

Questions and Answers about the Employment Non-Discrimination Act



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In the coming month, the Senate will hold a mark-up on the *Employment Non-Discrimination Act* (ENDA),¹ which would make it illegal to fire an employee or punish them professionally simply because they are gay or transgender. This memo seeks to answer questions often asked about the legislation.

Will this bill change the workplace as we know it?

No, because the bill is based on traditional American values that have long governed the workplace. The bill creates a level playing field and ensures that all people are judged on their workplace performance and behavior—not on the basis of personal characteristics like sexual orientation or gender identity. It will allow gay and transgender Americans to participate in the traditional workplace, abiding by the same rules that apply to all other employees.

Does this bill mean that employers will be forced to hire someone who is gay or transgender?

No. The bill guarantees that employment decisions are based on what they should be: merit. Employers can hire the person who will do the job best—whether or not that person is gay or transgender.

Does the bill create a quota program for hiring gay or transgender people?

No. The bill is careful not to create, or imply, any rights for gay, lesbian, and transgender employees that every other employee doesn't already have. The language of the bill explicitly states, "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” or “(2) the adoption or implementation by a covered entity of a quota on the basis of actual or perceived sexual orientation or gender identity.”²

How will this affect small family-owned businesses?

Small businesses are completely exempt from the bill’s requirements. If passed, the law would not apply to businesses with fewer than 15 employees.

Will the bill force churches and Sunday schools to hire gay or transgender people?

No. The bill contains an extremely broad religious exemption.³ It simply does not apply to a wide range of religious organizations. Among the organizations completely exempt from the requirements of the bill are: churches, synagogues, and other places of worship;⁴ religious schools, colleges, seminaries, and universities;⁵ and other religious corporations, associations, and 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, as long as their “purpose and character are primarily religious.”⁶

The language defining a religious organization in ENDA mirrors the strong and tested provision found in Title VII of the Civil Rights Act of 1964—giving those organizations certainty and decades of precedent to know whether they fall in or out of the law’s requirements. Moreover, the exemption in ENDA is actually *broad*er than the one in Title VII, because the law simply does not apply to those organizations at all. Under Title VII, religious organizations may decide to hire only those who share their faith, but they may not discriminate on the basis of race, color, sex, and national origin. If ENDA passes, a religious organization will still be able to choose to hire only those who share their faith *and*

they will not have to extend employment opportunities to gay or transgender individuals if they so choose.

This religious exemption language has garnered broad support across party and denominational lines in the past. Last time ENDA received a vote in the House of Representatives, 402 Members voted for the language of this exemption, including Minority Leader John Boehner (R-OH), now Minority Whip Eric Cantor (R-VA), and 175 other Republican Members.⁷ And 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 religious exemption that remains in the current version of the bill.⁸ While all of these organizations may not be neutral on the bill this time around, it is incontrovertible that they were consulted and satisfied at the time the language was drafted.

How would this affect organizations like the Boy or Girl Scouts?

There are two provisions in the bill that make certain it will not apply to the Boy and Girl Scouts, including for positions like troop leaders. First, the bill's requirements only apply to paid employees—there is an explicit exemption in the bill for unpaid volunteers.⁹ Secondly, the bill does not apply at all to any organization which is considered a “private membership club.” This language is modeled after a parallel exemption in the Civil Rights Act, and it means that even paid employees of an organization like the Boy or Girl Scouts would not be covered by the bill.¹⁰

How will this bill affect the business community, which is already struggling in the current economy?

The business community is well ahead of the rest of the country on this issue. As of April 2013, 88% of Fortune 500 companies have implemented policies prohibiting

discrimination against gay and lesbian employees in their workplaces, and 57% also protect transgender employees.¹¹ And leaders in the business community see these policies as a key component of their financial success. John Hassell of Hewlett-Packard Co. explained his company's non-discrimination policies this way: "One word: competitiveness. It's not just a nice-to-do thing. It's a requirement to be successful in the private sector."¹²

Notably, the Chamber of Commerce has taken no position on the bill. The Chamber had voiced concerns about certain provisions in prior versions of the bill, but the drafters have now incorporated language addressing those concerns. In addition to the new provisions that were added because of negotiations with the Chamber, the language of the bill also contains explicit exemptions for small businesses and private membership clubs.

What does it mean to transition to a new gender?

A transitioning person is one who has committed to living as the other gender, by taking on the dress, grooming, and other characteristics of that gender, and sometimes also through surgery or other medical treatment. If someone makes the decision to transition to the other gender after they are hired, they must notify their employer of the transition in order to be protected by the bill.

What will this bill mean for bathrooms in the workplace?

Men would use the men's room and women would use the women's room. Transgender people would either use the facility that is intended for their new gender, or a single-user facility, if available. The choice would be up to the employee. The bill is explicit that employers would not be required to construct new or additional facilities, only to allow their workers access to appropriate facilities that match their gender.¹³

How will this affect employer dress codes?

Employers may still require workers to abide by gender-specific dress codes, to be sure that all employees dress in an office-appropriate manner, as long as they allow transgender employees to follow the dress code that applies to their new gender.¹⁴

Will this bill create a flood of unnecessary lawsuits?

No. The bill is careful not to create or imply any rights for gay, lesbian, or transgender employees that other employees don't already have. The language of the bill explicitly prohibits quotas or preferential treatment for gay, lesbian, and transgender employees, and it also bans the use of forced affirmative action policies as punishment for violation.¹⁵ It explicitly states that it does not authorize lawsuits based on neutral policies that have an unintentional negative impact on gay, lesbian, or transgender employees ("disparate impact" suits),¹⁶ and it does not allow employees to sue for something that happened before the bill was passed.¹⁷

If my religion teaches that homosexuality is wrong, why should I support this bill?

The bill is consistent with core religious and American values. It furthers traditional religious values like the Golden Rule, because in the workplace, as in other settings, we should treat others as we'd like to be treated. It also protects the human dignity of all people, ensures that all employees are evaluated based on their workplace performance, and provides a broad exemption for religious employers.

Isn't this a threat to the speech and religion rights of people who don't approve of same-sex relationships?

No. Religious employers are completely exempted from the requirements of the bill, and other employers or employees who have religious objections to homosexuality are not forced to change their views or beliefs. The bill merely requires that people put their disagreements aside during

business hours and exhibit professionalism to their colleagues in the workplace. And that's business as usual.

Do any religious organizations support this bill?

Yes. The Episcopal Church, the Presbyterian Church, the United Church of Christ, the United Synagogue of Conservative Judaism, and the Union for Reform Judaism are among the many religious organizations that support the bill.

In addition, even organizations who have taken no position on the bill as a whole have supported the language of its religious exemption. 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—previously issued a joint statement supporting the religious exemption that remains in the current version of the bill.¹⁸ While all of these organizations may not be neutral on the bill this time around, it is incontrovertible that they were consulted and satisfied at the time the language was drafted.

Will this bill protect pedophiles or other sex offenders, or behaviors like necrophilia, bestiality, or exhibitionism?

No. The bill's language explicitly defines the characteristics it protects. It states, "The term 'sexual orientation' means homosexuality, heterosexuality, or bisexuality."¹⁹ It also says, "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."²⁰ Neither of these characteristics would protect people who participate in illegal sexual behavior.

Aren't these protections already provided by state law?

Twenty-one states and the District of Columbia already have state laws that prohibit discrimination on the basis of sexual orientation, and 16 states and the District of Columbia also protect against discrimination on the basis of gender identity. But in well over half of the country, people can still be fired for being gay, even if their work is good. And in two-thirds of the country, a person still can be fired for being transgender. Extending federal workplace protections to gay, lesbian, and transgender Americans would provide a backstop to state laws in places where they already exist and give basic protections in many states that currently have none.

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END NOTES

1. United States, Congress, Senate, “S.815 — Employment Non-Discrimination Act of 2013,” 113th Congress, 1st Session, April 25, 2013. Accessed June 17, 2013. Available at: <http://thomas.loc.gov/>.
2. United States, Congress, Senate, “S.815 — Employment Non-Discrimination Act of 2013,” 113th Congress, 1st Session, April 25, 2013. Accessed June 17, 2013. Available at: <http://thomas.loc.gov/>.
3. The religious exemption in Section 6 of the bill states: “This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII of the Civil Rights Acts of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a); 2000e–2(e)(2)).”
4. These organizations are specifically exempt under the Civil Rights Acts of 1964, Title VII, section 702(a).

- 5.** These organizations are specifically exempt as religious educational institutions under the Civil Rights Acts of 1964, Title VII, section 703(e)(2).
- 6.** Organizations such as those listed above have been determined to be exempt in 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).
- 7.** Vote on the Amendment by Hon. George Miller to HR 3685, Roll Call 1054, November 7, 2007.
- 8.** General Conference—Seventh Day Adventist Church, Union of Orthodox Jewish Congregations of America, U.S. Conference of Catholic Bishops, 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, Print.
- 9.** The bill states, “The provisions of this Act that apply to an employee or individual shall not apply to a volunteer who receives no compensation.”

- 10.** The definition of “employer” in the bill “does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.” This language mirrors the exemption in Title VII, which has been interpreted by courts for decades. While no court has specifically ruled that the Boy Scouts are a “private membership club” under Title VII, they have ruled that the Girls Scouts fall under that definition and are exempt from the requirements of Title VII. Courts have also protected the Boy Scouts as a “private club” in other contexts. See, e.g., *Roman v. Concharty Council of Girl Scouts, Inc.*, 195 F. Supp. 2d 1377, 1382 (N.D. Ga. 2002); *Welsh v. Boy Scouts of America*, 993 F. 2d 1267 (7th Cir. 1993); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
- 11.** “Issue: Federal Advocacy: Employment Non-Discrimination Act,” Human Rights Campaign, Accessed June 17, 2013. Available at: <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act>.
- 12.** Many other business leaders have echoed that sentiment. Microsoft CEO Steve Ballmer has said, “Since our beginning nearly 30 years ago, Microsoft has had a strong business interest in recruiting and retaining the best and brightest and most diverse workforce possible.” Linda E. Taylor of Raytheon Missile Systems agreed, “Our culture of inclusion absolutely gives us a recruiting edge.” A fuller list of employers who support the passage of ENDA is available here: http://www.hrc.org/issues/business_coalition_workplace_fairness.htm.
- 13.** The bill’s language reads, “Nothing in this Act shall be construed to require the construction of new or additional facilities.”

- 14.** The bill states, “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 as apply for the gender to which the employee has transitioned or is transitioning.”
- 15.** 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;”
- 16.** The language of the bill explicitly prohibits disparate impact claims, saying, “Disparate Impact- Only disparate treatment claims may be brought under this Act.”
- 17.** 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.”

- 18.** General Conference—Seventh Day Adventist Church, Union of Orthodox Jewish Congregations of America, U.S. Conference of Catholic Bishops, 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, Print.
- 19.** United States, Congress, Senate, “S.81 — Employment Non-Discrimination Act of 2013,” 113th Congress, 1st Session, Sec. 3, April 25, 2013. Accessed June 17, 2013. Available at: <http://thomas.loc.gov/>.
- 20.** United States, Congress, Senate, “S.81 — Employment Non-Discrimination Act of 2013,” 113th Congress, 1st Session, Sec. 3, April 25, 2013. Accessed June 17, 2013. Available at: <http://thomas.loc.gov/>.