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SENATE

{ REPORT  
113-105

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## THE EMPLOYMENT NON-DISCRIMINATION ACT OF 2013

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SEPTEMBER 12, 2013.—Ordered to be printed

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Mr. HARKIN, from the Committee on Health, Education, Labor, and Pensions, submitted the following

### R E P O R T

together with

### ADDITIONAL VIEWS

[To accompany S. 815]

The Committee on Health, Education, Labor, and Pensions, to which was referred the bill (S. 815) to prohibit employment discrimination on the basis of sexual orientation or gender identity, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

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## I. PURPOSE AND SUMMARY

Millions of lesbian, gay, bisexual, transgender (“LGBT”) and heterosexual Americans today face the possibility of being fired from their jobs, refused work, paid less, or otherwise being subjected to employment discrimination because of their actual or perceived sexual orientation or gender identity. Currently, 18 States and the District of Columbia explicitly prohibit firing someone based on their sexual orientation or gender identity.<sup>1</sup> Another four States explicitly prohibit firing someone based on their sexual orientation, but do not explicitly protect employees based on gender identity.<sup>2</sup>

The Employment Non-Discrimination Act (“ENDA” or “Act”) is intended to address this discrimination and explicitly protect all Americans who are or may be perceived to be lesbian, gay, bisexual or transgender.

The legislation extends Federal employment protections to LGBT workers similar to those protections provided to a person based on race, color, sex, national origin, religion, age or disability. The Act prohibits an employer from using an individual’s sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotion or compensation. ENDA also creates a cause of action for any individual—whether actually homosexual, heterosexual, or transgender—who is discriminated against because that individual is “perceived” as homosexual or transgender.

ENDA provides for similar procedures, while giving some more limited remedies, as those under Title VII of the Civil Rights Act of 1964 (“title VII”).<sup>3</sup> ENDA applies to Congress and the Federal Government, as well as to State and local governments.

The Act does not require employers to collect statistics on actual or perceived sexual identity or gender identity of its employees, and it expressly prohibits the Equal Employment Opportunity Commission (“EEOC”) from requiring the collection of such statistics by an employer. The Act also prohibits the imposition of affirmative action and the adoption of quotas or granting of preferential treatment to an individual by any employer on the basis of sexual orientation or gender identity. Religious organizations are exempt from coverage under ENDA. The relationship between the armed services and its uniformed service members is also not subject to the Act.

## II. LEGISLATIVE HISTORY

On June 23, 1994, Senator Edward Kennedy (D–MA) introduced the Employment Non-Discrimination Act of 1994, S. 2238. It was referred to the Senate Labor and Human Resources Committee, which held the first hearing on the issue titled “Employment Non-Discrimination Act of 1994” on July 29, 1994.<sup>4</sup>

<sup>1</sup> California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington have laws barring discrimination in employment based on sexual orientation and gender identity.

<sup>2</sup> Maryland, New Hampshire, New York, and Wisconsin have laws barring employment discrimination based on sexual orientation, but not gender identity.

<sup>3</sup> 42 U.S.C. §§2000e–2000e–917 (Title VII).

<sup>4</sup> *Gay Rights—U.S.: Sex Discrimination in Employment, Before the S. Comm. on Labor and Human Res.*, 103d Cong. 103–703 (1994). For a discussion of the history of the ENDA in the House of Representatives, see H. Rep. 110–406 (2007). On October 18, 2007, the Committee on

The hearing featured testimony from witnesses, including: The Honorable Claiborne Pell, U.S. Senator from the State of Rhode Island; The Honorable Jeff Bingaman, U.S. Senator from the State of New Mexico; Ms. Cheryl Summerville, Bremen, GA; Ernest Dillon, Detroit, MI; Mr. Justin Dart, Jr., chairman, President Bush's Committee on Employment of People with Disabilities; Warren Phillips, former publisher, the Wall Street Journal, and former CEO and chairman, Dow Jones & Company, Inc.; Steven Coulter, vice president, Pacific Bell; and Richard Womack, director of Civil Rights, AFL-CIO; Mr. Joseph E. Broadus, George Mason School of Law; Robert H. Knight, Family Research Council; and Chai Feldblum, Georgetown University Law Center, on behalf of Leadership Conference on Civil Rights.

Written statements were provided by: Mr. Philippe Kahn, president, chairman, and CEO, Borland, International; Leadership Conference on Civil Rights, Washington, DC; Mr. Deval Patrick, Assistant Attorney General, Department of Justice; The Honorable John Chafee, U.S. Senator from the State of Rhode Island; The Honorable Barry Goldwater, U.S. Senator from the State of Arizona; Reverend Edmond Browning, presiding bishop, Episcopal Church; Mrs. Coretta Scott King, president, Martin Luther King Jr. Center for Non-Violent Social Change; Ms. Mary Frances Berry, chairperson, U.S. Commission on Civil Rights; and Mr. Anthony Carnevale, chair, National Commission on Employment Policy.

On June 15, 1995, Senator James Jeffords (R-VT) introduced the Employment Non-Discrimination Act of 1995, S. 932, which garnered 30 cosponsors. It was referred to the Committee on Labor and Human Resources.

On September 5, 1996, Senator Edward Kennedy (D-MA) introduced the Employment Non-Discrimination Act of 1996, S. 2056, which garnered three cosponsors. It was brought before the Senate by unanimous consent. The Senate narrowly rejected S. 2056 on September 10, 1996 by a 49-50 vote.<sup>5</sup> It marked the first time that the idea of a Federal non-discrimination clause protecting gays and lesbians in employment was voted on in the Congress.

On June 10, 1997, Senator James Jeffords (R-VT) introduced the Employment Non-Discrimination Act of 1997, S. 869, which garnered 34 cosponsors. It was referred to the Committee on Labor and Human Resources.

On October 23, 1997, a hearing was held by the Committee on Labor and Human Resources entitled, "The Employment Non-Discrimination Act of 1997."<sup>6</sup> The following persons and organizations presented testimony: Ms. Kendall Hamilton, Oklahoma City, OK; Mr. David N. Horowitz, Phoenix, AZ; Raymond W. Smith, chairman of the board and CEO, Bell Atlantic Corporation, Arlington, VA; Mr. Thomas J. Grote, chief operating officer, Donato's Pizza, Blacklick, OH; Mr. Herbert D. Valentine, executive presbyter, Baltimore Presbytery, Moderator of the 203d General Assembly, the Presbyterian Church (USA); National Council of the Churches of Christ in the U.S.A.; Mr. Oliver Thomas, special Counsel for Civil

Education and Labor met to markup H.R. 3685, the Employee Non-Discrimination Act of 2007. The committee reported the bill favorably by a vote of 27-21 to the House of Representatives.

<sup>5</sup>Roll Call vote No. 281.

<sup>6</sup>*The Employment Non-Discrimination Act of 1997 Before the S. Comm. on Labor and Human Res.*, 105th Cong. 279 (1997).

and Religious Liberties; Ms. Chai Feldblum, associate professor of law, Georgetown University Law Center; American Civil Liberties Union; Ann McBride, president, Common Cause; America Psychological Association; Elizabeth Birch, executive director, Human Rights Campaign; Parents, Families, and Friends of Lesbians and Gays.

On June 24, 1999, Senator James Jeffords (R-VT) introduced the Employment Non-Discrimination Act of 1999, S. 1276, which garnered 36 cosponsors. It was referred to the Committee on Health, Education, Labor, and Pensions (“HELP”). No further action was taken.

On July 31, 2001, Senator Edward Kennedy (D-MA) introduced the Employment Non-Discrimination Act of 2002, S. 1274, which garnered 44 cosponsors. It was referred to the HELP Committee.

The HELP Committee held a hearing on the legislation on February 27, 2002 titled “The Employment Non-Discrimination Act.”<sup>7</sup> The following persons presented testimony: Mr. Charles K. Gifford, president and CEO FleetBoston Financial, Boston, MA; Lucy Billingsley, partner, Billingsley Company, Carrollton, TX; Robert L. Berman, director of Human Resources and vice president, Eastman Kodak Company, Rochester, NY; Richard Womack, director, Department of Civil Rights, AFL-CIO, Washington, DC; Lawrence Lane, Long Island, NY; and Matthew Coles, director, National Lesbian and Gay Rights Project, American Civil Liberties Union, New York City, NY.

Written statements were provided by: The American Psychological Association; Kim Wisckol, vice president and director of Human Resources of the Consumer Business Association, Hewlett-Packard Company; Elizabeth Birch, executive director, Human Rights Campaign; and the Honorable Patty Murray, U.S. Senator from the State of Washington. A letter was provided from the president of New Balance Athletic Shoe, Inc., James Davis, to Senators Kennedy and Gregg, dated April 18, 2002.

The bill was reported out of committee by voice vote and placed on the legislative calendar.<sup>8</sup> However, no vote was taken in the Senate.

On October 2, 2003, Senator Edward Kennedy (D-MA) introduced the Employment Non-Discrimination Act of 2003, S. 1705, which garnered 43 cosponsors. It was referred to the HELP Committee. However, no further action was taken.

On August 5, 2009, Senator Jeff Merkley (D-OR) introduced the Employment Non-Discrimination Act of 2009, S. 1584, which garnered 45 cosponsors. It was referred to the HELP Committee. The bill introduced in 2009 was the first version of ENDA introduced that prohibited discrimination based on sexual orientation *and* gender identity.

On November 5, 2009, the HELP Committee held a hearing on “Employment Non-Discrimination Act: Ensuring Opportunity for All Americans.” Witnesses testifying before the committee included: The Honorable Thomas E. Perez, Assistant Attorney General for Civil Rights; Mike Carney, police officer, city of Springfield police department; Helen Norton, professor of law, Colorado School of

<sup>7</sup>*The Employment Non-Discrimination Act Before the S. Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 307 (2002).

<sup>8</sup>S. Rep. No. 107-341 (2001).

Law; The Honorable Lisa Madigan, Illinois attorney general; Virginia Nguyen, Nike, Inc., Diversity & Inclusion Team Member; Craig Parshall, senior vice president and general counsel of the National Religious Broadcasters Association; and Camille Olson, partner at Seyfarth Shaw, LLP.

Written statements and letters were provided by: Eliza Byard, executive director of the Gay, Lesbian and Straight Education Network; Rea Carey, executive director, National Gay and Lesbian Task Force Action Fund; Jennifer Chrisler, executive director, Family Equality Council; Masen Davis, executive director, Transgender Law Center; Nancy Ratzan, president, National Council of Jewish Women; Joe Solmonese, president, Human Rights Campaign; African-American Ministers in Action; American Airlines; American Bar Association; American Psychological Association; American Civil Liberties Union; BMC Software, Inc.; Business Coalition on Workplace Fairness; Center for American Progress Action Fund; Martha Coakley, Massachusetts attorney general; Gay & Lesbian Advocates & Defenders (“GLAD”); Sun Microsystems; Interfaith Alliance; Lambda Legal Defense and Education Fund; Marriott International, Inc.; National Center for Lesbian Rights; Nationwide Mutual Insurance Company; Parents, Families and Friends of Lesbians and Gay (“PFLAG”) National; Raytheon Company; Unitarian Universalist Association of Congregations; Chevron Corporation; National Center for Transgender Equality and the National Gay and Lesbian Task Force; and Meghan Stabler.

On April 13, 2011, Senator Jeff Merkley (D–OR) introduced the Employment Non-Discrimination Act of 2011, S. 811, which garnered 43 cosponsors. It was referred to the HELP Committee.

On June 12, 2012, the HELP Committee held a hearing on “Equality At Work: The Employment Non-Discrimination Act.” Witnesses testifying before the committee included: M. V. Lee Badgett, research director of Williams Institute at the UCLA School of Law; Kylar Broadus, founder of Trans People of Color Coalition; Samuel Bagenstos, professor of law at Michigan Law School and former Principal Deputy Attorney General for Civil Rights in the Obama administration; Ken Charles, vice president of Diversity and Inclusion at General Mills; and Craig Parshall, senior vice president and General Counsel of the National Religious Broadcasters Association.

Written statements and letters were provided by Camille Olson, partner at Seyfarth Shaw LLP, Log Cabin Republicans, Human Rights Campaign, Transgender Law Center, Interfaith Alliance, and the National Gay and Lesbian Task Force.

On April 25, 2013, Senator Jeff Merkley (D–OR) introduced the Employment Non-Discrimination Act of 2013, S. 815, which currently has garnered 53 cosponsors. It was referred to the HELP Committee.

On July 10, 2013, the HELP Committee met to markup S. 815, the Employee Non-Discrimination Act of 2013. The committee reported the bill favorably by a vote of 15–7 to the Senate.

### III. SECTION-BY-SECTION ANALYSIS AND EXPLANATION OF THE LEGISLATION

#### *Section 1. Short title*

This section designates the bill as the “Employment Non-Discrimination Act.”

#### *Section 2. Purposes*

This section sets forth the Act’s purposes: (1) to address the history and persistent, widespread pattern of discrimination, including unconstitutional discrimination, on the bases of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers; (2) to provide an explicit, comprehensive Federal prohibition against employment discrimination on the bases of sexual orientation and gender identity; (3) to provide meaningful and effective remedies against such discrimination; and (4) to invoke Congressional powers, including those pursuant to the Fourteenth Amendment of the Constitution, as well as the Commerce Clause and the Spending Clause.

#### *Section 3. Definitions*

This section defines key terms used in the Act. Most of the definitions come directly from existing Federal civil rights laws, primarily title VII. The definitions of “employee” and “employer” exclude volunteers and private membership clubs from the coverage of the Act.

The committee believes the terms sexual orientation and gender identity, contained in section 4(7) and (10), are clear, and the terms homosexuality, bisexuality, heterosexuality and bisexuality are well understood in the courts and by the American people. Laws like ENDA exist in 22 States, including the District of Columbia, and hundreds of municipalities in this country and the definitions of sexual orientation and gender identity have not presented employers or the courts with any difficulty.

With respect to gender identity, the committee notes that gender transition is the process of a transgender individual publicly changing his or her gender presentation to be consistent with his or her gender identity. This process usually involves changes to name, personal appearance, voice and mannerisms. In some cases, it could mean medical procedures, including hormone therapy, sex-reassignment surgeries, and other procedures that are generally conducted under medical supervision. The committee emphasizes that an individual’s gender transition is unique and personal to each transgender employee. State laws that prohibit discrimination based on sexual orientation or gender identity do not include language defining gender transition; nor do they otherwise prescribe what steps a transgender employee must take in order to be treated in a nondiscriminatory manner that is consistent with his or her gender identity. The committee notes that every gender transition is unique. Therefore, it is the committee’s intent that nothing in this Act be read as establishing what an individual’s gender transition must entail.

If an employee has undergone a gender transition prior to the time of employment, the duty of nondiscrimination applies on the basis of the employee’s gender as established at the time of employ-

ment. The employer need not inquire, and the employee need not disclose, information regarding the employee's transition. The employer's obligation is simply not to discriminate in the event that the past transition comes to the employer's attention.

However, the term "notified" in section 8(a) indicates that an employee who undergoes gender transition on the job must take some affirmative step to communicate the matter to the employer.<sup>9</sup> Notification may be written or oral, and need not be in any specified form or use any "magic words," so long as it is sufficient for the employer to understand.<sup>10</sup>

#### *Section 4. Discrimination prohibited*

This section prohibits employers, employment agencies, labor organizations, and joint labor-management committees from discriminating in employment or employment opportunities on the basis of actual or perceived sexual orientation or gender identity. Employment opportunities include hiring, firing, compensation and other terms, conditions, or privileges of employment or union membership.

Similar to a similar provision of the Americans with Disabilities Act ("ADA") and case law under title VII, this section also prohibits discrimination based on the perceived sexual orientation or gender identity of an individual. The use of the term "perceived" is intended to address employment discrimination directed at individuals because of their presumed sexual orientation or gender identity, whether or not that presumption is correct. It ensures that ENDA's prohibitions reach all discriminatory actions of an employer, regardless of whether the assumptions upon which the employer bases his or her discrimination are accurate.

Also consistent with the ADA and case law under title VII, this section additionally prohibits discrimination against an employee because of whom he or she associates with.<sup>11</sup> It is the intent of the committee that this provision be construed consistently with the associative discrimination jurisprudence developed under the ADA and title VII.

Section 4(f) prohibits quotas and preferential treatment based on sexual orientation or gender identity.

Section 4(g) makes clear that disparate impact claims are not available under this Act. Thus, ENDA does not require employers to justify neutral practices that may result in a disparate impact against people of a particular sexual orientation or gender identity. Evidence of disparate impact may be introduced in a proceeding to

<sup>9</sup> See, e.g., *Detroit Coil Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 580 (6th Cir. 1979) ("the word 'notified,' in its ordinary usage, means the completed act of bringing information to the attention of another").

<sup>10</sup> See, e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) (concluding that the ADA does not require an employee to use any "magic words" when notifying an employer of his or her disability and request for reasonable accommodations); *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007) (concluding that the FMLA does not require an employee to use any "magic words" when notifying an employer of his or her request to take leave for a serious health condition); *EEOC Compliance Manual 12-IV.A.1* ("the applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job").

<sup>11</sup> See e.g., Americans with Disabilities Act, 42 U.S.C. §12112(b)(4) (2012); *Halcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008) (Title VII); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988 (6th Cir. 1999) (same); *Drake v. 3M*, 134 F.3d 878 (7th Cir. 1998) (same); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004) (same); *Parr v. Woodmen of World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986)(same).

support a claim of disparate treatment, but there is no cause of action under ENDA for disparate impact.

Section 4(h) provides that, consistent with title VII, in mixed motive cases, an unlawful employment practice is established when the complaining party demonstrates that sexual orientation or gender identity was a “motivating factor” for the adverse employment action, even if there were other factors motivating the adverse action.

In doing so, the committee explicitly rejects the “but for” standard of proof enunciated in the Supreme Court’s decision of *Gross v. FBL Financial*.<sup>12</sup> As Professor Helen Norton testified to the committee, “Gross entirely insulates from liability even an employer who confesses discrimination so long as that employer had another reason for its decision. By permitting employers to escape liability altogether even for a workplace admittedly infected by discrimination, with no incentive to refrain from similar discrimination in the future, the *Gross* rule thus undermines Congress’ efforts to stop and deter workplace discrimination.”<sup>13</sup>

The committee believes requiring the plaintiff to prove “but for” cause in a mixed motive case is particularly difficult. In these cases, the employer, rather than the employee, is in a better position to reconstruct history and prove whether an employer who has been proven to have engaged in discrimination would have taken the same action unaffected by bias. Therefore, shifting the burden of proof to the defendant is appropriate where the plaintiff has demonstrated that discrimination was a “motivating factor” in the defendant’s employment decision. As Professor Norton testified, “[s]uch burden shifting appropriately recognizes and responds to employers’ greater access to information that is key to proving or disproving an element of a particular claim. . . .”<sup>14</sup>

#### *Section 5. Retaliation prohibited*

This section prohibits retaliation against individuals because they oppose any practice prohibited by (or they reasonably believe to be prohibited by) the Act, or participate in an investigation or other proceeding authorized by the Act. This section is modeled directly on title VII’s retaliation prohibition. Therefore, retaliation claims under the Act should be treated like similar claims under title VII.

#### *Section 6. Religious organizations*

This section exempts from its coverage those religious institutions that are exempt under title VII’s prohibition on discrimination based on religion. Title VII’s language has been in effect since 1972, and thus the committee believes it is simple for organizations to understand who falls under the exemption.

ENDA would apply, however, to entities that are not primarily religious in purpose and character.<sup>15</sup> A non-religious entity would

<sup>12</sup>*Gross v. FBL Financial*, 557 U.S. 167 (2009).

<sup>13</sup>*Ensuring Fairness for Older Workers: Hearing Before the Senate Health Educ., Labor, and Pensions Committee*, 111th Cong. (2010) (written testimony of Helen Norton); see also, *Gross*, 557 U.S. at 190–91 (Breyer, J., dissenting).

<sup>14</sup>*Ensuring Fairness for Older Workers: Hearing Before the Senate Health Educ., Labor, and Pensions Committee*, 111th Cong. (May 6, 2010) (Senator Harkin’s Questions for the Record for Professor Helen Norton).

<sup>15</sup>*EEOC v. Townley*, 859 F.2d 610 (9th Cir. 1988).

not be able to not hire, fire, or otherwise take an adverse employment action against someone because of their sexual orientation or gender identity, even if his or her boss has a deeply held belief against homosexuality. For example, an entity that is for-profit, produces a secular product and is not affiliated with a church would not be exempt from the law.

Despite the Act's religious exemption, some have expressed concern that the religious beliefs of employers and employees are not sufficiently protected. They argue that those whose religion dictates that homosexuality is wrong will be forced to hire or work with gay men and lesbians. Similar arguments are not new to the civil rights debate, but our Nation's civil rights laws rightly require non-religious organizations and entities, particularly those who participate in commercial activity, to adhere to broad principles of fairness and equality.<sup>16</sup>

*Section 7. Nonapplication to members of the armed forces; veterans' preferences*

This section makes clear that the Act does not apply to members of the Armed Forces. The Act does not affect current law, regulation or policies applicable to members of the military. In addition, this section further provides that the Act does not repeal or modify any other law that gives special preferences to veterans.

*Section 8. Construction*

Section 8(a) provides that an employer may establish and enforce reasonable and otherwise lawful dress and grooming standards for employees during work hours. Employers may require workers to abide by gender-specific dress codes and ensure that all employees dress in an office-appropriate manner. At the same time, the provision ensures that employees who have undergone or are undergoing gender transition are allowed to follow the dress code that applies to the gender to which they identify.

Section 8(b) also provides that employers are not required to construct new or additional physical facilities in order to comply with the Act.

*Section 9. Collection of statistics prohibited*

This section expressly prohibits the EEOC or Department of Labor ("DOL") from requiring employers to collect statistics on the sexual orientation or gender identity of employees pursuant to this Act. ENDA allows a company to provide data on its workforce to the EEOC or DOL on a voluntary basis.

*Section 10. Enforcement*

This section authorizes the same enforcement powers, procedures, and remedies that currently exist in Federal employment law. All individual relief that is available under title VII is available under ENDA, other than disparate impact claims as noted in section 4 above.

Section 10(d) also clarifies that double-recovery of damages is not permitted. This provision is intended to be a restatement of current

<sup>16</sup>The committee further notes that the religious exemption contained in ENDA is broader than that contained in other civil rights laws. For example, under title VII, religious organizations are not permitted to discriminate based on race, sex and national origin.

law. A wide range of conduct often violates more than one statute, and this provision does not modify current standards which permit a plaintiff to plead alternative claims that challenge the same conduct under different legal theories. For example, Congress does not intend to overrule, displace, or in any other way affect a plaintiff's ability to bring suit under title VII, particularly given that Federal courts have interpreted title VII in such a way that protects LGBT individuals on the basis of sex.

The law is clear, however, that double recovery for claims based on the same facts is not permitted, and this provision restates that well established principle.<sup>17</sup>

Section 10(e) clarifies the availability of damages in mixed motive cases, as described in section 4. In a mixed motive case, if a plaintiff demonstrates that sexual orientation or gender identity was a "motivating factor" for the adverse employment action, but an employer demonstrates it would have made the same employment decision in the absence of discrimination damages are limited to injunctive and declaratory relief and attorney's fees and costs. This is consistent with language currently in the Civil Rights Act of 1991 with respect to title VII.

#### *Section 11. State and federal immunity*

This section abrogates State sovereign immunity. It makes clear that States are not immune from suit for employment discrimination based on sexual orientation or gender identity against employees or applicants within any State program or activity that receives Federal financial assistance.

This section is based on Congress' enforcement power pursuant to section 5 of the Fourteenth Amendment to the U.S. Constitution, as well as Congress' spending power under Article I. If the Federal Government or the States violate this Act, they are subject to the same action and remedies as other employers, except that punitive damages are not available.

#### *Section 12. Attorney's fees*

This section provides that, subject to the same limits as existing in title VII, a successful party (other than the EEOC or the United States) is entitled to attorneys' fees and litigation expenses.

#### *Section 13. Posting notices*

This section sets forth a covered entity's duty to post notices describing the requirements of the law. ENDA allows employers to post an amended notice rather than posting a separate notice.

#### *Section 14. Regulations*

This section authorizes, but does not require, the issuance of regulations to enforce the Act.

#### *Section 15. Relationship to other laws*

This section preserves provisions in other Federal, State, or local laws that currently provide protection from discrimination. For example, Congress does not intend to overrule, displace, or in any

<sup>17</sup>See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) ("It goes without saying that the courts can and should preclude double recovery by an individual." (quoting *Gen. Tel. Co. of the Northwest v. E.E.O.C.*, 446 U.S. 318, 333 (1980)))

other way affect any U.S. Supreme Court or other Federal court opinion that has interpreted title VII in such a way that protects LGBT individuals on the basis of gender.

*Section 16. Severability*

This section ensures that if one or more provisions of the Act are held invalid by a court, the rest of the Act will remain in effect.

*Section 17. Effective date*

This section provides that ENDA will take effect 6 months after its enactment and will not apply retroactively.

IV. COMMITTEE ACTION

The committee met on July 10, 2013, to consider S. 815. The committee adopted an amendment in the nature of a substitute proposed by Senator Harkin. This amendment served as the original text for purposes of further amendment. The amendment clarified that disparate impact claims are not allowed under the Act; that a plaintiff cannot recover for the same offense under both title VII and ENDA; that it is sufficient for an employer to post an amended notice regarding antidiscrimination policy; that the only attorney fees allowed are those permitted under title VII; that neither the EEOC or Department of Labor is permitted to mandate the collection of statistics; and that in mixed motive cases, an employee only need establish that discrimination was a “motivating factor” for the adverse employment action.

Three amendments were discussed but not offered, and an additional two amendments were filed and not offered. The bill, as amended, was adopted by rollcall vote of 15 ayes and 7 nays and the committee reported the bill favorably to the Senate.

*Amendments discussed during the markup*

1. Senator Alexander discussed an amendment to provide rules of construction regarding employer responsibilities with respect to individuals undergoing or having undergone gender transition.

2. Senator Alexander discussed an amendment to limit the application of the Act with respect to gender identity until regulations defining the term “transition” are issued.

3. Senator Alexander discussed an amendment to eliminate a provision regarding relief in motivating factor cases.

V. COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 11, 2013.*

Hon. TOM HARKIN,  
*Chairman, Committee on Health, Education, Labor, and Pensions,  
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 815, the Employment Non-Discrimination Act of 2013.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,  
*Director.*

Enclosure.

*S. 815—Employment Non-Discrimination Act of 2013*

Summary: S. 815 would prohibit employment discrimination based on sexual orientation or gender identity. Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 815 would cost \$47 million over the 2014–18 period mostly for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases.

The bill could affect direct spending, but we estimate that any such effects would be less than \$500,000 annually. Because the legislation would affect direct spending, pay-as-you-go procedures would apply. S. 815 would not affect revenues.

The bill would impose a number of intergovernmental and private-sector mandates on employers, employment agencies, and labor organizations. CBO estimates that the costs of complying with those mandates would not exceed the annual thresholds specified in the Unfunded Mandates Reform Act (UMRA) for intergovernmental or private-sector mandates (\$75 million and \$150 million in 2013, respectively, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of S. 815 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By Fiscal Year, in Millions of Dollars					
	2014	2015	2016	2017	2018	2014–2018
CHANGES IN SPENDING SUBJECT TO APPROPRIATION <sup>1</sup>						
Estimated Authorization Level .....	7	10	10	10	10	47
Estimated Outlays .....	7	10	10	10	10	47

<sup>1</sup>In addition to the bill's discretionary cost, S. 815 could affect direct spending, but CBO estimates that any such effects would be less than \$500,000 annually.

Basis of estimate: For this estimate, CBO assumes that the necessary amounts will be appropriated near the start of each fiscal year and that outlays will follow the historical spending pattern of those activities.

*Spending Subject to Appropriation*

The EEOC expects that implementing S. 815 would increase its annual caseload (currently about 100,000 cases) by 5 percent and would require about 110 additional personnel. CBO estimates that the cost to hire those new employees would reach \$9 million annually by fiscal year 2015, subject to the appropriation of the necessary amounts. For fiscal year 2013, the Congress provided \$344 million for EEOC operations. We expect that enacting S. 815 also would increase the workload of a few other agencies, such as the

Merit Systems Protection Board, but any increase in costs for those agencies would not be significant because of the small number of additional cases likely to be referred to them.

The additional cases resulting from S. 815 also would increase the workload of the Department of Justice's Civil Rights Division. Based on information from the Department of Justice, CBO estimates that it would cost about \$1 million annually for additional attorneys and support staff.

#### *Direct Spending*

Enacting S. 815 could increase payments from the Treasury's Judgment Fund for settlements against Federal agencies in discrimination cases based on sexual orientation or gender identity. However, CBO estimates that any increases in direct spending would be less than \$500,000 because of the small number of such payments that are likely to occur.

*Pay-as-you-go considerations:* The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. CBO estimates that the legislation would have an insignificant impact on direct spending.

*Intergovernmental and private-sector impact:* S. 815 would prohibit public and private employers, employment agencies, and labor organizations from discriminating against any employee, member, and applicant on the basis of sexual orientation or gender identity. The bill also would require those public and private entities to post notices displaying the Federal laws that prohibit such discrimination. Those prohibitions and requirements would be intergovernmental and private-sector mandates as defined in UMRA.

The costs of the mandates would include the costs of modifying employment procedures and posting notices to avoid discriminatory practices. CBO assumes that changes to employment procedures would likely build on ongoing training and updates to personnel manuals. Similarly, the costs of notices would probably be relatively minor and would be made in the course of other routine updates. Therefore, CBO estimates that the costs of complying with these mandates would not exceed the annual thresholds specified in the UMRA for intergovernmental or private-sector mandates (\$75 million and \$150 million in 2013, respectively, adjusted annually for inflation).

Estimate prepared by: Federal Costs: Mark Grabowicz and Martin Von Gnechten; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Vi Nguyen.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## VI. REGULATORY IMPACT STATEMENT

The Act prohibits employers (including government employers), employment agencies, labor organizations, and joint-labor management committees from engaging in intentional discrimination in employment on the basis of sexual orientation or gender identity. The Act's requirements and enforcement mechanisms are similar to those found in title VII, and accordingly, its impact on individuals and businesses is similar. The direct impact would equal the value of the resources used by employers and others to become familiar

with the law, post notices, and, if necessary, modify employment procedures to conform with the requirements of the Act.

## VII. APPLICATION OF THE LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of the bill to the legislative branch. Consistent with the CAA’s mandate that civil rights laws be applied to the legislative branch, ENDA prohibits employers—including those in the legislative branch—from engaging in intentional discrimination in employment on the basis of sexual orientation or gender identity.

## VIII. NEED FOR THE LEGISLATION

### A. DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IS WIDESPREAD AND PERSISTENT

Thousands of hardworking Americans have lost their livelihoods simply because of who they are or who they love, and millions more go to work every day facing that threat. The committee believes the Federal Government should not permit unfettered bigotry to go unchecked, leading to the loss of jobs, fear in the workplace, economic instability, and personal hardship, while allowing employers and the economy to lose competent, qualified workers.

Employment decisions should be made on individual merit and performance, not extraneous factors such as sexual orientation or gender identity. The committee believes that sexual orientation and gender identity are irrelevant to a person’s ability to do his or her job and they only become factors when people’s biases and prejudices determine employment actions such as hiring and firing.<sup>18</sup> Just as it is unacceptable to fire or refuse to hire a person based on his or her race, sex, national origin, religion, age or disability, it is unacceptable to base employment decisions on an employee’s or applicant’s sexual orientation or gender identity.

Nevertheless, workplace discrimination targeting LGBT Americans, as well as those perceived to be LGBT, has been persistent and widespread. Indeed, there has historically been severe discrimination based on sexual orientation and gender identity in both the State and private employment contexts. As the Iowa Supreme Court recently noted, “The County does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victims of purposeful and invidious discrimination because of their sexual orientation.”<sup>19</sup> And, in many instances, such discrimination was a matter of policy by public entities throughout the country.<sup>20</sup>

<sup>18</sup> As the Connecticut Supreme Court noted with respect to discrimination based on sexual orientation, “[t]he characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008).

<sup>19</sup> *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009); accord *Kerrigan*, 957 A.2d at 434 (“There is no question. . . . that gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.”); see also *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2009) (“[S]exual orientation is a characteristic . . . associated with a stigma of inferiority and second-class citizenship, manifested by the group’s history of legal and social disabilities.”).

<sup>20</sup> For a historical overview of discrimination based on sexual orientation, see, e.g., S. Rep. 107–341; H. Rep. 110–406. See generally, Russell J. Davis, *Refusal to Hire, or Dismissal From Employment, On Account of Plaintiff’s Sexual Lifestyle or Sexual Preference as a Violation of*

While much progress has been made, as the record demonstrates discrimination based on sexual orientation and gender identity remains widespread and persistent.<sup>21</sup> For example:

- According to a 2008 report, 42 percent of lesbian, gay, and bisexual people have experienced at least one form of employment discrimination because of their sexual orientation.
- A 2011 report found that 90 percent of transgender Americans experienced harassment, mistreatment or discrimination at work because of their gender identity or took actions like hiding who they are to avoid it. Forty-seven percent of transgender Americans said they experienced an adverse job outcome, such as being fired, not hired or denied a promotion because they were transgender or gender non-conforming. Twenty-six percent of transgender Americans reported losing their jobs due to being transgender. Fifty percent of transgender Americans reported being harassed.<sup>22</sup>
- This year, the GAO found that in States that had laws protecting LGBT Americans from discrimination in the workplace, 4,991 administrative complaints were filed between 2007–12 alleging discrimination based on sexual orientation.<sup>23</sup>

Importantly, this problem does not just impact the private sector. Twenty-five percent of lesbian, gay, and bisexual individuals who were employed by Federal, State, or local government reported having experienced employment discrimination because of their sexual orientation. A 2009 Williams Institute report found more than 380 *documented* examples of workplace discrimination by State and local employers from 1980 through 2009. The American Civil Liberties Union (ACLU) identified 87 examples of discrimination from 35 States, including inquiries from LGBT employees alleging 16 examples of discrimination by States and 48 stories of discrimination by municipalities in just one 18-month period.<sup>24</sup>

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*Federal Constitution or Federal Civil Rights Statutes*, 42 A.L.R. Fed. 189 (1979); Robin Cheryl Miller, *Federal and State Constitutional Provisions As Prohibiting Discrimination in Employment on the Basis of Gay, Lesbian or Bisexual Orientation or Conduct*, 96 A.L.R. 5th 391 (2002); The Human Rights Campaign, *Documenting Discrimination* (2001); William D. Rubenstein, *Do Gay Rights Matter?: An Empirical Assessment*, 75 S. Cal. L. Rev. 65 (2001); Edmund Reutter, Jr., *The Law of Public Education*, Fourth Edition 657 (New York Foundation Press, 1994) (describing discrimination faced by LGBT teachers due to State licensing requirements that included morality fitness tests); Laura S. Fitzgerald, *Towards a Modern Art of Law*, 96 Yale L. J. 2051 (1987).

<sup>21</sup>For recent examinations of the widespread and persistent discrimination in the workplace that LGBT Americans face, see Movement Advancement Project, Center for American Progress, Human Rights Campaign, *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers* (2013); Brad Sears & Christy Mallory, Williams Institute, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* (2011); Brad Sears, et al., Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation & Gender Identity in State Employment* (2009); M.V. Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 Chi. Kent L. Rev. 559 (2009); Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011).

<sup>22</sup>Injustice at Every Turn, *supra* note 21 at 3.

<sup>23</sup>U.S. Gov't Accountability Office, GAO–13–700R, *Update on State Statutes and Administrative Complaint Data on Employment Discrimination Based on Sexual Orientation and Gender Identity* (2013); U.S. Gov't Accountability Office, GAO–10–135R, *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data* (2009) (noting over 2,300 complaints filed between 2006–8 alleging discrimination based on sexual orientation or gender identity).

<sup>24</sup>Brad Sears, et al., *Documenting Discrimination*, *supra* note 21; *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 129–43 (2009) (statement of ACLU). See also *supra* at 147 (written statement of Gay & Lesbian Advocates & Defenders (“GLAD”)) (listing examples of employment discrimination against State employees; *supra* at 164 (written statement of LAMBDA legal); *supra* at 177 (written statement of National Center for Lesbian Rights); *supra* at 79 (written statement of National Gay and Lesbian Task Force) (same).

These statistics, moreover, grossly undercount the level of discrimination that exists. Since most States and localities do not explicitly provide redress for discrimination, most individuals have little reason to report discrimination. Moreover, even where there are laws and a complaint process, LGBT employees often are reluctant to use these processes because they must “out” themselves to members of the community or to future employers.<sup>25</sup>

To learn more about the widespread and persistent discrimination faced by LGBT Americans, in recent years the committee heard testimony from individuals who directly experienced discrimination.

In 2009, the committee heard from Michael Carney, a highly decorated police officer who was denied reinstatement to the Springfield, MA, police department because he is gay. Despite his solid record as an officer, and despite the police chief’s recommendation, Carney was denied re-instatement three times after informing the police commission that he was gay. Fortunately for Mr. Carney, Massachusetts has a law prohibiting such discrimination. As a result, he filed a claim under State law. After an investigation, the Massachusetts Commission against Discrimination ruled probable cause existed that the police commission discriminated against Officer Carney on the basis of sexual orientation. A settlement was subsequently reached and Officer Carney was reinstated. Mr. Carney’s experience demonstrates that State and local government employers continue to discriminate against LGBT workers, even though such discrimination is completely irrational and serves no conceivable government purpose.

The committee also heard from Kylar Broadus. Mr. Broadus worked for a major financial institution. After he announced his gender transition, within 6 months he was constructively discharged. He testified that he was harassed until he was forced to leave. He repeatedly received harassing telephone calls from his supervisor, received unrealistic work demands, and was even forbidden from talking with certain people. Mr. Broadus ultimately “was forced out and unemployed.”

In addition to the financial and economic impact of the discrimination, including the difficulties of finding any employment once he was forced out, Mr. Broadus testified to the emotional consequences of the discrimination. As he said,

“I suffer from post-traumatic stress as a result of the harassment that I encountered in the workplace from my employer, from not being allowed to change my name or use the name

<sup>25</sup> As just one example, in California, two-thirds of transgender Californians reported some form of workplace harassment or discrimination, but only 15 percent of those transgender Californians filed a complaint with the State. See 2009 Hearing, *supra* note 24 at 90–1 (written statement of Transgender Law Center); also *Kerrigan*, 957 A.3d at 446 n.40 (“Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena.” (quoting *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 10009, 101 (1985) (Brennan, J., dissenting)); 2009 Hearing, *supra* note 24, at 164 (written statement of LAMBDA Legal) (“For each year from 2004 to 2007, we received more calls regarding LGBT workplace discrimination than any other single issue. In each of those years, we received between 900 and 1,100 employment discrimination calls. Based on our experience with our legal help desk, we can say with confidence that these remarkable figures certainly understate the prevalence of the problem. Over the years, we have learned many reasons why employees choose not to pursue legal action, including that many people know how few legal remedies exist in most jurisdictions, and many others are afraid to come out publicly and therefore refrain from even considering pursuit of legal action.”)

I used, not being allowed to wear my hair a certain way, not being allowed to dress as me.”

He continued,

“I cannot emphasize this enough as I still sit here today without almost tears in my eyes, it is devastating, it is demoralizing, and dehumanizing to be put in that position.”

As the record makes clear, cases such as these are not isolated.

This widespread and persistent discrimination, moreover, has very real world consequences.

First, as the record overwhelmingly demonstrates, intentional employment discrimination on the basis of sexual orientation and gender identity causes severe economic harm. LGBT workers experience significant wage disparities, higher unemployment rates, and inequitable benefits. For example:

- Twelve studies conducted in the last decade show that gay male workers are paid less on average than their heterosexual male co-workers. The wage gap identified in these studies varies between 10 percent and 32 percent of the heterosexual men’s earnings.<sup>26</sup>

- Lesbian couples have a poverty rate of 6.9 percent compared to 5.4 percent for different-sex married couples. Poverty rates for children of same-sex couples are twice as high as poverty rates for children of married heterosexual couples.<sup>27</sup>

- Transgender respondents to a 2011 national survey were unemployed at twice the rate of the general population, and 15 percent reported a household income of under \$10,000 a year, nearly four times the rate for the general population.<sup>28</sup>

- Studies find that lesbians are more likely to live in poverty than are heterosexual women. For example, 24 percent of lesbians and bisexual women are living in poverty, compared to 19 percent of heterosexual women.<sup>29</sup>

In addition, LGBT workers tend to experience a substantially impaired ability to obtain employment-related benefits, including health insurance. As just one example, transgender Americans are uninsured at the same rate of the general population, but only 40 percent enjoy employer-based insurance coverage compared to 62 percent of the population at large. Without stable employment, income and access to jobs, the effects of discrimination are therefore felt in almost every aspect of life.<sup>30</sup>

This economic impact of discrimination, moreover, does not just impact individual LGBT Americans. Data show that 37 percent of LGBT adults have had a child and between 2 million and 2.8 mil-

<sup>26</sup>Evidence that ENDA will make a difference: studies demonstrate that both a pay gap and the differential treatment of gay applicants is less in States that have ENDA type laws. See generally *Equality at Work: The Employment Non-Discrimination Act, Before the S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong. (2012) (testimony of M.V. Lee Badgett).

<sup>27</sup>M.V. Lee Badgett et al., Williams Institute, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination* (2007); see also Randy Albelda et al., Williams Institute, *Poverty in the Lesbian, Gay, and Bisexual Community* (2009).

<sup>28</sup>Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 18 (2011).

<sup>29</sup>Movement Advancement Project, American Progress, and Human Rights Campaign. *A BROKEN BARGAIN: Discrimination, fewer Benefits, and More Taxes for LGBTQ Workers* 8 (June 2013).

<sup>30</sup>2009 Hearing, *supra* note 24, at 95.

lion American children are being raised by LGBT parents.<sup>31</sup> Like other parents, LGBT parents need to work to support their families. Nevertheless, substantial numbers live in States where there is no explicit protection from workplace discrimination based on sexual orientation and gender identity. For these families, workplace discrimination has devastating consequences for the families that depend on them.<sup>32</sup>

Such discrimination also impacts businesses and the economy as a whole. As Ken Charles, vice president of Diversity and Inclusion of General Mills, Inc., testified,

“[t]here is a real cost that all U.S. companies are paying right now in terms of loss of engagement when employees are in fear, loss of productivity when they cannot concentrate on bringing their whole self to their work every day, and loss of talent because of these artificial barriers to entry.”<sup>33</sup>

The National Center on Employment Policies calculated that discrimination against LGBT employees translated into a \$47 million loss in profits attributable to training expenditures and unemployment benefits alone. Not including outright terminations, it has been projected that hostile work environments cost companies \$1.4 billion in lost output each year because of a reduction in LGBT workers’ productivity.<sup>34</sup>

Second, in addition to severe economic consequences, the discrimination and/or fear of discrimination that LGBT workers face fosters hostile work environments and causes severe psychological impact.

According to the American Psychological Association, researchers have found that LGBT workers suffer psychological distress because they are often persecuted and in constant state of fear of being discovered. “Research has indicated that social stigma based upon sexual orientation may be a risk factor for psychological depression, and anxiety.” Kylar Broadus testified that he continues to suffer from post-traumatic stress as a result of the harassment and discrimination he faced.

#### B. EXISTING LAWS ARE NOT SUFFICIENT

Seventeen States and the District of Columbia currently explicitly prohibit workplace discrimination based on sexual orientation or gender identity. Another four States prohibit workplace discrimination based on sexual orientation but do not include a prohibition on gender identity. In addition, 88 percent of Fortune 500 companies include sexual orientation in their nondiscrimination policies, and 57 percent include gender identity. Many other companies, colleges, universities, State and local governments have non-discrimination policies encompassing sexual orientation and gender identity.

These explicit State and local laws apply to only 40 percent of the population. This leaves 60 percent of Americans without critical, explicit job protections.

<sup>31</sup> Movement Advancement Project, *supra* note 29 at 6.

<sup>32</sup> 2009 Hearing, *supra* note 24, at 89 (testimony of Jennifer Chrisler, executive director, Family Equity Council).

<sup>33</sup> 2012 Hearing, *supra* note 26 at 56.

<sup>34</sup> 2009 Hearing, *supra* note 24 at 186 (statement of Parents, Families and Friends of Lesbians and Gays (PFLAG) National).

Moreover, a number of Federal courts, and the EEOC, have found protections for some LGBT individuals under title VII's prohibition on discrimination on the basis of sex.<sup>35</sup> Nevertheless, there remains uncertainty in the courts regarding the protection of LGBT individuals under title VII.

The committee believes that in order to provide clear and certain protection for all LGBT workers, such protections should be explicitly written into the law.

### C. ENDA HAS BROAD SUPPORT

Overwhelming majorities have indicated that they believe that LGBT Americans should have equal rights in terms of job opportunities, and that they support ENDA. In a 2011 poll, 73 percent of voters expressed support for LGBT workplace nondiscrimination protections. Indeed, 89 percent of Americans believe such protections already exist.<sup>36</sup>

In addition to the broad support this legislation enjoys among the American public, corporate America supports ENDA. Many of our Nation's most successful companies have specifically endorsed the bill including: Accenture, Ltd., Alcoa Inc., American Eagle Outfitters Inc., American Institute of Architects, Ameriprise Financial Inc., Amgen Inc, AMR Corp. (American Airlines), Bank of America Corp., The Bank of New York Mellon Corp., Barclays, BASF Corp., Bausch & Lomb Inc., Best Buy Co. Inc, Bingham McCutchen LLP, BMC Software Inc., Boehringer Ingelheim Pharmaceuticals Inc., BP America Inc., Bristol-Myers Squibb Co., CA Technologies Inc., Caesars Entertainment Corp., Capital One Financial Corp., CC Media Holdings Inc. (Clear Channel), Charles Schwab & Co., Chevron Corp., Choice Hotels International Inc., Chubb Corp., Cisco Systems Inc., Citigroup, Clorox Co., The Coca-Cola Co., Corning Inc., Darden Restaurants Inc., Dell Inc., Deloitte LLP, Deutsche Bank, Diageo North America, Dow Chemical Co., Eastman Kodak Co., Electronic Arts Inc., Eli Lilly & Co., EMC Corp., Ernst & Young LLP, Expedia Inc., Gap Inc., General Mills Inc., General Motors Corp., GlaxoSmithKline, Goldman Sachs Group Inc., Google Inc., Hanover Direct Inc., Herman Miller Inc., Hewlett-Packard Co., Hillshire Brands Co., Hilton Worldwide, Hospira Inc., HSBC, Hyatt Hotels Corp., Integrity Staffing Solutions Inc., InterContinental Hotels Group Americas, International Business Machines Corp., Jenner & Block LLP, JPMorgan Chase & Co., Kaiser Permanente, KeyCorp, Kimpton Hotel & Restaurant Group, KPMG LLP, Levi Strauss & Co., Marriott International Inc., Marsh & McLennan Companies Inc., Merck & Co. Inc., Microsoft Corp., MillerCoors Brewing Co., Mitchell Gold + Bob Williams, Morgan Stanley, Motorola Inc., Nationwide, The Nielsen Co., Nike Inc., Oracle Corp., Orbitz Worldwide Inc., Pfizer Inc., PricewaterhouseCoopers LLP, QUALCOMM Inc., RBC Wealth Management, Replacements Ltd., Robins, Kaplan, Miller & Ciresi LLP, Ryder System Inc., Self-Help Credit Union Durham, SUPERVALU Inc.,

<sup>35</sup> See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl v. Maricopa Cnty Cmty Coll. Dist.*, 325 Fed. App'x. 492 (9th Cir. 2009); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C. April 20, 2012); *Castello v. Donahoe*, 2011 WL 6960810 (E.E.O.C. Dec. 20, 2011); *Veretto v. Donahoe*, 2011 WL 2663401 (EEOC July 1, 2011).

<sup>36</sup> Jeff Krehely, Center for American Progress, Polls Show Huge Public Support for Gay and Transgender Workplace Protections (June 2, 2011).

Teachers Insurance and Annuity Association, College Retirement Equities Fund, Tech Data Corp., Texas Instruments Inc., Thomson Reuters, Time Warner Inc., Travelers Companies Inc., US Airways Group Inc., WellPoint Inc., Wells Fargo & Co., Whirlpool Corp., Xerox Corp., and Yahoo! Inc.

Corporate leaders believe that ENDA is not only the right thing to do, but is also good for business. Kenneth Charles, vice president at General Mills testified,

“ENDA will be good for business and good for American by helping businesses attract and retain top talent, helping provide a safe, comfortable and productive work environment, free from any form of discrimination, and helping create a culture that fosters creativity and innovation that is vital to the success of all businesses.”

Likewise, Virginia Nguyen, vice president of Nike, testified that, “ENDA is good for business.” Robb Webb, chief human resources officer at Hyatt, wrote,

“[W]e believe that including sexual orientation and gender identity protection in workplace non-discrimination legislation will have a positive impact on our country’s ability to compete on the world stage.”

While small businesses with less than 15 employees are exempt from ENDA, small businesses also support ENDA. A 2013 poll found that 67 percent of small business owners support the bill. In fact, 81 percent of small business owners mistakenly believe that it is already illegal under Federal law to fire or refuse to hire someone because they are gay or lesbian.

One reason businesses support ENDA is because, they note, the Act is unlikely to lead to excessive litigation. In a 2013 report, the General Accounting Office wrote,

“the administrative complaint data reported by States for 2007 through 2012 show relatively few employment discrimination complaints based on sexual orientation and gender identity.”

Indeed, LGBT people are about as likely to file discrimination complaints as are people in groups that are currently protected against discrimination under Federal law.<sup>37</sup>

Finally, while religious organizations are not covered by ENDA, many religious organizations also support enactment of this legislation. Nearly 50 religious organizations wrote to the committee endorsing the legislation. These organizations wrote:

“As a nation, we cannot tolerate arbitrary discrimination against millions of Americans just because of who they are. Lesbian, gay, bisexual and transgender (LGBT) people should be able to earn a living, provide for their families and contribute to society without fear that who they are or who they love could cost them a job. . . . We call on you to pass this important legislation without delay.”

<sup>37</sup>Indeed, adjusted for the population size of different groups, LGBT individuals are as likely to file complaints as women and people of color. The annual rate of complaints was 4.7 per 10,000 LGBT people on average in the States with LGBT protections, a number similar to the number of sex discrimination complaints per woman (5.4 per 10,000 women) and race-based complaints per person of color (6.5 per 10,000). See 2012 Hearing, *supra* note 26 (statement of M.V. Lee Badgett).

These religious leaders also noted that,

“any claims that ENDA harms religious liberty are misplaced. ENDA broadly exempts from its scope houses of worship as well as religiously affiliated organizations. This exemption—which covers the same religious organizations already exempted from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964—should ensure that religious freedom concerns don’t hinder the passage of this critical legislation.”

The letter was signed by: Affirmation—Gay and Lesbian Mormons, African-American Ministers in Action, American Jewish Committee, Anti-Defamation League, The Association of Welcoming & Affirming Baptists, Bend the Arc Jewish Action, B’nai B’rith International, Brethren Mennonite Council for Lesbian, Gay, Bisexual and Transgender Interests, Call To Action, Central Conference of American Rabbis, Dignity USA, Disciples Home Missions, The Episcopal Church, Equally Blessed, Evangelical Lutheran Church in America, Friends Committee on National Legislation, The Global Justice Institute, Hadassah, the Women’s Zionist Organization of America, Inc., Integrity USA, Jewish Council for Public Affairs, Jewish Labor Committee, Jewish Women International, Keshet, Metropolitan Community Churches, More Light Presbyterians, Mormons for Equality, Mormons Building Bridges, Muslims for Progressive Values, Nehirim, New Ways Ministry, Presbyterian Church (U.S.A.), The Rabbinical Assembly, Reconciling Works, Lutherans for Full Participation, The Reconstructionist Rabbinical Association, Reconstructionist Rabbinical College, Religious Coalition for Reproductive Choice, Religious Institute, Sikh American Legal Defense and Education Fund (SALDEF), Soulforce, The Evangelical Network, The Fellowship of Affirming Ministries, The Interfaith Alliance, Union for Reform Judaism, United Church of Christ, Justice and Witness Ministries, United Church of Christ, Office for Lesbian, Gay, Bisexual and Transgender Ministries, United Church of Christ, Wider Church Ministries, United Methodist, General Board of Church and Society, United Synagogue of Conservative Judaism.

ENDA has also been endorsed by civil rights, religious, labor, and women’s organizations.<sup>38</sup>

#### IX. THE VISIBILITY OF ENDA’S PROTECTIONS WILL MAKE A DIFFERENCE IN THE LIVES OF LGBT PEOPLE

Apart from the legal remedies that ENDA will provide workers who have been wrongly discriminated against on the basis of sexual orientation and gender identity, the committee believes that passage of legislation that explicitly prohibits discrimination on the basis of sexual orientation and gender identity will send a strong signal that in American workplaces, people should be judged on their skills, abilities and accomplishments.

The bill will clearly articulate a national commitment to equal employment opportunity regardless of sexual orientation and gender identity. And, just as passage of legislation such as title VII and the ADA helped to change attitudes and diminish the social ac-

<sup>38</sup> See Letter from The Leadership Conference on Civil and Human Rights (July 8, 2013).

ceptability of bias, prejudice and bigotry, the committee believes passage of ENDA will make clear that lesbian, gay, bisexual and transgender Americans are equal, first-class citizens. They are fully recognized and welcomed as members of our American family.

#### X. CONSTITUTIONAL AUTHORITY

Congress has the authority to enact ENDA through the Commerce Clause and the Fourteenth Amendment of the U.S. Constitution. In addition, the Act's authorization of individual suits against State government employers is derived from Congress' enforcement power under Section Five of the Fourteenth Amendment as well as Congress' spending power under Article I.<sup>39</sup>

Section 11 of ENDA makes unmistakable congressional intent to abrogate State sovereign immunity. It makes clear that States are not immune from suit for employment discrimination based on sexual orientation or gender identity. The committee strongly believes that section 11 is a valid exercise of congressional power under Article I and Section Five of the Fourteenth Amendment ("section five") and that ENDA properly abrogates sovereign immunity.

Section Five gives Congress the power to enforce the substantive provisions of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provision of this article." Pursuant to this authority, the Supreme Court has recognized that section five is an affirmative grant of legislative power to Congress, and it is well established that when Congress enacts anti-discrimination legislation it has the power to abrogate State sovereign immunity in order to provide a private right of action for damages against States.<sup>40</sup> Indeed, the Federal Government has long recognized that ensuring civil rights is essential to national citizenship and has properly enforced and protected those rights under section five.

Notably, Congress may legislate, using its authority under section five, to deter or remedy Federal constitutional violations even if, in the process, the legislation prohibits conduct which itself is not unconstitutional.<sup>41</sup> Further, Congressional legislative authority under section five is broader than the language of the Fourteenth Amendment itself. Thus, Congress has the ability to deter and remedy conduct which is not itself forbidden by the Fourteenth Amendment.<sup>42</sup>

The Supreme Court has recognized that section five authorizes Congress to adopt "[l]egislation which deters or remedies constitutional violation[s]." <sup>43</sup> In doing so, "Congress is not limited to mere legislative repetition of [the Supreme] Court's constitutional jurisprudence."<sup>44</sup> Congress's power under section five "includes the authority both to remedy and to deter violations of rights guaranteed [by the Constitution] by prohibiting somewhat broader swath of conduct, including that which is not forbidden by the [Fourteenth]

<sup>39</sup> For a thorough discussion of Congress' authority to enact ENDA, see S. Rep. No. 107-341; H. Rep. No. 110-406.

<sup>40</sup> *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Fitzgerald v. Bitzer*, 427 U.S. 445 (1976).

<sup>41</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>42</sup> *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

<sup>43</sup> *City of Boerne*, 521 U.S. at 518.

<sup>44</sup> *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

Amendment’s own text.”<sup>45</sup> Congress has “a wide berth in devising appropriate remedial and preventive measures for unconstitutional actions.”<sup>46</sup>

Congress has the power to “enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause.”<sup>47</sup> And, here, the committee believes ENDA is centrally designed to prohibit violations of the Equal Protection Clause. Indeed, ENDA implicates discrimination based on sex<sup>48</sup> as well as discrimination based on sexual orientation and gender identity.

LGBT Americans have been, and continue to be, subject to pervasive, purposeful unequal treatment based on characteristics that are beyond the control of such individuals and result from stereotypical assumptions irrelevant to an individuals’ ability to participate in, and contribute to, society. Such discrimination deprives hard-working Americans basic equal protection—the right to be judged on one’s merits and not upon irrelevant factors such as sexual orientation or gender identity.

As is clear from the record and this report, there is overwhelming evidence of discrimination by State actors against LGBT individuals, which remains widespread and pervasive.<sup>49</sup> As the Iowa Supreme Court recently noted,

“The county does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victims of purposeful and invidious discrimination because of their sexual orientation.”<sup>50</sup>

As the Connecticut Supreme Court also recognized,

“There is no question . . . that gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.”<sup>51</sup>

Indeed, until recently, State laws criminalized same-sex sodomy, which translated into barriers to employment.<sup>52</sup> Additionally, States laws explicitly *permitted* employment discrimination based on sexual orientation and gender identity, for example in the context of public school teachers and law enforcement.<sup>53</sup>

Moreover, after reviewing the long history of discrimination by State and local employers, Congress finds that the States do not possess even a rational basis for discriminating against LGBT workers because of their sexual orientation or gender identity. Any such discrimination by State and local governments is completely

<sup>45</sup> *Garrett*, 531 U.S. at 365.

<sup>46</sup> *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

<sup>47</sup> *Lane*, 541 U.S. at 520.

<sup>48</sup> See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Higgins v. New Balance Shoe Co.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999).

<sup>49</sup> The committee also notes the overwhelming evidence of discrimination by municipal and private actors as well, which are relevant to the section 5 inquiry. *Lane*, 541 U.S. 509 at 527 n.16, 528.

<sup>50</sup> *Varnum*, 763 N.W.2d at 889.

<sup>51</sup> *Kerrigan*, 957 A.2d at 434.

<sup>52</sup> See *Laurence v. Texas*, 539 U.S. 558, 575–76 (2003) (“The Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms.”)

<sup>53</sup> See, e.g., *Nat’l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (“we see no constitutional problem in the statute’s permitting a teacher to be fired for engaging in ‘public homosexual activity.’”); States fired law enforcement officials. See, e.g., *Clearfield City v. Dep’t of Employment Sec.*, 663 P.2d 440, 443 (Utah 1983).

irrational. The intentional discrimination based on sexual orientation and gender identity in the State workforce is never justified by a legitimate State interest.

The committee also believes ENDA is necessary to prohibit violations of the Due Process Clause. Indeed, the Supreme Court has ruled that LGBT Americans have a right to engage in intimate consensual sexual activity between adults, and such conduct falls within the liberty protected by the Due Process Clause of the Fourteenth Amendment.<sup>54</sup>

Moreover, the committee firmly believes abrogating immunity in private suits for damages under ENDA is congruent and proportional to the problem addressed by the Act. ENDA specifically targets the pattern of irrational and unconstitutional discrimination on the part of State and local employers and it is narrowly tailored. The Act exempts certain categories of employers from liability. ENDA has no application to the military. It exempts businesses with fewer than 15 employees. It exempts religious organizations. ENDA also prohibits the imposition of affirmative action and the adoption of quotas or granting preferential treatment. Moreover, plaintiffs cannot bring disparate impact claims. Further, with regard to money damages, ENDA provides for the same caps that exist in title VII and to which the States are already subject. It does not provide for punitive damages in suits against State employers. Finally, it requires State employees to exhaust all administrative remedies before bringing an action for money damages in court.

In sum, these limitations demonstrate the Act's concern for targeting conduct which is in need of redress and which serves no possible rational purpose. Thus, ENDA is a congruent and proportional response to the problem of workplace discrimination based on sexual orientation and gender identity.

Finally, in addition to its authority under section five, Congress has the power to apply ENDA to States and localities under its Spending Power authority. States that wish to obtain Federal funds for their programs or activities must comply with reasonable, constitutional conditions placed on the receipt of such funds. Through this power, Congress has the authority to provide a private cause of action for damages against States to those State employees who are affected by discrimination based on their sexual orientation or gender identity.

## XI. ADDITIONAL VIEWS

SENATORS ALEXANDER, ENZI, ISAKSON, PAUL, ROBERTS AND SCOTT

We voted against this legislation when the committee considered it and continue to oppose this legislation.

To begin with, the legislation has not proceeded through regular order, and as a result there are far too many unanswered questions about the text and its application to American workplaces. The HELP Committee held no hearing on S. 815. Instead, the bill proceeded directly to markup 3 months after it was introduced. This bypass of regular order deprived Senators of the opportunity to ask

<sup>54</sup> *Lawrence*, 539 U.S. 558.

questions about the bill's language and explain concerns about its real-world application.

Although the committee has held hearings on similar legislation in past Congresses, the text of S. 815 is not identical to previous versions. Indeed, significant changes have been made. Further, the HELP Committee now has at least five members who were not committee members in these past Congresses. Therefore, they have had no opportunity to air concerns about any version of the bill.

One such concern relates to the potential for fraudulent abuse of the protections this bill would provide. S. 815 makes no provisions for, nor seems to in any way acknowledge the potential for, nefarious abuse of employment protections and gender-specific area access privileges. This oversight creates a gaping hole which could leave employers powerless and confused about how to prevent abuse and protect fellow employees, customers, and others present at the workplace.

Among other workplaces, we are concerned about the application of S. 815 in schools, preschools, and other institutions serving children. Issues with the use of shared facilities by transgender students have already arisen in several States<sup>55</sup> under State laws unrelated to ENDA. Under these State statutes the courts have largely dismissed the concerns of schools, teachers, parents, and fellow students regarding safety issues for the peers of transgender students, setting a precedent that leaves these groups powerless to raise or resolve such concerns.

We are concerned that this will be repeated in workplaces around the country. S. 815 would force employers to ignore and silence the concerns of fellow employees, customers, and other users of their facilities. The repercussions of disregarding such concerns could be devastating to an employer.

The lack of a legislative hearing on S. 815 also reveals itself in the bill's poorly defined or completely undefined terms. The bill language is too vague for employers to understand—specifically in regard to when mandated protections are triggered, what response is required by law, and the extent of the liability they may face.

In general, we object to additional employer mandates that impose individual values upon society and send the bill to employers. By reporting out S. 815 without fully defining the terms used in the bill, or giving stakeholders a chance to ask about them during a legislative hearing, this committee has sent a disturbing message to employers, and we strongly disagree with it.

For some employers, the mandates of this legislation would conflict with deeply held religious beliefs. As reported, the bill singles out specific classes of employers for total exemption based on religious beliefs, but disregards others whose religiously-based opposition to the bill's mandates may be just as sincere. In our view, there is little basis for this distinction.

The bill raises additional concerns with us because, in creating a new protected class, it actually affords that new class with rights that are elevated above those granted to existing protected classes of race, sex, national origin, religion, age and disability. In addition to creating a class based on what many consider to be non-immutable characteristics, the bill also codifies employment protection

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<sup>55</sup>Maine, Colorado and California.

rights for people who are not members of this new protected class, but who simply associate or have associated with members of the protected class.

Finally, we oppose S. 815 because the legislation is not necessary. As noted, 17 States and the District of Columbia have adopted similar legislation, as well as a number of cities. Some large employers have also adopted voluntary provisions. If accurate, the polling data cited in this report would seem to indicate that more States may choose to adopt such statutes. That is their choice, and in our system of government they are thankfully free to make it. However, in those States where the citizens do not see the need for such legislation, the Federal Government should not mandate it against their will.

It is also noted that employment protections for LGBT individuals have been granted under Title VII of the Civil Rights Act of 1964.<sup>56</sup> Although not comprehensive, courts do have the power to extend such protections under certain circumstances.

#### AMENDMENTS

During committee consideration of S. 815, five amendments were filed but not offered at the markup.

To address the bill's lack of direction on the use of shared facilities, an amendment was filed which would allow employers to view each situation individually and develop a resolution which the individual employer believes is least disruptive to the workplace. We would have supported this amendment.

Since the bill's drafters failed to define the various terms used in gender identity provisions of S. 815, an amendment was filed which would require the Equal Employment Opportunity Commission to issue regulations defining undefined terms in the bill before any employer could face liability. We would have supported that amendment.

Another amendment was filed to strike language added in the manager's amendment to allow lawsuits even when an employer had a legitimate reason for the employment action and would have taken the same action with or without the discrimination based on sexual orientation or gender identity. We would have supported that amendment.

Senator Enzi filed an amendment which would exempt all schools from S. 815, and we would have supported that amendment.

Senator Paul filed an amendment which would replace the bill's selective religious exemption with a comprehensive religious ex-

<sup>56</sup>*Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender . . . These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under title VII according to the rationale of *Price Waterhouse*.”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (plaintiff “established that he was a member of a protected class by alleging discrimination against the city for his failure to conform to sex stereotypes”); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination” under title VII); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding that an effeminate male employee who was abused by co-workers because of their belief, he “did not act as a man should act,” could claim actionable harassment under title VII); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012) (employer discriminated on the basis of sex because male employee took his husband’s last name).

emption for religious employers. We would have supported that amendment.

For these reasons, we voted against reporting out S. 815, and we continue to oppose the legislation.

