

Protecting Gender Identity: The Employment Nondiscrimination Act of 2013 Passes the Senate and Heads for the House

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While same-sex marriage has recently dominated the headlines, another important issue for gay rights' proponents is making headway in Congress. The Employment Nondiscrimination Act of 2013 (ENDA) was passed in the Senate on November 7, 2013. It would outlaw workplace discrimination on the basis of both sexual orientation and gender identity for private and public employers.[1] ENDA is currently awaiting approval in the House of Representatives.

Currently, federal law prohibits discrimination on the basis of race, color, sex, national origin, religion, age, disability, genetic information and veteran's status. There is no federal law that would specifically prohibit discrimination on the basis of sexual orientation or gender identity, although numerous state and local governments have passed various measures to outlaw such discrimination. However, the majority of states still have no comprehensive workplace protections for these groups. Although approximately thirty states currently have some form of protection against employment discrimination based on sexual orientation and/or gender identity,[2] only fifteen of these prohibit discrimination *both* on the basis of sexual orientation and gender identity for *both* public and private employers. Many of those thirty states only prohibit discrimination by public employers.[3]

Thus, ENDA would be the first comprehensive civil rights law creating a clear line in the sand that discrimination based on sexual orientation or gender identity is unlawful. ENDA's stated purpose is to "address the history and persistent, widespread pattern of discrimination on the bases of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers" and to "to provide an explicit, comprehensive Federal prohibition against employment discrimination on the bases of sexual orientation and gender identity..."[4] As implied by that statement, ENDA would apply to local governments. The definition of "employer" in ENDA is "a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has 15 or more employees..."[5]

For the most part, ENDA would track other federal non-discrimination laws like Title VII of the Civil Rights Act of 1964 (Title VII) as to what conduct is prohibited and how an employee could recover for prohibited discrimination.[6] Section 4 of ENDA prohibits discrimination in employment practices, making it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's *actual* or *perceived* sexual orientation or gender identity."[7] Thus if passed, ENDA would apply both to gay or transgendered individuals and also under circumstances where an employee is discriminated against because their employer (or co-workers) believed that he or she was gay or transgendered--regardless of his or her actual sexual orientation and gender identity. It would be similarly unlawful under ENDA to "limit, segregate, or classify the employees or applicants for employment...in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity."[8]

As with Title VII, retaliation under ENDA would be unlawful. So for example, employers would be prohibited from discriminating against someone for opposing or complaining about an action that is prohibited under ENDA or for participating in any investigation or hearing based on ENDA.[9] (Such prohibition against retaliation would apply regardless of whether or not the underlying claim turned out to be valid).. One major difference between ENDA and Title VII is that under ENDA an employee would be unable to bring a disparate impact claim.

The terms "sexual orientation" and "gender identity" are both defined within the statute. Specifically, ENDA defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality."[10] It defines the term "gender identity" as the "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[11] Thus, gender identity would include both transgender individuals and transsexual individuals. Likewise, the law would apply to individuals regardless of whether they have transitioned to another sex physically; for example, a person who is biologically male, but self-identifies as female and has not undergone sex reassignment surgery would be protected under ENDA.

ENDA addresses two concerns raised by employers in the context of gender identity: bathroom facilities and dress codes. The statute specifically states that it shall not be construed to require the construction of additional facilities.[12] Additionally, under ENDA, transgender individuals would be required to adhere to

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the same dress and grooming standards (if any) that are not otherwise prohibited by law that all other employees are expected to adhere to.[13] For example, if an employee is transitioning from male to female, that employee would be expected to adhere to the grooming standards for other women at the facility (again assuming they are not otherwise prohibited by law and applied uniformly).

ENDA has a long legislative history, going back twenty years. Variations of ENDA have been introduced in Congress at different times since 1994; however this is the first instance where a comprehensive bill has passed in the Senate. (An earlier version of the legislation passed in the House in 2007, but that version did not include any protections for transgender individuals). ENDA was originally introduced and championed by the late Senator Ted Kennedy (D. Mass.) and since his passing, Senator Jeff Merkley (D. Ore.) has taken up the issue. After the Senate passed this version in November 2013, Senator Merkley issued the following statement:

> Today's vote was a historic vote for equality and freedom. Deeply embedded in the constitution are notions of freedom and liberty, and discrimination is the antithesis of those founding values. Everyone should have the right to work hard and earn a living. No one should be fired for who they are or who they love. The Senate said today in a strong bipartisan voice that discrimination is just plain wrong. We are one step closer to equality for our LGBT friends and family.[14]

Although the bill easily passed in the Senate, with sixty four votes in favor of the bill and thirty two against, it will likely be a more uphill battle in the House of Representatives. House Speaker John Boehner has stated that he would oppose any law that would prohibit discrimination against gay and lesbian employees in the workplace as, according to his spokesman, he believes ENDA "will increase frivolous litigation and cost American jobs, especially small business jobs."[15] Speaker Boehner also believes that discrimination against gay and lesbian employees is "covered under existing law."[16]

While discrimination prohibiting sexual orientation and gender identity is not covered under any existing federal law, the Equal Employment Opportunity Commission (EEOC) has recently pushed to include gender identity and sexual orientation under the umbrella of "sex" discrimination under Title VII. Specifically, in 2012, the EEOC held that discrimination because a person is transgender (i.e., discrimination based on gender identity) is discrimination on the basis of sex, in violation of Title VII.[17] Similarly, the EEOC has found that claims by lesbian, gay, and bisexual employees alleging sex-stereotyping can also state a claim for justice, sex discrimination under Title VII.[18]

In *Macy v. Department of Justice*,[19] the complainant interviewed for a job and was told that the position was hers pending a background check. At the time of her interview, the complainant was still presenting as a man.[20] A couple of months later, after the complainant had again been told that she had the job pending a successful background check, the complainant e-mailed her new employer stating that she planned on transitioning from a male to female.[21] Five days later, the complainant was informed that due to budgetary restraints, the job was no longer available.[22] The complainant filed a complaint, alleging discrimination in violation of Title VII based on sex stereotyping and her gender identity.[23] Her gender identity claims were initially dismissed and she appealed.[24] The EEOC found that the agency had erred. The complainant's charge stated a claim for a violation of Title VII in that "discrimination against a transgender individual because that person is transgender is, by definition discrimination 'based on ....sex...'"[25] The EEOC reasoned that the word "sex" as used in Title VII encompasses both a person's biological sex and their gender--and a person's gender includes "not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[26] The EEOC explained the issue of gender stereotyping as follows:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[27]

Similarly in *Castello v. U.S. Postal Service*, the agency initially dismissed the complainant's charge, indicating that she was complaining about harassment based on sexual orientation, which was not protected under Title VII.[28] On appeal, the EEOC disagreed, holding that Title VII's prohibition of discrimination includes a prohibition of sex stereotyping discrimination.[29] The EEOC reasoned that the offensive and derogatory comments about the complainant having relationships with women could have been motivated by the "sexual stereotype that having relationships with men was an essential part of being women..."[30] Although the EEOC has moved forward in the absence of comprehensive federal litigation on the subject by pushing to protect individuals from discrimination based on gender identity and sexual orientation, the fact remains that until ENDA or a similar version of the legislation is passed, these individuals do not share the same workplace protections as other employees.

Notes

1. U.S. Senate, 113th Cong., S. 815, Employment Nondiscrimination Act of 2013 (Nov. 6, 2013) available at http://www.opencongress.org/bill/s815-113/text (last accessed Jan. 8, 2014).
2. *See* http://www.lambdalegal.org/states-regions (last accessed Jan. 8, 2014).
3. *Id.*
4. ENDA, Section 2.
5. ENDA would not apply to religious organizations. Specifically, Section 7 states: "[t]his Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of