

Employment Protections

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In most parts of the United States it is perfectly legal for employers in both the public and private sectors to openly discriminate on the grounds of sexual orientation and gender identity/gender expression. Lawful employment discrimination that is not based on merit and/or ability to work presents a major challenge to the assumption that each American citizen has the right to do his or her job and to contribute to society. This research summary presents an overview of the progressive attempts to put in place federal legislation that will disallow employer discrimination based on sexual orientation. It also includes current information regarding the status of “gender identity” as an add-on clause to employment non-discrimination policies and the possible impact of such policies on private, public, and religious organizations.

History of Employment Protection Legislation: ENDA

There is currently no federal law that provides legal protection against employment discrimination on the basis of sexual orientation and gender expression. Statewide the situation varies: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin and the District of Columbia have passed laws prohibiting employment discrimination based on sexual orientation in both the public and private sectors [1]. In the remaining 34 states that have not enacted such legislation, the situation varies by city and municipality. In Arizona, the cities of Flagstaff, Phoenix, Scottsdale, Tempe and Tucson all prohibit employment discrimination based on sexual orientation in the public sector [Appendix I].

On the national level, several attempts have been made to pass legislation that would prohibit employment discrimination based on sexual orientation. In the mid-1970s, a bill was introduced into the US Congress that would prohibit – across the board – discrimination against gays and lesbians. This bill was modeled after the succession of civil rights bills previously passed that prohibited employment discrimination based on race and sex. This early “gay rights” bill did not pass and the issue was not revisited for two decades, quite possible due to the redirected priorities caused by the urgency of the AIDS epidemic.

In 1994 a new version of the bill was introduced, entitled the *Employment Non-Discrimination Act*. This bill also did not pass, but it marked the first time that the idea of a federal non-discrimination clause protecting lesbians and gays in employment was seriously advocated by prominent (Democratic) politicians. The following year a new version of the bill was introduced designed to allay the fears of religious organizations and the armed forces. This bill, H.R. 1863, exempted both religious organizations and the US military from following nondiscrimination rules in regards to sexual orientation and was vocally supported by President Clinton, who referred to bill as legislation that would assure “*all Americans, regardless of their sexual orientation, can find and keep jobs based on their ability to work and the quality of their work*” [2]. The bill failed to pass again, with prominent Republicans referring to it as “*un-American*.” The defeat was hardly unanimous, however, and since then progressive reintroductions of new versions of ENDA have picked up steam from endorsements of major corporations (including AT&T, Eastman Kodak, Microsoft, and Xerox) and the AFL-CIO

labor union.

With Clinton out of office and both the House and the Senate under Republican control, the strongest advocate (as an elected official) for ENDA in the new millennium has been Senator Ted Kennedy (D-MA) who reintroduced the bill in 2002. The Human Rights Campaign in Washington, D.C. has also made ENDA a priority and is working diligently to re-introduce and finally pass legislation on this issue [3].

Aside from ENDA, attempts have been made to secure employment non-discrimination based on sexual orientation using the Title VII of the U.S. Civil Rights Act of 1964. Title VII prohibits discrimination based on sex but not sexual orientation. "Sex," however, means gender, and some federal courts have heard arguments that discrimination based on sexual orientation and gender expression should be covered by Title VII. Although no one has won a case in favor of LGBT persons using this argument, legal scholars have argued that the time will come when this argument is presented to a court in a way that will mandate serious reconsideration of the provisions and meaning of Title VII [4]. Additionally, the legalization of civil unions and gay marriage will also have ramifications for employers, and these issues are currently the subject of investigation and debate among prominent legal scholars [5].

The Corporate Response to Employment Non-Discrimination

In the absence of federal leadership on the issue of (ENDA), major corporations have taken matters into their own hands. Concerned with the core American business values of competition, productivity and profit, these corporations have put in place non-discrimination policies covering sexual orientation and gender expression in order to attract and maintain the best and brightest employees. For the seventh year in a row, the Human Rights Campaign Foundation has issued its annual Corporate Equality Index (CEI) "report card" scoring Fortune 583 businesses in regards to key indicators of fair treatment for GLBT workers. Using a scale of 0 to 100% (the higher the percentage the more favorable to LGBT employees) this year's findings included:

- Of the 255 Fortune 500 companies participating in the CEI, 120 received were given perfect scores.
- For Fortune 500 companies, the average rating was 83 percent.
- Law firms were invited to participate in 2006, and in that year 13 firms achieved a score of 100%. This year that percentage has risen to 64%, higher than banking and financial institutions.
- Ninety-nine percent of rated businesses offer employment protections on the basis of sexual orientation.
- Sixty-six percent of CEI participating employers prohibit discrimination based on gender identity or expression, a 28% increase over last year's report card [6].

Religion and ENDA

Major opposition to ENDA has been from the religious right, which has gone as far as establishing the *Capitol Hill Prayer Alert* [7] that calls on Christians to pray against passage of the ENDA bill. This call to arms oversteps any real or perceived threat to religious groups as ENDA would exempt religious organizations from non-discrimination based on sexual orientation and/or gender identity. Under the rubric of “religious freedom,” the issue was given much media attention in 2002 when a Methodist children’s organization fired a counselor that was discovered to be a lesbian solely on the grounds of her sexual orientation [8]. The employee attempted an unsuccessful legal battle against the Methodist organization, and her loss was seen as a victory by religious groups adamant on keeping LGBT persons out of their organizations. The media coverage of this issue obscured the fact that, since the beginning of ENDA, multiple religious organizations (Christian and otherwise) have actually supported the passage of the bill.

The reality is that there is not a consensus by churches that the issue of homosexuality is subject to narrowly and suspiciously interpreted scripture by anti-gay religious groups. Even though ENDA exempts religious organizations from adherence to anti-discriminatory policy, the issue is problematic, as religious groups would have free reign to discriminate against any person or group of persons based on their own subjective interpretations of their chosen scriptures.

It is worth looking at the issue of employment non-discrimination and religion from an international perspective: As in the cases of gay marriage, gay parenting and military policy, the US unfortunately remains far behind our Western industrialized neighbors. In 1998, while the US was concerned with the precise details of Clinton’s sexual encounter with Monica Lewinski, Canada resoundingly passed its federal amendment prohibiting employment discrimination based on sexual orientation throughout the country. The legislation was based on the ruling of the Canadian Supreme Court and the particular case involved a gay teacher fired from a Christian school. The ruling stated that there was no excuse and no provision for discrimination against gays and lesbians – period -- and the school was ordered to reinstate the teacher. Thus, the Canadian law does not exempt religious organizations from discriminatory policy and this ruling was supported by members of both liberal and conservative political parties.

Gender Identity and ENDA

Original versions of ENDA did not include provisions for employment nondiscrimination for gender expression. In 1999 an employment discrimination survey was distributed to the over 10,000 participants of the Columbus, Ohio Pride celebration in order to assess the occurrence and degree of employment discrimination experienced by those participants. Thirty-seven percent of the respondent sample reported experiencing job discrimination based on gender expression/gender identity issues. The sample base of the study was expanded and the results were similar: 41% of respondents reported employment discrimination based on gender expression/gender identity issues [9]. Such results validate what many suspect, that gender expression – or even the quality of acting “too gay” – may pose a higher risk for job discrimination than sexual orientation alone.

In 2004, the Human Rights Campaign decided that their support of ENDA must be contingent on the addition of gender expression as a protected category [10]. The organization hopes that a new version of ENDA, one that includes provisions for gender expression, will be considered in 2009. In a recent interview with *The New Yorker* magazine, Congressman Barney Frank expressed confidence that Congress will pass a version of ENDA with the transgender protections added in the Obama administration [11].

In Arizona, gender expression is a protected category in some municipalities but not others. Currently, the cities of Tempe and Tucson prohibit employment discrimination based on sexual orientation and gender identity but in the cities of Flagstaff, Phoenix and Scottsdale, provisions exist that only disallow employment discrimination based on sexual orientation. [Appendix I]. With Governor Janet Napolitano's departure to Washington DC this year, however, the Republican control of Arizona may adversely impact some or all of these current protections.

The case for ENDA: Utilizing an informed approach

The following points may be helpful when arguing the case for passage of the Employment Non-Discrimination Act:

- Referring to employment non-discrimination in terms of "Employment Protections" may have a more positive impact with fair minded Americans as it counteracts the right-wing jargon of "special rights."
- The bill would require that employers consider employees and potential employees fairly on the basis of their ability to do the job.
- Implementation of non-discrimination policies covering sexual orientation and/or gender expression by major Fortune 500 companies have occurred because those companies believed non-discrimination makes good sense, creates a healthy and productive work environment, and attracts the best and the brightest employees.
- Non-profit religious organizations would be exempt from non-discrimination.
- The issue of religious exemption from non-discrimination is not unanimously agreed upon. It is important to remember that in the 1960s that many religious groups taught that African Americans were inferior and did not deserve equal treatment in society. In Canada, religious organizations are not exempt from that country's non-discrimination policies.
- Transgender Americans face discrimination on a daily basis. Passing ENDA without inclusion of a clause covering gender identity would leave a vulnerable group open to unfair discrimination based on personal characteristics rather than education, experience, and ability to perform a particular job.

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Appendix I

Non-Discrimination Policies for Arizona County and City Employees (as of February 2005)

- City of Flagstaff:
 - Affirmative action statement prohibits discrimination on the basis of sexual orientation.
- City of Phoenix:
 - Does not allow discrimination on the basis of sexual orientation and discourages conducting business with vendors, suppliers or contractors that employ more than 35 persons and practice discrimination on the basis of sexual orientation.
- Pima County:
 - Prohibits discrimination based on sexual orientation.
- City of Scottsdale
 - Does not prohibit discrimination based on sexual orientation.
- City of Tempe:
 - Prohibits discrimination based on sexual orientation **and gender identity**.
- City of Tucson:
 - Prohibits discrimination based on sexual orientation **and gender identity**