



Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of the Employment Non-Discrimination Act (ENDA)

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Summary

Introduced in various incarnations in every congressional session since the 103rd Congress, the proposed Employment Non-Discrimination Act (ENDA; H.R. 1397/S. 811) would prohibit discrimination based on an individual's actual or perceived sexual orientation or gender identity by public and private employers in hiring, discharge, compensation, and other terms and conditions of employment. The stated purpose of the legislation is "to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal Government employers," as well as to provide effective remedies for such discrimination. Patterned on Title VII of the Civil Rights Act of 1964, the act would be enforced by the Equal Employment Opportunity Commission (EEOC).

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Introduction

Introduced in various incarnations in every congressional session since the 103rd Congress, the proposed Employment Non-Discrimination Act (ENDA; H.R. 1397/S. 811) would prohibit discrimination based on an individual's actual or perceived sexual orientation or gender identity by public and private employers in hiring, discharge, compensation, and other terms and conditions of employment. The stated purpose of the legislation is "to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal Government employers," as well as to provide effective remedies for such discrimination.¹ Specific exemptions from coverage are included for religious organizations and educational institutions, the armed services, and employers with fewer than 15 employees. Preferential treatment or quotas on the basis of sexual orientation or gender identity and "disparate impact" claims of discrimination would be specifically precluded. Patterned on Title VII of the Civil Rights Act of 1964,² the act would be enforced by the Equal Employment Opportunity Commission (EEOC).

Although earlier versions of the legislation, dating back to 1975, proposed simply amending the provisions of Title VII to add "sexual orientation" to categories of discrimination already prohibited, more recent versions of ENDA have proposed a stand-alone legislative safeguard against sexual orientation and gender identity discrimination in employment. Because the proposed legislation incorporates by reference many of Title VII's provisions, it is similar in scope to the earlier law. However, because discrimination on the basis of sexual orientation and gender identity was not before Congress when it enacted Title VII, the measures also differ in several significant respects.

Coverage

Like Title VII, ENDA would prohibit employers, employment agencies, and labor organizations from discriminating on the basis of sexual orientation or gender identity. Both public and private employers would be covered, although private employers who have fewer than 15 employees would be exempt. Like Title VII, ENDA would define "employer" to exclude "bona fide private membership" clubs that qualify for federal tax exemptions. As described in greater detail below, religious organizations and the Armed Forces would also be specifically excluded from coverage under the legislation.

Likewise, most public and private employees would be protected by ENDA, including employees covered by the Government Employee Rights Act of 1991 and the Congressional Accountability Act of 1995.³ Volunteers who receive no compensation, however, would not be covered under the legislation.

¹ H.R. 1397/S. 811, §2, 112th Cong.

² 42 U.S.C. §§2000e et seq.

³ *Id.* at §2000e-16; 2 U.S.C. §1301.

Prohibited Acts

If enacted, ENDA would make it an unlawful employment practice for an employer to discriminate against an individual “because of an individual’s actual or perceived sexual orientation or gender identity.”⁴ The legislation’s delineation of prohibited employment practices substantially tracks the catalogue of employer malfeasance condemned by Title VII, which generally makes it unlawful for employers with 15 or more employees, employment agencies, and labor organizations to discriminate against employees or applicants for employment because of race, color, religion, sex, or national origin.⁵ Thus, all forms of employment and pre-employment bias would be forbidden, including discrimination in hiring, discharge, promotion, layoff and recall, compensation and fringe benefits, classification, training, apprenticeship, referral, union membership, and other “terms, conditions, or privileges of employment.” Likewise, employers would not be allowed to “limit, segregate, or classify” employees in ways that “deprive or tend to deprive” them of job opportunities or “adversely affect” their employment status. A comparable range of employment agency and labor organization practices, again largely borrowed from Title VII, would be prohibited by ENDA, which also would prohibit discrimination in apprenticeship or training programs. In addition, the legislation incorporates Title VII language that would specifically prohibit retaliation against employees who complain of discriminatory conduct.

Despite these similarities with respect to prohibited acts, ENDA would differ from Title VII in several significant ways. For example, one provision without direct parallel in Title VII’s statutory text would make an employer liable for employment actions that are “based on the sexual orientation or gender identity of a person with whom the individual associates or has associated.”⁶ Another provision would narrow the evidentiary options available in sexual orientation and gender identity cases by stipulating that employees may bring only disparate treatment claims, meaning that disparate impact claims would be prohibited. Disparate treatment generally occurs when an employer intentionally discriminates against an employee by treating a similarly situated employee differently, while disparate impact occurs when an employer’s acts or policies are facially neutral but have an adverse effect on a class of employees and are not otherwise reasonable. Proof of intent to discriminate is required to prove a disparate treatment claim, but is not required to establish a disparate impact claim, which can often be proved through the use of statistics. Because disparate impact claims would not be allowed under ENDA, a plaintiff would have to prove that an employer intended to discriminate, a higher evidentiary threshold. Reinforcing this limitation is another provision that would bar the EEOC from collecting statistics or from requiring employers to collect statistics on sexual orientation and gender identity.

In addition to these provisions, the ENDA legislation would clarify that preferential treatment or quotas on the basis of sexual orientation or gender identity would not be required, nor would employers be required to extend domestic partnership benefits. Likewise, employers would not be

⁴ H.R. 1397/S. 811, §4, 112th Cong.

⁵ 42 U.S.C. §2000e-2.

⁶ It is important to note that the scope of legal protection afforded persons based on their “perceived” orientation may be difficult to gauge. There is no comparable language in Title VII prohibiting discrimination on the basis of “perceived” characteristics applicable to discrimination prohibited by the statute. Thus, courts would apparently be left the task of developing appropriate standards of proof in such “perceived” orientation cases.

prohibited from requiring employees to adhere to reasonable dress or grooming standards, as long as the employer permits employees who have undergone gender transition to comply with the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning. In a similar vein, ENDA would clarify that denying an employee access to shared shower or dressing facilities is not an unlawful employment practice, as long as the employer provides an employee with reasonable access to adequate facilities that are not inconsistent with the employee's gender identity, nor is construction of new or additional facilities required. Finally, ENDA would preserve the right of employers to enforce workplace rules and policies, provided that they "are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity."

Sexual Orientation

As noted above, ENDA would prohibit employment discrimination on the basis of actual or perceived sexual orientation. "Sexual orientation" would be defined to mean "homosexuality, heterosexuality, or bisexuality."⁷ In contrast, Title VII's prohibition against discrimination on the basis of sex has consistently been interpreted to exclude discrimination on the basis of sexual orientation. Although some have argued that sex discrimination encompasses sexual orientation discrimination, the courts have generally rejected that theory, reasoning that the prohibition against sex discrimination refers only to the traditional definition of biological sex.⁸ Because Title VII does not protect against employment discrimination on the basis of sexual orientation, ENDA would significantly expand the scope of protection under current employment discrimination law.

It is important to note, however, that courts have held that the fact that a victim of discrimination is gay or bisexual does not preclude a claim under Title VII. For example, in some cases, courts have allowed Title VII claims to proceed when an individual who is gay can demonstrate that he or she was the victim of unlawful sex discrimination in the form of sexual harassment or gender identity stereotyping.

In the context of sexual harassment, recent court decisions have been guided by the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*.⁹ In that case, a male employee suffered physical abuse of a sexual nature, but his claims of sexual harassment were initially denied because the lower court held that same-sex sexual harassment is not actionable under Title VII. The Supreme Court reversed, holding that, in cases of alleged sexual harassment, the gender of the victim and harasser are not dispositive, but rather the critical question is whether the harassment occurred "because of sex."¹⁰ The Court also recognized that an inference that harassment is "because of sex" is not obvious where the harasser and the victim are of the same

⁷ The legislation does not define these terms, although the terms were formerly defined elsewhere in the U.S. Code in the context of the military's now-repealed "Don't Ask, Don't Tell" policy. 10 U.S.C. §654(f) (2007). Among the states that do prohibit discrimination on the basis of sexual orientation, it is almost universally defined as including homosexuality, bisexuality, or heterosexuality. See Government Accounting Office, *Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions* at 2-4, tbl.1, July 9, 2002, available at <http://www.gao.gov/new.items/d02878r.pdf>.

⁸ See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pacific Tel. and Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

⁹ 523 U.S. 75 (1998).

¹⁰ *Id.* at 77, 81.

sex, but provided three examples of how such an inference could be established: (1) if the harasser sexually desired the victim; (2) if the harasser was hostile to the presence of one sex in the workplace; or (3) if comparative data showed that the harasser targeted only members of one sex.¹¹

Based upon the Supreme Court's opinion in *Price Waterhouse v. Hopkins*,¹² individuals who are gay may also prevail under Title VII when an employer discriminates based on the employee's failure to conform to sex stereotypes. In *Price Waterhouse*, a female employee was denied partnership in an accounting firm, despite the fact that she was regarded as a high performer.¹³ Furthermore, partners in the firm had instructed her to act more femininely in order to be considered for a partnership in the future.¹⁴ The Court held that Price Waterhouse was applying standards for partnership in a prohibited sexually disparate manner, in that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer's stereotypical view of femininity.¹⁵ As a result, harassment of an individual for failure to conform to sex stereotypes could constitute harassment "because of sex," even if the animosity towards nonconformance is caused by a belief that such behavior indicates homosexuality.

Based on these decisions, it appears that individuals who are gay may currently be protected under Title VII if they are discriminated against because of sex. However, such individuals would not be protected by current law if they were the victim of discrimination on the basis of sexual orientation, a situation that ENDA appears designed to remedy. It is important to note that ENDA states that the act should not be construed to invalidate or limit rights under any other federal or state law. Therefore, ENDA would not appear to alter the current protections that may be available to individuals who are gay under Title VII or state law.

Gender Identity

ENDA would also prohibit employment discrimination on the basis of actual or perceived gender identity. "Gender identity" would be defined to mean "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." Under current law, Title VII does not expressly prohibit gender identity discrimination. Nonetheless, there have been cases interpreting Title VII's prohibition against sex discrimination to cover gender and/or gender identity. Although the majority of federal courts to consider the issue have concluded that discrimination on the basis of gender identity is not sex discrimination,¹⁶ there have been several courts that have reached the opposite conclusion in the years since the Supreme Court's decision in *Price Waterhouse*. As noted above, the *Price Waterhouse* decision, in which the Court repeatedly declared that Title VII bars discrimination on the basis of "gender," held that discrimination against a female employee who did not conform to socially constructed gender expectations constituted unlawful gender

¹¹ *Id.* at 80-81.

¹² 490 U.S. 228 (1989).

¹³ *Id.* at 233-234.

¹⁴ *Id.* at 235.

¹⁵ *Id.* at 250-251.

¹⁶ *See, e.g.*, *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

discrimination in violation of Title VII. Since *Price Waterhouse*, several courts have openly speculated that the *Price Waterhouse* decision “seem[s] to indicate that the word ‘sex’ in Title VII encompasses both gender and sex, and forbids discrimination because of one’s failure to act in a way expected of a man or a woman.”¹⁷

For example, in *Smith v. Salem*, a male firefighter who was undergoing gender transition to female argued that he had been suspended because of his feminine appearance.¹⁸ The Sixth Circuit held that, to the extent that the firefighter asserted that she experienced discriminatory treatment due to the fact that she did not conform to what her employer believed males should look and act like, she had sufficiently plead a prima facie case of sex discrimination.¹⁹ Similarly, in *Barnes v. Cincinnati*, a male police officer undergoing gender transition to female was denied a promotion because she acted too femininely in her supervisors’ opinions.²⁰

More recently, the U.S. Court of Appeals for the Seventh Circuit reached a similar conclusion on constitutional grounds in a case involving a Georgia state employee who was fired from her job for being transgender. According to the court, “[w]e conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”²¹

Although some courts have held that Title VII’s prohibition against sex discrimination may encompass claims based on gender identity when unlawful gender stereotyping is involved, the courts have not recognized gender identity discrimination on its own to be an unlawful employment practice under Title VII. As a result, ENDA would expand the scope of protection under current employment law by explicitly prohibiting gender identity discrimination. As noted above, ENDA states that the act should not be construed to invalidate or limit rights under any other federal or state law. Therefore, ENDA would not appear to alter the current protections based on gender identity that may be available under Title VII or state law.

Exceptions for the Armed Forces and Religious Organizations

ENDA contains several exceptions. First, the Armed Forces, which include the Army, Navy, Air Force, Marines, and Coast Guard, would be exempt, and the legislation specifies that current laws regarding veterans’ preferences in employment would not be affected. The courts have similarly held that uniformed military personnel are not covered by Title VII,²² although civilian military employees are protected by Title VII.²³

¹⁷ *Enriquez v. West Jersey Health Sys.*, 342 N.J. Super. 501, 512 (App. Div. 2001) (holding that a New Jersey state law barring sex discrimination in employment includes gender discrimination and thus protects transsexuals). *See also*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

¹⁸ 378 F.3d 566 (6th Cir. 2004).

¹⁹ *Id.* at 575.

²⁰ 401 F.3d 729 (6th Cir. 2005).

²¹ *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011).

²² *See, e.g.*, *Luckett v. Bure*, 290 F.3d 493 (2d Cir. 2002).

²³ 42 U.S.C. §2000e-16(a).

Notably, certain religious organizations would also be exempt from coverage under ENDA. This exemption is consistent with previous congressional efforts to avoid infringing on a religious organization's exercise of religion with respect to its employment practices, such as the Title VII provision that exempts certain religious organizations from compliance with that statute. In that sense, ENDA would expand the current protection offered to religious organizations relating to discrimination in employment practices.

Title VII includes two exceptions that allow certain employers to consider religion in employment decisions. Specifically, the prohibition against religious discrimination does not apply to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”²⁴ The prohibition also does not apply to religious educational institutions if the institution “is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular [organization], or if the curriculum of the [institution] is directed toward the propagation of a particular religion.”²⁵ These exemptions are sometimes referred to as sections 702(a) and 703(e)(2), respectively. The Title VII exemptions apply with respect to discrimination based on religion only and do not allow qualifying organizations to discriminate on any other basis forbidden by Title VII, such as race, color, national origin, or sex.²⁶

Like Title VII, ENDA “shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act.”²⁷ By exempting the organizations covered by the 702(a) and 703(e)(2) exemptions of Title VII, ENDA ensures that such organizations would not be required to hire or retain an individual if the organization had objections to the individual's sexual orientation or gender identity. Notably, the language of Title VII does not appear to require that the organization's religious beliefs oppose certain sexual orientations or gender identifications. In other words, the ENDA exemption does not appear to limit the permissibility of religious organizations' discrimination based on sexual orientation or gender identity to instances in which those factors may conflict with religious beliefs. For example, under the legislation, even religious organizations whose religious teachings do not oppose homosexuality could be permitted to refuse to hire a gay applicant. Thus, the proposed legislation likely would not interfere with religious organizations' employment practices involving considerations of sexual orientation or gender identity of employees and applicants. To the contrary, it may actually broaden these organizations' ability to discriminate in hiring. In this sense, the ENDA exception goes farther than the Title VII exception, which allows religious employers to discriminate on the basis of religion but not on the basis of race, color, national origin, or sex.

The question of what organizations would be covered by the ENDA exemption may be resolved by looking at organizations that have sought protection under the relevant Title VII exemptions. Title VII did not define what organizations would qualify for an exemption under the statute, and court decisions have indicated several factors relevant to deciding whether an organization

²⁴ *Id.* at §2000e-1(a).

²⁵ *Id.* at §2000e-2(e)(2).

²⁶ *See* EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982); EEOC Notice N-915, September 23, 1987.

²⁷ H.R. 1397/S. 811, §6, 112th Cong. (citations omitted).

qualifies, including (1) the purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed upon staff and members of the organization (faculty and students if the organization is a school); and (4) the extent of religious practices in or the religious nature of products and services offered by the organization.²⁸ No single factor appears to be dispositive and as one federal court has noted, “the decision whether an organization is ‘religious’ for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization.”²⁹

Organizations may qualify for an exemption if their purpose, character, and operations incorporate elements of their religion. For example, in *LeBoon v. Lancaster Jewish Community Center Association*, a Jewish community center qualified for an exemption under Title VII when it terminated the employment of a Christian employee.³⁰ The center’s stated mission was to promote Jewish life and values, and three local rabbis were significantly involved in its management. Furthermore, the center conducted a variety of programs observing Jewish religious holidays and traditions. The Third Circuit noted the organization’s primarily religious character, indicated by factors such as the composition of its administrative body and the programs that it offered to the community. Ultimately, the court held that religious organizations may qualify for an exemption despite engaging in secular activities, not adhering to the strictest tenets of the religion, or not hiring only co-religionists.³¹

On the other hand, courts have declined to apply the exemption to organizations that cannot demonstrate a connection between religious beliefs and the organization itself. In *Equal Employment Opportunity Commission (EEOC) v. Townley Engineering and Manufacturing Company*, the owners of a mining equipment manufacturing company claimed an exemption under Title VII after an employee initiated legal proceedings objecting to attending mandatory religious services.³² The owners claimed that they founded their company under “a covenant with God that their business would be a Christian, faith-operated business” and that they were “unable to separate God from any portion of their daily lives, including their activities at the Townley company.”³³ The court reviewed legal precedent and the legislative history of Title VII and held that the central function of the exemption “has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities.”³⁴ It noted that Townley was a for-profit company, producing a secular product, with no affiliation with or support from a church. Further, it had no religious purpose. Although the court recognized that the owners did include religious characteristics in their operation of their company, the court held that “the beliefs of the owners and operators of a corporation are not simply enough in themselves to make the corporation ‘religious’” under the Title VII exemption.³⁵

²⁸ See *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226-27 (3rd Cir. 2007) (providing a summary discussion of circuit courts’ interpretations of organizations that qualify under Title VII’s exemption).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 229-230.

³² 859 F.2d 610 (9th Cir. 1988).

³³ *Id.* at 611-12 (internal quotations omitted).

³⁴ *Id.* at 618.

³⁵ *Id.* at 619.

In *Pime v. Loyola University of Chicago*, a former Jesuit university sought to retain its religious identity even after it had evolved into a secular institution.³⁶ It claimed an exemption under Title VII as a university supported, controlled, or managed in whole or in part by a religious society because it reserved three tenured positions for Jesuits and several university administrators (including the president, one-third of the trustees, and other officers) were also Jesuits. However, the Society of Jesus did not instruct the president or trustees with regard to university matters and did not control the decisions of other Jesuits who served in official positions at the university.³⁷ As a result, the Seventh Circuit held that, despite a “Jesuit presence” on campus, the university did not qualify for an exemption from Title VII.³⁸

In a similar case, *EEOC v. Kamehameha Schools/Bishop Estate*, the Ninth Circuit likewise held that a school that hired Protestant teachers to provide a secular education to students did not qualify for an exemption under Title VII.³⁹ The Kamehameha Schools were created by the will of a member of the Hawaiian royal family, which provided that teachers be members of the Protestant faith and claimed an exemption as a religious educational institution based on this provision. However, the court held that the schools’ purpose and character were primarily secular and not religious, noting that the religious characteristics the schools had (i.e., comparative religious studies, scheduled prayers and services, Bible quotations in a school publication, and employment of nominally Protestant teachers) were common to private schools. The court also noted that the schools had embraced a broad mandate to help native Hawaiians “participate in contemporary society for a rewarding and productive life” through a solid secular education.⁴⁰ As a result, the court held that the teachers’ religious affiliation was an insufficient basis to qualify for an exemption as a religious institution.

The result in *Kamehameha Schools* was influenced to some degree by the absence of church ownership or control. Indeed, the court of appeals observed that it had found “no case holding the Title VII exemption to be applicable where the institution was not wholly or partially owned by a church.”⁴¹ Subsequently, in *Killinger v. Samford University*,⁴² the Eleventh Circuit held that a Baptist college was an exempt religious institution which could require professors to subscribe to the school’s religious doctrine. The court noted that a Baptist convention comprised the largest single source of revenue for the college and that the school’s charter listed as its chief purpose the “promotion of Christian Religion.” Thus, under Title VII precedent, independent Christian and other religious schools not owned, financed, or controlled by church bodies may find it difficult to qualify for the “religious organization” exemption in ENDA. Of course, as stand-alone legislation, it is possible that courts would find that the policy concerns underlying ENDA are sufficiently different from Title VII to warrant a less restrictive reading of the former. Absent clarification in ENDA itself, or its legislative history, any resolution of the issue would have to await further judicial elaboration.

³⁶ 585 F. Supp. 435 (N.D. Ill. 1984), *aff’d*, 803 F.2d 351 (7th Cir. 1986).

³⁷ *Id.* at 440-41.

³⁸ *Id.*

³⁹ 990 F.2d 458 (9th Cir. 1993).

⁴⁰ *Id.* at 462-63 (internal quotations omitted).

⁴¹ *Id.* at 461, n. 7.

⁴² 113 F.3d 196 (11th Cir. 1997).

Enforcement and Remedies

Enforcement procedures under ENDA would parallel the enforcement provisions of Title VII. Thus, the Department of Justice (DOJ) would enforce ENDA against state and local governments, and administrative enforcement with respect to private employment would be delegated to the EEOC, which would have the same authority to receive and investigate complaints, to negotiate voluntary settlements, and to seek judicial remedies as it currently exercises under Title VII. Similarly, in devising remedies for sexual orientation or gender identity discrimination under the legislation, a federal court would have the same jurisdiction and powers as the court has to enforce Title VII. In general, federal courts possess broad remedial discretion under Title VII, including the ability to enjoin the unlawful employment practice and to “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other relief as the court deems appropriate.”⁴³ Although the Supreme Court early on adopted a “make-whole” theory of Title VII relief,⁴⁴ including use of affirmative action remedies, minority preferences and the like, where necessary to redress discrimination of a particularly “egregious” or “longstanding” nature, ENDA would specifically forbid employers from using quotas or preferential treatment.

Likewise, the remedies under ENDA would be patterned on Title VII’s remedial provisions. Under Title VII, victims of discrimination may seek equitable relief, including limited back pay awards for wage, salary, and fringe benefits lost as the result of discrimination. Private employers who intentionally discriminate in violation of the statute may be liable for compensatory and punitive damages, while plaintiffs may seek awards of compensatory, but not punitive, damages against federal, state, and local governmental agencies. The following ceilings or “caps” are established by law for compensatory and punitive damages combined: (1) \$50,000 for defendants who have 15 to 100 employees; (2) \$100,000 for employers with 101 to 200 employees; (3) \$200,000 for employers with 201 to 500 employees; and (4) \$300,000 for employers with more than 500 employees.⁴⁵ The Supreme Court has also excluded from the statutory limits on damages so-called “front pay,” awarded to redress discrimination victims for continuing injury in promotion or discharge cases where reinstatement is not a feasible remedy.⁴⁶ These Title VII remedies appear to be applicable to claims that would be filed under ENDA.

Meanwhile, ENDA would waive the states’ Eleventh Amendment immunity from suit for sexual orientation discrimination or gender identity against employees or applicants within any state “program or activity” that receives federal financial assistance. The Eleventh Amendment provides states with immunity from claims brought under federal law in both federal and state courts.⁴⁷ Although Congress may waive the states’ sovereign immunity by “appropriate” legislation enacted pursuant to §5 of the Fourteenth Amendment,⁴⁸ the scope of congressional power to create a private right of action against the states for monetary damages has been substantially narrowed by a series of Supreme Court decisions.

⁴³ 42 U.S.C. §2000e-5(g).

⁴⁴ For more information, see CRS Report RL30470, *Affirmative Action in Employment: A Legal Overview*, by Jody Feder.

⁴⁵ 42 U.S.C. §1981a(b).

⁴⁶ *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

⁴⁷ U.S. Const. amend. XI.

⁴⁸ U.S. Const. amend. XIV.

The era of a reinvigorated Eleventh Amendment immunity can be traced to *Seminole Tribe v. Florida*,⁴⁹ which invalidated a portion of the Indian Gaming Regulatory Act authorizing tribal suits against the states. Neither the Commerce Clause nor §5 proved to be an effective vehicle to override state sovereign immunity. Three years later, in *Alden v. Maine*⁵⁰ the Supreme Court ruled that the states could not be sued, even in their own courts, for violation of the Fair Labor Standards Act. *City of Boerne v. Flores*⁵¹ announced the Court's new framework for determining the validity of congressional action under §5. In holding unconstitutional the Religious Freedom Restoration Act, Justice Kennedy wrote that Congress's §5 power was remedial only; it was not a basis for legislation defining the substantive content of the equal protection guarantee. Moreover, the remedy had to be "congruent and proportional" to the scope and frequency of any violations identified by Congress. These constitutional limitations were subsequently applied by the Court to hold the states immune from private lawsuits under the Age Discrimination in Employment Act,⁵² the Violence Against Women Act,⁵³ and the Americans with Disabilities Act.⁵⁴

Taken together, these decisions restrict the ability of private individuals to take the states to court for federal civil rights violations. They may not, however, apply to states' voluntary acceptance of federal benefits that are expressly conditioned on waiver of Eleventh Amendment immunity. "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions."⁵⁵ Thus, when a statute enacted under the Spending Clause⁵⁶ conditions grants to the states upon an unambiguous waiver of Eleventh Amendment immunity, as ENDA proposes, "the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it."⁵⁷

Finally, the attorney's fees provision in ENDA is substantially identical to Title VII, which states

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.⁵⁸

Under Title VII, a "prevailing" plaintiff is ordinarily entitled to attorney's fees unless special circumstances make such an award unjust.⁵⁹ Complainants may be considered "prevailing parties" if "they succeed on any significant issue in litigation which achieves some of the benefit

⁴⁹ 517 U.S. 44 (1996).

⁵⁰ 527 U.S. 706 (1999).

⁵¹ 521 U.S. 507 (1997).

⁵² *Kimel v. Bd. of Regents*, 528 U.S. 62 (2000).

⁵³ *United States v. Morrison*, 529 U.S. 598 (2000).

⁵⁴ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

⁵⁵ *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

⁵⁶ U.S. Const. art. I, §8, cl. 1.

⁵⁷ *Litman v. George Mason Univ.*, 186 F.3d 544, 555 (4th Cir. 1999). For more information on waiving state sovereign immunity, see CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

⁵⁸ 42 U.S.C. §2000e-5(k).

⁵⁹ *Albermarle Paper Co. v. Moody*, 442 U.S. 405 (1975); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

the parties sought in bringing the suit.”⁶⁰ Although either a plaintiff or a defendant may be the prevailing party, fee awards to defendant employers are not the general rule, given the public interest in having Title VII plaintiffs act as “private attorneys general” and the likelihood that defendant employers would have less need of financial assistance.⁶¹

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⁶⁰ Hensley v. Eckherhart, 461 U.S. 424 (1983).

⁶¹ Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).