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EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) OF 1994 (Job Discrimination Bill)

QUESTIONS AND ANSWERS

1) What does ENDA do?

ENDA prohibits an employer from using an individual's sexual orientation as the basis for adverse or different treatment in employment or employment opportunities.

2) Who is protected?

ENDA protects heterosexuals, homosexuals (gay men and lesbians), and bisexuals from discrimination in the workplace based on their sexual orientation.

3) Why is ENDA necessary?

ENDA is necessary because gay men, lesbians, and bisexuals face serious discrimination in employment, ranging from being fired from a job, being denied a promotion, or experiencing harassment on the job.

4) What employers are covered by ENDA?

ENDA covers the same entities that the employment section of the Civil Rights Act of 1964 ("Title VII") covers. Federal, state and local governments, labor unions, and employment agencies are all covered under this bill, as they are under Title VII.

5) Is the military covered under ENDA?

No. ENDA does not apply to the relationship between the United States government and members of the Armed Forces. Thus, this bill does not affect current law on gay men, lesbians, and bisexuals in the military.

6) Does ENDA have a small business exemption?

Yes. ENDA does not cover employers with fewer than 15 employees.

(over)

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THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

SECTION-BY-SECTION SUMMARY

An Act to prohibit employment discrimination
on the basis of sexual orientation

Section 1. Short Title.

The short title of the bill is the "Employment Non-Discrimination Act of 1994" (ENDA). ENDA is designed to provide protection for lesbians, gay men, bisexuals, and heterosexuals against discrimination in the workplace.

Section 2. Findings and Purposes. [Senate Only]

The findings set out the basic premise of the bill that sexual orientation has no relationship to ability to contribute to society and that employment discrimination based on sexual orientation violates fundamental values of equality and fairness.

The purpose of the bill is to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation and to provide meaningful remedies against such discrimination.

Section 3. Discrimination Prohibited.

ENDA prohibits employers (including government employers), employment agencies, and labor organizations from subjecting employees to different standards or treatment, or otherwise discriminating in employment or employment opportunities, on the basis of sexual orientation. Employment and employment opportunities include hiring, firing, compensation, and other terms or conditions of employment. Like a similar provision in the Americans with Disabilities Act (ADA), section 3 prohibits discrimination based on the sexual orientation of someone with whom an employee associates.

Section 4. Benefits.

ENDA does not require employers to provide benefits to their employees' same-sex partners. However, employers remain free to provide these benefits if they wish to do so.

Section 5. No Disparate Impact.

ENDA does not require employers to justify neutral practices that may result in a disparate impact against people of a particular sexual orientation. As a result, the "disparate impact" claim, available under Title VII of the 1964 Civil Rights Act (Title VII), is not available to gay men, lesbians, bisexuals, or heterosexuals under this bill.

Section 6. Quotas and Preferential Treatment Prohibited.

ENDA prohibits employers from adopting quotas or giving preferential treatment to an individual on the basis of sexual orientation.

Section 7. Religious Exemption.

Section 7 exempts religious organizations, including educational institutions substantially owned, managed, controlled, or supported by religious organizations and educational institutions whose curriculum is directed to the teaching of religious doctrine. The bill covers only a religious organization's for-profit activities subject to taxation under the Internal Revenue Code.

Section 8. Non-Application to Members of the Armed Forces; Veterans' Preferences.

ENDA does not apply to the relationship between the U.S. government and members of the Armed Forces. Thus, the bill does not affect current law on gay men, lesbians, and bisexuals in the military. In a provision taken from Title VII, Section 8 further provides the bill does not repeal or modify any other law that gives special preferences to veterans.

Section 9. Enforcement.

Section 9 authorizes the Equal Employment Opportunity Commission (EEOC), the Attorney General, and the federal courts to exercise the same power to enforce ENDA as those branches of the Federal Government have to enforce Title VII. Individuals have the same right to bring a private action that individuals have under Title VII. Congress is covered by the same enforcement mechanisms established by the Civil Rights Act of 1991.

Section 10. State and Federal Immunity.

Section 10 provides that the States and the Federal Government are subject to the same actions and remedies as are other employers for violation of the law.

Section 11. Attorneys' Fees.

The bill provides for attorneys' fees and litigation expenses.

Section 12. Retaliation and Coercion Prohibited.

Section 12 prohibits retaliation against individuals because they oppose an act or practice prohibited by the bill, or participate in an investigation or other proceeding under the bill. This section also prohibits coercion, intimidation, threats, or interference against individuals exercising or enjoying rights protected by the bill. This provision is modelled after similar provisions in Title VII and the Fair Housing Act of 1968.

Section 13. Posting Notices.

As in Title VII, the bill requires that employers post notices describing the requirements of the law.

Section 14. Regulations.

Section 14 authorizes the EEOC to issue regulations to enforce ENDA. Regulations are not mandated under the bill.

Section 15. Relationship to Other Laws.

This section preserves provisions in other federal, state, or local laws that currently provide protection from discrimination.

Section 16. Severability.

The bill includes a general severability clause. Thus, if any provision of ENDA is declared unconstitutional, this section preserves the rest of the bill.

Section 17. Effective Date.

ENDA takes effect sixty days after its enactment. It does not apply retroactively.

Section 18. Definitions.

Most of the definitions in ENDA come directly from existing civil rights laws, primarily Title VII. The bill adds a definition: it defines "sexual orientation" as real or perceived lesbian, gay, bisexual, or heterosexual orientation. The definition includes orientation stated by individuals or manifested in their personal relations.



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EMBARGOED FOR RELEASE UNTIL A.M.,
THURSDAY, JUNE 23, 1994

Statement of Ralph G. Neas, Executive Director of The Leadership Conference On Civil Rights, On Behalf of the Employment Non-Discrimination Act June 23, 1994

Today, I am pleased and proud to announce that the Leadership Conference on Civil Rights (LCCR), the legislative arm of the civil rights movement, strongly supports the Employment Non-Discrimination Act (ENDA). This historic legislation would prohibit discrimination on the basis of an individual's sexual orientation in hiring, firing, promotions, compensation, and other employment decisions.

It is a special honor to be here today with congressional leaders and with Coretta Scott King, Justin Dart, former chairman of the President's Committee on Employment of People with Disabilities under President George Bush, and many other representatives of minority, women, disability, labor and religious groups.

The Leadership Conference welcomes the bipartisan support for this measure in both the House of Representatives and the Senate. Currently, there are more than two dozen Senate and more than 80 House original cosponsors. We especially applaud the leadership of the bipartisan sponsors of the Employment Non-Discrimination Act, including Senators Ted Kennedy (D-MA), John Chafee (R-RI), Patty Murray (D-WA), James Jeffords (R-VT), Joseph Lieberman (D-CT), and Diane Feinstein (D-CA); and Representatives Barney Frank (D-MA), Gerry Studds (D-MA), Connie Morella (R-MD), Christopher Shays (R-CT), Don Edwards (D-CA), Pat Schroeder (D-CO), Henry Waxman (D-CA), and Michael Huffington (R-CA).

The Leadership Conference on Civil Rights is the nation's oldest, largest, and most broadly based coalition. Founded in 1950, LCCR has 185 national organizations representing minorities, women, persons with disabilities, older Americans, labor, gays and lesbians, and major religious groups. LCCR has coordinated the national campaigns leading to the enactment of every major civil rights law since 1957. Recent LCCR legislative priorities enacted into law include the Americans with Disabilities Act, the Civil Rights Act of 1991, the

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Civil Rights Restoration Act, the Fair Housing Act Amendments of 1988, the Japanese American Redress Act, and the 1982 Voting Rights Act Extension.

Earlier this month, the National Board of the Leadership Conference, which meets annually, designated the Employment Non-Discrimination Act a top legislative priority for the 103rd Congress. This is the first time that the Leadership Conference has endorsed a specific legislative measure which prohibits discrimination against gays and lesbians. This decision underscores the growing bipartisan consensus in this country that prohibiting discrimination against gays and lesbians is a fundamental civil rights issue.

The Leadership Conference believes strongly that every worker should have the right to be judged solely on his or her ability to do the job. People who work hard and perform well should not be kept from leading productive and responsible lives -- paying their taxes, covering their mortgages and contributing to the economic life of the nation.

Regrettably, job discrimination against lesbian and gay people is widespread, and there is no federal anti-discrimination law that covers them. The Employment Non-Discrimination Act takes a modest step toward securing equal treatment for millions of Americans who continue to experience discrimination in the workplace.

In addition to the anti-discrimination sections of the Employment Non-Discrimination Act, there are other important provisions in the legislation that would:

- exempt religious organizations, including religious educational institutions;
- exempt small businesses with fewer than 15 employees;
- prohibit quotas and preferential treatment based on sexual orientation; and
- not require employers to provide benefits to the same-sex partner of an employee.

The Employment Non-Discrimination Act would not apply to uniformed members of the armed forces. It would apply to Congress, and it has the same remedies provided by the Civil Rights Act of 1991 and the Americans with Disabilities Act.

The time is right for a federal law protecting gay and lesbian Americans from employment discrimination. Indeed, national polls show that 76 percent of all Americans believe that people should not be fired or discriminated against for being gay.

The Leadership Conference on Civil Rights is committed to working at the national, state, and local levels on behalf of the Employment Non-Discrimination Act. We call on the House of Representatives and the Senate to follow the lead of a growing number of businesses that already ban job discrimination against gays and lesbians and to pass this vital legislation as soon as possible.

A number of organizations in the Leadership Conference have not taken a position at this time and do not join in this statement.

If you would like a copy of the Employment Non-Discrimination Act or need additional information or materials, please call us at 202-466-3311.



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(*Therese...)

▼ The Employment Non-Discrimination Act of 1994 (ENDA) prohibits discrimination in employment on the basis of sexual orientation. ENDA extends fair employment practices -- not special rights -- to lesbians, gay men, bisexuals and heterosexuals.

▼ Federal law currently protects employees from discrimination on the basis of race, religion, gender, national origin, age, and disability. ENDA remedies a gap in federal non-discrimination protection.

▼ ENDA prohibits employers, employment agencies, and labor unions from using an individual's sexual orientation as the basis for employment decisions, such as hiring, firing, promotion, or compensation.

▼ Under ENDA, employers may not subject an individual to different standards or treatment based on that individual's sexual orientation (real or perceived) or discriminate against an individual based on the sexual orientation of those with whom the individual associates.

▼ The "disparate impact" claim available under the employment section of the Civil Rights Act of 1964 (Title VII) is not available under ENDA. An employer is not required to justify a neutral practice that may have a statistically disparate impact based on sexual orientation.

▼ ENDA exempts small businesses with fewer than fifteen employees, as does Title VII.

▼ ENDA exempts religious organizations, including educational institutions substantially controlled or supported by religious organizations.

▼ ENDA prohibits preferential treatment, including quotas, based on sexual orientation.

▼ ENDA does not require an employer to provide benefits for the same-sex partner of an employee.

▼ ENDA does not apply to the relationship between the U.S. government and the armed forces and thus does not affect current law on lesbians and gay men in the military.

▼ ENDA incorporates the remedies of Title VII (injunctive relief and damages to the extent allowed by Title VII).

▼ ENDA applies to Congress with the same remedies as provided by the Civil Rights Act of 1991.

▼ ENDA is not retroactive.

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▼ The Employment Non-Discrimination Act of 1994 (ENDA) prohibits discrimination in employment on the basis of sexual orientation. ENDA extends fair employment practices -- not special rights -- to lesbians, gay men, bisexuals and heterosexuals.

▼ Federal law currently protects employees from discrimination on the basis of race, religion, gender, national origin, age, and disability. ENDA remedies a gap in federal non-discrimination protection.

▼ ENDA prohibits employers, employment agencies, and labor unions from using an individual's sexual orientation as the basis for employment decisions, such as hiring, firing, promotion, or compensation.

▼ Under ENDA, employers may not subject an individual to different standards or treatment based on that individual's sexual orientation (real or perceived) or discriminate against an individual based on the sexual orientation of those with whom the individual associates.

▼ The "disparate impact" claim available under the employment section of the Civil Rights Act of 1964 (Title VII) is not available under ENDA. An employer is not required to justify a neutral practice that may have a statistically disparate impact based on sexual orientation.

▼ ENDA exempts small businesses with fewer than fifteen employees, as does Title VII.

▼ ENDA exempts religious organizations, including educational institutions substantially controlled or supported by religious organizations.

▼ ENDA prohibits preferential treatment, including quotas, based on sexual orientation.

▼ ENDA does not require an employer to provide benefits for the same-sex partner of an employee.

▼ ENDA does not apply to the relationship between the U.S. government and the armed forces and thus does not affect current law on lesbians and gay men in the military.

▼ ENDA incorporates the remedies of Title VII (injunctive relief and damages to the extent allowed by Title VII).

▼ ENDA applies to Congress with the same remedies as provided by the Civil Rights Act of 1991.

▼ ENDA is not retroactive.

"Equality In a Free, Plural, Democratic Society"



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THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

QUESTIONS AND ANSWERS

SOURCE DOCUMENT

GENERAL QUESTIONS

1. Who will be protected under the Employment Non-Discrimination Act of 1994 ("ENDA")?

ENDA protects heterosexuals, homosexuals (gay men and lesbians), and bisexuals from discrimination in the workplace based on their sexual orientation.

2. What does ENDA do?

ENDA prohibits an employer from using an individual's sexual orientation as the basis for adverse or different treatment in employment or employment opportunities.

3. Why is ENDA necessary?

ENDA is necessary because gay men, lesbians, and bisexuals face serious discrimination in employment, ranging from being fired from a job, to denied a promotion, to experiencing harassment on the job.

4. Why does ENDA focus on employment discrimination?

ENDA focuses on employment discrimination because such discrimination is a critical problem for gay men, lesbians, and bisexuals. A June 1994 Newsweek poll indicated that 91% of gay people believe securing equal rights in the workplace is a "very important" goal for the gay community. The general public also supports this goal. A February 1994 Newsweek poll showed that "74% of all Americans favor protecting gays from job

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discrimination." A Mellman, Lazarus, Lake poll taken during the same period showed that 76% of those polled "believe that people should not be fired or discriminated against for being gay."

5. **Do gay rights and civil rights groups plan to support legislation that goes beyond employment discrimination?**

Gay rights and other civil rights groups believe that discrimination on the basis of sexual orientation should also be prohibited in housing, public accommodations, and governmental services. However, in the long tradition of other civil rights struggles, this bill addresses one issue first -- in this case, employment discrimination. Employment discrimination strikes at the core of an individual's ability to participate in society. Thus, it is appropriate for Congress to act to remedy this evil.

6. **Who supports the principle of combatting anti-gay job bias?**

Numerous civil rights and religious organizations have issued statements, or adopted policies, against anti-gay job bias. The Executive Committee of the Leadership Conference on Civil Rights, an organization of over 160 civil rights groups, has endorsed ENDA.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

7. **Is it true there is no effective recourse for sexual orientation job discrimination under existing laws?**

There is no truly effective recourse for sexual orientation job discrimination in 42 states across this country. Eight states have laws that prohibit discrimination on the basis of sexual orientation in employment, as well as in other areas. Various municipalities have similar ordinances. But the vast majority of gay men, lesbians, and bisexuals across this country have no protection.

Individuals have tried to challenge sexual orientation discrimination under Title VII of the Civil Rights Act of 1964 as a form of gender discrimination. All such challenges have failed. Courts have ruled that Title VII does not cover sexual orientation.

Individuals have also tried to challenge sexual orientation discrimination under the federal Constitution. An ongoing review of reported cases shows that at least twenty-nine cases have been decided under various constitutional claims since 1970. Seven of these cases have been successful. Even if a constitutional challenge is successful, however, the Federal Constitution provides protection only against a governmental body

-- e.g. the federal government or state or local governments. The vast majority of citizens who work for private companies are not protected by the Constitution.

Finally, individuals have tried to challenge sexual orientation discrimination under contract or tort theories. Five reported cases have been decided under such claims since 1991. Only two of these claims have been successful. One of these was successful on a contract claim, and another on a claim of intentional infliction of emotional distress.

As a general matter, the employment-at-will doctrine means an employer may fire an individual for any reason unless the employer has voluntarily bound itself otherwise by contract. The only exception, accepted in a number of states, is if a court determines such an action would be contrary to public policy. The public policy exception has never been successfully used to challenge a firing based on sexual orientation.

EMPLOYERS/COVERED ENTITIES

8. What employers are covered under ENDA?

ENDA covers the same entities that the employment section of the Civil Rights Act of 1964 ("Title VII") covers. Federal, state and local governments, labor unions, and employment agencies are all covered under this bill, as they are under Title VII.

9. Does ENDA have a small business exemption?

Yes. ENDA does not cover employers with fewer than 15 employees. This is the same exemption that exists in Title VII and in the Americans with Disabilities Act (ADA).

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

10. Is the federal government covered under ENDA?

Yes. The federal government, and other state and local governmental entities, are covered in their capacity as employers.

11. Is the military covered under ENDA?

No. ENDA does not apply to the relationship between the United States government and members of the Armed Forces. Thus, this bill does not affect current law on gay

men, lesbians, and bisexuals in the military.

12. Is Congress covered under ENDA?

Yes. The Senate and the House of Representatives are covered under this bill, in the same manner in which Congress is covered under Title VII. This means the requirements of the law apply equally to Congress, with special enforcement mechanisms established separately for the House of Representatives and the Senate.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

13. Are religious entities covered under the ENDA?

No. ENDA exempts all religious corporations, associations, and societies. ENDA also exempts educational institutions substantially owned, managed, controlled, or supported by religious organizations, or educational institutions whose curriculum is directed to the teaching of religious doctrine. Thus, any employment decisions made by these types of organizations are not covered under ENDA.

ENDA covers only employment decisions related to a religious organization's for-profit activities subject to taxation (because they are substantially unrelated to religious purposes).

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

EVIDENCE OF DISCRIMINATION

14. Is there really a problem with discrimination in employment based on sexual orientation? Can't gay people do well in their jobs if they do not make a big deal of their sexuality?

No. Even when gay men, lesbians, or bisexuals never talk about their sexual orientation at work, they are subject to possible harassment or firing based on the suspicion or rumor that they are gay. Moreover, although many gay men, lesbians, and bisexuals try strenuously to keep their sexual orientation a secret, such information may be divulged inadvertently through a co-worker overhearing a private telephone conversation or through a co-worker disclosing to others information initially told in confidence. Gay people are never safe in the workplace. Trying to keep one's sexual

orientation a secret in the workplace is not a real protection against discrimination.

15. **Are the only people who would benefit from this bill, then, those who happen to have their sexual orientation disclosed inadvertently at the workplace?**

No. Many people will ultimately benefit from this law. Even if a gay man or lesbian is able to keep his or her sexual orientation a secret in the workplace, this comes at a very heavy cost. "Passing" as straight in the workplace requires significant energy and self-censorship on the part of a gay person. It also puts gay employees at a disadvantage because they cannot interact socially with their co-workers and supervisors in an equal manner. Studies show that passing increases stress and even reduces productivity for gay workers. "Passing" as straight is not a good substitute for assurances of nondiscrimination.

16. **Don't lesbians and gay men have higher per capita incomes when compared to other minority groups?**

No. This is a myth. This false assumption comes from the misuse of surveys that were never intended to describe the economic status of all lesbians and gay men. Rather, these surveys were designed to show the usefulness of targeted marketing to the gay community and were therefore biased toward gay individuals with high incomes. In reality, gay men, lesbians, and bisexuals cross all lines equally: income, age, race, ethnicity, and disability. Gay men and lesbians, as a class, are a portrait of America.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

BASES FOR CLAIMS/RELIEF

17. **What actions of an employer are covered under ENDA?**

ENDA covers an employer's decisions regarding employment and employment opportunities, such as hiring, firing, promotion, training or compensation. The bill requires that such decisions not be made on the basis of an individual's sexual orientation.

18. **What would an individual have to show to prove a discrimination case under ENDA?**

ENDA adopts the same standards for proving intentional discrimination that are used

under Title VII and other federal civil rights laws.

First, a person must prove he or she is a member of a protected class. Under ENDA, this means a person must establish he or she is a gay man, a lesbian, a bisexual, or a heterosexual, or is perceived to be in one of those categories, or associates with someone in one of those categories.

Second, the person must show he or she was qualified for a particular job or promotion (or whatever employment opportunity is at issue) and that the employer's adverse employment action raises an inference the employer acted on the basis of the person's sexual orientation. This establishes the plaintiff's "prima facie" case of discrimination.

The employer then presents evidence to prove that the adverse employment decision was not taken on the basis of the person's sexual orientation, but rather, was taken because of some legitimate, non-discriminatory reason.

The person then has the opportunity to rebut that claim, by proving the stated reason was really a pretext, and that the adverse action was actually taken on the basis of sexual orientation. The plaintiff bears the ultimate burden of proof at this stage of the case.

19. May an individual bring a "disparate impact" claim under ENDA?

No. ENDA does not allow an individual to bring a traditional "disparate impact" claim -- that is, a claim that a facially neutral practice of the employer has a disproportionate adverse effect on persons of a particular sexual orientation. Thus, the standards for proving a "disparate impact" claim, which exist under Title VII, do not apply to ENDA.

20. What is a "disparate impact" claim?

A disparate impact claim is a claim that a facially neutral practice of an employer has a disproportionately adverse effect on persons of a particular protected group.

A disparate impact claim relies heavily on statistics. In a traditional disparate impact claim, a plaintiff compares the percentage of individuals of a particular gender, race, or ethnicity in an employer's workforce with the percentage of such individuals in the pool of qualified applicants. If there is a significant disparity between the percentages, the plaintiff may argue that one or more of the employer's neutral employment practices causes the adverse effect on the hiring of such individuals. If the plaintiff makes out this case, the employer must then show the challenged employment practice is job-related and consistent with business necessity.

In the Civil Rights Act of 1991, Congress codified this "disparate impact" claim under Title VII.

21. **Why are traditional disparate impact claims not allowed under ENDA?**

The exclusion of a disparate impact claim from ENDA results primarily from the fact that it is difficult to perform an accurate statistical analysis in the context of sexual orientation. Privacy concerns would ordinarily foreclose an accurate statistical count of all gay men, lesbians, bisexuals, and heterosexuals in an employer's workforce and in the qualified applicant pool. While one could develop a count of the number of openly-gay people in a particular workforce, it would be difficult, if not impossible, to assess the number of openly-gay people in the relevant applicant pool.

The exclusion of disparate impact claims should not impact significantly on the ability of plaintiffs to challenge the type of discrimination gay people traditionally face. Such discrimination usually takes the form of either overt, intentional discrimination or seemingly neutral actions that are clearly pretexts for discrimination. Both of these types of actions are outlawed by ENDA.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

22. **What kind of relief is available under ENDA?**

ENDA incorporates the enforcement mechanisms and remedies of Title VII. This means a plaintiff must first go through the administrative mechanism of the Equal Employment Opportunity Commission (EEOC). A plaintiff may then file a lawsuit in federal court and, if the plaintiff prevails, may receive injunctive relief, such as reinstatement in a job and/or back pay. Attorney's fees are available, as they are under Title VII.

A plaintiff may also receive compensatory and punitive money damages, to the extent such damages are allowed under Title VII. In the bipartisan compromise which resulted in the passage of the Civil Rights Act of 1991, damages under Title VII were capped as follows:

- * \$50,000, when suing an employer with 15 - 100 employees;
- * \$100,000, when suing an employer with 100 - 200 employees;
- * \$200,000, when suing an employer with 200 - 500 employees; and
- * \$300,000, when suing an employer with more than 500 employees.

These same caps on damages apply to ENDA. If these caps are modified for Title VII, such modifications would apply to ENDA as well.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

NO QUOTAS/NO SPECIAL RIGHTS

23. Does ENDA require quotas? Does ENDA allow quotas?

No. ENDA explicitly states that employers may not adopt quotas on the basis of sexual orientation.

24. Will ENDA give gay people special rights over heterosexuals?

No. ENDA prohibits giving preferential treatment to any individual based on sexual orientation. Thus, employers may not provide special treatment to gay men, lesbians, bisexuals, or heterosexuals. The bill provides solely that an employer may not use the fact of an individual's sexual orientation as the basis for discrimination against that individual in employment or employment opportunities.

25. Would efforts to increase the diversity of an applicant pool by advertising at gay community events and in gay publications constitute preferential treatment?

No. An employer may take affirmative measures to inform the gay and lesbian community of job opportunities. This is not preferential treatment. Rather, it is an effort on the part of the employer to expand its applicant pool. Such efforts do not constitute preferential treatment in an employer's selection decisions.

26. May an employer expand its definition of "minority" to include gay men and lesbians under its affirmative action statement?

No. If defining gay men and lesbians as a minority under an affirmative action statement means the employer will give gay men and lesbians preference in the selection process, or will establish goals and timetables based on sexual orientation, that policy would violate ENDA's prohibition against preferential treatment.

By contrast, simply adding "sexual orientation" to an employer's non-discrimination or anti-bias policy does not violate ENDA's prohibition against preferential treatment. An employer does not give preference to an individual or class of persons by practicing non-discrimination.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

27. **Will this bill adversely affect the employment opportunities of other racial, religious, ethnic, or gender minorities?**

No. ENDA does not affect any other existing civil rights law. The bill ensures simply that a person of any race, religion, ethnicity, gender, age, or disability status is not discriminated against on the basis of his or her sexual orientation. ENDA does not take away any rights granted to individuals on the basis of such characteristics under other federal or state laws.

MILITARY

28. **Does this bill change the military's policy towards lesbians, gay men, and bisexuals?**

No. ENDA exempts the relationship between the United States government and members of the Armed Forces from the bill. Thus, the military's ban on the service of gay men, lesbians, and bisexuals would remain unaffected by passage of this legislation.

BENEFITS

29. **Does this bill mandate the provision of health benefits to same-sex partners?**

No. The denial of health and other benefits to the life partners of lesbians and gay men is a significant form of employment discrimination against gay people. Because benefits constitute almost a third of the cost of an employee, a gay person who is denied benefits for his or her life-partner is essentially being paid less than a heterosexual person who receives benefits for his or her spouse. This is a classic form of employment discrimination.

Nevertheless, ENDA does not take on the struggle regarding provision of benefits. Rather, the bill explicitly does not apply to the provision of benefits to an individual's partner.

Of course, employers remain free to provide benefits to their employees' same-sex partners if they wish to do so. More and more companies across the country are discovering it makes good business sense to extend such benefits to their gay and lesbian employees. This trend will be encouraged and nurtured by those opposed to employment discrimination on the basis of sexual orientation.

MISCELLANEOUS QUESTIONS

30. Why does the bill need to protect people who are perceived to be gay?

Individuals who are perceived to be gay, but who are not actually gay, face the same discrimination experienced by gay men, lesbians and bisexuals. Therefore, it is necessary for ENDA to cover these individuals. This is identical to the ADA, which protects people who are perceived to have disabilities.

31. Does ENDA protect people who associate with gay men and lesbians from discrimination in the workplace?

Yes. Like the Fair Housing Amendments Act and the ADA, which prohibit discrimination against those who associate with people with disabilities, ENDA prohibits employers from discriminating against people who associate with gay men, lesbians, and bisexuals. Straight people, including parents and siblings of gay men, lesbians, and bisexuals, are often subject to harassment and other job discrimination because of their association with their gay family member or gay friend. Such individuals are not perceived to be gay themselves (and therefore, would not be covered on that basis), but rather, are discriminated against solely because of their association.

(SEE ATTACHED ONE-PAGER.)

32. If this legislation becomes law, will employers still be able to require gender appropriate clothing on the job?

Yes. Under ENDA, an employer may require gender appropriate clothing on the job -- as long as all individuals (gay men, lesbians, bisexuals, and heterosexuals) are required to wear gender appropriate clothing.

Of course, requiring men and women to conform strictly to stereotypical views of male and female roles may violate Title VII as a form of sex discrimination. It would not, however, be a violation of ENDA.

33. If this legislation becomes law, would an employer be able to fire an employee because customers or co-workers are uncomfortable with a gay person?

No. "Customer preference" has never been allowed to justify discrimination under a federal or state civil rights law. For example, the fact that co-workers or customers might be uncomfortable with African Americans has never been permitted to justify discrimination against African Americans. The fact that men might prefer flight attendants to be women -- perhaps even increasing business for airlines thereby -- has

not been allowed to justify discrimination on the basis of sex. Similarly, customer preference would not be allowed to justify discrimination on the basis of sexual orientation under ENDA.

34. **Would this be the first law in the country to outlaw employment discrimination on the basis of sexual orientation? Are we breaking new ground with this law?**

No. Eight states currently have laws that prohibit employment discrimination on the basis of sexual orientation. Wisconsin, the first state to pass such a law, did so in 1982. The other states that have anti-discrimination laws on the basis of sexual orientation are: Massachusetts -- 1989; Connecticut -- 1991; Hawaii -- 1991; California -- 1992; New Jersey -- 1992; Vermont -- 1992; and Minnesota -- 1993.

There are also at least 110 cities that have laws, ordinances, or regulations prohibiting employment discrimination on the basis of sexual orientation. In addition, at least 31 counties in the United States have council or mayoral resolutions banning discrimination based on sexual orientation in public employment.

(SEE ATTACHED ONE-PAGERS.)

35. **If there are so many laws prohibiting employment discrimination on the basis of sexual orientation, why do we need this law?**

We need a federal law in order to ensure comprehensive and consistent protection against discrimination on the basis of sexual orientation in employment. Most states and localities do not provide any protection against such discrimination. Indeed, in some states, the ability even to pass such laws is being threatened by ballot initiatives that would make it illegal to prohibit discrimination on the basis of sexual orientation.

36. **What has been the experience in those states that have anti-discrimination laws? Have there been a flood of lawsuits?**

The eight states forbidding sexual orientation discrimination in employment have had relatively low numbers of complaints filed. For instance, in 1993, the peak year for such complaints, only 90 people filed employment discrimination complaints alleging sexual orientation discrimination with the state of Massachusetts. This category accounted for only 2% of all complaints filed with the Massachusetts Commission Against Discrimination. In Hawaii, 18 complaints have been filed since 1991, approximately 2% of their total employment discrimination complaints.

(SEE ATTACHED ONE-PAGER FOR FURTHER INFORMATION.)

37. **Would ENDA make existing state and local laws irrelevant?**

No. Just like every other federal civil rights law, ENDA maintains in place state and local laws that provide protection on the basis of sexual orientation. Thus, the federal law will operate together with state and local laws.

38. **If we keep adding categories of groups covered under federal civil rights laws, where will it stop?**

This is not a slippery slope. The basic principle currently governing employment in America is that private employers may fire, hire, and make other employment decisions as they wish. (The "employment-at-will" doctrine.) This freedom is constricted only if private employers choose to bind themselves otherwise by contract or if the state or federal government chooses to intervene.

Historically, state or federal governments have constricted employers' prerogatives only where there is a demonstrated problem of discrimination against a recognized group of people. Race, gender, national origin, religion, disability, age, and sexual orientation all fit this pattern. The addition of sexual orientation to the current list of protected characteristics does not mean every other characteristic held by a group of people will automatically receive protection as well, in a "slippery slope" fashion. Rather, the same demonstration of discrimination against a recognized class must be made by that group.

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