

# Should Who You Love Be A Terminable Offense? Senate Says “No” And Passes ENDA

November 8, 2013

By [Nonnie L. Shivers](#)



On November 7, 2013, the U.S. Senate passed the Employment Non-Discrimination Act (ENDA) by a vote of 64-32, with the support of 10 Senate Republicans. ENDA essentially extends workplace protections based on race, religion, gender, age, national origin, and disability (under Title VII of the Civil Rights Act of 1964,.....

On November 7, 2013, the U.S. Senate passed the Employment Non-Discrimination Act (ENDA) by a vote of 64-32, with the support of 10 Senate Republicans. ENDA essentially extends workplace protections based on race, religion, gender, age, national origin, and disability (under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA)) to lesbian, gay, bisexual, and transgender (LGBT) employees and those who associate with them. The Senate’s vote is certainly historic as ENDA has been introduced in every congressional session except one since 1994. President Obama expressed support for ENDA (including on the [Huffington Post blog](#)) and announced that passage of ENDA would be “preferable” to issuance of a more limited-impact executive order prohibiting federal contractors from discriminating against LGBT employees.

ENDA prohibits workplace discrimination based on sexual orientation and gender identity. Specifically, it prohibits employers with 15 or more employees from taking adverse actions against employees who are (or are perceived to be) gay, lesbian, bisexual, or transgender. ENDA also prohibits retaliation against employees for engaging in protected activity related to LGBT status or gender identity. ENDA defines gender identity as “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.”

ENDA contains numerous exceptions to these protections that are meant to enhance the chances of it being enacted, including:

- **Inapplicability to Religious Organizations:** ENDA does not apply to churches and other houses of worship, employees falling under the ministerial exception, or any corporation, association, society, or educational institution or institution of learning that is exempt from the religious discrimination provisions of Title VII. Federal, state, and local governments are also prohibited from retaliating against organizations exempted from ENDA.
- **No Facility Changes Required:** ENDA does not require employers to construct new or additional facilities, such as bathrooms or locker rooms, in order to comply with the law.
- **Reasonable Dress Codes Stand:** ENDA does not prohibit employers from requiring employees to adhere to a reasonable dress or grooming standard. Employers, however, must allow transgender employees who have transitioned or who are currently transitioning to adhere to the same dress or grooming standard as the gender to which he or she is transitioning or has transitioned.
- **DOL and EEOC Data Collection Prohibited:** ENDA specifically prohibits the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL) from collecting statistics on sexual orientation and gender identity from employers. The U.S. Chamber of Commerce believes that this will help decrease the potential for litigation should ENDA pass, although it takes a neutral stance on ENDA overall.
- **No Disparate Impact Claims:** ENDA previously allowed for disparate impact claims, which is a claim that an employer’s facially neutral policy had an adverse (usually statistical) impact on a protected class. ENDA is specifically limited to disparate treatment claims.
- **No Double Recoveries:** Even though discrimination based on gender stereotyping is already unlawful under Title VII, plaintiffs are barred from recovering under both Title VII *and* ENDA.

Despite these exceptions and carve-outs in the Senate-passed version of ENDA, the chances of ENDA being introduced on the floor of the U.S. House of Representatives or successfully passing through the Republican-controlled House seem slim right now. The Growth & Opportunity Project of the Republican National Committee called for evolution of the party’s stance on gay rights in its recent report. The Project’s report called for Republicans to reach out to gay voters and “demonstrate we care about them, too.” But this outreach may be insufficient to compel the House to act. House Speaker John Boehner has openly opposed ENDA, citing concerns over potential frivolous lawsuits and the resulting impact on U.S. jobs. In addition, since ENDA is not on the House’s calendar, the current consensus is that ENDA will not be passed in this legislature.

If ENDA does pass, employers should be poised to revise their EEO/non-discrimination policies to include LGBT and gender identity as protected classes and consider updating training for managers and the workforce. Even if ENDA is not enacted, employers should stay up-to-date on state and local protections that may be afforded to LGBT employees and work on revising any policies and procedures impacted by the recent decisions issued by the Supreme Court of the United States in [United States v. Windsor](#) and [Hollingsworth v. Perry](#), which overturned the Defense of Marriage Act. For the practical implications of these decisions on your workforce, see our blog posts on the topic, including:

- “DOMA Ruling: Practical Implications of the Supreme Court’s Decision”;
- “Supreme Court DOMA Decision—Part I: Fringe Benefits and Other Tax Implications”;
- “Supreme Court DOMA Decision—Part II: Wage Overstatements and Tax Refunds”;
- “FMLA Policy Changes Employers Should Make in Light of Windsor and the DOL’s New Guidance”;
- “Early Guidance Sheds Light on Impact of United States v. Windsor on Employee Benefit Plans”; and
- “Correcting Employment Taxes for Same-Sex Spouses: Optional Procedures After Windsor.”

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