

LABOR AND EMPLOYMENT NOTES



EMPLOYMENT NON-DISCRIMINATION ACT

In addition to the economic and health care reform legislation in the pipeline, employers should keep an eye out for the Employment Non-Discrimination Act (H.R. 3017), better known as the “ENDA.” The bill was referred to House committees and subcommittees last summer; however, commentators have reported that the ENDA could be submitted to a House vote “soon.”

If passed, the ENDA will prohibit discrimination in employment based on sexual orientation or gender identity. Under federal anti-discrimination laws, membership in a protected class is an essential element of a plaintiff’s claim of unlawful discrimination. As the law now stands, sexual orientation and gender identity are not protected classes, so currently there is no protection, or cause of action, under Title VII of the Civil Rights Act of 1964 (the broad federal anti-discrimination statute) for discrimination based on sexual orientation or gender identity.

The ENDA aims to change that. The ENDA purports to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation or gender identity, including remedies for any such discrimination. In its current form, the ENDA would prohibit employers with fifteen or more employees from

discriminating on the basis of actual or perceived sexual orientation or gender identity.

In particular, under the ENDA, it would be an “unlawful employment practice” for an employer to:

- (1) discriminate against a person because of that person’s actual or perceived sexual orientation or gender identity; or
- (2) limit, segregate, or classify employees or applicants in any way that would tend to deprive an individual of employment, or otherwise adversely affect the status of the individual as an employee, because of the individual’s actual or perceived sexual orientation or gender identity.

The above “unlawful employment practices” would also include an action taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.

The ENDA also contains several limiting statements:

- (1) The ENDA does not provide for preferential treatment or quotas;
- (2) The ENDA does not include disparate

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impact claims. By its express terms, only disparate treatment claims may be brought under the ENDA;

- (3) The ENDA does not apply to religious organizations otherwise exempt from the religious discrimination provisions of Title VII;
- (4) The ENDA's definition of "employment" does not apply to the relationship between the United States and members of the Armed Forces;
- (5) The ENDA does not change existing laws creating a special right or preference concerning the employment of veterans; and
- (6) The ENDA does not require an employer to treat an unmarried couple in the same manner as it would treat a married couple for purposes of employee benefits.

In addition, the ENDA contains several significant provisions regarding its interpretation and construction. First, regarding employer rules and practices, the ENDA does not prevent an employer from enforcing rules and policies that do not intentionally circumvent the purposes of the Act, if the rules and policies are designed for, and are universally applied to, all individuals, regardless of actual or perceived sexual orientation or gender identity.

Second, the ENDA does not limit an employer from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that the rules and policies on sexual harassment are designed for, and are uniformly applied to, all individuals, regardless of actual or perceived sexual orientation or gender identity.

Third, the ENDA does not establish an unlawful employment practice due to the denial of access to shared shower or dressing facilities, where being seen naked is unavoidable, as long as the employer provides the employee with reasonable access to an adequate facility that is not inconsistent with the employee's gender identity either: (1) as established with the employer at the time of employment, or (2) upon notification that the employee is undergoing or

has undergone gender transition, whichever is later.

Fourth, the ENDA would not require the employer to construct new or additional facilities.

Finally, the ENDA does not prevent 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 federal, state, or local law. However, the employer must allow any employee who has undergone gender transition before 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.

The Equal Employment Opportunity Commission, the courts, and other designated entities will have the same powers and jurisdiction to enforce the ENDA that such entities have to administer and enforce Title VII. The procedures and remedies applicable to a claim alleged by an individual for a violation of the ENDA are the procedures and remedies applicable for a violation of Title VII.

Currently, twenty-one states protect against discrimination based on sexual orientation, and twelve states protect against discrimination based on sexual orientation and gender identity. In addition, many corporations already include sexual orientation in their non-discrimination policies. However, despite these existing protections, if passed, the ENDA promises to drastically change the exiting legal landscape by providing new causes of action for discrimination based on actual or perceived sexual orientation or gender identity.



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