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The Necessity of the Employment Non-Discrimination Act

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INTRODUCTION

Currently there is no all-encompassing federal legislation protecting LGBT employees from discrimination in the United States. While there are protections in place in certain jurisdictions, anti-discrimination legislation varies not only by state, but also by city. In twenty-nine states there are no state laws protecting gay and lesbian workers from discrimination and in thirty-three states there is no legislation protecting transgender employees.1 Because of this lack of well-defined protections, LGBT employees not only face discrimination, but also find themselves with a lack of legal recourse within such situations.

The Employment Non-Discrimination Act (ENDA) would rectify these issues of discrimination. EDNA would expand protections already granted for categories such as religion and race to the areas of gender identity and sexual orientation. By making it illegal for employers to discriminate due to gender identity or sexual orientation, EDNA would also give victims of discrimination legal grounds to sue when such unfair practices did occur.2 The passage of EDNA would lead to a fairer work environment as well as a fairer America.

While ENDA passed the Senate on November 7th, 2013, at the time of this writing it has yet to be brought to a vote in the House of Representatives.3 By looking at statements from Congressman, as well as other advocacy organizations, it seems that there are three major reasons for people to oppose ENDA. Firstly, there is the religious argument that it is immoral to protect LGBT people from discrimination.4 This stems from the belief that in passing ENDA the United States government would be complicit in the encouragement of morally illicit behavior. Next, there are those who believe that it is wrong on principle for the government to interfere with the affairs of private businesses.5 There may be a prevalent belief that discrimination in itself is wrong, but an equally strong philosophical belief that the government should not

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2 . https://www.govtrack.us/congress/bills/113/s815/text

3 http://www.hrc.org/blog/entry/enda-passes-senate-64-32

4 A belief echoed most loudly by the American Family Association, Focus on the Family, The Family Research Council, and the Catholic Church.

5 The Libertarian position, taken most strongly perhaps by Senator Rand Paul.
interfere anyways. Finally, there are those who argue that ENDA is unnecessary. This argument stems from the belief that such discrimination does not occur; or rather protective legislation would not solve the issue. Instead, the argument follows; legislation such as ENDA would only lead to frivolous lawsuits.

All of these arguments are unfounded. The Employment Non-Discrimination Act is both a practical and necessary piece of legislation. Everyday LGBT Americans face discrimination in the workplace, whether it’s during the hiring process, at work itself, or in being wrongfully terminated. Despite changing attitudes in regards to sexual orientation and gender identity within the United States, federal protective legislation is still required to ensure a safe and fair work environment. State ordinances are not uniform and locally granted protections are hard to enforce; it’s time that the federal government took action. ENDA is a structurally sound piece of legislation and one which would improve the United States if it is passed.

I. HISTORY OF THE EMPLOYMENT NON-DISCRIMINATION ACT

A sort of precursor to anti-discrimination legislation can be found within the federal Constitution itself. The Fifth Amendment states that the federal government cannot deprive anyone of “life, liberty, or property” without “due process of the law”. This has been interpreted at times in a way which has given victims of discrimination legal recourse when wrongfully treated. The Fourteenth Amendment more forcefully regulates against discrimination and states that no state shall, “deny to any person within its jurisdiction the equal protection of the laws.” The Fourteenth Amendment was used to incorporate the due process clause of the Fifth Amendment to the States. However, even with the expansion of due process, the private sector was still unaffected by any efforts to curb discrimination. In order to expand civil rights legislation to the private sector, Congress used its power to regulate interstate commerce, as found in Section II of the Constitution.

The first law passed to limit employment discrimination was the Equal Pay Act of 1963. It amended the Fair Labor Standards Act passed the same year and was an attempt to end the wage gap that existed between male and female employees. A year later Congress passed the 1964 Civil Rights Act. Title VII of this legislation required employers to implement non-discriminatory hiring practices. This was followed by the Age Discrimination Act of 1968 and the Pregnancy discrimination Act of 1978. Other anti-discrimination legislation passed in the late 20th century and early 21st century includes legislation prohibiting discrimination based on disability status, “black lung” status, bankruptcy, and genetic status. Despite covering a myriad of disparate conditions, sexual orientation and gender identity remained uncovered.

The first iteration of protective legislation for gays and lesbians was proposed in 1974, five years after the Stonewall Riots of the 1960s kick-started the gay rights movement. This “Equality Act” was introduced by Representatives Bella Abzug and Ed Koch, both Democrats from New York. This act would add sexual orientation to the list of protective classes found

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6 John Boehner is a strong believer in this position.
7 http://finduslaw.com/us-constitution-5th-14th-amendments
8 http://www.law.cornell.edu/wex/commerce_clause
9 http://www.eeoc.gov/laws/statutes/epa.cfm
10 Such as having a chronic condition such as cystic fibrosis or being a carrier for such a condition.
11 http://www.ngltf.org/issues/nondiscrimination/timeline
within the Civil Rights Act of 1964, thus guaranteeing fair employment and access to public facilities. The bill died in committee and when it was re-introduced in 1975 once again met a similar fate.12

After the failure of the 1975 Equality Act, on a federal level the effort to protect LGBT citizens would stall for nearly twenty years. On a state level however, non-discrimination legislation began to slowly be passed throughout the 1980s. In 1982 Wisconsin became the first state to pass legislation adding sexual orientation as a protected class. In 1993 Minnesota became the first state which protected both sexual orientation and gender identity.13

During the early to mid-90s, as gay rights once again became a hot button issue, the weight shifted back to the federal government to make decisions. During his 1992 presidential run, Clinton portrayed himself as an ally to the gay community. Once he became president his track record was rather mixed. In 1993 Clinton signed ‘Don’t ask, Don’t tell’, reneging on his campaign promise to let gays serve openly in the military.14 While looking back this seems like a clear step in an anti-progressive direction, at the time it was the only way to avert an all-together ban on gay military service.15 In 1995 President Clinton signed Executive Order 12968 maintaining that the United States does not discrimination regards of sexual orientation when it comes to disseminating classified information.16 In 1998 he signed Executive Order 13087 outlawing discrimination based on sexual orientation in “competitive federal civilian jobs”, such as the post office.17 This executive order excluded positions working for the CIA, the NSA, or the FBI.

On a congressional level, it was also during this time period that the first version of the modern Employment Non-Discrimination Act was introduced. This version of the bill was introduced in the House by Democrat Gerry Studds in 1994. It did not include protections in regards to gender identity and failed in committee. The bill was introduced in the Senate two months later by Ted Kennedy and once again died in committee. Since the 103rd Congress in ’94, ENDA has been reintroduced in every subsequent Congress except one.18 In 1996 it failed in the Senate 49-50. The bill, which added protections for gender identity in 2007, would not make it out of committee again until 2013.19

From ENDA’s first introduction in 1994 to its passage of the Senate in 2013, gay rights in America have changed dramatically. Despite the Bush presidency, in 2003 States began to legalize same-sex marriage. In the ten year period from same-sex marriage’s 2003 legalization in Massachusetts until today, seventeen states have legalized same-sex marriage.20 Moreover, during this time period, more states adopted statewide bans on discrimination based on sexual orientation and gender identity. As of ENDA’s passage of the Senate on November 7th 2013,
seventeen states protect against discrimination based on sexual orientation and gender identity. Federally, gay rights have taken a huge leap forward since the election of Barack Obama in 2008. In 2010 President Obama signed the repeal of “Don’t ask, Don’t tell”. The next year both he announced his support of gay marriage. In 2012 he would then become the first President to be elected on a pro-same-sex marriage platform. Later that year in June, the Supreme Court ruled that the Defense of Marriage Act was unconstitutional, granting federal benefits to married gay couples. However, even with these advancements, there is still no federal legislation which protects against discrimination based on gender identity and sexual orientation in the private sector.

On April 25th 2013, a version of ENDA protecting both sexual orientation and gender identity was introduced to the Senate by Democrat Jeff Merkley. It was voted out of the Health, Labor & Pensions committee on July 10th by a 15-7 vote. On November 4th the bill passed a cloture vote 61-30, with six Republicans joining the Democratic majority. Only one Democrat in the Senate voted against cloture. ENDA officially passed the Senate on November 7th, 2013. It currently has not been brought to a vote in the House.

II. THE NECESSITY OF THE EMPLOYMENT NON-DISCRIMINATION ACT

A. Cases of discrimination

There is well documented discrimination against LGB and Transgendered Americans in the United States. Those who argue that a bill such as ENDA is not necessary are sadly mistaken. There have been many studies done about workplace discrimination against LGBT people, all of which have found it to be quite pervasive.

According to a 2008 General Social Survey, 42% of LGB individuals in the United States have faced discrimination in the workplace. Of this percentage, 27% of respondents had felt such discrimination in the last five years. When it came to forms of discrimination, workplace harassment was most frequent with 37% saying they had been harassed. The second most common form of discrimination was job termination with 16% of respondents claiming that they

21 While there is certainly overlap, these are not the same seventeen that have legalized gay marriage.
22 https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map
26 Id.
27 The reason for separating transgender from LGB here is due to the following data’s differentiation between the discrimination faced by people who are transgendered and those who are LGB.
28 To avoid redundancy, the citation for the information in this section is found at the end of each paragraph.
had lost a job due to being LGB. Only 5.8% of those who identified as Bisexual where out to their fellow employees.29

Transgender people face even higher levels of discrimination than those who identify as lesbian, gay, or bisexual. In non-probability studies done on transgendered members of the workforce between 1996 and 2006, well over half of trans people reported having been discriminated against. Of these who reported being discriminated against in the studies, up to 56% had lost their jobs for being transgendered. In a more recent study done in California in 2009, over 70% of transgendered respondents reported facing some sort of discrimination in the workplace.30

Another way in which to measure discrimination is through controlled experiments. In one study to determine discrimination against LGB employees, researchers sent out identical resumes to different employers, some indicating that an employee was LGB, others indicating the employee to be straight. A recent study of this kind reported that it would take fourteen applications for a gay candidate to receive positive feedback but only nine for a candidate who was straight. Consistently, it was more difficult for the LGB resumes to receive positive feedback in states without anti-discrimination legislation.31

LGBT workers are also consistently payed less their heterosexual coworkers. Studies have shown a wage gap of ten to thirty-two percent when comparing the incomes of gay and straight men in the workplace. Transgender people have double the unemployment rate of cis-gendered Americans. A significant amount of the transgender community makes wages below the poverty line.32

B. “Frivolous Lawsuits”

Speaker of the House John Boehner has claimed that he would not support ENDA. His spokesman has stated that the speaker believes ENDA would, “increase frivolous litigation and cost American jobs, especially small business jobs.” This claim by the Speaker is untrue. If we look at past example of anti-discrimination legislation, it becomes obvious that Speaker Boehner’s fears would not come to fruition.34

As previously stated, there already are protections set up for LGBT employees in several states. In these states there has not been an increase in lawsuits regarding sexual orientation and gender identity. Likewise, there have been no cases of fraud reported in the usage of protective laws.35 All together there have been a small number of complaints regarding sexual orientation in states with protective legislation and the number of complaints tends to stay consistent from year to year. For example, in California less than 5.5% of employment discrimination claims were in regards to sexual orientation. This number remained consistent over a five year period. In Iowa

30 Id.
31 Id.
32 People whose gender identity aligns with their biological sex.
33 Id.
35 http://mediamatters.org/blog/2013/11/11/no-enda-lie-is-too-ridiculous-for-the-washingto/196845
the number of claims based on sexual orientation was 3.6% and those based on gender identity only .6%.\textsuperscript{36}

Still, this claim that EDNA will increase bureaucracy and hurt small business is extremely prevalent. A quick Google search will show that many politicians, as well as right-wing blogs, seem to repeat such a claim over and over again.\textsuperscript{37} However, just because something is repeated \textit{ad infinitum}, does not make it true. Furthermore, the non-partisan Congressional Budget Office expects EDNA to increase claims to the Equal Employment Opportunity Commission by a mere 5%.\textsuperscript{38}

III. THE RELIGIOUS ARGUMENT

\textbf{A. The Carve-Out}

Besides claims against its necessity, the next most common argument against ENDA is that it gives approval to what some see as immoral behavior. Groups including the American Family Association, The Traditions Values Coalition and the Catholic Church advocate this position. All of these groups’ arguments are almost identical; they believe that the government is violating religious liberty by protecting the LGBT community in the workplace.\textsuperscript{39}

There is of course no reason for these groups to be concerned. ENDA has a wide carve out for religious organizations.\textsuperscript{40} According to the bill, all religious groups would be completely exempt from the provisions of EDNA and they wouldn't even have to cite any rationale.\textsuperscript{41} A similar religious provision was found in the Civil Rights Act of 1964 meaning that there is even precedent for religious organizations to defend themselves. This carve out is so wide that liberal organizations such as the ACLU have issued statements warning that it could possibly undermine the bill itself.\textsuperscript{42} Thus religious organizations have absolutely nothing to be concerned about when it comes to the passing of ENDA.

\textbf{B. America isn't a Theocracy}

Some religious organizations will not be satisfied with the fact that they themselves are not affected by ENDA. They will insist that the bill still should not be passed because the effect it could have on America as a whole. This argument is complete hogwash. America is a legally secular country and does not base its laws on any religion. Regardless of the beliefs of any

\textsuperscript{36} Id.
\textsuperscript{37} To the extent where there were three full search results pages from right wing blogs issuing this claim.
\textsuperscript{38} Id.
\textsuperscript{39} Out of all these organizations, the Catholic Church’s position is the most nuanced. While the Church argues that they believe in the dignity of all workers, they have specific issues with ENDA. They believe that having “same-sex attractions” should be protected, but not acting on such desires. Their problem with ENDA is that it does not contain a difference between these two things. The church also opposes that definition of gender identity as anything separate from biological sex.
\textsuperscript{41} https://www.govtrack.us/congress/bills/113/s815/text
\textsuperscript{42} http://gaycitynews.com/legal-advocates-voice-concerns-about-enda-religious-carve-outs/
person or organization, American law should be based on facts, not on personal religious conviction.  

IV. Will it Work?  

A final concern with the Employment Non-Discrimination Act, even among those who support its passage, is whether it will even make a difference. By looking at studies that have been conducted regarding the matter, it seems that the answer is an unequivocal 'yes'. If ENDA was passed it would have an effect on lowering discrimination against LGBT employees in the workplace. According to research, just by being put in place, anti-discrimination legislation works to change attitudes towards LGBT employees. This correlation has been proven by controlled experiments as well as the responses to multiple scientific surveys.  

CONCLUSION  

Members of the LGBT community suffer from workplace discrimination within the United States. While there are laws on a state level that help protect against such discrimination, there is no federal legislation that protects employees on the basis of sexual orientation and gender identity. The Employment Non-Discrimination Act which has recently passed the Senate would add such workplace protections.  

There are those who argue that LGBT people do not actually suffer from discrimination in the workplace. This has been found to be untrue in numerous studies. There are also those who feel that the passage of ENDA would lead to a rash of frivolous lawsuits. This assertion can be proven false by looking at states that already have legislation that protects employees on the basis of sexual orientation. Still, there are people who think that ENDA should not pass due to religious convictions. Religious organizations however would have an exemption from the provisions of ENDA. Finally, there is a worry among some that ENDA would simply be ineffective. While it impossible to judge its effectiveness before its passage, all signs point to ENDA helping alleviate discrimination against LGBT employees.  

The United States federal government should implement protections for LGBT citizens. While there are already protections in place within some states and local jurisdictions, these are not universal and can be hard to enforce. The passage of the Employment Non-Discrimination Act would be a step towards a better and fairer America.  

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43 While this assertion can be backed by numerous different sources, both legal and otherwise, let us direct our attention to the founders. Jefferson of course believed strongly in a “wall of separation between church and state” (http://www.loc.gov/loc/lcib/9806/danpre.html) These feelings were echoed in The Treaty of Tripoli, “the United States of America is not, in any sense, founded on the Christian religion.”  
