

# Litigation Implications For Employers Under ENDA

Law360, New York (December 06, 2013, 6:43 PM ET) -- In recent years, there has been a push at federal, state and local levels to increase workplace protections for individuals who identify as gay, lesbian, bisexual, or transgender (LGBT). This movement came closer to a reality on Nov. 7, 2013, when the United States Senate passed the Employment Non-Discrimination Act (ENDA), a bill designed to prohibit employment discrimination on the basis of sexual orientation or gender identity.[1]

ENDA had been brought before Congress every year since 1994, before finally passing the Senate with a 64-32 vote.[2] The Senate vote on ENDA comes on the heels of the U.S. Supreme Court's decision this past summer in *United States v. Windsor*. [3] In that case, the court declared Section 3 of the Defense of Marriage Act unconstitutional by affirming that same-sex couples that are legally married are entitled to the same federal benefits as heterosexual married couples. It is unclear, however, whether ENDA will pass the House of Representatives.

If passed by the House and signed into law, ENDA could bring about several changes to employers' workplace policies. Employers would need to ensure that their employment policies do not open them up to possible liability for discrimination based on sexual orientation or gender identity. However, despite these implications, it is unlikely that there would be a significant uptick in discrimination-related litigation if ENDA becomes law.

Under current federal law, employers are prohibited from discriminating on the basis of race, color, religion, sex, national origin, disability, age or genetic information.[4] ENDA would add to this list by prohibiting discrimination on the basis of sexual orientation or gender identity by employers with more than 15 employees.[5]

ENDA would prevent employers from using sexual orientation or gender identity when making employment decisions related to hiring, discharging, promoting or compensation. It would also be unlawful for employers to limit, segregate or classify applicants or employees based on sexual orientation or gender identity in any manner that would have an adverse effect on employment. Furthermore, ENDA would prohibit the use of quotas or preferential treatment based on the same characteristics, and would prohibit retaliation against individuals who oppose unlawful discrimination.[6] Litigants who are successful in claims under ENDA would be entitled to a wide range of damages such as injunctive relief, back pay, compensatory and punitive damages, and attorney's fees.[7]

Despite these implications, ENDA's reach would be limited in several respects. Disparate impact claims are explicitly not recognized under ENDA. As a result, ENDA only encompasses claims related to disparate treatment.[8] Therefore, employers can avoid litigation stemming from neutral practices that have an adverse effect on individuals based on their sexual orientation or gender identity.

ENDA further prohibits double recovery. An individual that recovers damages under ENDA would not be able to recover damages a second time by claiming that the same unlawful practice was discriminatory because of sex under Title VII of the Civil Rights Act of 1964. Moreover, ENDA would neither require nor compel employers to produce statistics related to sexual orientation or gender identity in the workplace. Religious organizations, including houses of worship and parochial and similar religious schools, would be exempt from ENDA.

Furthermore, ENDA would allow employers to maintain current dress codes and grooming standards. However, employers would be required to permit any employee who has

undergone gender transition to adhere to the same dress or grooming standards that apply to the gender to which the employee has transitioned or is transitioning. Additionally, ENDA would not require employers to construct new facilities, such as locker rooms or bathrooms, to comply with the proposed law.

Despite these limitations, there has been significant concern that ENDA could lead to an increase in discrimination-related litigation. House Speaker John Boehner recently announced his opposition to the law and stated that it would “increase frivolous litigation and cost American jobs, especially small business jobs.”[9] A report released by the Congressional Budget Office estimates that implementing ENDA would cost \$47 million over the 2014-2018 period mostly for the Equal Employment Opportunity Commission to handle additional discrimination cases.[10] The EEOC expects that implementing the law would increase its annual caseload (approximately 100,000 cases) by 5 percent and require hiring about 110 additional personnel.[11]

In spite of this increased cost to the federal government, the cost to private sector employers is projected to be minor. Since ENDA would not apply to companies with fewer than 15 employees, its impact on small businesses would be innately limited. For covered employers, the majority of costs are likely to stem from updating personnel manuals and training procedures, as well as modifying employment procedures and posting notices to avoid discriminatory practices. However, the CBO notes that these changes would be “relatively minor and would be made in the course of other routine updates.”[12]

Moreover, almost half the states and many cities currently prohibit sexual orientation and gender identity discrimination. These regions provide insight as to whether there would be an increase in litigation on a national scale if ENDA became law. Currently, 21 states have implemented their own laws that prohibit discrimination based on sexual orientation, and 17 states have implemented laws against gender identity discrimination.[13] However, according to a 2013 report released by the U.S. General Accountability Office, “relatively few employment discrimination complaints based on sexual orientation and gender identity” have been filed in those states.[14]

Even if ENDA does not become law, many cities, counties and localities may continue to pass similar legislation even if states do not. Research done by the New York City Bar’s Labor and Employment Committee found that since New York City amended its laws to prohibit discrimination based on sexual orientation and gender identity, those complaints comprised less than 1 percent of those filed with the New York City Commission on Human Rights from 2002 to 2010. Out of 3,280 complaints received during that time, only 92 were based on sexual orientation and 14 based on gender identity.[15] Additionally, a 2008 study by The Williams Institute at the UCLA School of Law revealed that in states with sexual orientation protections, for every 10,000 LGBT employees there were approximately 5 complaints filed every year.[16]

Furthermore, many companies already have policies in place that protect against sexual orientation and gender identity discrimination. Currently, 96.8 percent of Fortune 500 companies include sexual orientation protection in their discrimination policies,[17] and 57 percent include gender identity protection.[18] While the U.S. Chamber of Commerce has remained neutral and declined to take a position on the proposed law,[19] companies such as Apple, Accenture, Bank of America, Capital One, Citigroup, General Electric, Goldman Sachs, JPMorgan Chase, and many others have expressed their support of ENDA.[20]

Although ENDA may not result in a significant uptick in litigation, it is important for employers to stay abreast of developments surrounding the proposed law. Should ENDA pass, employers may need to review their nondiscrimination policies with particular focus on protections for sexual orientation and gender identity. Employers also may need to

update their spousal benefit policies, as well as their leave, sick or bereavement policies. In states that do not recognize same-sex marriage, employers that offer extended benefits to same-sex unmarried couples in domestic partnerships may need to consider extending those same benefits to unmarried opposite sex couples in domestic partnerships, or conversely narrowing those benefits to spouses only, in order to avoid claims of disparate treatment on the basis of sexual orientation.

Thus, while ENDA is unlikely to lead to a significant increase in discrimination litigation, employers are still well advised to consider whether workplace policies related to sexual orientation and gender identity may be required to be instituted or amended under the act in the event it is signed into law.

—By Katharine H. Parker, Proskauer Rose LLP

*Katharine Parker is a partner in Proskauer's labor & employment law department and co-head of the firm's employment law counseling & training practice group. Jason A. Georges is a law clerk in Proskauer's Labor & Employment Law Department. Both are based in the firm's New York office. Special thanks to Proskauer associate Laura M. Fant for her contribution in helping with this article.*

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[1] U.S. Senate Roll Call Votes 113th Congress - 1st Session. Employment Non-Discrimination Act of 2013. November 7, 2013. [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00232](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232)

[2] Id.

[3] United States v. Windsor, 570 U.S. \_\_\_\_ (2013). [www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf)

[4] The U.S. Equal Employment Opportunity Commission. Federal Equal Employment Opportunity (EEO) Laws. <http://www.eeoc.gov/facts/qanda.html>

[5] ENDA defines sexual orientation as "homosexuality, heterosexuality, or bisexuality." Gender-identity is defined as 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." Employment Non-Discrimination Act of 2013, S. 815, 113th Cong., 1st Sess. (2013). <http://www.gpo.gov/fdsys/pkg/BILLS-113s815es/pdf/BILLS-113s815es.pdf>

[6] Id.

[7] New York City Bar Labor and Employment Committee. The Employment Non-Discrimination Act. April 2011. <http://www.nycbar.org/pdf/report/uploads/20072091-TheEmploymentNon-DiscriminationAct.pdf>

[8] Id.

[9] Gay & Lesbian Alliance Against Defamation. "ENDA poised to pass Senate, but will likely stall in the House." November 4, 2013. <http://www.glaad.org/blog/enda-poised-pass-senate-will-likely-stall-house>

[10] Congressional Budget Office. S. 815, Employment Non-Discrimination Act of 2013. September 11, 2013. <http://cbo.gov/sites/default/files/cbofiles/attachments/s815.pdf>

[11] Id.

[12] Id.

[13] Human Rights Campaign. Statewide Employment Laws and Policies. June 19, 2013. [www.hrc.org/files/assets/resources/employment\\_laws\\_062013.pdf](http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf)

[14] U.S. General Accountability Office. Update on State Statutes and Administrative Complaint Data on Employment Discrimination Based on Sexual Orientation and Gender Identity. July 31, 2013. <http://www.gao.gov/assets/660/656443.pdf>

[15] New York City Bar Labor and Employment Committee, *supra* note 6.

[16] UCLA School of Law. The Williams Institute. Employment Discrimination against Lesbian, Gay, Bisexual, and Transgender People in Oklahoma. January 2011. [www.williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Herman-Badgett-OK-Emp-Discrim-Jan-2011.pdf](http://www.williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Herman-Badgett-OK-Emp-Discrim-Jan-2011.pdf)

[17] Equality Forum. Fortune 500 Non-Discrimination Project. [www.equalityforum.com/fortune500](http://www.equalityforum.com/fortune500)

[18] Human Rights Campaign. Corporate Equality Index 2013. [www.hrc.org/files/assets/resources/CEI\\_2013\\_Final\\_low.pdf.pdf](http://www.hrc.org/files/assets/resources/CEI_2013_Final_low.pdf.pdf)

[19] Gay & Lesbian Alliance Against Defamation. "U.S. Chamber of Commerce stays neutral on ENDA." September 19, 2013. <http://www.glaad.org/news/us-chambercommerce-stays-neutral-enda>

[20] Human Rights Campaign. Business Coalition for Workplace Fairness. [www.hrc.org/resources/entry/business-coalition-for-workplace-fairness-members](http://www.hrc.org/resources/entry/business-coalition-for-workplace-fairness-members)