

QUESTIONS AND ANSWERS ABOUT THE EMPLOYMENT NON-DISCRIMINATION ACT

This backgrounder provides information about current versions of the Employment Non-Discrimination Act (ENDA), a federal bill that would make it unlawful for employers to make decisions about hiring, firing, compensation, or other terms or conditions of employment based on actual or perceived “sexual orientation” or “gender identity.”

This backgrounder is intended to be read in the context of the Church’s teaching about the rights of workers, a teaching grounded in the meaning and truth of the dignity of the human person. All people are created in the image and likeness of God and therefore possess an inviolable dignity. Furthermore, “work,” as Pope Francis recently said, “is fundamental to that dignity.” It follows that no one should be deprived of the opportunity to work. The Catholic Church has consistently stood with workers in this country and continues to oppose unjust discrimination in the workplace. As explained below, however, ENDA does not represent an authentic step forward in the pursuit of justice in the workplace, and the United States Conference of Catholic Bishops (USCCB) therefore opposes ENDA.

1. How does ENDA define “sexual orientation”?

ENDA defines “sexual orientation” as “homosexuality, heterosexuality, or bisexuality.” The bill does not distinguish, however, between sexual *inclination* and sexual *conduct*. When a non-discrimination statute fails explicitly to make that distinction, courts have construed a term such as “homosexuality” to protect both same-sex attraction and same-sex sexual conduct. We are not aware of any claim that ENDA would *not* apply to sexual conduct, and there is little question that efforts explicitly to exclude conduct would elicit strong resistance from ENDA’s proponents.

2. How does ENDA define “gender identity”?

ENDA defines “gender identity” as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.” The special protections of ENDA would apply, for example, to a man because he dresses like (or simply “identifies” as) a woman; to a woman because she dresses like (or simply “identifies” as) a man; or to a person because he or she is undergoing or has undergone a sex-change operation.

3. Does ENDA apply to everyone?

Federal law has two provisions that protect certain religious employers from Title VII’s ban on religious discrimination. ENDA states that it does not apply to *those* religious employers. However, questions have arisen recently, and federal courts have reached different conclusions, about *which* religious employers qualify for this protection. As a result, there is greater doubt

and concern today about which religious employers would be exempted from ENDA under the Title VII exemption.

ENDA covers all other employers except for those with fewer than fifteen employees. *See also* Q. 9, below. ENDA permits no exception in situations where “gender identity” or “sexual orientation” is a “bona fide occupational qualification” (BFOQ)—that is, where an employment decision based on these characteristics is reasonably necessary to the employer’s ordinary operation.¹ With the exception of race, all of the other prohibitions against employment discrimination within Title VII—including religion, sex, and national origin—are subject to a BFOQ exception.

4. Does ENDA apply to employee fringe benefits?

Yes. ENDA would regulate decisions not only over whether to hire or fire, but also over compensation, terms, conditions, and privileges of employment. Therefore, ENDA would likely require an employer to provide health coverage to the employee’s same-sex “spouse,” and other fringe benefits, on the same basis as the employer provides spousal benefits to other legally married employees—even if the employer regarded all or some of these actions as facilitating or cooperating with same-sex sexual relationships contrary to the employer’s religious or moral convictions.

5. Does ENDA’s treatment of “sexual orientation” pose any problem?

Yes. On October 31, relevant committee chairs of the USCCB sent a letter to members of the U.S. Senate outlining some of the problems arising from ENDA’s definition and treatment of “sexual orientation.”² First, ENDA makes no distinction between sexual conduct and sexual inclination. Second, the bill has no exception for those cases where it is neither unjust nor inappropriate to consider a job applicant’s or an employee’s sexual inclination.³ Third, the bill has only a limited religious exemption, which applies only to some (not all) religious organizations. Fourth, statutory protection on the basis of sexual orientation has been a basis for court rulings that require the redefinition of marriage to include two persons of the same sex.

¹ For example, a prison housing female inmates can lawfully insist on hiring only female correctional officers if gender is a BFOQ reasonably necessary to accommodate the privacy of the inmates. *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998). ENDA has no similar exception.

² The letter is available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/joint-letter-senate-enda-2013-10-31.pdf>

³ That sexual inclination may be relevant to some employment positions is expressed in longstanding guidance from the Congregation for the Doctrine of the Faith. *See* “Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons,” ¶ 11 (1992), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19920724_homosexual-persons_en.html.

6. Why is the absence of a distinction between same-sex sexual conduct and same-sex attraction in ENDA problematic?

While the Church is opposed to unjust discrimination on any grounds, including those related to same-sex attraction, she teaches that all sexual acts outside of the marriage of one man and one woman are morally wrong and do not serve the good of the person or society. Same-sex sexual conduct, moreover, is categorically closed to the transmission of life and does not reflect or respect the sexual difference and complementarity of man and woman. Therefore, opposition to same-sex sexual conduct by the Church (and others) is not unjust discrimination and should not be treated as such by the law. In contrast to sexual conduct between a man and woman in marriage, sexual conduct outside of marriage, including same-sex sexual conduct, has no claim to any special protection by the state. Therefore, although ENDA may forbid some unjust discrimination, it would also forbid as discrimination what is legitimate, moral disapproval of same-sex conduct.

7. How might ENDA be used to redefine marriage?

Some courts have already relied on state law prohibiting workplace discrimination on the basis of “sexual orientation” (so-called “state-ENDAs”) as part of the basis for creating a state constitutional right to same-sex “marriage.” For example, the highest courts of California, Connecticut, and Iowa, relying in part on the existence of ENDA-like laws in their respective states, have declared that the definition of marriage as the union of one man and one woman is “discriminatory” or lacks any “rational basis.” Indeed, these rulings reflect a legal strategy that “gay rights” advocates have repeatedly and publicly explained in scholarly articles and other media—first, secure the passage of “sexual orientation” antidiscrimination laws, such as ENDA, and then invoke the principle embedded within those laws as a basis for same-sex “marriage.” Particularly in the wake of the U.S. Supreme Court’s recent decision (*United States v. Windsor*) which struck down the definition of marriage in the federal Defense of Marriage Act, and which has already triggered numerous additional federal constitutional challenges to the definition of marriage, the virtual certainty that ENDA would be invoked for similar purposes poses an especially great concern.

8. Does ENDA’s treatment of “gender identity” pose any problem?

Yes. First, ENDA’s treatment of “gender identity” would lend the force of law to a tendency to view “gender” as nothing more than a social construct or psychosocial reality that can be chosen at variance from one’s biological sex. Second, ENDA’s treatment of “gender identity” would adversely affect the privacy and associational rights of others. In this respect, ENDA would require workplace rules that violate the legitimate privacy expectations of other employees. For example, “gender identity” could be construed to allow a biological male to use the women’s restroom or locker room in the workplace because the male identifies as female. Third, ENDA would make it far more difficult for organizations and employees with moral and religious

convictions about the importance of sexual difference, and the biological basis of sexual identity, to speak and act on those beliefs. As the Church is concerned for the well-being of all persons, she also extends her pastoral care to those who struggle with questions concerning their sexual identity, or other aspects of their sexuality.

9. Does ENDA threaten religious liberty?

Yes. Except for a relatively narrow subset of religious employers, ENDA provides no religious liberty protection of any kind for any stakeholder. Thus, for-profit employers, nonprofit employers having no religious affiliation, solely-owned and closely-held businesses, and even some religious employers would be subject to ENDA, even if they have a religious or moral objection to same-sex sexual behavior, or to the provision of fringe benefits to persons based on their having a sexual relationship with their employees outside of a marriage between a man and a woman. In addition, ENDA does not protect the speech or religious convictions of employers and co-workers on matters of sexual ethics and sexual identity.

10. Is religiously-based opposition to ENDA merely a pretext for animus toward persons with same-sex attractions or who act on those attractions?

Absolutely not. The Church is clear that persons with same-sex attraction “must be accepted with respect, compassion, and sensitivity....”⁴ Catholic teaching states that all people are created in the image and likeness of God and thus possess an innate human dignity that must be acknowledged and respected by other persons and by the law. No one should be an object of scorn, hatred, or violence for any reason, including sexual inclination. The Church affords special concern and pastoral attention to those who experience same-sex attraction and stands committed to avoid “[e]very sign of unjust discrimination in their regard.”⁵

At the same time, the Church makes clear that “[u]nder no circumstances can [same-sex sexual behavior] be approved.”⁶ Thus, the respect, compassion, and sensitivity that the Church extends to persons who experience same-sex attraction – including those who act on that attraction – do not undermine her teaching that same-sex sexual behavior is inherently immoral. Put another way, a principled religious objection to same-sex sexual behavior should not be construed as a lack of respect, compassion, or sensitivity toward persons who are inclined to, or who engage in, such acts.

⁴ CATECHISM OF THE CATHOLIC CHURCH (2d ed. 1997), ¶ 2358.

⁵ *Id.*

⁶ *Id.*, ¶ 2357.