



The Freedom to Work, the Freedom to Worship

The Employment Non-Discrimination Act Advances Workplace Equality and Protects Religious Liberty

By Crosby Burns and Jeff Krehely June 2012

Tomorrow the Senate Committee on Health, Education, Labor, and Pensions will hold a hearing on the Employment Non-Discrimination Act of 2011. If passed into law it would finally prohibit employment discrimination on the basis of sexual orientation and gender identity. The last time the committee held a hearing on this critical piece of legislation was in November 2009.

The Employment Non-Discrimination Act, or ENDA, is sorely needed.¹ Gay² and transgender workers face extraordinarily high rates of discrimination on the job, inflicting significant economic pain on many workers at a time when all families are struggling to stay afloat.³ Considering it remains perfectly legal in a majority of states to fire someone based simply on their sexual orientation or gender identity, ENDA would finally put in place uniform and comprehensive protections for the gay and transgender workforce.⁴

In addition to advancing workplace equality for gay and transgender employees, ENDA also includes a critical provision that safeguards religious organizations' constitutional rights and religious freedoms. Specifically, Section 6 of ENDA provides religious organizations (which are broadly defined) a substantial exemption that allows them to continue to take sexual orientation and gender identity into account when making employment decisions. In this way ENDA's religious exemption is broader than other laws that provide exemptions to religious organizations with respect to employment.

With this exemption ENDA in no way poses a threat to religious freedom, contrary to the misleading claims of conservative opponents of workplace fairness. The antigay American Family Association, for example, asserts that "ENDA does not contain a sufficiently broad exemption for religious organizations," despite the fact that ENDA clearly gives religious organizations wide latitude to consider sexual orientation and gender identity when making employment decisions.⁵ In fact ENDA's religious protection language is partly why dozens of faith-based communities and religious organizations have come together in voicing strong support for ENDA.⁶

Politically, the bill's religious exemption is needed to advance ENDA and ultimately secure employment protections for gay and transgender Americans. This brief examines this exemption in more detail and compares it to religious exemptions found in the nation's major employment nondiscrimination law, Title VII of the Civil Rights Act of 1964.

Religious exemptions under Title VII

Before we discuss the religious exemptions in ENDA specifically, it is first important to understand how religious exemptions work under Title VII of the Civil Rights Act of 1964, upon which ENDA is based.⁷

Title VII prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin.⁸ Additionally, it includes a critical exemption that allows religious entities to make employment decisions—such as hiring, promoting, and firing—based on an individual's religion. Specifically, Section 702(a) of Title VII states:

This subchapter shall 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, education institution, or society of its activities.

Section 703(e)(2) of Title VII similarly reiterates that religiously run or religiously owned schools may also take an individual's religion into account when making hiring or firing decisions.

In other words, although Title VII does not exempt religious entities from discrimination based on race, color, sex, or national origin, it does carve out an exemption that allows those entities to discriminate on the basis of religion. A Lutheran elementary school, for example, may fire a teacher for being a Mormon. But it may not fire a teacher for being Asian American or for being a woman.

In 1987 the Supreme Court affirmed that Title VII's religious exemption allows faith-based organizations to discriminate on the basis of someone's religion, even when the employee's work is secular in nature. The Court ruled in *Bishop v. Amos* that a Mormon Church could require its janitor to practice Mormonism and could terminate his employment if he refused.

Religious exemptions under ENDA

Like Title VII, ENDA includes explicit language with exemptions for religious organizations. ENDA's religious exemption, however, is in some ways broader than Title VII's, since it gives religious organizations license to discriminate on the basis of sexual orientation and gender identity—not just on the basis of religion.

Section 6 of ENDA states:

This Act 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.⁹

What this means is that just as religious organizations may take into account an individual's religion with respect to employment decisions, ENDA's religious exemption allows religious organizations to also take into account an individual's sexual orientation or gender identity. In other words ENDA gives religious organizations a legal right to discriminate on the basis of sexual orientation and gender identity.

By contrast, Title VII does not permit religious organizations to discriminate on the basis of an individual's race, color, sex, or national origin. Going back to our earlier example, under Title VII a Lutheran school can hire or fire a teacher for being a Mormon, but not for being a woman or for being Asian American. If ENDA passed, a Lutheran school would also be able to fire or not hire a teacher for being gay or transgender, but would still not be able to do so for being a woman or for being Asian American. In this way ENDA's religious exemption is broader than that found in Title VII.

Moreover, ENDA's religious exemption applies to the same universe of religious and religiously affiliated institutions that are exempt under Title VII.¹⁰ They not only apply to houses of worship such as churches, synagogues, and mosques, but also schools whose primary purpose is religious worship or teaching religious doctrines. This includes schools that are owned (in whole or in part), controlled, or managed by religious institutions.

Why ENDA's religious exemption is important

At its core ENDA is about ensuring that all Americans can go to work in an environment free of discrimination. By including such a broad exemption for religious organizations, ENDA is also about protecting religious freedoms. Freedom to Work, a nonprofit organization dedicated to securing policies that level the playing field for gay and transgender workers, states clearly why the religious exemption is such a crucial component of ENDA:

ENDA gives religious organizations a legal right to discriminate on the basis of sexual orientation and gender identity.

ENDA's drafters recognized that religious liberty is one of our nation's founding principles. The bill protects the First Amendment religious freedom rights of churches to come to whatever conclusion they wish about LGBT people. Some churches and religious organizations will choose discrimination and some churches will choose inclusion of all of God's children. ENDA does not force the choice of the federal government upon any church, and therefore ensures that ENDA will not be struck down someday by the U.S. Supreme Court for violating religious liberties.¹¹

In this way ENDA does not threaten but instead advances the freedom of religion in the United States. This is why dozens of religious organizations and faith-based communities have come out in strong support of ENDA, often citing the importance of ENDA's religious protections as a reason to support the bill.¹² In a November 2009 letter in support of ENDA, a number of religious organizations articulated their support noting that with ENDA's religious exemption lawmakers can simultaneously advance the freedom to work while protecting the freedom of religion:

... as religious denominations and faith groups, we deeply value our guarantee to the freedoms of faith and conscience under the First Amendment. ENDA broadly exempts from its scope any religious organization, thereby ensuring that religious institutions will not be compelled to violate the religious precepts on which they are founded, whether or not we may agree with those precepts. In so doing, ENDA respects the protections for religious institutions afforded by the First Amendment and Title VII of the Civil Rights Act of 1964 while ensuring that lesbian, gay, bisexual and transgender people are protected from baseless discrimination in the workplace.¹³

Including this broad exemption for religious organizations has also been a critical component of attracting support for ENDA on Capitol Hill.¹⁴ When the religious exemption was last included in ENDA in November 2007, members of the House of Representatives voted overwhelmingly (402-25) in favor of its inclusion. This included hardline conservatives such as former House Speaker Dennis Hastert (R-IL) and current House Speaker John Boehner (R-OH). When ENDA last came up for a vote in the House, the religious exemptions even garnered the support from Rep. Paul Ryan (R-WI), who voted in favor of the entire ENDA bill when it came to the floor.

Debunking religious freedom arguments against ENDA

ENDA equips religious organizations with a strong and broad exemption. Still, conservative opponents of ENDA continue to make misleading arguments to the contrary as a way of distracting from the debate and derailing ENDA.

Perhaps the most oft-cited religious argument against ENDA is that, surprisingly, its religious exemptions do not go far enough. Specifically, ENDA would not permit

business owners to discriminate against potential or existing employees on the basis of their sexual orientation or gender identity. A Christian owner of an otherwise secular business, for example, does not have an exemption under ENDA, meaning that he or she would not be able to fire an employee who is gay or transgender. This same business owner could also not fire someone for his or her religious beliefs, per Title VII.

Rather than focus on what ENDA actually does—prohibit discrimination—a host of antigay, right-wing organizations continue to argue that ENDA does not do enough to protect commercial entities:

- Concerned Women for America claims that ENDA “would leave individual business owners entirely unprotected.”¹⁵
- The Family Research Council asserts that ENDA “would prohibit employers from taking their most deeply held beliefs into account when making hiring, management, and promotion decisions.”¹⁶
- The American Family Association argues that ENDA’s “current religious exemption would not cover all religious non-profit organizations and would not cover small business owners with conscientious objections to homosexual conduct and bisexual conduct.”¹⁷

Opponents testifying against ENDA have also voiced similar opposition to the bill. In his 2009 ENDA testimony before the Senate Committee on Health, Education, Labor, and Pensions, Craig Parshall, senior vice president and general counsel for the National Religious Broadcasters Association, echoed this sentiment and is likely to do so again when he testifies before the HELP committee tomorrow. In his 2009 testimony Parshall stated that ENDA affords “no exemption for [a] small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place.”¹⁸

And he’s right. Under ENDA only organizations whose purpose is directly tied to religion are afforded exemptions. To allow commercial entities to discriminate against gay and transgender individuals in hiring and firing would completely gut ENDA because any employer could simply cite his or her personal beliefs as a justification for firing gay or transgender employees. The fact that Parshall says private business owners want to discriminate against gay and transgender people is evidence of why we need ENDA in the first place.

Additionally, some religious organizations oppose ENDA because they claim it is unclear which religious organizations will be affected and which will not be affected by ENDA’s religious exemptions. For example, Parshall stated in his 2009 testimony that ENDA’s applicability “creates a nether world of uncertainty for religious organiza-

tions.” As a result, ENDA opponents like Parshall argue that religious organizations will have to incur litigation costs as courts allegedly determine which entities ENDA’s exemption applies to.

However, this is blatantly false. Because Section 6 of ENDA incorporates the same language as is used in Title VII, any religious entity that is exempt under Title VII is also exempt under ENDA. By tying the language directly to Title VII, language that has been in effect since 1972 and consistently upheld by the courts, ENDA actually makes it relatively simple for religious organizations to understand who falls under its exemption. Rather than create confusion, ENDA helps advance workplace equality for gay and transgender people while also helping religious organizations avoid massive litigation costs and confusion that would manifest had ENDA not tied its exemption’s applicability to Title VII.

Small businesses actually support ENDA, not oppose it

Antigay organizations continue to trumpet the claim that ENDA is an affront to America’s small-business owners and their constitutional right to practice their religion free of government interference. But the reality is that small-business owners themselves actually do not see a conflict between ENDA and their religious freedoms. In fact a strong majority of small-business owners support commonsense laws like ENDA.

A Center for American Progress poll of small-business owners in 2011 found that most small businesses already take steps to ensure their workplace is free of discrimination, including discrimination against their gay and transgender workers.¹⁹ But for the minority of small businesses that did not prohibit discrimination on the basis of sexual orientation and/or gender identity, were moral or religious concerns a reason for not doing so? Hardly.

With respect to gender identity, for example, 34 percent said they did not prohibit discrimination against transgender employees because they “never thought to do so.” Thirty-three percent said they did not have transgender employees and that is why they did not have a gender-identity-inclusive policy on their books, with another 30 percent saying having such a policy was simply not a priority.²⁰

And what about religious or moral concerns? A grand total of just 7 percent of small-business owners voiced religious or moral concerns as a reason for not including gender identity in their nondiscrimination policy.

Perhaps most importantly, small-business owners are strong supporters of laws that level the playing field for the gay and transgender workforce. A whopping 85 percent of small-business owners support or are neutral toward ENDA, with a strong majority of 63 percent voicing support for the bill. These entrepreneurs understand that discrimination is an inefficient distraction, and that laws and policies that level the playing field for gay and transgender workers make for good business.

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Still, right-wing antigay organizations continue to use small business as a tool to scare lawmakers away from supporting ENDA. And they will continue to do so even when small businesses themselves call on Congress to enact laws that advance the equal and fair treatment of gay and transgender employees in the workplace.

No lawmaker today would give individual business owners the legal right to discriminate against someone because they are black or because they are women, based on some sort of religious rationale for doing so. But this is exactly what ENDA's opponents are claiming is lacking from the law. Lawmakers should not be fooled by these arguments, and they should reject any line of reasoning that suggests that business owners religiously opposed to equality should be allowed to fire employees based on their sexual orientation or gender identity.

ENDA is about fairness

ENDA's premise is simple. Otherwise-qualified individuals should not be discriminated against based on job-irrelevant qualities such as their sexual orientation and gender identity. Discrimination is hurtful to victims, their families, and notably to employers who allow discrimination to go unchecked.²¹ ENDA would help combat discrimination against gay and transgender workers, and Congress would be smart to act swiftly and pass ENDA.

Opponents of workplace fairness, however, would like you to think the debate is not about the freedom to work but rather the freedom to worship, and that somehow ENDA compromises the latter. In reality ENDA provides broad exemptions to religious organizations that would allow them to make employment decisions based on sexual orientation and gender identity—in addition to their current legal ability to discriminate based on religion.

The senators presiding over tomorrow's ENDA hearing would do well to remember that ENDA maintains and enhances religious liberty and that claims to the contrary are based in fiction, not fact.

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See also:

Seth Althaus and Sarah Greenberg, “FAQ: The Employment Non-Discrimination Act,” Center for American Progress, July 19, 2011, available at http://www.americanprogress.org/issues/2011/07/enda_faq.html.

Crosby Burns and Jeff Krehely, “Small Businesses Support Fairness,” Center for American Progress, October 5, 2011, available at http://www.americanprogress.org/issues/2011/10/enda_poll.html.

Jeff Krehely, “Polls Show Huge Public Support for Gay and Transgender Workplace Protections” Center for American Progress, June 2, 2011, available at http://www.americanprogress.org/issues/2011/06/protection_poll.html.

Endnotes

- 1 Seth Althaus and Sarah Greenberg, "FAQ: The Employment Non-Discrimination Act," Center for American Progress, July 19, 2011, available at http://www.americanprogress.org/issues/2011/07/enda_fa.html.
- 2 In this column, "gay" is used as an umbrella term to describe individuals that identify as lesbian, gay, or bisexual.
- 3 Brad Sears and Christy Mallory, "Documented Evidence of Employment Discrimination and Its Effects on LGBT People" (Los Angeles: The Williams Institute, 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>.
- 4 "Pass ENDA Now: End Workplace Discrimination!" available at <http://sites.hrc.org/sites/passendanow/index.asp?gclid=COLJ5KvZtLACFUZN4Aod4we5Vg>; Carlos Maza and Jeff Krehely, "Establishing Fairness and Legal Predictability" (Washington: Center for American Progress, 2010), available at http://www.americanprogress.org/issues/2010/11/pdf/lgbt_nondiscrimination.pdf.
- 5 "The Employment Non-Discrimination Act (ENDA)," available at <http://archive.afa.net/enda.pdf>.
- 6 "Golden Rule At Work," available at <http://goldenruleatwork.org/about/>.
- 7 "Title VII of the Civil Rights Act of 1964" available at <http://www.eeoc.gov/laws/statutes/titlevii.cfm>.
- 8 A number of other federal laws that build off of Title VII similarly prohibit discrimination in employment. For example, the Age Discrimination in Employment Act of 1967 prohibits employment discrimination based on age (specifically for individuals who are 40 years of age or older), and the Americans with Disabilities Act of 1990 prohibits discrimination against individuals with disabilities. See: "Federal Laws Prohibiting Job Discrimination: Questions And Answers," available at <http://www.eeoc.gov/facts/qanda.html>.
- 9 *Employment Non-Discrimination Act of 2011*, S. 811, 112th Cong., 1st Sess., April 13, 2011, available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s811is/pdf/BILLS-112s811is.pdf>.
- 10 Ibid., p. 9–10.
- 11 "ENDA's Religious Exemption," available at http://www.freedomtowork.org/?page_id=41.
- 12 "Golden Rule At Work."
- 13 "Religious Organizations Letter in Support the Employment Non-Discrimination Act," available at http://sites.hrc.org/sites/passendanow/documents/ENDA-Senate_Religious_Org_Letter_2009-11-2.pdf.
- 14 "ENDA's Religious Exemption."
- 15 Concerned Women for America, "CWA Asks President for Veto Pledge on ENDA," available at <http://www.cwfa.org/articledisplay.asp?id=14006&department=MEDIA&categoryid=life>.
- 16 Family Research Council, "Talking Points: H.R. 2015: The Employment Non-Discrimination Act of 2007" (2010), available at <http://www.frc.org/get.cfm?i=IF07102>.
- 17 "The Employment Non-Discrimination Act (ENDA)."
- 18 Craig L. Parshall, Testimony before the U.S. Senate Committee on Health, Education, Labor, and Pensions, November 5, 2009, available at <http://www.help.senate.gov/imo/media/doc/Parshall.pdf>.
- 19 Crosby Burns and Jeff Krehely, "Small Businesses Support Fairness," Center for American Progress, October 5, 2011, available at http://www.americanprogress.org/issues/2011/10/enda_poll.html.
- 20 Figures do not total to 100 percent because respondents were able to choose multiple reasons for which they did not have a gender-identity-inclusive policy on the books.
- 21 Crosby Burns, "The Costly Business of Discrimination" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/issues/2012/03/pdf/lgbt_biz_discrimination.pdf.