

Summary:

Employment discrimination against lesbian, gay, bisexual and transsexual workers is pervasive and harmful. It violates core American values of fairness and equality by discriminating against qualified individuals based on characteristics unrelated to the job.

Over the years, Congress has responded when it found that people were not being hired or promoted for unfair or arbitrary reasons, such as race, gender, national origin, or disability. When Congress has found such discrimination, it has passed laws to restore civil rights by ensuring arbitrary considerations do not determine access to employment. Such legislation continues to be an essential part of equal protection under the law.

The Employment Non-Discrimination Act (ENDA) offers Congress the opportunity to ensure workplace equality by protecting lesbian, gay, bisexual or transsexual (LGBT) workers from employment discrimination. ENDA is federal legislation that would ban employment discrimination based on an individual's sexual orientation. The bill protects workers from discriminatory hiring, firing, promotion or compensation practices, as well as retaliation for reporting such practices.

The original version of the bill would have included protections for transsexual workers. While the ACLU believed that transsexual workers are protected against discrimination under civil rights laws banning sex discrimination, they lobbied hard for the inclusion of gender identity because they felt it is important for Congress to reinforce the position that employees should be judged on the basis of their abilities, not on their gender identity. Unfortunately, key supporters of ENDA in the House decided to strip gender identity from the bill.

The American Civil Liberties Union (ACLU) has been working to pass ENDA or similar legislation since 1974. The ACLU worked hard while [the bill] was in committee to try to keep a non-inclusive bill from being sent to the floor. However, once it was ready for a floor vote, the ACLU supported passage of the stripped-down bill because they believed having a bigger vote for the bill would help in the fight to restore gender identity protection in the next congress.

On November 7, the House voted 235 to 184 to pass ENDA, barring workplace discrimination against lesbian and gay people. This was welcome news to lesbian and gay people who can now be fired or refused a job in 30 states for no reason other than being themselves.. **However, the bill did not include protections for the full lesbian, gay, bisexual and transsexual community.**

The spotlight now moves to the Senate, where Senator Kennedy has promised to introduce ENDA "soon". However, even if the bill does pass both the House and the Senate, the White House has issued statements indicating that the President's advisors are recommending that he veto the bill.

Background of the Employment Non-Discrimination Act (ENDA):

A bill was introduced into the US congress in the mid 1970's that would do for gays and lesbians what various civil rights bills had done for African-Americans, women and others. It went nowhere.

In 1994, a stripped-down version of the bill was introduced to Congress; it had limited range, guaranteeing only freedom from discrimination in employment. It was called the *Employment Non-Discrimination Act* or ENDA, and was widely viewed as a bill supported only by the fantasies of liberals in the Democratic party. It also did not progress.

In 1995, Rep. Studds introduced H.R.1863. The "digest" section of the bill stated:

1. This Act does not apply to the provision of employee benefits for the benefit of an employee's partner; and
2. A disparate impact does not establish a prima facie violation of this Act. Prohibits quotas and preferential treatment.
3. Declares that this Act does not apply to:
 - religious organizations (except in their for-profit activities);
 - the Armed Forces; or
 - laws creating special rights or preferences for veterans.

Provides for enforcement. Disallows State immunity. Makes the United States liable for all remedies (except punitive damages) to the same extent as a private person. Allows recovery of attorney's fees. Prohibits retaliation and coercion. Requires posting notices for employees and applicants.

This bill was supported by President Clinton in 1995-OCT. He said that if the bill were passed, it would guarantee that "*all Americans, regardless of their sexual orientation, can find and keep their jobs based on their ability to work and the quality of their work.*" It was also supported by: the *Leadership Conference on Civil Rights*, by many large corporations (AT&T, Eastman Kodak, Microsoft, RJR Nabisco, Quaker Oats, and Xerox), and by many liberal and mainline religious organizations, including the *National Council of Churches*, *National Catholic Conference for Interracial Justice*, *Southern Christian Leadership Conference*, and the *Union of American Hebrew Congregations*. [Where was the Unitarian-Universalist Church?]

When the *Defense of Marriage Act* (the anti-gay marriage bill) was considered by the Senate, a bipartisan coalition attempted to attach the ENDA bill, as an amendment. Republican leaders eventually compromised by separating the two bills and allowing ENDA to be brought forward for a separate vote. It was reintroduced in 1996-SEP with the backing of the House and Senate Democratic minority leaders. The bill was characterized by conservative Republicans as controversial, immoral, and un-American. This time, it actually made it to a Senate vote; it was narrowly defeated 49 to 50. Although it was not passed in the Senate, and would not have had any chance at all in the House, this close vote still represents a stunning victory for basic lesbian/gay civil rights in a Republican controlled Senate.

The critical wording in ENDA (1996 version) is contained in its Section 2:

"A covered entity, in connection with employment or employment opportunities, shall not --

1. subject an individual to different standards or treatment on the basis of sexual orientation;
2. discriminate against an individual based on the sexual orientation of persons with whom such an individual is believed to associate or to have associated; or
3. otherwise discriminate against an individual on the basis of sexual orientation"

The bill banned any affirmative action policy which might benefit gays and lesbians. The Military, religious organizations, and employers with fewer than 15 employees would be allowed to continue to discriminate against workers on the basis of their sexual orientation.

The [current version of the] **Employment Non-Discrimination Act (ENDA)**, was a proposed U.S. federal law that would prohibit discrimination against employees on the basis of sexual orientation. There were two versions of the bill:

- H.R. 2015, introduced on 24 April 2007 by Representatives Barney Frank, Chris Shays, Tammy Baldwin, and Deborah Pryce, *did* include gender identity within its protections; and
- H.R. 3685, introduced by Representative Frank on 27 September 2007 and passed by the Education and Labor Committee on 18 October, *did not* include gender identity within its scope

Both versions of the bill provided employment protections similar to those of the Civil Rights Act of 1964 (also known as "Title VII"), but specifically directed to gay, lesbian, bisexual (and under HR 2015, transsexual) employees. The new bill was different from Title VII in that it contained exemptions concerning employer dress codes.

Here are the sections pertinent to gender identity:

Section 3 (a) (6) GENDER IDENTITY- The term 'gender identity' means 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.

Section 8(a)(3) CERTAIN SHARED FACILITIES- Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen fully unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

Section 8(a)(4) DRESS AND GROOMING STANDARDS- Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.

Currently, 13 states and the District of Columbia have policies prohibiting both sexual orientation and gender identity discrimination in employment: California, Colorado, Connecticut, Iowa, Illinois, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington in the public and private sector.

Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York and Wisconsin have state laws that prohibit discrimination based on sexual orientation only. Fifteen other states have laws that have been interpreted to protect transsexual persons.

[Florida does not have a state policy, but the communities of Miami-Dade and Gainesville have recently established non-discrimination policies against the LGBT community.]

Previous versions of ENDA did not include provisions that protected transsexual people from discrimination. The latest version of the proposed legislation (H.R, 2095) did contain such provisions, including a specific definition of gender identity, as well as exemptions for employer dress codes and locker rooms, however these provisions were eventually removed from the final version of ENDA,

The inclusion of transsexual employees in ENDA has long been debated in the LGBT community. One argument is that transsexual individuals are already covered under existing laws prohibiting employment based on gender stereotypes.

In 1999, the National Gay and Lesbian Task Force became the first LGBT civil rights organization to stop work on ENDA because of its lack of transsexual-inclusion. In the years until now, it has worked to build a LGBT community consensus to only support a trans-inclusive bill, and participated in redrafting the fully trans-inclusive version for the 110th Congress. ENDA enjoyed the unequivocal support of a large coalition of civil rights, labor and religious organizations. In August 2004, the Human Rights Campaign – an LGBT organization that is among the primary lobbyists for the bill – announced that it would only support passage of ENDA if it included gender identity protections as well.

After an unofficial whip count conducted by the House Democratic leadership on or about September 26, 2007, it allegedly appeared that some members of Congress were unsure about voting for ENDA in its inclusive form, that is, including both sexual orientation and gender identity. This suggested there were not enough definite yes votes to ensure passage. However, if the legislation only contained prohibitions on sexual orientation discrimination, there were enough votes. As a result, one of the lead

sponsors, Representative Frank, proposed a new bill, H.R. 3685, that contained only prohibitions on sexual orientation discrimination.

This posed a problem for GLBT advocacy organizations, many of which had pledged not to support a non-inclusive ENDA. Approximately 250 such organizations stated, in response, that they would not support H.R. 3685. A campaign began to call members of Congress to ask that they support the original bill, and the scheduled markup of H.R. 3685 was postponed by the Democratic leadership.

An important part of the controversy was whether it would be better to move forward to pass a bill now that protects the majority of GLBT people, and to try to enact a bill on gender identity protection in the future, or whether it would be better to move forward with an inclusive bill and to use it to educate members of Congress and their constituents, even though the bill may not pass.

Those who argued that ENDA should move forward as an inclusive bill noted that President Bush was expected to veto it regardless of whether it contained gender identity or not, so this was not a choice between protecting some people or none. In addition, unfairly excluding transsexual people would undermine the underlying principle of ENDA, which is that fairness is a fundamental American principle, and it is unfair to fire or refuse to hire people based on identity, rather than job performance or qualifications. They also claimed that the process of moving the inclusive bill forward would educate people about transsexual identity, which would make it easier to pass in a future Congress when there is a Democratic president. In addition, failure to include gender identity/expression would weaken the protection for the portion of the gay population that needs it most: gender non-conforming gays, who are discriminated against in greater numbers than their gender-conforming compatriots. The courts would narrowly interpret a sexual-orientation-only ENDA as not covering anti-gay discrimination that stems from gender expression.

Those who argued that ENDA should move forward with sexual orientation only, with another bill to be introduced on the subject of gender identity, said that there would be a grave risk if the inclusive bill failed in the House. It would make it almost impossible to pass any form of ENDA in the near future because members of Congress would be concerned about charges of flip-flopping if they voted against it now and voted in favor of it later on. Furthermore, they noted that creating a sexual-orientation-only bill was not a slight against transsexual people, but rather, recognition of a political reality that the bill could not pass with gender identity included. More education was needed on the subject of transsexual identity, which would take some years, and then, in the more favorable climate created once ENDA has been passed, a gender identity bill could be enacted. Lastly, they argued that a sexual-orientation-only ENDA would protect gender non-conforming gays and lesbians because any gender expression discrimination is virtually always accompanied by sexual orientation discrimination.

On November 7, 2007, the Baldwin amendment to reinsert the protections for the transsexual community, HR 2015, was withdrawn. ENDA moved forward without gender identity language and H.R. 3685 was passed by the House of Representatives by a vote of 235 to 184 (14 members did not vote).

The spotlight now moves to the Senate, where Senator Kennedy has promised to introduce ENDA "soon". However, even if the bill does pass both the House and the Senate, the White House has issued statements indicating that the President's advisors are recommending that he **veto the bill**.

Arguments in favor of ENDA

Most proponents of the law intend it to address cases wherein gay, lesbian and/or transsexual employees have been discriminated against by their employer because of their sexual orientation or gender identity. Currently, these employees are unable to find protection in the judicial system of most US states. Proponents argue that such a law is appropriate in light of the US Constitution's guarantees of equal protection and due process to all. Advocates say that being gay, lesbian, bisexual or transsexual is not a "lifestyle," but an identity, and that the "special rights" argument does not apply to a group subject to widespread prejudice. According to a study published in 2001 by the Williams Institute at the UCLA School of Law, reports of discrimination based on sexual orientation are roughly equal to those on race or gender. There are also studies showing that local anti-discrimination laws are ineffective, and federal law is needed.

The bill exempts small businesses, religious organizations and the military. Religious [for profit] businesses (such as Christian book stores) are not exempted.

Cost estimates from the Congressional Budget Office from 2002 show that the EEOC estimated that their complaint caseload would rise by only 5 to 7%. Regarding constitutionality, the act incorporates language similar to that of [Title VII of the Civil Rights Act of 1964] which has consistently been upheld by the Courts.

There is no better example of the reason we need a transsexual-inclusive ENDA than Diane Schroer, a former Airborne Ranger qualified Special Forces officer. Schroer retired after 25 years of distinguished service in the Army, and began taking steps to transition from male to female shortly thereafter. She was offered a job as a terrorism research analyst at the Library of Congress, but the offer was rescinded when she told her future supervisor that she was undergoing gender transition. The ACLU is now representing her in a Title VII sex discrimination lawsuit.

Arguments against ENDA

ENDA would prohibit discrimination based on “sexual orientation,” thus opening businesses with 15 or more employees to harassment by homosexual activist lawyers.

ENDA is billed as an expansion of equality, but it is really a “gay power grab” that would severely curb constitutionally guaranteed “unalienable” rights that Americans hold dear, including the freedoms of speech, religion and association. [There is no “freedom of association” enumerated in the Declaration of Independence or the Constitution.]

In brief, ENDA would:

- **Turn groups like the Boy Scouts into targets of federally funded lawsuits.** While he was Vice President, Al Gore said on *Good Morning America*, in answer to a question about the Boy Scouts, that he hoped ENDA would do away with all “discrimination” by public and private groups.
- **Constitute a major expansion of federal power over the workplace and create a new way for the government to manipulate employers.** ENDA’s intent is to create grounds for lawsuits. By injecting sexuality into civil rights law, ENDA opens a Pandora’s box of ways for the government to dictate to businesses.
- **Make people’s sexual “temptations” a source of material for federal lawsuits.** The [current] law properly deals with actions, not beliefs. ENDA creates a new class based on the fuzzy grounds of perception and intention. This is far removed from laws designed to end racial discrimination, because not only is race evident but also it has no moral aspect. Sexual behavior is fraught with moral consequences. [!!!]
- **Elevate “multiple-sex-partner relationships” into a federally protected right.** By including “bisexuality” in the definition of sexual orientations, the government would go on record supporting the practice of having sex with more than one person. This is a direct challenge to the intent behind the Defense of Marriage Act and other laws designed to protect marriage.
- **Put the federal government in the position of adopting a view of sexuality utterly at odds with that propounded by the major faiths of Christianity, Judaism and Islam.** (Have they ever heard of separation of church and state?) All(?) major [religious] faiths support marriage and oppose homosexual conduct. The U.S. government would be placing people with traditional views of morality into opposition to their own government. King George never intruded this deeply into Americans’ lives.
- **Prohibit employers from taking into account sexual conduct in the hiring of education and child-care worker positions.** Because ENDA is so sweeping, employers could not take into account any sexual conduct, even that which might “severely impact children”.
- **Afford special protections to an already privileged group.** Statistically, homosexuals do not qualify as a bona fide minority group, as determined by the U.S. Supreme Court. Homosexuals are not defined by an immutable characteristic, they are not economically deprived, “nor do they suffer from a history of discrimination and political powerlessness”.
- **Change national policy by forcing the government to abandon support for marriage – the bedrock of every healthy society.** By declaring traditional morality regarding sexuality as a form of “discrimination,” ENDA will undermine the special status of marriage as the union of one man and one woman. **(Totally irrelevant!)**
- **Lead to further demands by homosexual activists to force others to “celebrate” abnormal and unhealthy sexual behavior.** Many corporations that adopted “sexual orientation” policies soon found themselves besieged by demands for outright “gay pride” celebrations. **(Completely unsubstantiated!)** Anything less than open promotion is regarded by many homosexual activists as “discriminatory.”