

CONGRESS MODIFIES LEGISLATION THAT WOULD PROVIDE FEDERAL PROTECTION AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

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On September 17, 2007, we provided an analysis of The Employment Non-Discrimination Act (ENDA), introduced as H.R. 2015, and the significant legal implications its provisions would create for all employers. A copy of that analysis is attached for ease of reference.

Since that time, House Democratic leaders have made several modifications to the proposed legislation and re-introduced it as H.R. 3685 in hopes of attracting additional votes needed to pass it. We have reviewed the revised legislation. These modifications include (1) removing gender identity as a specific protected class and deleting related provisions concerning shared facilities and dress/grooming standards; and (2) expanding the scope of the exemption for religious organizations.¹ The impact of these proposed modifications are addressed below.

A. Individuals With Gender Identity Issues Arguably Still Would Be Protected Under ENDA

Although the recently modified version of ENDA removes gender identity as a specific protected class, individuals with gender identity disorders arguably would still be protected.

ENDA, as modified, still defines “sexual orientation” as heterosexuality, homosexuality and bisexuality and still prohibits discrimination based on an employee’s “actual or perceived” sexual orientation. Significantly, the inclusion of the concept of “perceived” is a far broader protection than that provided for African-Americans, women, and people of faith under the landmark civil rights legislation, Title VII of the Civil Rights Act of 1964. ENDA, as modified, would still, in effect, protect any status that may be perceived by an employer or co-workers to fall within the three included categories. There is no condition of sexual abnormality that may

¹ More specifically, House Democratic Leaders have re-introduced legislation to prohibit employment discrimination based on gender identity as a separate bill, H.R. 3686. H.R. 3686 includes essentially the same provisions to prohibit employment discrimination based on gender identity as H.R. 3685 utilizes to prohibit employment discrimination based on sexual orientation, including the expanded exemption for religious organizations discussed herein. Also, H.R. 3686 contains the same provisions regarding shared facilities and dress/grooming standards as the previous bill, H.R. 2015.

not be perceived to fall within one of these categories, including the following categories excluded by the ADA: pedophilia, exhibitionism, voyeurism and sexual behavior disorders.² Accordingly, gender identity disorders, even though removed from the current proposed ENDA legislation as a specific protected class, also could be “perceived” to fall within one of the three categories. Without containing an explicit exclusion, like that contained in the ADA, persons with these conditions likely will have protection under ENDA, with the result being that ENDA would provide greater and broader protection than those with disabilities under the ADA.

This result is illustrated by Lie v. Sky Publishing Corp., 2002 WL 31492397 (Mass.Super.). In that case, the court construed a Massachusetts statute that, similar to ENDA, defined “sexual orientation” as “having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality.” Id. at *7 (emphasis added). While emphasizing that gender identity is unrelated to sexual orientation, the court stated as follows:

The court nevertheless recognizes that those who transgress traditional gender roles and defy stereotypes associated with their biological sex are less likely to be perceived as heterosexual than the general population. [citation omitted]. The conflation of one’s appearance with one’s sexual orientation in this fashion may lead to discrimination actionable under the second prong of Chapter 151B’s definition of sexual orientation, that is, discrimination due to being identified as having an orientation for heterosexuality, bisexuality, or homosexuality, regardless of the person’s actual orientation. [citation omitted].

Id. at *8. In support of this analysis, the court cited with approval a decision by the Massachusetts Commission Against Discrimination stating that, while transsexualism is not a sexual orientation, “it might be protected if the employer regarding it as such and discriminated on that basis.” Id. at *7. The court dismissed the complaint only because the plaintiff did not allege that the defendant confused her transsexual status with a sexual orientation, “homosexual or otherwise.” Id. at *8. See also Rosa v. Park West Bank & Trust, 214 F.3d 213, 214 (1st Cir. 2000) (“It is . . . reasonable to infer . . . that [the teller] refused to give [the plaintiff] the loan application because she thought he was gay, confusing sexual orientation with cross-dressing” and noting that Massachusetts statute prohibits discrimination based on sexual orientation).

² For example, in apparent recognition that the prohibition against discrimination based on sexual orientation could be construed as protecting an individual who engages in pedophilia, the Massachusetts legislature deemed it necessary and appropriate to insert the following language in a similar state statute: “It shall be an unlawful practice : 1. For an employer...because of...sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object,...to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.” MA ST. 151B§ 4(1) (emphasis added).

Thus, under the analysis set forth above, individuals with gender identity disorders still would receive protection under ENDA even though language explicitly including gender identity as a protected class has been removed from the proposed legislation. At a bare minimum, whether individuals with gender identity disorders or who engage in other sexually abnormal behavior would be protected under ENDA's "perceived" sexual orientation prong would be the subject of extensive and protracted litigation.

B. ENDA Would Still Cover Many Faith-Based Entities In Spite Of Broader Exemption For Religious Organizations

The previous version of ENDA limited the exemption to "the employment practices of a religious corporation, association, educational institution, or society which has its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief." The recently modified version of ENDA removes this language and substitutes in its place the following provisions:

SEC. 3. DEFINITIONS.

(a) IN GENERAL- In this Act:

* * *

(8) RELIGIOUS ORGANIZATION- The term 'religious organization' means--

(A) a religious corporation, association, or society; or

(B) a school, college, university, or other educational institution or institution of learning, if--

(i) the institution is in whole or substantial part controlled, managed, owned, or supported by a religion, religious corporation, association, or society; or

(ii) the curriculum of the institution is directed toward the propagation of a religion.

SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS

This Act shall not apply to a religious organization.

Although this language, which was present in versions of ENDA introduced prior to 2007, provides for a broader exemption than that provided for in H.R. 2015, the modified version of ENDA still has substantial implications to the operations of faith-based entities that do not qualify as a "religious organization." In fact, substantial litigation exposure will result to such entities where it is not clear if they meet the test of qualifying as a "religious corporation, association, or society." Moreover, with respect to faith oriented religious institutions, it is unclear what constitutes "propagation of a religion."

Many entities operating for the express or sole purpose of furthering religious views and affiliation still will be subject to suit under ENDA. For example, Christian schools or universities that are not controlled, managed, owned or supported by a denomination, religious corporation, association or society likely would still be covered under the modified version of ENDA. Similarly, independent nursing homes, child care facilities, publishing facilities and advocacy groups, even those with specific religious objectives, likely would still be covered under the modified version of ENDA.

C. Conclusion

Even though gender identity has been removed as a protected class under the modified version of ENDA, individuals with gender identity disorders and who engage in a broad range of sexual behavior may still be protected under ENDA because of its broad language prohibiting discrimination based on an individual's "perceived" sexual orientation. Moreover, many faith-based entities would still be covered under ENDA in spite of the broader religious exemption provided for in the modified version of ENDA. Even under its modified form, ENDA would result in increased liability for employers under a far broader range of circumstances than most employers likely anticipate.

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