the Civil Rights Act to provide employment non-discrimination protections based on sexual orientation and gender identity. Equality of opportunity is a key pillar of our great democracy—one that allows all people to pursue their American Dream—and part of what makes our nation exceptional. Our industries, representing tens of millions of Americans, understand this basic fact and have been at the forefront of efforts to combat discrimination based on sexual orientation and gender identity in the workplace.

It continues:

We believe an appropriately-tailored federal standard would complement our members' ongoing work to promote equal opportunity in the workplace. A clear federal standard would better enable individuals to succeed based on their abilities and qualifications to perform a job. Our members recognize the value of equal opportunity because it enables them to attract and retain the most talented employees. Title VII of the Civil Rights Act provides a well-understood legal framework for preventing and addressing discrimination. Amending the Act to include protections based on sexual orientation and gender identity is a sensible approach to ensure consistency with other protected classes.

Allow me to explain further why that is.

Including Sexual Orientation and Gender Identity in Title VII

Section 7 of the Equality Act amends Title VII of the Civil Rights Act of 1964 to clarify that the definition of sex *includes* discrimination on the basis of sexual orientation and gender identity. In other words, the bill would codify once and for all the position long-held by manufacturers as well as the independent agency charged with enforcing Title VII. As such, employers may not take an individual's LGBT affiliation into consideration in any aspect of employment. This includes hiring, firing, benefits, promotions, job assignments, pay, and many other terms and conditions of employment. The NAM supports this method of including sexual orientation and gender identity in federal law, in particular Title VII.

Guarding Against a Patchwork

Many states and hundreds of localities explicitly protect residents from discrimination in the workplace based on their sexual orientation and gender identity. In addition, the United States Equal Employment Opportunity Commission (EEOC) has consistently argued that the Civil Rights Act already protects against LGBT-related discrimination as a form of sex discrimination. Several federal circuit courts have agreed, although a circuit split remains.

Each year additional jurisdictions pass protections for LGBT individuals—contributing to a patchwork of different laws. Some laws protect individuals only from discrimination based on their sexual orientation. Other laws extend further and include gender identity protections as well. Some jurisdictions only protect individuals in the workplace, while others protect them from discrimination in public spaces as well. Laws covering the workplace may exempt small employers and provide for religious exemptions, or they may not. Protections may come in the form of explicit statutory provisions, or by way of judicial interpretations.

These protections are obviously not universal, and the conditions under which employers provide benefits to their employees can vary. In general, however, the employer community has made remarkable strides toward supporting LGBT employees

even in the last ten years, as evidenced by annual reports on corporate equality efforts. States and localities are in motion; manufacturers are in motion too.

A uniform federal approach would help our sector by providing a clear basic level of non-discrimination protection across the states. This consistent approach would give certainty to employees who may wish to move from one facility location to another, as well as reliable rules for employers, making it more cost-effective to educate employees and enforce these protections.

Accommodating Small and Religiously-Owned Businesses

The framework of Title VII brings with it two important pragmatic protections for smaller employers: a basic applicability threshold of 15 or more employees, and a religious exemption contained in Section 703(e) of Title VII that allows employers to differentiate between employees based on a bona fide occupational qualification, also known as a BFOQ.

Rather than enabling or incentivizing discrimination for smaller firms, this 15-employee applicability threshold serves principally to protect smaller firms from the burden of compliance and oversight (or “red tape”) that applies to larger employers. As mentioned earlier, large and small employers experience the burden of legal and regulatory requirements differently. For example, the NAM issued a report in 2014 that found that manufacturers in 2012 spent on average \$19,564 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses in general. The smallest manufacturers—those with fewer than 50 employees—incurred regulatory costs of \$34,671 per employee per year. This is more than triple that of the average U.S. business. Businesses with 15 or more employees already must understand and comply with Title VII. This fact is a key benefit of the Equality Act.

By amending Title VII, the Equality Act would also draw upon current case law with regard to sex discrimination. Employers’ and employees’ rights would not need to be established through decades of litigation and court opinions—these cases and EEOC enforcement guidance, to an extent, already exist. By putting sexual orientation and gender identity on a level playing field with other sex-based non-discrimination

protections, the Equality Act merely maintains a consistent and sensible threshold for compliance.

Conclusion

Manufacturers can only attract talented employees when they feel safe from discrimination, harassment, or worse at work and in their communities. This legislation would help us do so. It would also actually establish a solid federal framework to help manufacturers prevent and address discrimination in the future. Above all, manufacturers believe that passing this bill is simply the right thing to do.

No bill is ever flawless on introduction, and the Equality Act is no different in this regard. That's what this hearing is for. We expect that Congress will amend the bill to address items that otherwise could become interpretive problems down the road, both within and outside the Title VII provisions that I am here to discuss today.

Individual characteristics like sex, color, race, national origin, religion, sexual orientation, or gender identity are some of the core elements at the root of who a person is. The ways in which we are all different make our country stronger and should not be used to make one individual legally inferior to another. We look forward to working with members of the Committee as you consider this important legislation.

Thank you for your consideration today. I look forward to answering any questions you may have.

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