

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

# THE EMPLOYMENT NON-DISCRIMINATION ACT

*by* THE LABOR AND EMPLOYMENT LAW COMMITTEE,  
THE COMMITTEE ON SEX AND LAW, AND  
THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS COMMITTEE

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*“Injustice anywhere is a threat to justice everywhere . . . Justice is indivisible.”*

*Martin Luther King*

## Introduction

On June 24, 2009, and August 5, 2009, respectively, members of the United States House and Senate introduced the Employment Non-Discrimination Act of 2009 (“ENDA”)—legislation that would ban job discrimination based on sexual orientation and gender identity in the workplace.<sup>1</sup> Previous versions of this legislation have been raised in almost every Congress since 1994 and have all been defeated by narrow margins.<sup>2</sup> The Association of the Bar of the City of New York recommends that Congress pass ENDA in a timely fashion and that President Barack Obama sign the legislation into law. The principle of equal opportunity that ENDA represents can no longer be denied in a society dedicated to freedom and equal protection under the law.

ENDA is modeled after other federal anti-discrimination in employment statutes such as Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>3</sup> and the Americans with Disabilities Act (“ADA”).<sup>4</sup> It provides in pertinent part that employers, employment agencies, and labor unions shall not: (1) subject an individual to different standards or treatment on the basis of actual or perceived sexual orientation or gender identity,<sup>5</sup> or (2) discriminate against an individual in connection with employment or employment opportunities, including hiring, firing, promotion, or compensation, based on the sexual orientation or gender identity of persons with whom such individual is believed to associate or to have associated. Like Title VII, the ADA, and many other federal, state, and local anti-discrimination laws, ENDA prohibits retaliation against individuals who oppose unlawful discrimination.<sup>6</sup> ENDA offers the same remedies provided by Title VII and the ADA, namely, injunctive relief, back pay, compensatory and punitive damages, and attorneys fees.<sup>7</sup>

Unlike Title VII, however, ENDA does not recognize disparate impact claims—claims that challenge neutral employment practices or policies that have a statistically disparate impact

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<sup>1</sup> Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3017>; Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009), <http://thomas.loc.gov/cgi-bin/query/z?c111:S.1584>.

<sup>2</sup> 142 CONG. REC. S10129-39 (Sept. 10, 1996); *see also* 140 CONG. REC. E1311 (June 23, 1994); 141 CONG. REC. S8502 (June 15, 1995).

<sup>3</sup> 42 U.S.C. § 2000e *et seq.* (2006).

<sup>4</sup> 42 U.S.C.A. § 12101 *et seq.* (West 2009).

<sup>5</sup> H.R. 3017 § 4. ENDA defines “gender identity” as an individual’s “gender-related identity, appearance or mannerisms or other gender-related characteristics” with or without regard to the individual’s designated sex at birth. *Id.* § 3(a)(6). Like Title VII and the ADA, employers with fewer than 15 employees would be exempt from ENDA. *Id.* § 3(a)(4)(A). Religious organizations and the armed forces would also be exempt from ENDA. *Id.* §§ 6, 7.

<sup>6</sup> *Id.* § 5; *see also* 29 U.S.C.A. § 623(d) (West 2010) (ADEA); 29 U.S.C.A. § 1141 (West 2010) (ERISA); 42 U.S.C. § 2000e-3 (2006); 42 U.S.C. § 12203 (2006) (ADA); N.Y. EXEC. LAW § 290 (McKinney 2009).

<sup>7</sup> H.R. 3017 §§ 10, 12; *see also* 42 U.S.C. § 1981a (2006).

on individuals with a certain sexual orientation or gender identity.<sup>8</sup> Further, ENDA does not require employers to provide benefits to the same-sex partner of an employee,<sup>9</sup> or require compliance by religious organizations, other than with respect to their for-profit activities.<sup>10</sup> Finally, ENDA expressly prohibits preferential treatment and quotas based on sexual orientation or gender identity.<sup>11</sup>

### **There Is a Need for Federal Legislation**

Like other legally protected classes, gays, lesbians, bisexuals, and transgender and gender non-conforming individuals<sup>12</sup> have experienced a history of discrimination.<sup>13</sup> A 2007 meta-analysis of 50 studies of workplace discrimination found that up to 68% of LGBT people reported experiencing employment discrimination.<sup>14</sup> One example of workplace discrimination discussed in a November 4, 2009 letter from the ACLU to the Senate Committee on Health, Education, Labor and Pensions—the story of John Schmidt—illustrates the severity of discrimination that LGBT individuals suffer in the workplace: when Schmidt’s fellow officers in the New Jersey State Troopers discovered that he was gay, they severely beat him while he was undercover in a sting operation.<sup>15</sup>

Transgender and gender non-conforming individuals also report experiencing workplace discrimination at alarming rates. For example, a survey by the National Survey for Transgender Equality and the National Gay and Lesbian Task Force in November 2009 found that 47% of

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<sup>8</sup> Compare H.R. 3017 § 4(g), with 42 U.S.C. § 2000e-2(k) (2006).

<sup>9</sup> H.R. 3017 § 8(b).

<sup>10</sup> *Id.* § 6.

<sup>11</sup> *Id.* § 4(f).

<sup>12</sup> The terms “transgender” or “gender non-conforming” as used in this report refer to persons whose gender-related identity, appearance, mannerisms, or other gender-related characteristics differ from their designated sex at birth. See H.R. 3017 §3(a)(6). This class of persons would consequently be covered by ENDA’s proscription against discrimination on the basis of gender identity, regardless of whether they actually identify as transgender and regardless of whether they have transitioned (or taken steps to transition).

<sup>13</sup> Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 72 (1996); see also *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985); *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1302 (1985).

<sup>14</sup> *Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 111th Cong. (2009) (statement of Rea Carey, Executive Director, National Gay and Lesbian Task Force Action Fund), available at [http://www.thetaskforce.org/downloads/release\\_materials/enda\\_1109\\_testimony.pdf](http://www.thetaskforce.org/downloads/release_materials/enda_1109_testimony.pdf).

<sup>15</sup> Letter from Matthew A. Coles, Dir., ACLU LGBT & AIDS Project, to Tom Harkin, Chairman, U.S. Senate Comm. on Health, Educ., Labor & Pensions, and Michael Enzi, Ranking Member, U.S. Senate Comm. on Health, Educ., Labor & Pensions (Nov. 4, 2009), available at [http://www.aclu.org/files/assets/ACLU\\_Letter\\_to\\_Senate\\_HELP\\_Committee\\_on\\_ENDA\\_and\\_Sovereign\\_Immunity.pdf](http://www.aclu.org/files/assets/ACLU_Letter_to_Senate_HELP_Committee_on_ENDA_and_Sovereign_Immunity.pdf).

respondents experienced an adverse job action because they were transgender, 26% had lost jobs based on their gender identity or expression, and 97% felt they had experienced mistreatment, harassment, or discrimination on the job.<sup>16</sup>

Congress has addressed employment discrimination suffered by other classes of people such as women, racial minorities, and individuals with disabilities, recognizing that federal public policy mandates equal employment opportunities and assessment of job applicants' and employees' skills rather than a personal characteristic wholly unrelated to job performance.<sup>17</sup> The Supreme Court confirmed that Congress's primary purpose in enacting Title VII<sup>18</sup> was to assure equality of employment opportunities and eliminate practices which had fostered inequality.<sup>19</sup> When enacting the Civil Rights Act of 1991,<sup>20</sup> Congress found that women and minorities remained substantially underrepresented in senior decision-making positions, that artificial barriers existed to the advancement of women and minorities, and that enforcement of existing equal opportunity laws had not adequately addressed the problem.<sup>21</sup> Concerning the need to enact the Age Discrimination in Employment Act Amendments of 1986,<sup>22</sup> President Ronald Reagan stated that "discrimination against older workers is a matter of great concern to this Nation because of the need to sustain and enhance our productive capacity and attain the goal of fairness in employment opportunity for all American workers."<sup>23</sup> When passing the

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<sup>16</sup> Nat'l Ctr. for Transgender Equality & Nat'l Gay & Lesbian Task Force, Preliminary Findings: National Transgender Discrimination Survey (2009), available at [http://www.thetaskforce.org/downloads/release\\_materials/tf\\_enda\\_fact\\_sheet.pdf](http://www.thetaskforce.org/downloads/release_materials/tf_enda_fact_sheet.pdf). In addition, a survey of transgender people in San Francisco found that nearly 50% of the respondents experienced employment discrimination based on their gender identity or expression. Shannon Minter & Christopher Daley, Nat'l Ctr. for Lesbian Rights & Transgender Law Ctr., *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Community* (2003), available at <http://www.transgenderlawcenter.org/trans/pdfs/Trans%20Realities%20Final%20Final.pdf>. According to another survey of the transgender community in Washington, D.C., less than 60% of respondents held paying jobs, nearly 30% reported no source of income whatsoever, and an additional 31% reported annual incomes of less than \$10,000; 15% of respondents had lost a job due to discrimination based on their gender identity or expression. Jessica M. Xavier, *The Washington Transgender Needs Assessment Survey* (2000), available at <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml>.

<sup>17</sup> See, e.g., 29 U.S.C.A. § 620 *et seq.* (West 2010); 42 U.S.C. § 2000e *et seq.* (2006); 42 U.S.C.A. § 12101 *et seq.* (West 2009).

<sup>18</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

<sup>19</sup> *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

<sup>20</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 2 U.S.C. §§ 601 & 1201-1224 (2006), 29 U.S.C.A. § 626 (West 2010), 42 U.S.C. § 1981 (2006), and additional scattered sections of the U.S.C.).

<sup>21</sup> See H.R. REP. NO. 102-40(I), 102nd Cong., 1st Sess. (1991) (to accompany the Civil Rights Act of 1991).

<sup>22</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (2006).

<sup>23</sup> Statement by President Ronald Reagan upon Signing H.R. 4154, 22 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1517 (Nov. 20, 1986), reprinted in 1986 U.S.C.C.A.N. 5642.

Americans with Disabilities Act,<sup>24</sup> Congress found that individuals with disabilities have been subjected to purposefully unequal treatment consisting of unfair and unnecessary discrimination that “denies people with disabilities the opportunity to compete on an equal basis.”<sup>25</sup> It is therefore appropriate and consistent with prior legislative action for Congress to enact ENDA to address widespread discrimination against gays, lesbians, and transgender and gender non-conforming individuals.

In addition, ENDA cures the inexplicable inconsistency between recognized public policy concerning equal employment opportunities for all and the federal anti-discrimination laws that—by omitting statutory protections for LGBT people—signal to employers that they can discriminate against gay, lesbian, bisexual, transgender, and gender non-conforming workers.

Title VII does not provide adequate protections for LGBT individuals. Although some courts have found that Title VII provides limited protections for some transgender and gender non-conforming individuals, other courts have explicitly excluded LGBT individuals from protection under the statute. For example, some courts have upheld Title VII employment discrimination claims by transgender plaintiffs, ruling that their claims fell within the reasoning of the *Price Waterhouse* decision (among other theories).<sup>26</sup> In contrast, other courts have emphatically rejected such claims and reasoning, ruling that Congress did not intend to protect transgender persons when it barred employment discrimination on grounds of “sex” and that Title VII precludes discrimination only on the grounds that an employee is male or female—not transgender.<sup>27</sup> Absent uniform federal law, therefore, the protections provided to a transgender employee depend on the happenstance of where the employee resides or works. Accordingly, ENDA is as essential for the protection of transgender employees as it is for gay, lesbian, and bisexual employees.

Likewise, ENDA is needed to ensure that all employers who are otherwise subject to Title VII—regardless of their location—adhere to federal policy requiring equal employment opportunities for all. Currently, only 21 states plus the District of Columbia have civil rights

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<sup>24</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101–12213 (West 2009) & 47 U.S.C. §§ 225, 611 (2006)).

<sup>25</sup> 42 U.S.C.A. § 12101(a)(9); *see* S. REP. NO. 116, at 6–8 (1989).

<sup>26</sup> *E.g., Barnes v. Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (transgender police officer who claimed that city intentionally discriminated against her because of her failure to conform to sex stereotypes stated claim for relief under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

<sup>27</sup> *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007) (rejecting argument that a transgender employee falls within a protected class under Title VII); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (concluding Title VII does not protect transgender employees); *Powell v. Read’s, Inc.*, 436 F.Supp. 369 (D. Md. 1977) (same). *But see Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (holding that withdrawal of employment offer from transgender employee was discrimination on the basis of sex under Title VII).

laws that explicitly prohibit discrimination based on sexual orientation,<sup>28</sup> while only 12 states and the District of Columbia have laws that explicitly prohibit workplace discrimination based on gender identity.<sup>29</sup> The number of cities and counties with non-discrimination ordinances protecting LGBT workers is also quite small; 171 locales ban discrimination on the basis of sexual orientation, while only 136 locales ban discrimination on the basis of gender identity.<sup>30</sup>

Further, state initiatives, most notably in California and Maine, indicate that a number of states may be in the grip of a homophobic backlash.<sup>31</sup> To the extent such campaigns continue, states are likely to be divided over the need for state legislation protecting against sexual orientation and gender identity discrimination. Absent a federal law, a multi-state employer would be subject to competing state laws with respect to LGBT employees, requiring personnel departments to draft various contradictory company policies for different states. Congress has frequently held that such administrative burdens should not be placed on employers if they can possibly be avoided.<sup>32</sup> ENDA would prevent such difficulties for multi-state employers.

ENDA is also necessary to prevent employer subversion of existing laws such as the Americans with Disabilities Act, which prohibits employers from discriminating against

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<sup>28</sup> CAL. CODE § 12920 (2001); COLO. REV. STAT. §§ 24-34-401 to -402 (2009); CONN. GEN. STAT. §§ 46a-81c to -81m (2009); D.C. CODE §§ 2-1401.01-.02, 2-1402.11, .21, .31, .41, .71 & .73; HAW. REV. STAT. 515-2 to -7 (2009); ILL. COMP. STAT. 5/1-102; IOWA CODE §§ 216.1-.21 (2009); MASS. GEN. LAWS ANN. ch. 151B, §§ 3-4 (2009); MD. ANN. CODE art. 49B § 5 (2001); ME. REV. STAT. ANN. tit. 5, § 4571-4576 (2009); MINN. STAT. §§ 363A.01-.41 (2009); N.H. R.S.A. §§ 21-I:42, 354-A:2, 354-A:6 (2002); N.J. STAT. ANN. §§ 10:2-1, 10:5-1 to -49 (2009); 196, N.M. STAT. ANN. §§ 28-1-2, -7, -9 (2009); N.V. REV. STAT. §§ 233.010(2), 613.330 (2009); N.Y. EXEC. LAW §§ 296, 296-a (2009); R.I. GEN. LAWS § 28-5-3 (2001); 21 V.S.A. § 495 (2009); 8 V.S.A. § 10403 (2009); WASH. REV. CODE §§ 49.60.130-.175 (2009); WIS. STAT. §§ 36.12, 106.50, 106.52, 111.31, 230.18, 224.77; Del. S. Bill No. 121 (2009); Oregon Equality Act, Pub. L. No. 100, Oregon SB 2 (2007).

<sup>29</sup> Human Rights Campaign, Employment Non-Discrimination Laws on Sexual Orientation and Gender Identity, available at <http://www.hrc.org/issues/4844.htm> (last visited Jan.13, 2011) & Human Rights Campaign, Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity, available at <http://www.hrc.org/issues/gender-identity-city-county-laws.htm> (last visited Jan.13, 2011).

<sup>30</sup> *Id.*

<sup>31</sup> The Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), declared unconstitutional under the Equal Protection Clause of the U.S. Constitution an amendment to the Colorado state constitution that prohibited state and local governments from enacting any law, regulation, or policy that would have provided minority status or protection from discrimination to gay, lesbian, and bisexual people. That precedent, however, did not lead to a diminution in efforts to block gay rights nationwide. For example, in the past several years California, Florida, and Arizona voters have approved referenda banning same-sex marriage. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, available at [http://www.nytimes.com/2008/11/06/us/politics/06marriage.html?\\_r=1](http://www.nytimes.com/2008/11/06/us/politics/06marriage.html?_r=1). Maine recently became the 31st state to block through public referendum proposed legislation legalizing same-sex marriage. Abby Goodnough, *Gay Rights Rebuke May Change Approach*, N.Y. TIMES, Nov. 5, 2009, at A25, available at [http://www.nytimes.com/2009/11/05/us/05marriage.html?\\_r=1](http://www.nytimes.com/2009/11/05/us/05marriage.html?_r=1).

<sup>32</sup> See, e.g., The Employee Retirement Income Security Act, 29 U.S.C.A. § 1144(a) (West 2010) (imposing broad preemption on state laws which *relate to* employee benefit plans, for similar reasons).

employees based on HIV status.<sup>33</sup> Commentators have noted that some employers feel justified in firing LGBT employees as a means of controlling potential HIV medical claims, conduct that the Americans with Disabilities Act proscribes.<sup>34</sup> However, if an employer can advance an employee's perceived sexual orientation or gender identity, rather than the employee's medical condition, as the reason for the employee's termination with impunity, the employer's conduct would be protected unless ENDA is enacted.

In sum, for all of the above reasons, ENDA is needed.

### **Economic and Common Law Principles, As Well As Public Policy, Support Enactment of ENDA**

Economic and common law principles, as well as public policy, support enactment of ENDA. First, individual economic responsibility is an essential tenet of American capitalism.<sup>35</sup> Consistent with this tenet, common law proscribes employers from unreasonably infringing on an individual's right to a livelihood. For example, courts have refused to enforce unreasonable non-competition agreements<sup>36</sup> and recognized suits for wrongful discharge in violation of public

<sup>33</sup> In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the U.S. Supreme Court determined in the context of medical treatment that asymptomatic HIV infection may qualify as a disability under ADA. Other authorities have noted that the ADA can encompass HIV in the employment setting. See *Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000), *reh'g en banc denied*, 2000 U.S. App. LEXIS 9557 (6th Cir. May 4, 2000) (city failed to undertake individualized determination required under federal disability law when it disqualified applicant for position as police officer because of his HIV status); *Teachout v. N.Y. City Dep't of Educ.*, No. 04 Civ. 945, 2006 U.S. Dist. LEXIS 7405 (S.D.N.Y. Feb. 22, 2006) (observing in part that HIV infection qualifies as a disability under ADA). See also Jeffrey A. Mello, *Limitations of the Americans with Disabilities Act in Protecting Individuals with HIV from Employment Discrimination*, 19 SETON HALL LEGIS. J. 73, 101–02 (1994) (citing *Racine Educ. Ass'n v. Racine Unified Sch. Dist.*, 476 N.W.2d 707 (Wis. Ct. App. 1989), in which the court found that the employer's policy of placing employees with HIV on disability leave was illegal because it was based upon the assumption of possible transmission through casual contact). In *Petri v. Bank of New York Co.*, 582 N.Y.S.2d 608, 612 (1992), the court found that while the employer knew that the plaintiff was gay, "constru[ing] mere membership in a group at risk as equivalent to a perceived disability would be to import into the statute the ban on sexual orientation that [the legislature] has to date conspicuously omitted."

<sup>34</sup> See, e.g., Samuel A. Marcossou, *Who Is 'Us' and Who Is 'Them'— Common Threads and the Discriminatory Cut-Off of Health Care Benefits for AIDS Under ERISA and the Americans with Disabilities Act*, 44 AM. U. L. REV. 361, 405 (1994); Maria O'Brien Hylton, *Insurance Risk Classification After McGann: Managing Risk Efficiently in the Shadow of the ADA*, 47 BAYLOR L. REV. 59, 62 n.9 (1995).

<sup>35</sup> See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that the Civil Rights Act was enacted to assure equality of employment opportunity by eliminating practices and devices that interfere with the unfettered operation of the employment markets).

<sup>36</sup> See, e.g., *Deutsche Post Global Mail, Ltd. v. Conrad*, 116 Fed. Appx. 435 (4th Cir. 2004); *Prod. Action Int'l v. Mero*, 277 F. Supp. 2d 919 (S.D. Ind. 2003); *L.G. Balfour Co. v. McGinnis*, 759 F. Supp. 840 (D.D.C. 1991); *Economou v. Physicians Weight Loss Ctrs.*, 756 F. Supp. 1024, 1031 (N.D. Ohio 1991); *Fine v. Prop. Damage Appraisers, Inc.*, 393 F. Supp. 1304, 1310 (E.D. La. 1975); *Trans-Am. Collections, Inc. v. Cont'l Account Servicing House, Inc.*, 342 F. Supp. 1303, 1305-06 (D. Utah 1972); *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685 (Ohio Ct. C.P. 1952).

policy.<sup>37</sup> Inextricably bound up with American economic ideals are the promises of liberty memorialized in the U.S. Constitution. No more should this fundamental promise, representing much of what America prides itself on as a nation, be abridged by anti-LGBT conduct in the workplace. As one court forcefully commented:

The compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.<sup>38</sup>

Senator Edward Kennedy expanded on this theme in remarks regarding ENDA proffered in November 2007 with the following observation:

This Nation was founded on the principle of equal justice for all. That noble goal represents the best in America—that everyone should be treated fairly and should have the chance to benefit from the many opportunities of this country. . . . But progress has left some Americans out. . . . Many hard-working Americans live every day with the knowledge that, no matter what their talents and abilities, they can be denied a job simply because of who they are. Many young students grow up knowing that, no matter how hard they study, the doors of opportunity will be locked by prejudice and bigotry when they enter the workplace.<sup>39</sup>

<sup>37</sup> See, e.g., *Holwell v. PPL Servs. Corp.*, 232 Fed. Appx. 111, 113 (3d Cir. 2007) (recognizing cause of action for wrongful discharge where termination violates clear public policy mandate); *Moore v. Home Ins. Co.*, 601 F.2d 1072 (9<sup>th</sup> Cir. 1979) (recognizing tort of wrongful discharge in violation of public policy); *Strinni v. Mehlville Fire Prot. Dist.*, No. 4:08cv1628, 2101 WL 106633, at \*22 (E.D. Mo. Jan. 6, 2010) (Missouri recognizes tort claim for wrongful discharge “when the discharge violates a clear mandate of public policy”); *Carter v. Tropicana Prods. Sales, Inc.*, Civ. No. 07 10921, 2008 WL 190791 (D. Mass. Jan. 4, 2008) (Massachusetts has cause of action for wrongful discharge where the termination violates a clearly established public policy); *Kelley v. City of Mesa*, 873 F. Supp. 320 (D. Ariz. 1994) (Arizona recognizes implied covenant of good faith and fair dealing in employment at will situations); *Harrell v. Reynolds Metals Co.*, 495 So.2d 1381 (Ala. 1986) (recognizing cause of action for breach of implied employment contract when termination is repugnant to public policy); *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290 (1<sup>st</sup> Dist. 1981); *Cleary v. American Airlines, Inc.*, Cal. App. 3d 443 (2d Dist. 1980) (recognizing cause of action for breach of implied employment contract when termination is repugnant to public policy); *Bennett v. Evanston Hosp.*, 540 N.E.2d 979 (Ill. App. 1<sup>st</sup> Dist. 1989) (recognizing public policy exception to employment at will doctrine); *Vaughn v. City of Cedar Rapids*, 527 N.W.2d 411 (Iowa Ct. App. 1994) (same). But see, e.g., *In re Flagstaff Foodservice Corp.*, 25 B.R. 844 (S.D.N.Y. 1982); *Fleming v. Mack Trucks, Inc.*, 508 F. Supp. 917 (E.D. Pa. 1981); *Bass v. Happy Rest, Inc.*, 507 N.W.2d 317 (S.D. 1993); *Martin v. Tapley*, 360 So.2d 708 (Ala. 1978).

<sup>38</sup> *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. App. 1987). Moreover, the U.S. Supreme Court recognized the interest in preserving individual dignity in matters relating to sexual conduct when it invalidated a Texas criminal statute that proscribed sodomy between individuals of the same sex as violative of the liberty interests of consenting adults under the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>39</sup> 153 Cong. Rec. S14118-01, S\*14118 (Nov. 8, 2007).



ENDA is consistent with these principles in that it protects the employment of gays, lesbians, transgender, and gender non-conforming individuals and enables them to pursue their chosen livelihood instead of relying on government support. As another commentator expostulates, “[a] job is one of the single most important things a person can have in this society. It is not just the way people support themselves; it is critical to the way people define themselves and the way they are defined by society.”<sup>40</sup> Indeed, according to the National Commission on Employment Policy, 42,000 gay and lesbian workers are dismissed each year because of their sexual orientation.<sup>41</sup> This translates approximately into a \$47 million loss in terms of training expenditures and unemployment benefits.<sup>42</sup> Thus, failure to enact ENDA represents a cost to society at large.

Second, there are very limited costs to individual businesses in implementing ENDA. According to a 2007 Congressional Budget Office cost estimate, the mandates imposed on private sector employers, such as modifying required notices regarding federal anti-discrimination laws, would be negligible.<sup>43</sup> Many companies—at least 89% of Fortune 500 companies (hardly novices to good business practices)—have already adopted policies prohibiting discrimination based on sexual orientation.<sup>44</sup> Of those companies, approximately 43% have policies with explicit protections on the basis of gender identity.<sup>45</sup> These companies recognize that there is a cost to *not* having such policies. Specifically, they seek a competitive edge by enacting policies that assist them in being able to effectively tap the talents of a diverse workforce.

Explaining Nike’s philosophy towards diversity and implementation of its policies prohibiting discrimination based on sexual orientation, gender identity to the U.S. Senate Committee on Health, Education, Labor and Pensions, Virginia Nguyen of Nike stated:

Diversity and Inclusion at Nike is about respecting our differences, mining the skills and talents that exist, leveraging our strengths and maximizing opportunity for all. These values are our competitive advantage and make Nike a better company, passionately supportive of our employees, respectful of our consumers and more competitive in our industry . . . . Nike’s support of [ENDA] is a reflection of our employment policies, practices, and training programs, which

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<sup>40</sup> Matthew A. Coles, *The Case for Gay Rights*, 9 HAMLIN J. PUB. L. & POL’Y 237, 241 (1989) (citation omitted).

<sup>41</sup> See Kenneth A. Kovach, ENDA Promises to Ban Employment Discrimination for Gays, PERSONNEL J., Aug. 1995, at 48.

<sup>42</sup> *Id.*

<sup>43</sup> Cong. Budget Office, Cost Estimate on H.R. 3685 Employment Non-Discrimination Act of 2007 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8738/hr3685.pdf>.

<sup>44</sup> Human Rights Campaign, Corporate Equality Index 2001, available at <http://www.hrc.org/documents/HRC-CEI-2011-Final.pdf> (last visited Jan. 15, 2011).

<sup>45</sup> *Id.*

have been in place for decades. These are designed to reinforce a culture of inclusion and respect where each employee can reach their full potential.<sup>46</sup>

The Coca-Cola Company, as well as many other large companies, have similar philosophies.<sup>47</sup>

Many companies already provide better protections than ENDA would require. For instance, a number of companies with anti-discrimination policies also provide health benefits to same-sex domestic partners. In this respect, approximately 57% of Fortune 500 companies provide domestic partners with health insurance benefits.<sup>48</sup> Although same-sex benefits are frequently provided through employer self-insurance to avoid negotiating with inflexible insurance carriers, dozens of carriers have recently begun to offer fully insured policies for same-sex domestic partners.<sup>49</sup> The federal government has followed suit. On June 17, 2009, President Obama signed into law legislation that would provide domestic partner benefits to all federal employees.<sup>50</sup> In addition, a May 2009 Gallup poll showed that 67% of Americans agree with providing health insurance and other employment-related benefits to same-sex couples.<sup>51</sup> If this trend in the insurance industry continues, meeting the needs of gay and lesbian employees in the traditional workplace will be simplified. In short, there are strong economic and public policy justifications—justifications supported by common law—for enacting ENDA.

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<sup>46</sup> The Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing on S. 1584 Before the S. Comm. on Health, Education, Labor and Pensions, 111th Cong. 1–2 (2009) (statement of Virginia Nguyen, Diversity & Inclusion Team Member, Nike, Inc.), *available at* [http://help.senate.gov/Hearings/2009\\_11\\_05/Nguyen.pdf](http://help.senate.gov/Hearings/2009_11_05/Nguyen.pdf).

<sup>47</sup> See 153 CONG. REC. H11911-01, \*11911 (Oct. 23, 2007) (statements of Rep. Weiner) (noting that J.P. Morgan, Microsoft, Nationwide Insurance, American Express, and Clear Channel Communication are some of the many employers who endorse ENDA). See also Press Release, AFL-CIO, Statement by AFL-CIO President Sweeney on the Introduction of the Employment Non-Discrimination Act (June 24, 2009) (noting that the AFL-CIO a nationwide leader of labor unions also supports ENDA's passage), *available at* <http://www.aflcio.org/mediacenter/prsptm/pr06242009.cfm>.

<sup>48</sup> Human Rights Campaign, Corporate Equality Index 2001, *available at* <http://www.hrc.org/documents/HRC-CEI-2011-Final.pdf> (last visited Jan. 15, 2011).

<sup>49</sup> See Human Rights Campaign, Domestic Partner Benefits: Finding an Insurance Carrier, <http://www.hrc.org/issues/workplace/benefits/4824.htm> (follow “mission.sfgov.org/hrcdip” hyperlink) (last visited Jan. 31, 2010). For instance, in New York there are 22 insurance carriers offering health insurance to same-sex couples including: AETNA, Blue Cross Blue Shield of Northeastern and Western New York, CIGNA, Oxford Health Plans, and others. See City and County of San Francisco Human Rights Commission, Carrier List, <http://mission.sfgov.org/hrcdip/CarrierList.aspx?cn=&st=NY&pr=Medical&pl=&gs=all> (last visited Jan. 31, 2010).

<sup>50</sup> Jim Rutenberg, *Outcry on Federal Same-Sex Benefits*, N.Y. TIMES, June 17, 2009, *available at* <http://www.nytimes.com/2009/06/18/us/politics/18benefits.html>.

<sup>51</sup> Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, *available at* <http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx>.

Third, there is widespread public support for ENDA.<sup>52</sup> According to a May 2007 Gallup Poll, at least 89% of Americans expressly favor protecting gay and lesbian individuals from job discrimination.<sup>53</sup> In a separate 2008 poll, 71% of heterosexual adults agreed that how an employee does her job should be the standard for judging an employee, not whether or not she is transgender.<sup>54</sup> Describing equal treatment as a “fundamental American value,” Senator Tom Harkin stated at a recent hearing on ENDA that “[i]t’s time to make clear that lesbian, gay, bisexual and transgender Americans are first class citizens. They are full and welcome members of our American family and deserve the same civil rights protections as all other Americans.”<sup>55</sup> And as Representative Mike Honda stated on the floor of the House of Representatives in an earlier debate on ENDA, “[i]t is high time for Congress to recognize and address the fear of persecution in the workplace experienced by gay, lesbian, bisexual, and transgender Americans. The Federal Government is right to follow the lead of 20 progressive states to extend federal employment protection to the lesbian and gay community.”<sup>56</sup>

Support for ENDA has grown exponentially since its first introduction in Congress. For example, the United ENDA coalition, comprised of over 396 national and local organizations, was established for the primary goal of seeking ENDA’s enactment.<sup>57</sup> In addition, the Human Rights Campaign, a leading LGBT rights organization, has formed a coalition of large national and international corporations that also support ENDA, including companies such as Google and Bank of America.<sup>58</sup>

### **Criticism of ENDA Is Misinformed and Misguided**

Opponents of ENDA claim that federal legislation is not needed, citing faulty statistics that purportedly show LGBT employees are not economically impacted by workplace discrimination. Recent and reliable studies demonstrate the inaccuracy of these statistics and show that LGBT individuals indeed suffer economic harm as a result of workplace discrimination. For example, the Williams Institute at UCLA School of Law found that

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<sup>52</sup> See, e.g., 153 CONG. REC. S14118-01, \*14118 (Nov. 8, 2007) (statement of Sen. Kennedy).

<sup>53</sup> Gay & Lesbian Alliance Against Defamation, Talking About Inclusive Employment Protections 2 (2009), <http://www.glaad.org/Document.Doc?id=41>.

<sup>54</sup> OUT & EQUAL, WORKPLACE CULTURE REPORT (2008) (reporting a national poll among 2637 U.S. adults by Harris Interactive), available at <http://outandequal.org/node/89>.

<sup>55</sup> Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing Before the S. Comm. on Health, Education, Labor and Pensions, 111th Cong. (Nov. 5, 2009) (statement of Sen. Tom Harkin, Chairman, Senate Comm. on Health, Education, Labor, and Pensions), available at [http://help.senate.gov/Hearings/2009\\_11\\_05/2009\\_11\\_05.html](http://help.senate.gov/Hearings/2009_11_05/2009_11_05.html).

<sup>56</sup> 153 CONG. REC. H13228-02, \*H13239 (Nov. 7, 2007) (statement of Rep. Honda).

<sup>57</sup> United ENDA, Home Page, <http://www.unitedenda.org> (last visited Jan. 31, 2010).

<sup>58</sup> Human Rights Campaign, Business Coalition for Workplace Fairness, [http://www.hrc.org/documents/Business\\_Coalition\\_for\\_Workplace\\_Fairness.pdf](http://www.hrc.org/documents/Business_Coalition_for_Workplace_Fairness.pdf) (last visited Jan. 31, 2010).

workplace discrimination lowered the income of gay men by 10% to 32% relative to their heterosexual peers.<sup>59</sup> Moreover, the personal, social, and psychological harm resulting from workplace discrimination may have far-reaching adverse consequences that cannot be easily measured.

Opponents of ENDA also claim that the law is overbroad and would pose an unconstitutional burden on religious organizations.<sup>60</sup> This contention is not legitimate, as ENDA was narrowly drafted to avoid conflicts with an employer's right to freedom of religion.<sup>61</sup> Almost 30 religious organizations support ENDA, including the American Jewish Committee, the Alliance of Baptists, the American Friends Service Committee, the Unitarian Universalist Association, the United Methodist Church, the Episcopal Church, the United Church of Christ, the Presbyterian Church, and the Anti-Defamation League.<sup>62</sup>

Similarly, ENDA expressly states that it does not recognize disparate impact claims, thereby avoiding litigation about neutral employment policies which inadvertently affect certain groups in the workplace disproportionately.<sup>63</sup> Rather, the legislation is narrowly focused on discrimination in the form of disparate treatment.

Finally, opponents of ENDA have asserted that protecting gays, lesbians, and transgender individuals from workplace discrimination would constitute the sole workplace discrimination legislation that is based on behavior rather than immutable personal characteristics like age, race, or gender. Leaving aside biological research concerning the basis for sexual orientation or

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<sup>59</sup> The Williams Institute report noted that more than 12 studies have shown a "significant wage gap" between gay and heterosexual men. *Hearing Before the H. Comm. on Education and Labor*, 111th Cong. (Sept. 23, 2009) (statement of R. Bradley Sears, Executive Director, Williams Institute), available at <http://edlabor.house.gov/documents/111/pdf/testimony/20090923RBradleySearsTestimony.pdf>. Similar wage discrepancies exist for gay, lesbian, and bisexual employees who are government employees, with two studies showing that they earn 8% to 29% less than their heterosexual counterparts. *Id.*

<sup>60</sup> Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions, 111th Cong. (Nov. 5, 2009) (statement of Craig Parshall, Senior Vice President and General Counsel, National Religious Broadcasters Association), available at [http://help.senate.gov/Hearings/2009\\_11\\_05/Parshall.pdf](http://help.senate.gov/Hearings/2009_11_05/Parshall.pdf).

<sup>61</sup> See Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 6 (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3017>. Moreover, as Rabbi David Saperstein testified before the Committee on Education and Labor of the House of Representatives, "[c]laims by some that [ENDA's religion] exemption goes beyond Title VII are simply erroneous. Since ENDA creates no new tests for determining which religious institutions are exempt from its provisions and instead adopts the longstanding exemption of Title VII, it will greatly reduce confusion among employers, employees, policy makers, and judges." *H.R. 3017, Employment Non-Discrimination Act of 2009: Hearing Before H. Comm. on Education and Labor*, 111th Cong. (2009) (statement of Rabbi David Saperstein, Director, the Religious Action Center), available at <http://edlabor.house.gov/documents/111/pdf/testimony/20090923DavidSapersteinTestimony.pdf>.

<sup>62</sup> Religious Organizations Letter in Support of the Employment Non-Discrimination Act (S. 1584), Nov. 5, 2009, available at [http://www.hrc.org/sites/passendanow/documents/ENDA-Senate\\_Religious\\_Org\\_Letter\\_2009-11-2.pdf](http://www.hrc.org/sites/passendanow/documents/ENDA-Senate_Religious_Org_Letter_2009-11-2.pdf).

<sup>63</sup> Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 4(g) (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3017>.

gender identity, this statement completely ignores protection based on religious practice, which is purely a matter of personal choice in most instances.<sup>64</sup> Moreover, ENDA does not give “special rights” to gays, lesbians, and transgender individuals.<sup>65</sup> ENDA merely requires that LGBT individuals in the workforce be judged on their merit like everyone else, rather than by irrelevant personal characteristics, in the same manner that a non-LGBT employee would expect to be treated.

### **Lessons from the New York Experience**

Both New York State and a number of New York municipalities, including New York City, have enacted legislation prohibiting discrimination in employment based on a person’s sexual orientation. New York State’s Sexual Orientation Non Discrimination Act (“SONDA”)<sup>66</sup> has been in effect since January 2003 while New York City prohibited such discrimination more than twenty years ago, in 1986.<sup>67</sup> Since 2002, when it amended its Human Rights Law to re-define “gender,” New York City has prohibited discrimination based on gender identity and gender expression.

The New York experience with legislation prohibiting employment discrimination on the basis of sexual orientation and gender identity on a locality basis has been positive and supports passage of ENDA in two ways. First, the New York experience demonstrates the compelling need for nationwide protection. The New York statutes have provided an avenue for aggrieved lesbian, gay, bisexual and, in some cases, transgender workers to pursue claims arising out of patently offensive and reprehensible anti-LGBT conduct. Had these allegations arisen in jurisdictions lacking statutory protection for LGBT workers, no avenue for redress would have been available. Second, any concern that ENDA will unduly burden employers by opening the floodgates to an excessive number of discrimination claims and lawsuits is contradicted by the New York experience. New York has not experienced any significant increase in the number of workplace discrimination claims as a result of expanding anti-discrimination protection to cover LGBT workers. From 2004 to 2009, 1,587 employment discrimination claims were filed with the New York City Commission on Human Rights. Of those claims, only 92 were based on sexual orientation.<sup>68</sup> Moreover, the Commission received only 14 gender identity discrimination matters following the City’s amendment of its Human Rights Law to include gender identity and

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<sup>64</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

<sup>65</sup> As Senator Patty Murray stated, “Just as it is illegal now to discriminate against someone in the workplace based on sex, race or religion, there is no reason why Americans should be able to be treated unfairly based on their sexual orientation.” *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. (2009) (statement of Sen. Patty Murray), available at [http://help.senate.gov/Hearings/2009\\_11\\_05/2009\\_11\\_05.html](http://help.senate.gov/Hearings/2009_11_05/2009_11_05.html).

<sup>66</sup> N.Y. EXEC. LAW § 296 (McKinney 2009).

<sup>67</sup> N.Y.C. ADMIN. CODE § 8-108.1(1) (2010).

<sup>68</sup> Memorandum from Carls Velez, Executive Dir., Law Enforcement Bureau, N.Y. Comm’n on Human Rights, to Milagros Navarro (Nov. 24, 2009) (on file with authors).

expression as protected categories.<sup>69</sup> These claims comprised less than half of one percent of approximately 3,280 complaints the city agency received between January 2002 and February 2010.<sup>70</sup>

As several New York cases demonstrate, the New York statutes have provided an indispensable means for LGBT workers to challenge discriminatory conduct. In an early case brought before the New York City Commission on Human Rights in 1991, *Polster v. American Society for the Prevention of Cruelty to Animals*,<sup>71</sup> the complainant claimed that she suffered continuous harassment and ultimately termination of employment due to her sex and sexual orientation. She informed her employer that she was a lesbian during the interview process, and she was thereafter subjected to relentless harassment. For example, her work area was defaced by offensive graffiti and pornographic photos; she was subjected to sexually offensive and derogatory comments; male co-workers filed a frivolous grievance against her; and she was terminated two and a half months after she started in retaliation for complaining about the harassment. The Commission found that the employer subjected Ms. Polster to “unrelenting abuse on the basis of her gender and sexual orientation” and awarded Ms. Polster lost earnings and compensatory damages for mental anguish.

In *Lederer v. BP Products North America*,<sup>72</sup> a 2006 case brought in the U.S. District Court for the Southern District of New York, Mr. Lederer, the employee, worked as a baker for BP Connect. He alleged that his manager repeatedly made sexually offensive remarks to him and around him, including calling him “faggot” and making offensive sexual comments such as “I don’t know how he can work, he’s always on his knees.” Lederer’s manager questioned him about homosexuality and made comments about engaging in homosexual acts. Lederer’s employment was terminated shortly after he disclosed to the manager that he was HIV positive. Lederer sued BP claiming that he was wrongfully terminated and subjected to a hostile work environment in violation of the ADA, Title VII, and the New York State and City Human Rights Laws. The court interpreted his Title VII claims as claims of discrimination based on sexual orientation. Ruling that sexual orientation is not a protected category under Title VII, the court dismissed those claims. It permitted the ADA claim to proceed to trial and exercised supplemental jurisdiction over Lederer’s state law claims, concluding that he had presented evidence from which it could reasonably be concluded that the incidents of abusive language and behavior were sufficiently severe to create a hostile work environment. Lederer’s claims against BP were settled shortly before the case was scheduled to go to trial.

In another recent case, *Gallo v. Alitalia-Linee Aeree Italiane-Societa*,<sup>73</sup> Mr. Gallo’s supervisor had asked him about his “perceived” sexual orientation and made crude and

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<sup>69</sup> E-mail from Clifford Mulqueen, Deputy Comm’r & Gen. Counsel, N.Y. City Comm’n on Human Rights, to Daniel Schlein (Mar. 25, 2010, 2:23 EST) (on file with authors).

<sup>70</sup> *Id.*

<sup>71</sup> Complaint No. EM02423-02/16/90-DE.

<sup>72</sup> No. 04 Civ. 9664, 2006 U.S. Dist. Lexis 87368 (S.D.N.Y. Nov. 30, 2006).

<sup>73</sup> 585 F. Supp. 2d 520 (S.D.N.Y. 2008).

discriminatory comments about gays and lesbians on a daily basis. When Gallo confronted the supervisor about the comments, the supervisor threatened him physically. The employer fired Gallo in May 2006. He then brought suit under the New York State and City Human Rights Laws alleging hostile work environment, discriminatory termination, and retaliation.

The employer and supervisor behavior alleged in these cases should not be tolerated in any workplace. But in a majority of states, employees like Polster, Lederer, and Gallo would have no recourse to challenge such conduct. The passage of ENDA would prohibit such conduct nationwide.

Although these cases illustrate the compelling need for legislation that would allow aggrieved LGBT individuals to challenge discriminatory conduct through litigation, any concern that employers will be burdened by an avalanche of claims appears unfounded based on the New York experience. Statistics maintained by the New York State Division on Human Rights (NYSDHR) indicate that the addition of sexual orientation as a protected category has neither caused any meaningful increase in the number of claims filed nor an increase in frivolous claims dismissed.<sup>74</sup> Since the passage of SONDA, claims based on sexual orientation constitute an average of 3.1% of the total employment discrimination cases filed with NYSDHR each year. The NYSDHR statistics also show that claims dismissed for lack of probable cause at the investigatory stage or later at the hearing stage have not increased meaningfully since the passage of SONDA. A recent study focused on the implementation, effectiveness, and enforcement of SONDA found results consistent with the NYSDHR statistics.<sup>75</sup> In short, the New York experience illustrates both the compelling need for an avenue to seek redress for discriminatory treatment of LGBT individuals in the workplace and that providing such an avenue will not unduly burden employers with excessive litigation.

## **Conclusion**

In conclusion, the Labor and Employment Committee, the Lesbian, Gay, Bisexual and Transgender Rights Committee, and the Committee on Sex and Law of the Association of the Bar of the City of New York unanimously support the passage of ENDA.

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<sup>74</sup> See charts attached as Attachment A.

<sup>75</sup> Roddrick Colvin, Adding Sexual Orientation to New York State's Human Rights Law: Initial Information About Implementation and Effectiveness, 56 J. HOMOSEXUALITY 485 (2009).

**Committee on Labor and Employment**

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Hope Sarah Goldstein

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Priscilla Lundin

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Katherine Greenberg

Kendra Hutchinson

Edward Jacobs

Erica Kagan

Scott Kohanowski

Nancy Kramer

Eric Laufgraben

M. Dru Levasseur

Mara Levy

Lisa Linsky

Linton Mann

Frank Martinez

Brian McGrath

Erin Meyer

Ron L. Meyers

Lisa Nowlin

Hollis V. Pfitsch

Laura Redman

Joydeep Sengupta

Susan Sommer

Naomi Sunshine

Kevin Tam

Jeannette Vargas

Jay Weiser

Sean Weissbart



**ATTACHMENT A**

<b>Employment Complaints Filed with NYSDHR</b>			
<b>Fiscal Year Filed</b>	<b>Complaints Filed (# of cases)</b>	<b>Basis of Sexual Orientation (# of cases)</b>	<b>Sexual Orientation Claims Filed as Percentage of Total</b>
2003 – 2004	4537	114	2.5%
2004 – 2005	4655	142	3.1%
2005 – 2006	4682	148	3.2%
2006 – 2006	4603	141	3.1%
2007 – 2008	6064	216	3.6%
2008 – 2009	6438	270	4.2%
<b>TOTAL</b>	<b>34,651</b>	<b>1153</b>	<b>3.1%</b>

Figures provided by NYSDHR.

<b>Fiscal Year</b>	<b>Employment Claims Filed</b>	<b>No. of Total New Investigations</b>	<b>No Probable Cause Found</b>	<b>No. of Total Hearings</b>	<b>Dismissed After Hearing</b>
2006 – 2007	89%	5187	64%	1012	9%
2007 – 2008	83.4%	7623	53%	1081	8%
2008 – 2009	89%	7231	62%	1194	9%
2009 – 2010 (as of Sept. 2009)	89%	3080	57%	495	10%

Figures compiled from NYSDHR Annual Reports available at <http://www.dhr.state.ny.us/>.