

# One Minute Memo<sup>®</sup>



## Employment Non-Discrimination Act Clears Initial Hurdle To Pave The Way For Congressional Vote

The Employment Non-Discrimination Act (ENDA) cleared a major hurdle yesterday. For the first time since the legislation was introduced in 1994, the U.S. Senate took an important step toward passing the Act by voting in favor of cloture—the only procedure by which the Senate can place a time limit on consideration of a bill or other matter to overcome a filibuster. Fifty-four Democrats voted for cloture, joined by seven Republicans including Kelly Ayotte (NH), Susan Collins (ME), Orrin Hatch (UT), Dean Heller (NV), Mark Kirk (IL), Rob Portman (OH) and Pat Toomey (PA).

The proposed text of ENDA would prohibit employers with 15 employees or more from discriminating against any individual based on that person's actual or perceived sexual orientation and/or gender identity with respect to employment decisions and other terms, conditions, and privileges of employment, or by limiting, segregating, or classifying them in a way that adversely affects them. It would also prohibit discrimination based on the perceived or actual sexual orientation or gender identity of a person with whom that person associates. ENDA would allow employers to continue to require an employee to adhere to otherwise lawful and reasonable dress and grooming standards consistent with the employee's sex at birth, so long as an employee who has notified their employer that they have undergone or are undergoing gender transition is allowed the opportunity to follow the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.

ENDA would not apply retroactively, and would not: (1) alter the definition of "marriage" under federal law for benefits purposes; (2) apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of Title VII; (3) allow preferential treatment, including quotas, based on sexual orientation or gender identity; (4) require employers to build new or additional facilities; (5) allow for a "disparate impact" claim available under Title VII of the Civil Rights Act of 1964; (6) allow the Equal Employment Opportunity Commission (EEOC) to compel employers to collect statistics on sexual orientation or gender identity.

The Senate is expected to take a final vote passing ENDA after additional testimony is filed, likely on Wednesday. However, ENDA's prospects of passing the GOP-controlled House of Representatives are less favorable. House Speaker John Boehner (R-OH) announced this week that he opposes the legislation.

### Implications For Employers

Regardless of whether ENDA is passed, employers should be aware that the federal trend favors protecting sexual orientation and gender identity in the workplace. Indeed, in *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (April 23, 2012), the Equal Employment Opportunity Commission (EEOC) held that transgender individuals may state a claim for sex discrimination under Title VII. The EEOC has also specifically identified lesbian, gay, bisexual and transgender employment protections as a priority in its 2012-2016 Strategic Enforcement Plan. In addition, 17 states and

the District of Columbia ban discrimination based on sexual orientation and gender identity/expression, four states ban discrimination based on sexual orientation alone, and at least 189 cities and counties ban employment discrimination on the basis of gender identity.

Increased protection for LGBT employees raises the stakes for employers by potentially creating new vulnerabilities ripe for charges and lawsuits, and employers would be wise to think proactively about their existing policies and practices. Employers should:

- Check for any applicable state and local discrimination laws that may already protect employees from discrimination or harassment based on sexual orientation and/or gender identity, and modify existing policies where necessary.
- Train (or re-train) managers, supervisors, and employees to explain any enacted changes to policies and/or reinforce the current state of the law.
- Emphasize the importance of the employer's internal complaint procedures and investigations for any alleged policy violations.
- Consider developing guidelines for managing workplace gender transitions, and train managers and human resources personnel on those guidelines.
- Review health insurance and other benefits, to consider whether changes must be made to disability and leave related policies, and/or to health insurance plan offerings.

Employers are well advised to stay abreast of the news this week regarding the progress of ENDA.

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