



Footnote in new trade deal causes confusion over LGBTQ protections

Tim Fitzsimons

December 4, 2018

The final version of a new trade deal signed by the U.S., Canada and Mexico on Nov. 30 includes language that says the three countries “shall implement policies that protect workers against discrimination” including on the basis of “sexual orientation” and “gender identity.” The language is the first time a major international trade deal has included workplace protections for LGBTQ people.

However, following [a letter](#) by 46 “deeply concerned” Republican lawmakers who took issue with the “unprecedented inclusion” of such language, a footnote was added to the document that has sowed broad confusion about the current status of LGBTQ protections in the now-signed deal.

“The United States’ existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article,” footnote 13, at the bottom of page 23-6, states. “The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.”

Legal and labor experts disagree on exactly how or whether the original LGBTQ protections, inserted by Canada, will be enforceable in the U.S., but most see the footnote as an attempt to exempt the U.S. from taking any additional steps to protect lesbian, gay, bisexual, transgender and queer workers. Currently, LGBTQ federal workers are protected uniformly, thanks to Obama-era executive orders, but LGBTQ workers in the private sector are protected (or not protected) by a patchwork of state laws.

In a statement sent to NBC News, Adam Austen, a spokesperson for Canadian Foreign Minister Chrystina Freeland, said Ottawa sees the deal — footnote and all — as a win, because it “is the first international trade deal that recognizes gender identity and sexual orientation as grounds for discrimination.”

The footnote, however, quickly [drew scorn](#) from Sarah Kate Ellis, president of U.S.-based LGBTQ advocacy group GLAAD.

“Though the new USMCA trade deal includes protections for LGBTQ workers, they’re effectively nullified by a footnote,” Ellis wrote in a tweet. “Once again @realDonaldTrump

caves to anti-LGBTQ activists and squanders the United States' status as a leader in LGBTQ equality.”

Simon Lester, associate director of the Herbert A. Stiefel Center for Trade Policy Studies at the Cato Institute, said the original deal “provided a strong, enforceable obligation in relation to workplace protections on sex-based discrimination, including sexual orientation and gender identity,” but the added footnote, he explained, “leaves a lot of discretion to the [U.S.] government as to what exactly they want to do.”

“The new footnote seems to say that existing U.S. policies on federal workers completely fulfill the obligation, even with respect to non-federal workers where protections may not apply,” he said, referring to the many states in which LGBTQ workers can be fired for their gender identity or sexual orientation. “Now, there is no obligation to actually protect workers, but rather to simply do what you ‘consider appropriate.’”

However, some legal experts, including those at GLBTQ Legal Advocates and Defenders, or GLAD, told NBC News the footnote in question may prevent a rollback of existing LGBTQ workplace protections in the U.S.

A statement provided by GLAD said while the “footnote is confusing” and the “particulars seem to still be developing,” the language appears to be treating Obama-era executive orders banning workplace discrimination based on sexual orientation and gender identity as the “status quo.”

In addition, GLAD said, “The [Trump] administration is agreeing with the basic argument we’ve been making for years with increasing success in the courts,” GLAD explained, “that sexual orientation and gender identity discrimination are both examples of discrimination ‘because of sex,’ which is forbidden by Title VII.”

Title VII of the Civil Rights Act of 1964 prohibits “employment discrimination based on race, color, religion, sex and national origin.” The issue of whether “sex” discrimination includes discrimination based on sexual orientation and gender identity has recently been considered by a several federal courts and may be taken up by the Supreme Court next year.

An official in the Canadian Foreign Ministry, who spoke to NBC News on the condition of anonymity, appeared to agree with GLAD’s assessment. The official said the Canadian government does not view the footnote “as having any impact,” except to serve as a backstop from rolling back the current state of affairs for LGBTQ workers in the U.S.

Rep. Bill Pascrell, the ranking Democrat on the House Subcommittee on Trade, which will consider the U.S.-Mexico-Canada Agreement, or USMCA, said that while the trade deal “appears to remain committed to existing U.S. policies that provide protections against discrimination in the workplace,” he stands ready to “vigorously oppose opening the door to workplace discrimination based on gender or sexual orientation.”

“It is disturbing that House Republicans are so interested in making discrimination permissible,” Pascrell said, referencing the Nov. 16 letter signed by 46 conservative members of Congress taking issue with the inclusion of discrimination protections based on “sexual orientation” and “gender identity.”

Their letter, which preceded the addition of the controversial footnote, called the addition of the “sexual orientation” and “gender identity” (SOGI) language a “dangerous precedent” and

“strongly urged” President Donald Trump to remove the language before signing the the agreement on Nov. 30.

Rep. Doug Lamborn, R-Colo., who led the effort to remove the language, said at the time, “My concern is the precedent this could set for activist courts to cite as Congressional support for SOGI language once the USMCA is adopted.”

After the footnote was added and the deal was signed, Lamborn sent a statement to NBC News conveying disapproval of the deal’s language.

“I am deeply disappointed that the Office of the U.S. Trade Representative bowed to Canada's wishes in including SOGI language for the first time in a trade deal,” he said. “While the language has been modified to try to limit the force of the language, the fact that it included at all is unacceptable.”

The James Dobson Family Institute, a conservative organization that seeks to prevent the expansion of LGBTQ rights, echoed Lamborn, calling the footnote “an unacceptable solution.”

“Given that experts disagree on the force of the language, clearly the provision remains an open legal question and we believe Congress should not even give the courts a chance to review,” Jenna Ellis, the organization’s director of public policy, told NBC News. “We stand with the members of Congress who have said this is an unacceptable assault on the United States sovereignty and a dangerous precedent for future trade agreements.”

In order for the deal to be enacted, all three nations must ratify the agreement. In the U.S., that means it must be approved by Congress, which has vowed to take up USMCA in 2019, after the new Congress is seated.