



Department of Justice

STATEMENT OF

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BEFORE THE

**COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
UNITED STATES SENATE**

ENTITLED

**“EMPLOYMENT NON-DISCRIMINATION ACT:
ENSURING OPPORTUNITY FOR ALL AMERICANS”**

PRESENTED

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**Statement of
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Assistant Attorney General
Department of Justice
Before the
Committee on Health, Education, Labor and Pensions
United States Senate
At a Hearing Entitled
“Employment Non-Discrimination Act: Ensuring Opportunity for All Americans”
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Mr. Chairman, Ranking Member Enzi and members of the HELP Committee, thank you for the opportunity to appear before you today. It is a privilege to represent the Obama Administration and the Department of Justice at this hearing to consider the Employment Non-Discrimination Act (ENDA), and to voice the Administration’s strong support for fully-inclusive legislation that prohibits discrimination on the basis of sexual orientation and gender identity.

The Civil Rights Division, which I have the great honor to lead, serves as the conscience of the federal government. Our mission is clear: to uphold and protect the civil and constitutional rights of all Americans, particularly some of the most vulnerable among us. We seek to advance this Nation’s long struggle to embrace the principle so eloquently captured by Dr. Martin Luther King, Jr., that persons should be judged based on “content of their character,” and not on their race, color, sex, national origin, religion or any other irrelevant factors. Our civil rights laws – laws enforced by the Civil Rights Division – reflect and uphold this noble principle.

Just last month Congress passed and the President made history when he signed the first federal law that provides civil rights protections to lesbian, gay, bisexual and transgender (LGBT) individuals. I applaud you for recognizing the critical need for the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, and I assure you the Department of Justice is prepared to fulfill its new duties under that law. Its enactment filled a critical gap in our enforcement abilities. Today, I come before you because passage of ENDA would provide us with the tool we need to fill another hole in our enforcement authority.

On an issue of basic equality and fundamental fairness for all Americans, we cannot in good conscience stand by and watch unjustifiable discrimination against lesbian, gay, bisexual and transgender individuals occur in the workplace without redress. We have come too far in our struggle for “equal justice under the law” to remain silent or stoic when our LGBT brothers and sisters are still being mistreated and ostracized for reasons that have absolutely nothing to do with their skills or abilities and everything to do with myths, stereotypes, fear of the unknown, and prejudice. No American should be denied a job or the opportunity to earn promotions, pay raises and other benefits of employment because of his or her sexual orientation or gender

identity, which have no bearing on work performance. No one should be fired because he or she is gay, lesbian, bisexual or transgender. Period. ENDA would provide much needed and long overdue federal protections for LGBT individuals, who still face widespread discrimination in workplaces across the Nation. For this reason, the passage of ENDA is a top legislative priority for the Obama Administration.

Broadly stated, ENDA would prohibit intentional employment discrimination on the basis of actual or perceived sexual orientation or gender identity, by employers, employment agencies, and labor organizations. Its coverage of intentional discrimination parallels that available for individuals under Title VII, and the principles that underlie this coverage have been well-established for decades. Under ENDA, we would share responsibility for its enforcement with the Equal Employment Opportunity Commission (EEOC). Our role would be to challenge prohibited discrimination by state and local government employers.

The Civil Rights Division and other federal civil rights agencies regularly receive letters and inquiries from individuals all over the country complaining of sexual orientation and gender identity discrimination in employment. This ongoing discrimination and abuse takes many forms, ranging from cruel instances of harassment and exclusion to explicit denials of employment or career-enhancing assignments because of the individual's sexual orientation or gender identity. It is painfully disappointing to have to tell these working men and women that, in the United States of America in 2009, they may well be without redress because our federal employment anti-discrimination laws either exclude them or fail clearly to protect them.

Many letters sadly describe the same kind of hostility, bigotry and even hatred that other groups faced for much of our history, and which Congress responded to by passing the landmark Civil Rights Act of 1964. That Act prohibited employment discrimination on the basis of race, color, religion, sex, or national origin. At the time the bill was debated, many of the same arguments that we hear today about ENDA – that it would open the floodgates to litigation, it would overburden employers and afford special rights to certain groups – were vociferously offered by the bill's opponents. No one would seriously contend that the parade of horrors predicted at the time ever became reality, and the 1964 Act, which, like ENDA, was introduced over multiple Congresses before it finally passed, has become a rock-solid foundation for our laws ensuring equality of opportunity in the workplace.

Throughout the decades that followed passage of the 1964 Act, we as a nation have recognized a need to attend to unfinished business in the fight for justice in the workplace. Accordingly, Congress has expanded the scope of employment protections on several occasions, passing the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, and the Americans With Disabilities Act of 1990. The Obama Administration believes that ENDA must be the next step, and that this Act will be a worthy addition to its venerable predecessors.

It is estimated that there are more than one million LGBT individuals working in state and local governments and just under seven million LGBT individuals employed in the private sector. A large body of evidence demonstrates that employment discrimination against LGBT individuals remains a significant problem. The Williams Institute, a national research center on sexual orientation and gender identity law and public policy at the UCLA School of Law, conducted a year-long study of employment discrimination against LGBT individuals. The study reviewed the numerous ways in which discrimination has been documented – in judicial opinions; in surveys of LGBT employees, state and local government officials; and in extensive evidence presented to Congress over the past fifteen years during which ENDA has been considered. The study concluded that discrimination based on sexual orientation and gender identity is widespread and persistent in terms of quantity, geography and occupations. The study focused primarily on discrimination against LGBT employees of state and local governments, but also reviewed broader surveys that indicate that the problem is equally widespread in the private sector.

To combat the widespread employment discrimination against LGBT individuals, some states have passed laws banning discrimination based on sexual orientation and gender identity. However, 29 states still provide no protections for lesbian, gay and bisexual individuals and 38 states provide no protection for transgender workers. State laws therefore leave large numbers of LGBT individuals without recourse for workplace discrimination on the basis of the sexual orientation or gender identity.

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and other bedrock civil rights laws recognize that protecting valued members of our workforce from discrimination should not be left to a patchwork of state and local laws that leaves large gaps in coverage. Discrimination in my home state of Maryland is just as wrong as discrimination in Montana. As with those laws, federal legislation prohibiting discrimination based on sexual orientation and gender identity will help eradicate workplace discrimination that should be neither tolerated nor condoned.

To underscore the need for a federal statute, I would like to review the current scope of the law. 21 states – including Connecticut, Nevada, New Hampshire, and Maryland – prohibit employment discrimination based on sexual orientation. Another 12 states – including Iowa, New Mexico, Oregon, Colorado, Minnesota, Washington, Rhode Island, and Vermont – as well as the District of Columbia, prohibit discrimination based on sexual orientation and gender identity. A number of local jurisdictions contain similar protections in their local laws. For example, in my home state of Maryland, Baltimore City and Montgomery County have expanded the protections available under state law by banning employment discrimination against transgendered individuals.

In states where no remedies exist, LGBT employees have no opportunity to combat egregious workplace discrimination and harassment. The recent report of the Williams Institute documents a distressing number of such allegations. For example:

- A police officer at the Pineville City Police Department in West Virginia reported regular harassment by his coworkers because of his sexual orientation, who deliberately sent him on calls without back-up. After learning of the officer's sexual orientation, one coworker allegedly hit him across the face with a night stick, breaking the officer's glasses and cutting his eye. The officer believes that his eventual discharge was based on his sexual orientation and not his job performance.
- An openly lesbian probation officer in Carroll County, Indiana, was allegedly denied promotion to chief probation officer because of her sexual orientation. A superior court judge allegedly told her that he would not promote her because she was a lesbian, that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. A man with no prior probation experience was promoted to the position.
- An employee of the Virginia Museum of Natural History, a state agency, was allegedly forced to resign because of his sexual orientation shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The Executive Director of the Museum reportedly expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual orientation employment discrimination claim, holding that the governor's executive order prohibiting such discrimination did not create a private right of action.

These examples – which would fall within the Civil Rights Division's enforcement authority under ENDA – are but a sampling of a disturbing number of reports of workplace discrimination against LGBT Americans in recent years. Unfortunately, the above LGBT employees have no opportunity to prove their claims, because they live in states that do not afford them redress.

The Williams Institute estimates that there are more than 200,000 LGBT employees in the federal workforce, yet, as in the case of state and local governments, we also lack strong statutory protection from sexual orientation and gender identity discrimination in this arena. The Civil Service Reform Act, which prohibits discrimination on the basis of conduct not affecting job performance, has been interpreted by the Office of Personnel Management to prohibit discrimination on the basis of sexual orientation. In addition, Executive Order 13087 prohibits employment discrimination on the basis of sexual orientation in much of the Executive Branch. But the administrative remedies available under both of these provisions are far more limited than those available to federal employees who experience other forms of discrimination, such as race, sex, or disability discrimination.

Moreover, although some courts have held that Title VII's prohibition against sex discrimination can protect LGBT persons from certain types of discrimination under certain circumstances, the extent of such protection varies significantly from court to court. Enactment

of legislation prohibiting discrimination against LGBT individuals in employment is needed to meaningfully and unambiguously prohibit employment discrimination on the basis of sexual orientation and gender identity and to give victims of such discrimination adequate remedies.

Preventing employment discrimination on the basis of sexual orientation and gender identity and providing the victims of such discrimination with a means to protect their rights not only is a matter of basic fairness, it is also a matter of enlightened economic self-interest. As the global marketplace becomes increasingly competitive, and as we work to revitalize and strengthen our economy, America cannot afford to waste talent or allow workplace bias and hostility to impede productivity, especially when many businesses operate in multiple cities and states. There is no reason why, for example, LGBT employees working for a company in Wisconsin, which was the first state to prohibit discrimination against LGBT individuals, should have their right to earn a living jeopardized or taken away if they are transferred across the lake to Michigan, which has not yet passed such a law.

Many of America's top businesses already recognize that discrimination of any kind, anywhere, is bad for business and costs money. Indeed, hundreds of companies now bar employment discrimination on the basis of sexual orientation and/or gender identity. According to the Human Rights Campaign's recently published Corporate Equality Index 2010, as of September 2009, 434 (87%) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 207 (41%) had policies that include gender identity. This, of course, is just the tip of the iceberg. Although most of the nation's largest businesses have started addressing workplace fairness for LGBT employees, significant numbers of individuals still face discrimination on the basis of sexual orientation or gender identity and desperately need the nationwide protections and remedies that ENDA would provide.

I have explained why legislation like ENDA is sorely needed in the private and public sectors and why it makes good business sense. We look forward to working with you on legislation as it advances in the Congress and are currently reviewing the proposed legislation. We may offer some technical comments on the bill. Now let me take a few moments to briefly dispel some misconceptions about the scope and impact of the legislation.

As you know, ENDA covers cases of intentional discrimination and explicitly precludes disparate-impact claims, does not permit the use of quotas or other forms of preferential treatment. Moreover, ENDA does not apply to small businesses with fewer than 15 employees, tax-exempt private membership clubs, or religious organizations. Indeed, ENDA contains a broad exemption for religious organizations and states that it does not apply to any corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII. In addition, nothing in ENDA infringes on an individual's ability to practice his or her faith, to hold and adhere to religious beliefs, or to exercise First Amendment rights of free speech on these or other issues. In addition, ENDA does not apply to the relationship between the federal government and members of the armed forces, and does not affect federal, state, or local rules providing veterans' preferences in employment decisions.

Lastly, there is nothing to suggest that ENDA will burden employers, unleash a flood of complaints that would threaten to overwhelm the EEOC or the Department of Justice, or clog the federal courts. On the contrary, the experience of states and local governments with sexual orientation and gender identity discrimination statutes for decades demonstrates that complaints under these statutes make up a relatively small portion of total employment discrimination complaints. Moreover, the jurisdictions that prohibit discrimination on the basis of sexual orientation and gender identity have been able to implement and enforce these laws in an entirely workable manner. We fully expect that the same would hold true at the federal level.

I will conclude by noting what a great honor it is for me to testify about a legislative initiative of the late Senator Ted Kennedy, who championed ENDA for more than a decade and who constantly reminded us that civil rights are the great unfinished business of our nation. I can think of no better way to honor his life and work than to pass ENDA and provide sorely-needed protections from arbitrary and unjustified discrimination to LGBT individuals in the workplace throughout our nation.

Thank you once again for the opportunity to testify. I welcome your questions.