

THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)

The Issue:

The Employment Non-Discrimination Act (ENDA) would elevate sexual orientation to a protected status in federal nondiscrimination laws just like race. No matter how ENDA is drafted, lawmakers should oppose ENDA for at least two fundamental reasons of principle: first, ENDA expresses a collective moral judgment that homosexuality and bisexuality are morally equivalent to heterosexuality; second, history shows that laws like ENDA are an important step on the path to same-sex marriage. ENDA also suffers from several additional flaws, including: the failure to include a sufficient exemption for religious institutions; the inclusion of ambiguous language and new grounds for lawsuits that could impose vast new costs on businesses; and failure to account for free market solutions that have led many firms already to implement ENDA-like provisions with highly invasive federal regulation. In addition, a version of ENDA including “transgender” as an additional protected category would raise several additional disturbing issues.

Watch List:

Observers expect a freestanding ENDA bill to be introduced within the first three to four months of the 111th Congress. It is unclear whether the bill will be introduced in the House or Senate. President-elect Obama has pledged to sign such a bill.

The House passed a version of ENDA in November 2007. That was the first time either the House or the Senate had passed a version of ENDA. The Senate failed to pass an earlier version of ENDA in 1996 by just one vote.

Talking Points:

No matter how ENDA is drafted, lawmakers should oppose ENDA for at least two fundamental reasons of principle.

- **ENDA expresses a collective moral judgment that homosexual conduct and bisexual conduct is morally legitimate and morally equivalent to heterosexual conduct.** This collective moral approval of homosexuality and bisexuality should be opposed in itself and also because it undermines collective judgments about sexuality that underlie society’s commitment to preserving marriage as a relationship between a man and a woman.
- **ENDA is an important step on the path to same-sex marriage.**
 - Sexual orientation scholars, homosexual activists, and same-sex marriage activists agree that the path to same-sex marriage is incremental in nature and involves a series of intermediate, sequential steps. In this view, elevating sexual orientation to a protected status in nondiscrimination laws is widely considered to be one of the key steps toward marriage redefinition.

- In marriage litigation throughout the country, same-sex marriage advocates have argued that laws like ENDA demonstrate that sexual orientation is a suspect class and require courts to examine traditional marriage laws with heightened scrutiny.
- Activist courts in Vermont, New Jersey, New York, California, and Connecticut have cited sexual orientation nondiscrimination laws in decisions redefining marriage or requiring some alternative form of legal recognition for homosexual unions.
- Homosexual activists believe that laws like ENDA will facilitate the political conditions of same-sex marriage. Laws like ENDA involve a smaller change than redefining marriage and therefore desensitize the public to homosexuality. Once laws like ENDA are passed, lawmakers will find it increasingly difficult to resist marriage redefinition politically.

Even if ENDA did not suffer from these fundamental defects in principle, lawmakers should still oppose ENDA due to several other flaws.

- **Nondiscrimination laws that govern private behavior place heavy burdens on personal liberty.** To the extent nondiscrimination laws are used at all, they should be used to rectify only the most egregious social harms. In any case, the list of protected statuses should not continue to be expanded.
- **ENDA does not contain a sufficiently broad exemption for religious organizations.** The current religious exemption would not cover all religious non-profit organizations and would not cover small business owners with conscientious objections to homosexual conduct and bisexual conduct.
- **ENDA threatens to increase litigation costs for small businesses.** ENDA bans discrimination based on actual sexual orientation and “perceived” sexual orientation. Employment discrimination lawsuits are already one of the biggest targets for plaintiffs’ attorneys. ENDA’s sloppy wording, ambiguous use of the word “perceived,” and dramatic expansion of legal grounds for suing employers threaten to impose vast new costs on already heavily burdened small businesses.
- **Nearly 90% of Fortune 500 companies have already implemented ENDA-like policies without federal regulations.** Proponents of ENDA have stated that ignoring sexual orientation makes good business sense in today’s economy. If that’s true, no federal regulation is needed. Instead of passing new, highly-invasive, very expensive federal laws that advance controversial social policies with hotly-disputed moral dimensions, Congress should rely on the free market to work out this issue itself.

Furthermore, it is possible that ENDA will attempt to elevate “gender identity” to a protected status just like race. A “transgender inclusive” version of ENDA would create several additional problems.

- **A transgender inclusive ENDA could create chaos in the workplace.** Workplace areas like restrooms and locker rooms could become landmines for disputes and disturbances. An anatomically male employee who claims a female “gender identity” might be able to demand

access to the women's restroom and locker room. Female employees could feel threatened by having a man in these otherwise gender-segregated facilities.

- **A transgender inclusive ENDA could create hidden costs for taxpayers, consumers, and employers.** State-run health care plans could be required to pay for costly sex-reassignment surgical procedures, including extensive pre- and post-operative evaluations and therapies. Homosexual- and transgender-rights groups estimate that these surgeries cost on average between \$30,000 and \$70,000.¹ Employers also might be pressured to absorb some of these costs. Citizens are already facing situations like these in certain states.²

Research Findings: See endnote list. Additional forthcoming research paper explaining that laws like ENDA are viewed as significant steps on the path to same-sex marriage. Other arguments developed by coalition members can be found in the record for the congressional hearing on ENDA held in September 2007 (see below).

For additional information:

- The Ethics and Religious Liberty Commission, <http://erlc.com/article/enda-unacceptable-to-religious-and-lgbt-groups>;
- H.R. Rep. No. 110-406 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr406p1.110.pdf
- Congressional Hearing No. 110-60 (Sep. 5, 2007) (includes copies of arguments submitted by coalition members against ENDA in 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf
- Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in John D'Emilio et al. eds., *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* (2002).
- PFOX (Parents and Friends of Ex-Gays) <http://pfox.org/faq.html>

Available Experts

Tom Messner, Heritage Foundation

Ashley Horne, Federal Issues Analyst, Focus on the Family Action

Bruce Hausknecht, Judicial Issues Analyst, Focus on the Family Action

¹ "More U.S. Employers Cover Sex Transition Surgery: Large Corporations Follow City's Lead in Offering Benefit," *San Francisco Chronicle*, 31 January 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/31/BAGC5NS2V31.DTL>

² The Massachusetts state health plan was required to pay for transsexual's breast reconstruction surgery due to defective breast implants. See GayLawNews, "Judge Orders State to Pay for Transsexual's Breast Reconstruction," May, 2000, http://www.gaylawnet.com/news/2000/tr00.htm#judge_orders. In Minnesota, lawsuits have been generated over a "transgender" person's "right" to use either bathroom in a public high school. See ACLU website, "Federal Appeals Court Rejects School Teacher's Lawsuit Seeking To Keep Transgender Employee from Bathrooms," (6/20/2002), <http://www.aclu.org/lgbt/transgender/11837prs20020620.html>. In New York, a high school was required to pay for a teacher's one year leave in order to have a sex-change operation and now the teacher is seeking disability benefits. See Jayne J. Feld, "Teacher fights for sick pay," *The Journal News* (Westchester County, NY), June 25, 2002. In Wisconsin, at least two lawsuits have been filed in Wisconsin against prison officials by "transgender" inmates. See "Transgender Inmates seek sex-change surgery," *Associated Press*, as reported on MSNBC.com, August 24, 2006, <http://www.msnbc.msn.com/id/14502715/>, "Wisconsin Transgender Inmates Sue for Therapy," *PlanetOut Network*, January 25, 2006.