

Is This The Beginning Of ENDA?

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Discrimination

For nearly two decades, the Employment Non-Discrimination Act (ENDA) has consistently been put before Congress, but so far it has never reached the President's desk. That may be about to change. ENDA, modeled after Title VII (preventing discrimination on the basis of race, sex, color, religion, and national origin), would prohibit the harassment or discrimination against employees based on sexual orientation and gender identity. Notably, the bill provides exceptions for religious schools, organizations and houses of worship.

In light of the Supreme Court's recent opinion in *U.S. v. Windsor* on same-sex marriage and shifting public attitudes towards LGBT rights, many insiders believe the time is ripe for ENDA. Indeed, the last Senate Democratic holdout, Joe Manchin (D-W. Va.), recently confirmed his support for the bill. With every Senate Democrat on board, along with several Republicans who support the bill, those charged with knowing such things now say that the legislation is one vote shy of 60 in the Senate, which would provide a filibuster-proof majority. Of course, the real fight would likely reside in the House of Representatives.

Business leaders seem divided on the issue. Many business leaders have no problem with the equality sentiment behind the bill, but rather have concerns about its real-world application, as an employee's sexual orientation or gender identity may not be apparent or may be the subject of co-worker speculation, leading to some thorny liability issues. Would there be a "perceived as" claim under ENDA? On the other hand, 16 states, the District of Columbia, and, according to a survey, nearly 90 percent of Fortune 500 companies already ban discrimination on the basis of sexual orientation. Thus, for many employers, the passage of ENDA would just be business as usual.

In any event, the time-honored advice of ensuring that personnel decisions (especially adverse ones) are well-documented and relate only to legitimate business concerns remains as alive as ever. In the meantime, we'll keep track of ENDA and update you with any important developments.

Update: Senator Dean Heller (R – Nev) has recently announced [his support for ENDA](#), bringing the Senate count to 60 members in favor of the legislation, which could now pass the upper chamber this week with a filibuster-proof majority.

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