

Employment Non-Discrimination Act Prohibits Discrimination on Basis of Sexual Orientation

House-Passed ENDA Does Not Include Gender Identity Protection, ERISA Exception for Domestic Partner Benefits

Legislation to ban workplace discrimination based on an individual's sexual orientation—H.R. 3685, the Employment Non-Discrimination Act (ENDA), by Rep. Barney Frank (D-MA)—passed the House of Representatives on November 7, 2007, by a vote of 235 to 184. The bill differs from the ENDA bill introduced earlier in the year (H.R. 2015) in two significant respects. H.R. 3685 does not protect against discrimination against “gender identity”—a separate bill has been introduced to provide that protection (H.R. 3686). In addition, H.R. 2015 specified that the bill itself would not require domestic partner benefits, but would have exempted state and local requirements from ERISA preemption. H.R. 3685 drops the ERISA preemption exception.

Protected Class Established for Sexual Orientation ENDA prohibits employers from subjecting employees or applicants to different standards or treatment in hiring, firing, promotions, compensation, and training based on sexual orientation. “Sexual orientation” is defined to include “homosexuality, heterosexuality, or bisexuality.” In addition to these prohibitions, ENDA borrows language from the ADA and prohibits “association discrimination,” which is discrimination against an employee or applicant based on the sexual orientation of a person with whom the employee or applicant 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, as noted above, an earlier version in this Congress (H.R. 2015) 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 is 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. 3685 would not change the ERISA preemption of such laws.

Prohibits Discrimination Based on “Perceived” Orientation Unlike the ADA and regulations implementing the Rehabilitation Act, which protect those “regarded as” having a disability, ENDA provides protection to those discriminated against based on their “perceived” sexual orientation. Supporters of the bill justify the use of “perceived” because it is consistent with state laws banning sexual orientation discrimination and the federal Hate Crimes Sentencing Enhancement Act. However, there is some concern that using language inconsistent with that used in other federal anti-discrimination laws could create a new standard that may be more easily triggered.

Impact on Workplace Rules ENDA contains two specific provisions related to workplace rules impacted by sexual orientation or gender identity:

- Employers are specifically permitted to enforce rules and policies “that do not 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 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.

H.R. 3685 as introduced would have specifically prohibited an employer from having any employment practice that is conditioned upon an employee being married or eligible to be married in a state where a person cannot marry another person of the same sex. An amendment offered by Rep. Mark Souder (R-IN) was adopted by the House, by a vote of 325 to 101, striking this prohibition. In voting for the amendment, House Education and Labor Committee Chairman George Miller (D-CA) stated that an employer that had such a policy as a pretext for denying employment on the basis of sexual orientation would be in violation of the general prohibition against discrimination anyway.

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. However, the bill does prohibit employers from actions that are conditioned upon individuals being married or eligible to marry in states where a person cannot marry another person of the same sex. 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 a practice that either is or is “reasonably believed” to be unlawful under ENDA or who initiates or participates in a legal proceeding under ENDA.