

How to Talk About ENDA Support



Lanae Erickson
Hatafsky

Vice President for the
Social Policy & Politics
Program

 [@LanaeErickson](https://twitter.com/LanaeErickson)

According to Gallup, 89% of the country believes that gay and lesbian Americans should have “equal rights in terms of job opportunities.”¹ Though this public support has remained a solid supermajority for over a dozen years, we believe that there is an underlying ambivalence about this issue that is rooted in a simple but important concept: joining versus changing. This memo offers guidance about how to talk about the *Employment Non-Discrimination Act* (ENDA)² in a way that speaks to people’s core concerns.

According to our extensive public opinion research, if voters in the middle think that a gay equality initiative is meant to change a traditional institution, like marriage, the military, or the workplace, they are less likely to support it. That is why the opposition’s arguments are all about change and disruption. However, if people in the middle believe that a gay equality measure is intended simply to allow gay, lesbian, and transgender Americans to *join* in a traditional institution, rather than change it, they are much more likely be supportive. So talking about how ENDA conforms to the traditional rules of the workplace can help assuage fears of those who may struggle with the issue.

Proponents can also frame ENDA as a common ground measure. Generally, people assume that advocates for a cause are focused more on their own welfare than on the good of society as a whole. This is particularly true of gay equality advocates, who the general public often views as fighters and rule-breakers who are looking to push their agenda without regard for any potential harm it might do to society. ENDA supporters can occupy common ground by showing they took account of all sides, therefore marginalizing the legislation’s opponents.

In order to make the case that ENDA is about allowing gay, lesbian, and transgender Americans to join the workplace,

rather than to change it, advocates must emphasize three things:

- The bill conforms to the traditional rules of the workplace;
- It does not change the rules for the religious community; and,
- It furthers core, traditional American values.

ENDA conforms to the traditional rules of the workplace.

Even among people who express support for the idea that gay, lesbian, and transgender employees should be hired, fired, or promoted based on their job performance, rather than their sexual orientation or gender identity, there remains concern that the passage of a federal law prohibiting discrimination will fundamentally alter the rules of the American workplace. To address this fear, supporters of ENDA must show that the bill is about enabling gay and transgender Americans to participate in the traditional workplace, not to change it. Advocates can demonstrate this principle by pointing to the following facts:

- **The bill merely creates a level playing field for all employees.** It ensures that all people are judged on the quality of their work—not on the basis of personal characteristics like sexual orientation or gender identity.
- **The bill is careful not to create, or imply, any rights that every other employee doesn't already have.** The language of the bill explicitly prohibits quotas or preferential treatment for gay and transgender employees, and it also bans the use of forced affirmative action policies as punishment for violation.³ It explicitly disallows lawsuits based on conduct that happened before the bill was passed,⁴ and it prohibits suits based on neutral policies that may have a “disparate impact” on gay or transgender employees.⁵

- **The bill takes the lead of America's most successful businesses.** It is significant, in our view, that the business lobby does not oppose this legislation, even though it targets companies. Many in business realize that most employers are already ahead of Washington when it comes to equal employment opportunity. In fact, 87% of Fortune 500 companies have already implemented policies prohibiting discrimination against gay and lesbian employees in their workplaces, and 46% also protect transgender employees.⁶
- **The bill has an explicit exemption for small businesses.** It would not apply to businesses with fewer than 15 employees.

ENDA does not change the rules for the religious community.

Because proponents of ENDA have listened to the concerns of people of faith, the bill includes a specific exemption for religion that respects the freedom of religious communities to follow their own beliefs. Advocates can allay concerns that ENDA would infringe on religious freedom by emphasizing this limitation.

- **The bill contains an explicit exemption that makes clear it does not apply to a broad range of religious organizations,⁷ including:**
 - **Churches,** synagogues and other places of worship (including clergy and nonclergy employees);⁸
 - **Religious schools,** colleges, seminaries or universities (both denominational and non-denominational);⁹ and,
 - **Other religious corporations,** associations, or societies, including religious hospitals, religious social services agencies, gyms and community centers run by religious groups or with religious missions, religious retirement homes, and religious newspapers and publishers.¹⁰

- **As a result of negotiations with a diverse array of religious leaders, the exemption was broadened.** The bill's drafters listened to and addressed the concerns of the religious community, strengthening the language of the exemption to mirror the same strong and tested exemption found in Title VII of the Civil Rights Act of 1964.¹¹
- **The exemption has been supported by a wide range of religious groups.** Notably, last time the legislation received a vote, three major religious organizations who took no position on ENDA itself—the U.S. Conference of Catholic Bishops, the Union of Orthodox Jewish Congregations of America, and the General Conference of Seventh Day Adventists—issued a joint statement supporting the current religious exemption.* They wrote: "We believe this language provides an indispensable protection of the free exercise rights of religious organizations and strongly support its inclusion in ENDA."¹²

* The U.S. Conference of Catholic Bishops has recently changed its position and now says that the religious liberty protections mirroring Title VII are insufficient.

ENDA furthers core, traditional American values.

To alleviate fears that ENDA is intended to change the workplace, supporters must explain that the bill is consistent with the core American values that have traditionally governed the workplace. Proponents can emphasize three American values that would be furthered by its passage:

- **Meritocracy:** All employees should be rewarded and punished based on how well they do their jobs.
- **Religious Liberty:** Our laws should protect freedom of speech and religion for all Americans.
- **The Golden Rule:** We should all treat others as we'd like to be treated.¹³

Recommended Message:

This legislation says that you cannot fire someone who is otherwise doing a good job. It follows the traditional rules of the workplace and merely creates a level playing field by ensuring that all employees are evaluated on the quality of their work. It ensures that gay and transgender Americans can join in the traditional workplace, participating on the same basis as every other employee.

The bill addresses concerns on both sides of this issue and finds common ground. It follows the lead of America's top businesses and provides specific exemptions for small businesses and religious institutions. It also pursues a high moral and religious calling by honoring the Golden Rule principle that we should treat others as we'd like to be treated.

And it would ensure that everyone is judged at work on the job they do and nothing more. That is the American way.

TOPICS

LGBT EQUALITY 84

END NOTES

- 1.** “Gay and Lesbian Rights,” Poll, Gallup, May 8–11, 2008, Accessed June 7, 2012. Available at: <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx>. In another poll, 74% of Americans agreed that “how an employee performs at their job should be the standard for judging an employee, not whether or not they are transgender”; See also “Majority of Heterosexual Americans Believe Job Performance Should Be the Standard for Judging an Employee, Not Gender Identity or Sexual Orientation,” Poll, The Harris Poll/Witeck-Combs Communications/Out and Equal Workplace Advocates, October 25, 2011, Table 4, Accessed June 7, 2012. Available at: <http://outandequal.org/node/427>.
- 2.** United States, Congress, Senate, “S.811 — Employment Non-Discrimination Act of 2011,” 112th Congress, 1st Session, April 13, 2011. Accessed June 5, 2012. Available at: <http://thomas.loc.gov/>.
- 3.** The bill includes a section that states: “NO PREFERENTIAL TREATMENT OR QUOTAS. — Nothing in this Act shall be construed or interpreted to require or permit — (1) any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation or gender identity of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation or gender identity employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such actual or perceived sexual orientation or gender identity in any community, State, section, or other area, or in the available work force in any community, State, section, or other area;”
- 4.** The bill states: “This Act shall take effect on the date that is 6 months after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.”

- 5.** The language of the bill explicitly prohibits disparate impact claims, saying, “DISPARATE IMPACT.— Only disparate treatment claims may be brought under this Act.”
- 6.** “Issue: Federal Advocacy: Employment Non-Discrimination Act,” Human Rights Campaign, Accessed June 6, 2012. Available at: <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act>.
- 7.** The religious exemption in Section 6 of the bill states: “This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Acts of 1964 pursuant (42 U.S.C. 2000e et seq.) to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a), 2000e–2(e)(2)).”
- 8.** These organizations are specifically exempt under the Civil Rights Acts of 1964, Title VII, section 702(a).
- 9.** These organizations are specifically exempt as religious educational institutions under the Civil Rights Acts of 1964, Title VII, section 703(e)(2)).

- 10.** Organizations such as those listed above have been determined to be exempt in well-established case law regarding Title VII of the Civil Rights Acts of 1964. The Title VII exemption has been interpreted and applied by courts for over thirty years, and it is well understood by the federal judiciary. To determine whether an employer is covered by the exemption, courts utilize a totality-of-the-circumstances test, under which “[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation’s purpose and character are primarily religious.” Factors that are weighed in the primary purpose test include whether the organization is owned by or closely affiliated with a religious denomination; whether the organization is organized as a nonprofit; whether it is incorporated for a religious purpose; the degree to which religious expressions or exercises pervade the organization’s activities; and whether the organization has consistently made religious membership or belief a qualification of employment. See, e.g., *EEOC v. Townley Eng. & Manuf. Co.*, 859 F.2d at 618 (9th Cir. 1988); *Accord Hall v. Baptist Mem’l Health Care Corp.*, 27 F. Supp. 2d 1029, 1034–36 (W.D. Tenn. 1998), *aff’d*, 215 F.3d 618 (6th Cir. 2000); *Killinger v. Samford Univ.*, 113 F.3d 196, 198–99 (11th Cir. 1997).
- 11.** Joseph Goldstein, “Churches May Get Pressure on Gay Tenets,” *New York Sun*, September 5, 2007.
- 12.** Joint letter to Hon. George Miller (chairman), Howard “Buck” McKeon (ranking member), House Committee on Education and Labor, U.S. House of Representatives, October 18, 2007.
- 13.** According to a Third Way national poll in 2009, 88% of Americans agreed that “We should all follow the Golden Rule and treat others as we’d like to be treated, including gay people.” This included 87% of Evangelicals and 85% of regular churchgoers. “Relationship Recognition Poll: National,” Poll, Third Way, January 13–18, 2009, Accessed June 6, 2012. Available at: <http://thirdway.org/publications/146>.