

Employment Non-Discrimination Act Prohibits Discrimination on Basis of Sexual Orientation, Gender Identity

ENDA Would Not Require Domestic Partner Benefits, and Would Not Exempt State, Local Laws from ERISA Preemption

Legislation to ban workplace discrimination based on an individual's sexual orientation and gender identity—the Employment Non-Discrimination Act (ENDA; H.R. 2981/S. 1584)—has been reintroduced in the 111th Congress. While the bill passed the House of Representatives in the 110th Congress by a vote of 235 to 184, it was never introduced or considered in the Senate. In this Congress, however, it has been introduced in the Senate by Senator Merkley (D-OR) with 39 co-sponsors including, Sens. Snowe (R-ME) and Collins (R-ME), two key Republican votes. The bill is more expansive than the ENDA bill that was passed by the House of Representatives in 2007. The bill would protect “gender identity,” prohibiting workplace discrimination against transgendered individuals or those perceived to be so. H.R. 2981 does not require domestic partner benefits nor does it allow for an ERISA preemption carve out as previous versions of ENDS would have permitted. Rather than amend existing laws, ENDA has been drafted as a stand-alone discrimination law, but has the same enforcement scheme and remedies as Title VII.

Protected Class Expanded to Include Gender Identity ENDA prohibits employers from subjecting employees or applicants to different standards or treatment in hiring, firing, promotions, compensation, and training based on sexual orientation and gender identity. “Sexual orientation” is defined to include “homosexuality, heterosexuality, or bisexuality.” “Gender identity is defined 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.” This new class is intended, among other things to protect individuals who undertake a gender transition. In addition to these prohibitions, ENDA borrows language from the ADA and precludes “association discrimination,” which is discrimination against an employee or applicant based on the sexual orientation or gender identity of a person with whom the employee or applicant is or has been associated.

No Requirement to Provide Domestic Partner Benefits Section 8(b) of ENDA states that it does not require employers to provide employee benefits to domestic partners. This provision has been included in versions of ENDA in previous Congresses but, an earlier version introduced last Congress would have allowed state and local governments to enact such mandates “notwithstanding this Act or any other provision of law.” The principal effect of this provision would have been to create an exception to ERISA, which preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” H.R. 2981, however, would not change the ERISA preemption of such laws.

Prohibits Discrimination Based on “Perception” ENDA provides protection to those discriminated against based on their “perceived” sexual orientation or gender identity. Supporters of the bill justify the use of “perceived” because it is consistent with state laws banning sexual orientation and gender identity discrimination and the federal Hate Crimes Sentencing Enhancement Act. However, there is some concern that using language inconsistent with that used in other federal non-discrimination laws could create a very subjective standard.

Indeed, an individual may “perceive” themselves to be homosexual or a different gender and such perception may not be clear to others.

Impact on Workplace Rules and Facilities ENDA contains several provisions related to workplace issues and rules impacted by sexual orientation or gender identity:

- Employers are specifically permitted to enforce rules and policies “that do not intentionally circumvent the purposes of” ENDA as long as they are designed for and uniformly applied to all individuals regardless of sexual orientation or gender identity. The apparent purpose of this provision is to enable employers to enforce office fraternization and similar policies as long as they do so evenhandedly.
- Employers may take adverse action against individuals charged with sexual harassment as long as the rules and policies and their enforcement are designed for and uniformly applied to all individuals regardless of sexual orientation or gender identity.
- Employers may deny access to certain shared shower or dressing facilities to individuals who have undergone or are undergoing gender transition as long as the employer provides reasonable access to “adequate facilities that are not inconsistent with the employee’s gender identity at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.” Although employers would not be required to build “new or additional facilities” significant questions remain regarding “reasonable access to adequate facilities” which result in increased litigation.
- Employers are allowed to have reasonable dress or grooming standards (not otherwise prohibited by another law) as long as the employer allows an individual who has undergone gender transition (or has given notice to the employer of such transition) to adhere to the standards for the gender to which they have or are transitioning.

No Quotas or Disparate Impact Claims ENDA specifically prohibits quotas and preferential treatment based on sexual orientation or gender identity. Likewise, ENDA only permits claims based on disparate treatment. In other words, claims may only be brought for intentional discrimination, not claims based on a statistically disparate impact. ENDA would also bar the EEOC from collecting statistics on employees’ sexual orientation.

Consistent Damages, Procedures With Title VII, ADA ENDA would be enforced by the EEOC under the same procedures as Title VII, thus individuals would be entitled to a private right of action in federal court. Similarly, the remedies available under ENDA parallel those available under Title VII, among them jury trials, punitive and compensatory damages up to a cap of \$300,000, and attorney’s fees. The bill also prohibits employers from discrimination against an individual who opposes an unlawful practice under ENDA or who initiates or participates in a legal proceeding under ENDA.