



Office of the General Counsel

B-277688

October 23, 1997

The Honorable James M. Jeffords
Chairman, Committee on Labor and Human Resources
United States Senate

Subject: Sexual-Orientation-Based Employment Discrimination:
States' Experience With Statutory Prohibitions

Dear Mr. Chairman:

Three federal statutes—title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act—together make it unlawful for an employer to discriminate against an employee on the basis of characteristics such as race, color, religion, sex, national origin, disability, and age. Eleven states and the District of Columbia¹ have enacted laws that prohibit discrimination in employment on the basis of sexual orientation.² As a principal sponsor of S. 869, the Employment Non-Discrimination Act of 1997 (ENDA), a bill that would make such discrimination a violation of federal law, you asked us to study these states' laws and report on the states' experiences with enforcing them. Specifically, you asked us to (1) examine the characteristics, coverage, and exclusions of the laws, including how they compare with provisions of ENDA, and (2) gather information concerning the number of complaints filed with the states.

To respond to your request, we reviewed ENDA and the laws in the 12 states as well as reports of decisions in court cases brought under those laws. We reviewed the literature for studies or surveys involving protection against

¹Except where otherwise specified, we use the word "state" throughout this correspondence to refer to the District of Columbia as well as to the 11 states.

²A referendum on the ballot for the November election in the state of Washington would, if enacted, create a thirteenth state law prohibiting employment discrimination on the basis of sexual orientation.

discrimination in employment on the basis of sexual orientation. To get information about each state's enforcement experience, we contacted the office in the state charged with enforcing the prohibition against discrimination in employment. Specifically, we collected readily available data from each state on the numbers of employment discrimination complaints filed, and the proportion of those complaints involving sexual orientation, for recent fiscal years. All data are as reported by the state agency; we did not verify these data. We conducted our review between July and October 1997 in accordance with generally accepted government auditing standards.

In summary, although the state laws differ in some respects, they generally share a number of features with one another and with ENDA. For example, almost all states and ENDA define "sexual orientation" to mean homosexuality, heterosexuality, and bisexuality, and provide that the term includes both actual and perceived sexual orientation. All the state laws and ENDA cover employees in both the public and private sectors and, except for one state, exempt religious organizations; many of the states and ENDA exempt some nonprofit organizations as well. All the state laws and ENDA vest an administrative agency with at least partial enforcement authority; typically, the courts play a role also. All of the state laws and ENDA also provide for protection of employees against retaliation. Finally, these laws and ENDA establish a range of remedies for unlawful discrimination, which may include civil penalties imposed on the employer and back pay awards and punitive damages for the employee.

For those states where the law has taken effect (two states' statutes are not yet in operation), relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints in the state. Moreover, the state statistics generally do not show any trend in the volume of employment discrimination cases based on sexual orientation over the periods we examined. We also found no indication that these laws have generated a significant amount of litigation.

SIGNIFICANT FEATURES OF STATE LAWS PROHIBITING EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

ENDA and most state laws that protect against employment discrimination on the basis of sexual orientation do so in ways that differ in detail but that generally address the same basic issues. ENDA and the states, with one exception, have a definition of "sexual orientation" that establishes the general scope of protection. The state laws and ENDA also contain features that fall

generally within one of three categories: coverage, enforcement and evidence, and remedies. The coverage category includes whether employers below a certain size are exempt and whether certain kinds of organizations, such as religious groups or nonprofit entities, are covered. (Table I.1 compares coverage under ENDA and the various state laws.) In the category of enforcement and evidence, the laws cover such matters as the powers of the state enforcement agency and whether the complainant can bring suit without first having given the agency the opportunity to resolve the complaint. (Table I.2 compares selected provisions of state laws and ENDA related to enforcement and evidence.) Finally, the remedies that may be available under the various state laws or ENDA may include awards of back pay or other compensation for the victim of discrimination. (Table I.3 compares remedies under state laws and ENDA.)

Regarding the state laws and ENDA, the information in this letter is an overview. The laws are complex and are interwoven with other state nondiscrimination laws. We discussed some of their features with state officials and have noted some exceptions and conditions, but we have not attempted to describe either the laws or ENDA exhaustively. Moreover, although ENDA and the state laws apply to both private and public sector employers, this letter focuses on the application of these provisions to employers in the private sector.

Definitions of "Sexual Orientation"

The definition of sexual orientation in the laws establishes the basis for the protection they provide. In the 11 states that have definitions,³ all but one provide in some form that sexual orientation means heterosexuality, homosexuality, or bisexuality.⁴ Except for Vermont and the District of Columbia, all the definitions include people who, whether or not they actually fall within one of those three categories, are perceived by others to be in that category or are identified with that category. An effect of this is to prohibit

³California does not have such a definition, but California law has one element in common with the definitions in other states: It makes discrimination on the basis of sexual orientation unlawful, regardless of whether the sexual orientation is actual or perceived.

⁴Minnesota defines sexual orientation in part as involving an "emotional, physical, or sexual attachment to another person without regard to the sex of that person," or a "self-image or identity not traditionally associated with biological maleness or femaleness."

B-277688

discrimination not only against an employee who is homosexual, for example, but also against an employee who the employer wrongly believes is homosexual.

Two of the state laws (Massachusetts and Minnesota) explicitly say, in connection with the definition of sexual orientation, that the protection of the law does not extend to pedophiles. Some state laws that do not have an explicit limitation of that kind have provisions that may have the same effect; they provide, for example, that the state prohibition against employment discrimination on the basis of sexual orientation does not protect conduct that is otherwise unlawful under state law. In addition, some state laws provide that the definition describes the status of certain persons but does not constitute legislative approval of that status.

ENDA uses the same terminology—heterosexuality, homosexuality, bisexuality—in its definition as do most of the state laws and, like most of those laws, bars discrimination on the basis of either real or perceived sexual orientation. In addition, ENDA bars discrimination on the basis of not only the sexual orientation of the employee but also the sexual orientation of anyone with whom the employee has associated or is believed to have associated. (Table I.4 lists the definitions of sexual orientation in ENDA and the state laws.)

Coverage

Size of Employer

Under the state laws, as is also the case under the existing federal laws and ENDA, the size of the employer is a factor in determining coverage. State nondiscrimination laws set a minimum number of employees, and employers with fewer employees than this threshold are not covered. Generally, the state laws set the minimum lower, and thus cover more small businesses, than their federal counterparts. Seven states include, in effect, all employers regardless of size. In the other five states, the minimum number of employees that triggers coverage ranges from as few as three to as many as six. ENDA would cover employers with 15 or more employees, as do title VII of the Civil Rights Act and the Americans With Disabilities Act.

Nature of Employers' Business or Activity

The nature of the work is a factor in determining coverage in all states. Various types of organizations may be expressly subject to the law or exempt on the basis of the nature of their business or activities. All 12 states cover not

only private employers but also the state itself, its agencies, and its political subdivisions. ENDA also would cover private and public employers; its public coverage includes the federal government⁵ and the states.

An exemption for religious organizations exists in all the states. Although the state exemptions vary, they generally permit religious organizations to give preference to those of the same religion, or to people whose employment is in accord with the tenets of their religions. ENDA would also generally exempt religious organizations. Under ENDA, employment by a religious organization would be covered only if the duties of the employee's position pertain solely to an activity of the organization that generates business taxable income unrelated to its religious activities. In addition, the exemption in ENDA for employers with fewer than 15 employees would apply to religious organizations that might otherwise be covered.

Most states have an exemption for nonprofit organizations, although the scope of the exemption varies among the states. The corresponding provision in ENDA exempts any "bona fide private membership club (other than a labor organization)" that is exempt from federal income taxation. However, the exemption in ENDA for employers with fewer than 15 employees (and the exclusion of uncompensated volunteers, discussed in the following section) would likely result in the exemption of additional small nonprofit organizations.

ENDA exempts the military with respect to members of the armed forces. (Civilian employees of the military departments would be covered.) This provision has no counterpart in state laws.⁶

⁵ENDA would cover federal employees generally, including employees of the Congress and presidential appointees. With respect to public sector employees, the enforcement procedures and remedies under ENDA vary depending on the type of employer and employee. In this letter, the references to ENDA, unless otherwise noted, describe its application to employees in the private sector.

⁶Connecticut law exempts the conduct and administration of a Reserve Officers Training Corps (ROTC) program at an institution of higher education. However, the ROTC program, as the Connecticut statute acknowledges, is conducted under authority of federal law. It is therefore not clear that state law could have any effect on the ROTC program even without the exemption.

Other Conditions

Certain kinds of work and certain classes of workers are exempt from coverage under the state laws. Although only one state law explicitly exempts volunteers from coverage under the sexual orientation protection, a number of the state laws have the effect of doing so, for example by defining "employee" to include only those who receive compensation. ENDA explicitly exempts uncompensated volunteers.

Another exemption based on the nature of the work exists in the states which exempt domestic workers from protection. ENDA does not have the same specific exemption, but, in many instances, the 15-employee minimum set by ENDA would presumably have much the same effect: A person who employs as many as 14 domestic workers would be exempt from coverage under ENDA.

In some states, the nondiscrimination law does not apply when there is a close family relationship between the employer and the employee. The definition of such a relationship differs among the states, but typically the laws exempt people employed by a parent, a spouse, or a child. ENDA has no corresponding provision, but here, too, the 15-employee minimum would have the same effect as these state exemptions on small family businesses.

Enforcement and Evidence

Enforcement Mechanisms

Procedures for filing and pursuing complaints and for enforcement of the law vary among the state laws, but certain basic elements are common to all or most of the laws. All the state laws designate an agency or department to handle complaints of discrimination⁷ but the agencies' roles differ. Some states make an administrative agency the only forum for seeking relief; private lawsuits for employment discrimination are not authorized. Other states let the employee choose between a complaint to the administrative agency or a lawsuit. A third group of states requires that the complainant first seek relief from the administrative agency and wait either for a specified period or until the agency reaches a decision before bringing suit; if the issue is not resolved

⁷Generally this authority is vested in a state labor or human rights commission or department. In Vermont, however, the Attorney General enforces the law in the private sector.

B-277688

at the agency level, the agency generally issues a "right-to-sue" letter to the complainant.

ENDA provides that the enforcement procedure would be the same as that now followed for complaints of employment discrimination prohibited by title VII of the Civil Rights Act of 1964. That procedure has been described as "elaborate and intricate," but it is most analogous to those state procedures under which the complainant must bring the complaint to an administrative agency before being allowed to sue. In general, under ENDA, complaints of discrimination in the private sector or against the states would go to the Equal Employment Opportunity Commission (EEOC). However, if the complaint is from a state that prohibits the same kind of discrimination alleged and that has a state agency that EEOC has determined can adequately address the issue, EEOC will defer to the state. EEOC's role, if it takes the case, is to investigate and attempt to negotiate a conciliation agreement. A complainant may go to court if EEOC dismisses the charge, does not itself choose to initiate an enforcement action in court, or fails to achieve a conciliation agreement acceptable to the complainant.

Protection of Complainant

All states prohibit retaliation against individuals who file complaints or help in investigations; most states also specifically prohibit using coercion against such people. ENDA also expressly prohibits both retaliation and coercion.

Disparate Impact

A claim of civil rights violation because of disparate impact is one in which the employer's practice is neutral on its face—that is, it does not explicitly distinguish between employees based on prohibited classifications like sex or race—but statistical evidence shows that the practice has that effect. For example, the Supreme Court found disparate impact when a state corrections agency adopted height and weight standards for prison guards that were shown to have the effect of excluding 40 percent of women but only 1 percent of men.

The existence of disparate impact is said to establish a prima facie case of discrimination. This does not prove unlawful discrimination; it simply means that the employee has met the initial burden of proof to show that discrimination may exist and that the burden now shifts to the employer to show that the practice complained of is not unlawfully discriminatory. For example, under title VII of the Civil Rights Act of 1964, even if the complainant establishes disparate impact, there is no violation if the employer shows that

B-277688

the challenged practice is job-related for the position and is consistent with business necessity.

Most state laws are silent concerning disparate impact, in effect leaving it to the courts to determine how to deal with disparate impact claims. Two states explicitly authorize the use of disparate impact evidence. ENDA provides that evidence of disparate impact of a business practice on sexual orientation does not establish a prima facie violation of title VII of the Civil Rights Act.

Collection of Statistics

ENDA prohibits EEOC from collecting statistics on sexual orientation from employers or from compelling the collection of such statistics. This provision generally has no counterpart in the state laws.

Remedies

Back Pay

Back pay is one among a range of remedies that may be available to victims of discrimination.⁸ All the states authorize back pay awards. However, the procedure for this and other remedies differs among the states depending on how their programs are structured. In 10 states, the enforcement agency can order back pay and other remedies. In the other two, it is the courts that are empowered to order remedies for the victims of discrimination. ENDA follows the latter pattern: EEOC cannot order remedies but can bring suit itself, on behalf of the victim and others, and can ask the court to order back pay.

Punitive Damages

Eight states expressly authorize punitive damages. Under ENDA, the victim of intentional employment discrimination on the basis of sexual orientation could recover punitive damages if the defendant acted with malice or with reckless indifference to the complainant's rights.

⁸Other remedies that may be available are hiring or reinstatement; actual damages sustained (the states vary on whether damages for pain and suffering may be awarded); and "front pay," which is reimbursement of an employee for losses caused by an unjustifiable discharge or denial of promotion when the employee cannot be reinstated or promoted immediately because no opening is available.

Civil Penalties

The state laws are mixed regarding their use of authority to impose civil penalties against an employer who violates a nondiscrimination statute. Six authorize civil penalties, ranging from \$1,000 to \$100,000; the other six do not authorize such penalties. ENDA does not provide for civil penalties.

Attorneys' Fees

State officials in all but two states told us that their laws permit the recovery of attorneys' fees. Of those two, one prohibits the award of attorneys' fees; the other state's law is not yet in effect and is silent on this point. ENDA authorizes a reasonable attorney's fee to be awarded to the prevailing party (unless the prevailing party is the United States).

Preferential Treatment

Five states expressly prohibit the use of quotas or other preferential treatment as remedies for sexual orientation discrimination; only one expressly authorizes preferential treatment under certain circumstances, subject to the approval of the enforcement agency. Six other states are silent concerning these remedies.

Under ENDA, employers may not adopt or implement quotas, or give preferential treatment to individuals, on the basis of sexual orientation, nor may EEOC enter into consent decrees that provide for quotas or preferential treatment. This is an exception to the general provision of ENDA that the same procedures and remedies applicable to a violation of title VII of the Civil Rights Act of 1964 are applicable to claims under ENDA; the Civil Rights Act, under certain conditions, permits employers voluntarily to adopt race- or gender-based preferences.

Other Features of State Law and ENDA

ENDA and some of the state laws provide that the prohibition of discrimination on the basis of sexual orientation does not apply to the provision of benefits for an employee's partner. The effect of this provision is to maintain neutrality with respect to partner benefits: It is left to other statutes or to the courts to determine whether or not such benefits are authorized or required.

At least two features of ENDA have no counterpart in the state statutes: ENDA explicitly permits a covered employer to enforce "rules regarding nonprivate sexual conduct, if the rules of conduct are designed for, and uniformly applied

B-277688

to, all individuals regardless of sexual orientation." This permits employers to adopt rules of conduct for the work place; as long as the rules apply to all employees uniformly, they will not be considered to be unlawfully discriminatory. Another unique feature of ENDA is a section providing that the law would not affect any veterans' preference in employment granted under federal, state, local, or territorial law.

RELATIVELY FEW COMPLAINTS HAVE FOLLOWED ENACTMENT OF STATE SEXUAL ORIENTATION PROTECTION LAWS

We found that, in those states with a law making it illegal to discriminate in employment on the basis of sexual orientation, relatively few complaints of such discrimination have been made. The statistics do not show any trend in the number of complaints over time. The number of court cases brought under those laws has also been small.

Few Complaints of Sexual Orientation Discrimination in Employment Filed

In the 12 states that have enacted statutes prohibiting discrimination in employment on the basis of sexual orientation, 10 are in effect. (The laws in Maine and New Hampshire have not yet been implemented.) The earliest, in the District of Columbia, took effect in 1977. Seven others were implemented between 1982 and 1993. The most recent to take effect was Rhode Island's, in 1995.

Overall, the states' data showed that relatively few complaints of discrimination in employment on the basis of sexual orientation were filed annually, whether measured in absolute numbers or as a percentage of all employment discrimination complaints. Also, our analyses of the data obtained from the states generally did not show any trends in the number of these complaints over time, nor was there evidence of large numbers of complaints immediately after the implementation of the sexual orientation statutes.

Detailed information on the state laws' effective dates and numbers of complaints by fiscal year for the 10 states with complaint experience is shown in table 1. The latest fiscal years for which complete data were available are shown for each state.

Table 1: Data on States' Experience With Sexual Orientation Employment Discrimination Complaints

| Fiscal year | Total employment discrimination cases | Sexual orientation employment discrimination cases ^a | Sexual orientation cases as a percentage of total employment discrimination cases |
|---|---------------------------------------|---|---|
| California ^b (law effective 1993) | | | |
| 1993 | 13,362 | 159 | 1.2 |
| 1994 | 15,730 | 159 | 1.0 |
| 1995 | 16,206 | 161 | 1.0 |
| 1996 | 17,164 | 173 | 1.0 |
| Connecticut ^c (law effective 1991) | | | |
| 1993 | 2,035 | 20 | 1.0 |
| 1994 | 2,404 | 32 | 1.3 |
| 1995 | 2,668 | 23 | 0.9 |
| 1996 | 2,262 | 44 | 1.9 |
| 1997 | 2,355 | 41 | 1.7 |
| District of Columbia (law effective 1977) | | | |
| 1992 | 214 | 7 | 3.3 |
| 1993 | 304 | 9 | 3.0 |
| 1994 | 344 | 3 | 0.9 |
| 1995 | 337 | 8 | 2.4 |
| 1996 | 230 | 7 | 3.0 |
| Hawaii (law effective 1991) | | | |
| 1992 | 555 | 12 | 2.2 |
| 1993 | 364 | 6 | 1.6 |

B-277688

| | | | |
|---|-------|-----|-----|
| 1994 | 367 | 13 | 3.5 |
| 1995 | 396 | 15 | 3.8 |
| 1996 | 415 | 11 | 2.7 |
| Massachusetts ^d (law effective 1989) | | | |
| 1990 | 3,232 | 37 | 1.1 |
| 1991 | 3,496 | 71 | 2.0 |
| 1992 | 3,225 | 62 | 1.9 |
| 1993 | 4,372 | 115 | 2.6 |
| 1994 | 4,592 | 121 | 2.6 |
| 1995 | 5,144 | 124 | 2.4 |
| 1996 | 4,990 | 132 | 2.6 |
| Minnesota (law effective 1993) | | | |
| 1995 | 886 | 34 | 3.8 |
| 1996 | 980 | 24 | 2.4 |
| New Jersey (law effective 1992) | | | |
| 1992 | 2,712 | 17 | 0.6 |
| 1993 | 2,159 | 20 | 0.9 |
| 1994 | 1,919 | 25 | 1.3 |
| 1995 | 2,127 | 30 | 1.4 |
| 1996 | 1,277 | 20 | 1.6 |
| 1997 ^e | 1,650 | 30 | 1.8 |
| Rhode Island (law effective 1995) | | | |
| 1995 | f | f | f |
| 1996 | 317 | 2 | 0.6 |
| 1997 | 449 | 14 | 3.1 |
| Vermont (law effective 1991) | | | |

| | | | |
|--------------------------------|-------|----|-----|
| 1993 | 139 | 4 | 2.9 |
| 1994 | 136 | 5 | 3.7 |
| 1995 | 152 | 2 | 1.3 |
| 1996 | 129 | 2 | 1.6 |
| 1997 | 115 | 6 | 5.2 |
| Wisconsin (law effective 1982) | | | |
| 1996 ^g | 3,653 | 43 | 1.2 |
| 1997 | 5,209 | 54 | 1.0 |

^aGenerally, a complainant can allege other bases—sex, race, or religion, for example—in a complaint that also alleges employment discrimination on the basis of sexual orientation. In this table, a case is counted as a sexual orientation case whether or not other bases are also alleged in the same complaint.

^bData on the number of employment discrimination cases filed are from the Department of Fair Employment and Housing, which keeps records on the basis of the state's July-June fiscal year. Data on the number of sexual orientation cases are from the Department of Labor Standards Enforcement, which keeps records on a calendar-year basis.

^cConnecticut did not have data on the number of employment sexual orientation cases, but estimated that approximately 90 percent of the total sexual orientation cases involved employment.

^dMassachusetts did not have data on the number of employment sexual orientation cases, but estimated conservatively that 85 percent of the total sexual orientation cases involved employment.

^eNew Jersey officials had not compiled actual numbers for fiscal year 1997 but estimated that 1,650 employment discrimination cases would be filed.

^fThe law was in effect for only 5 weeks in fiscal year 1995, and no cases were recorded during that time.

^gData were not readily available for earlier fiscal years.

As shown in table 1, the states' percentages of employment discrimination complaints on the basis of sexual orientation relative to the total number of employment discrimination cases generally ranged from approximately 1 percent to 3 percent a year. Only in certain years in the District of Columbia, Hawaii, Minnesota, Rhode Island, and Vermont did cases of discrimination in employment on the basis of sexual orientation exceed 3 percent of total employment discrimination cases. In compiling the multiyear averages of the states with data for more than 2 years, we noted that, on average, the percentage of total employment discrimination cases that involved sexual orientation as the basis for the claimed discrimination ranged from about 1.0 percent in California during 4 fiscal years to about 2.8 percent in Vermont during 5 fiscal years.

We examined the state data to determine whether any trends in the numbers and percentages of sexual orientation employment discrimination complaints filed were evident. We found that only in New Jersey was any trend apparent. In that state, the data showed that the percentage of sexual orientation cases, as a proportion of total employment discrimination cases, had increased slightly every fiscal year, from 0.6 percent of cases in 1992 to 1.6 percent of the cases in 1996. New Jersey officials believe that for fiscal year 1997 this percentage may increase to 1.8 percent if the estimate on the total number of employment discrimination cases holds true. At the same time, the actual number of sexual orientation cases increased in every fiscal year since 1992, except 1995. Even with the increases in New Jersey, the percentage remains consistent with the relatively low level we found in all the states.

In looking at the data for California, complaints of employment discrimination on the basis of sexual orientation were 1.0 percent of total employment discrimination complaints filed during the period 1994 through 1996, a decrease from 1.2 percent in 1992. Data for 1997 were not yet complete. As shown for the other states that provided more than 2 years of information, no trends were evident.

Little Evidence of Litigation Under State Laws on Sexual Orientation

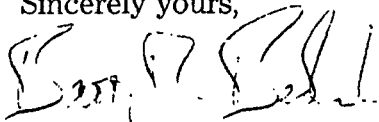
In a search of standard sources for the 12 states, we found few decisions by the courts under the states' laws prohibiting discrimination in employment on the basis of sexual orientation. Of those decisions, a number involved only procedural issues, such as whether a complainant must first take the complaint to an administrative agency before bringing suit or how the applicable statute of limitations operates.

B-277688

It is not possible to conclude definitively that, because we found few substantive decisions arising under these laws, the volume of litigation in the states is small, but that seems likely. Lawsuits may have been brought that did not result in reported decisions and that we were therefore unable to identify.⁹ However, considering that, as discussed, relatively few complaints have been filed and that in a number of the states a suit is not permitted unless a complaint has first been filed, it seems probable that there have also been relatively few lawsuits.

- - - - -
If you have any questions about this letter, please contact me on (202) 512-8203. Major contributors included Larry Horinko, Assistant Director, and Susan A. Poling, Assistant General Counsel.

Sincerely yours,



Barry R. Bedrick
Associate General Counsel

Enclosure

⁹For example, a case may be settled by the parties before reaching the decision stage, or the court, without written explanation, may grant an injunction sought by the employee against some practice of the employer; in either situation, because there is no decision, the case would not appear in the databases we used.

SPECIFIC ELEMENTS OF ENDA AND STATE STATUTES

Table I.1: Comparison of Selected Coverage Features of ENDA and State Statutes
 S. 869, Employment Non-Discrimination Act of 1997 (ENDA)/State employment nondiscrimination statutes

| Feature | ENDA | Calif. | Conn. | Hawaii | Maine | Mass. | Minn. | N.H. | N.J. | R.I. | Vt. | Wis. | D.C. |
|--|---------|------------|----------------------------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|----------------------|
| Minimum no. of employees for coverage | 15 | 5 | 3 | 1 | 1 | 6 | 1 | 1 | 6 | 1 | 4 | 1 | 1 |
| Public and private sector employers ^a | Covered | Covered | Covered | Covered | Covered | Covered | Covered | Covered | Covered | Covered | Covered | Covered | Covered |
| Religious organizations ^b | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt |
| Nonprofit organizations ^c | Exempt | Exempt | Covered | Exempt | Exempt | Exempt | Exempt | Exempt | Covered | Exempt | Exempt | Exempt | Covered ^d |
| Armed forces | Exempt | Law silent | ROTC program ^e exempt | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent |

^a"Public sector," with reference to ENDA, means the federal and state governments; ENDA covers both. With reference to the states, it means the government of each state.

^bAlthough, as this indicates, all state laws and ENDA have a religious exemption, the scope of these exemptions varies; for example, one version exempts religious associations, without qualification; another provides that a religious organization may select employees in a manner "calculated by such organization to promote" its religious principles.

^cThe scope of these exemptions in the states and in ENDA varies. One version is limited to fraternal or social organizations hiring one of their members; another exempts any nonprofit social, fraternal, charitable, or educational organization.

ENCLOSURE

ENCLOSURE

^dThis exemption applies only to political organizations giving preference to people "of the same . . . political persuasion."

^eThe Reserve Officers' Training Corps program at colleges and universities is created by federal law.

Table 1. 2: Comparison of Selected Enforcement and Evidence Features of ENDA and State Statutes

| S. 869, Employment Non-Discrimination Act of 1997 (ENDA)/State employment nondiscrimination statutes | | | | | | | | | | | | | |
|--|-----------------|------------|------------|------------|------------|-----------------|------------|------------|------------|------------|------------|------------|------------|
| Feature | ENDA | Calif. | Conn. | Hawaii | Maine | Mass. | Minn. | N.H. | N.J. | R.I. | Vt. | Wis. | D.C. |
| Agency may investigate | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Agency may order compliance | No ^a | Yes | Yes | Yes | No | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Complainant may sue in court ^b | Yes | Yes | No | Yes | Yes | Yes | Yes | No | Yes | Yes | Yes | No | Yes |
| Collection of sexual orientation statistics prohibited | Yes | Law silent | Law silent | Law silent | Law silent | No ^c | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent | Law silent |
| Disparate impact evidence prohibited ^d | Yes | Law silent | Law silent | Law silent | Law silent | Law silent | No | Law silent | Law silent | No | Law silent | Law silent | Law silent |
| Retaliation against complainant prohibited | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

^aIf the Equal Employment Opportunity Commission finds reasonable cause to believe that the charge of discrimination is true, it can either permit the complainant to bring a private cause of action or can bring suit itself.

^bStates in which the complainant has to file first with the state enforcement agency are listed as "Yes" if the complainant can later file a lawsuit in court.

^cCollection of statistics is authorized when ordered by the state enforcement agency.

^d"Disparate impact" refers to statistical evidence that an apparently neutral policy of the employer has the effect of discriminating against employees. In some states where the law is silent, courts have interpreted state law to permit disparate impact analysis.

Table 1.3: Comparison of Selected Remedy Features of ENDA and State Statutes

| S. 869, Employment Non-Discrimination Act of 1997 (ENDA)/State employment nondiscrimination statutes | | | | | | | | | | | | | |
|--|------|--------|-------|------------|------------|-------|-------|------------|------|------------|------------|------------|-----------------|
| Feature | ENDA | Calif. | Conn. | Hawaii | Maine | Mass. | Minn. | N.H. | N.J. | R.I. | Vt. | Wis. | D.C. |
| Civil penalties ^a authorized | No | No | No | No | Yes | No | Yes | Yes | Yes | No | Yes | No | Yes |
| Back pay awards authorized ^b | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Punitive damages ^c authorized | Yes | No | No | Yes | Yes | Yes | Yes | No | Yes | Yes | Yes | No | Yes |
| Attorneys' fees authorized | Yes | Yes | No | Yes | Law silent | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Quotas or preferential treatment expressly prohibited | Yes | Yes | Yes | Law silent | Law silent | Yes | Yes | Law silent | Yes | Law silent | Law silent | Law silent | No ^d |

^aFines assessed against a violator, payable to the government.

^bIn some states, these awards can be made by the agency or department administering the law; in others and under ENDA, they can only be made by the courts. The length of time for which back pay can be awarded is limited under some laws.

^cPayments to the victim, intended to punish the violator.

^dMust be approved by the enforcement agency.

Table I.4 Definitions of Sexual Orientation in ENDA and State Statutes

| Bill/state law | Definition |
|----------------|--|
| ENDA | "Homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived." |
| California | No definition, but the law applies specifically to both "actual or perceived" sexual orientation. |
| Connecticut | "Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference," but excluding "any behavior which constitutes a violation" of state criminal laws regarding offenses such as sexual assault, rape, and prostitution. |
| Hawaii | "Having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences," provided that sexual orientation "shall not be construed to protect conduct otherwise proscribed by law." |
| Maine | "Having a preference for heterosexuality, homosexuality, or bisexuality, having a history of that preference or being identified with that preference." |
| Massachusetts | "Having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality," but not including persons "whose sexual orientation involves minor children as the sex object." |
| Minnesota | "Having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness," but not including "a physical or sexual attachment to children by an adult." |

| | |
|----------------------|---|
| New Hampshire | "Having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality," provided that the definition "is intended to describe the status of persons and does not render lawful any conduct prohibited by the [state's] criminal laws" or "confer legislative approval of such status." |
| New Jersey | "Affectional or sexual orientation means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." ^a |
| Rhode Island | "Having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality," provided that the definition "is intended to describe the status of persons and does not render lawful any conduct prohibited by the [state's] criminal laws" or "confer legislative approval of such status." |
| Vermont | "Female or male homosexuality, heterosexuality, or bisexuality," provided that the law "shall not be construed to protect conduct otherwise proscribed by law." |
| Wisconsin | "Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference, or being identified with such a preference." |
| District of Columbia | "Male or female homosexuality, heterosexuality and bisexuality, by preference or practice." |

^aNew Jersey defines heterosexuality, homosexuality, and bisexuality as "affectional, emotional or physical attraction or behavior which is primarily directed towards persons of," respectively, the other gender, the same gender, or both genders.

^bConnecticut's law also provides that nothing in it condones homosexuality or bisexuality; authorizes promotion of either, or requires the teaching of either, as acceptable lifestyles; authorizes the recognition or right of same-sex marriages; or establishes sexual orientation as a "specific and separate cultural classification."

(996223)