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B-284923

April 28, 2000

The Honorable James M. Jeffords  
Chairman, Committee on Health, Education, Labor and Pensions  
United States Senate

Subject: Sexual-Orientation-Based Employment Discrimination: States' Experience  
With Statutory Prohibitions Since 1997

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; these laws do not cover discrimination based on sexual orientation. In 1997, we reported to you our findings regarding the experience of 11 states and the District of Columbia<sup>1</sup> with statutes prohibiting discrimination in employment on the basis of sexual orientation.<sup>2</sup>

As a principal sponsor of S. 1276, the Employment Non-Discrimination Act of 1999 (ENDA-99), a bill that would prohibit employment discrimination on the basis of sexual orientation, you asked, in a March 7 letter, that we update our earlier report. Specifically, you asked that we report on (1) characteristics, coverage, and exclusions of any new state laws and (2) the enforcement experience of the states since our earlier report.

To respond to your request, we looked for changes in state statutes or new state statutes since 1997. To get information about states' experience, we spoke with

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<sup>1</sup> The states were California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. In the following discussion, "state" includes the District of Columbia.

<sup>2</sup> Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions, (GAO/OGC-98-7R, Oct. 23, 1997).

officials charged with enforcing the state laws governing employment discrimination. 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 fiscal years since our earlier report. All data are as reported by the state agency; we did not independently verify them. We also asked state officials to identify any significant litigation of which they were aware; and we searched electronic databases for court decisions addressing state laws that prohibit employment discrimination on the basis of sexual orientation. To update that portion of our earlier report that discussed pending federal legislation, we compared ENDA-99 to its counterpart in the 105th Congress, S. 869 (ENDA-97).

### SUMMARY

Twelve states currently have laws that prohibit discrimination in employment on the basis of sexual orientation.<sup>3</sup> The content of these laws varies, but they share many significant features. Eleven of the states were on the list in our earlier report, but Maine is no longer included—a 1998 referendum repealed that part of Maine's law that made it unlawful to discriminate in employment on the basis of sexual orientation<sup>4</sup>—and we have added Nevada, where a law barring employment discrimination on the basis of sexual orientation took effect on October 1, 1999.<sup>5</sup>

Formal complaints of employment discrimination based on sexual orientation continue to be filed in the states that permit them. However, as was the case in 1997, we found that these complaints are a relatively small proportion of all employment discrimination complaints in those states. We also found, as before, no indication that these laws have generated a significant amount of litigation.

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<sup>3</sup>California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont, Wisconsin, and the District of Columbia. Since our earlier report, a presidential directive has expanded equal employment opportunity protections in the federal government to include sexual orientation. Executive Order 13087, May 28, 1998.

<sup>4</sup> It is possible that coverage in Maine will be restored. The Governor has signed into law a statute that would protect against discrimination on the basis of sexual orientation in employment, housing, public accommodations and credit. However, by its terms, this law will not take effect unless of majority of those voting in the state's general election in November endorse it.

<sup>5</sup> In the discussion below, we compare Nevada's new law to those of the other states, but significant information on enforcement does not yet exist. Like the laws in the other 11 states, Nevada's law shares a number of features with ENDA-99.

## STATE LAWS AND ENDA-99 SHARE FEATURES

State laws that protect against employment discrimination on the basis of sexual orientation differ in some respects, but generally address the same issues and share a number of features with one another and with ENDA-99. In our earlier report, we discussed in detail the significant features that are common to state laws barring employment anti-discrimination statutes on the basis of sexual orientation and to ENDA-97.<sup>6</sup> The significant features shared by these laws, and how ENDA-99 compares, may be summarized as follows:

- State statutes define the term “sexual orientation” as heterosexual, homosexual, or bisexual, and generally include both actual and perceived sexual orientation.
  - ◆ ENDA-99’s coverage is similar; in addition, it would bar discrimination based on the sexual orientation of anyone with whom the employee has or is believed to have associated.
- Coverage provided by the state statutes is not universal: whether an employer is subject to the law depends on the number of workers employed and the nature of the work. Concerning the latter point, all the state laws cover both private and public employment; all exempt religious organizations; most exempt nonprofit organizations.
  - ◆ ENDA-99 generally applies to employers with 15 or more employees. Civilian federal employees, including the Congress, the White House, and the Executive Office of the President, are covered. ENDA-99 exempts religious organizations to the extent they are engaged in religious activities,<sup>7</sup> as well as tax-exempt private membership clubs (other than labor organizations).

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<sup>6</sup> See GAO/OGC-98-7R, Oct. 23, 1997. Except for Maine, where voters repealed the sexual orientation provision, the state laws analyzed in our 1997 report have not changed. ENDA-99 differs from its predecessor, ENDA-97, in two noteworthy respects: ENDA-99’s description of discriminatory conduct proscribed now tracks Title VII of the Civil Rights Act of 1964; in addition, ENDA-99 excludes imposition of affirmative action as a remedy. See the enclosure for a summary comparison of ENDA-97 and ENDA-99.

<sup>7</sup> The exemption would not be available where an employee’s duties for a religious organization pertain solely to an activity that generates “business taxable income” unrelated to the organization’s religious activities.

- The state laws designate a state agency to handle discrimination complaints, but differ concerning the circumstances under which complainants may seek judicial enforcement.
  - ◆ ENDA-99 provides that the enforcement procedure would be the same as that now followed for complaints of employment discrimination under Title VII of the Civil Rights Act of 1964. That procedure is analogous to those state procedures under which the complainant must bring the complaint to an administrative agency before being allowed to sue.<sup>8</sup>
- State laws protect complainants and witnesses from retaliation.
  - ◆ ENDA-99's provisions are comparable.
- All state statutes provide a range of remedies, which can include back pay awards, punitive damages, or civil penalties.
  - ◆ ENDA-99's range of remedies does not include civil penalties.
- States are split on the use of quotas or preferential treatment: five of the state statutes prohibit quotas or preferential treatment; two permit preferential treatment; five are silent.
  - ◆ ENDA-99 prohibits employers from adopting or implementing quotas, or from giving preferential treatment to individuals on the basis of sexual orientation and provides explicitly that affirmative action may not be imposed. This is an exception to the general provision of ENDA-99 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-99. The Civil Rights Act, under certain conditions, permits employers to voluntarily adopt race- or gender-based preferences.

#### Nevada Law Similar to Other States' Laws and to ENDA-99

Nevada's statute, which took effect on October 1, 1999, is similar in substance to the other states' laws barring employment discrimination on the basis of sexual orientation:

- Sexual orientation is defined as having, or being perceived to have, an orientation for heterosexuality, homosexuality, or bisexuality.

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<sup>8</sup> For more information, see GAO/OGC-98-7R, at 7.

- The law applies to private and state employers with 15 or more employees, employment agencies, and labor organizations. Exempted are out-of-state employees, religious organizations,<sup>9</sup> Indian tribes, and tax-exempt private membership clubs.
- Employees may file a complaint concerning unlawful employment practices with Nevada's Equal Rights Commission and, after an unfavorable decision, may seek court relief. A complainant is entitled to file suit once administrative remedies have been exhausted, and to have a trial *de novo*. (This means in effect that the court will proceed as if there had been no administrative proceeding.)
- Discrimination against anyone for filing a complaint, appearing as a witness, or assisting in an investigation is explicitly prohibited.
- The enforcement agency has authority only to assess back pay and seek the reemployment of the complainant. It cannot assess penalties, or award punitive damages or attorney's fees.
- Preferential treatment as a remedy for correcting imbalance in the percentage of persons employed who belong to a protected group appears to be permitted but is not required.

#### NO SUBSTANTIAL INCREASE IN COMPLAINTS OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION SINCE 1997

In 1997, we reported that, in those states with statutes making it illegal to discriminate in employment on the basis of sexual orientation, relatively few formal complaints or lawsuits alleging such discrimination had been filed. Subsequent data provided by the states show that complaints of employment discrimination based on sexual orientation continue to be filed in the states. While there has been some variation over time, both the number and the percentage of such complaints as a portion of overall complaints of employment discrimination filed may still be characterized as relatively small. We also found no indication of a substantial amount of litigation since 1997; the number of lawsuits brought under these laws remains small.

#### Few Complaints of Sexual Orientation Discrimination in Employment Filed

Of the 12 state statutes prohibiting discrimination in employment on the basis of sexual orientation, 3 have been in effect for over 10 years. The earliest, in the District

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<sup>9</sup> A religious organization is not exempt if the employee is performing work not connected with the employer's religious activities. This provision is similar to those in ENDA-99 and in some of the other states' laws.

of Columbia, was enacted 23 years ago. Seven laws date from between 1991 and 1995. The most recent is Nevada's, which took effect in October 1999.

Overall, the states' data show that relatively few complaints of discrimination in employment on the basis of sexual orientation have been filed each year, whether measured in absolute numbers or as a percentage of all employment discrimination complaints. The data do not reveal any obvious growth trend in the number of complaints, nor is there evidence of large numbers of complaints filed immediately after a sexual orientation protection statute takes effect.

For example, in California, 159 complaints of sexual orientation discrimination (1.2 percent of all employment discrimination complaints) were filed in 1993, the year California's statute became effective. In 1999, 154 complaints were filed (0.8 percent of all employment discrimination complaints). Nevada has had one complaint filed since its law took effect 6 months ago.

Similarly, 12 complaints of sexual orientation discrimination were filed in Hawaii in 1992, the year after its anti-discrimination statute took effect. This was 2.2 percent of its overall employment discrimination complaints. In 1998, the most recent year for which statistics are available, six complaints were filed, representing 1.1 percent of the state's overall discrimination complaints.

Since 1997, New Jersey has seen a decline in the number of complaints filed based on sexual orientation discrimination in employment. There were 35 such complaints in 1997 as compared to 21 complaints in 1999. However, the total number of employment discrimination complaints filed during the same period also decreased, from 1,580 complaints in 1997 to 1,202 complaints in 1999. As a result, the percentage of complaints based on sexual orientation discrimination remained constant.

Detailed information on numbers and percentages of complaints filed in the states by fiscal year is shown in table 1. The latest 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 complaints	Sexual orientation employment discrimination complaints	Sexual orientation complaints as a percentage of total employment discrimination complaints
<b>California (law effective 1993)</b>			
1993	13,362	159	1.2
1994	15,730	159	1.0
1995	16,206	161	1.0
1996	17,164	173	1.0
1997	18,752	151	0.8
1998	18,892	127	0.7
1999	18,644	154	0.8
<b>Connecticut (law effective 1991)</b>			
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
1998	2,107	48	2.2
1999	2,100	28	1.3
<b>District of Columbia (law effective 1977)</b>			
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
1997	277	6	2.1
1998	295	6	
<b>Hawaii (law effective 1991)</b>			
1992	555	12	2.2
1993	364	6	1.6
1994	367	13	3.5
1995	396	15	3.8
1996	415	11	2.7
1997	483	10	2.0
1998	537	6	1.1

Massachusetts (law effective 1989)*			
1990	3,232	43 <sup>d</sup>	1.3
1991	3,496	83	2.3
1992	3,225	73	2.2
1993	4,372	135	3.0
1994	4,592	142	3.0
1995	5,144	146	2.8
1996	4,990	155	3.1
1997	5,173	148	2.9
1998	4,558	169	3.7
1999	4,180	113	2.7
Minnesota (law effective 1993)			
1995	886	34	3.8
1996	980	24	2.4
1997	1,436	34	2.3
1998	1,299	26	2.0
1999	1,268	32	2.5
Nevada (law effective October 1, 1999)*			
New Hampshire (law effective 1998)			
1998	220	2	0.9
1999	241	8	3.3
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	1,580	35	2.0
1998	1,495	27	2.0
1999	1,202	21	2.0
Rhode Island (law effective 1995)			
1996	317	2	0.6
1997	449	14	3.1
1998	428	5	1.1
1999	337	5	1.4
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
1998	200	6	3.0
1999	150	4	2.7
Wisconsin (law effective 1982)			
1996 <sup>b</sup>	3,653	43	1.2
1997	4,619	61	1.4
1998	4,073	64	1.6
1999	3,598	65	1.8

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<sup>a</sup> For 1998 and 1999, Connecticut gave us exact data on the number of employment sexual orientation cases. At the time of our 1997 correspondence, they did not have those data and estimated that approximately 90 percent of the total sexual orientation cases involved employment.

<sup>b</sup> Data on the number of complaints based on sexual orientation were not available for 1998.

<sup>c</sup> Massachusetts provided data for all discrimination complaints filed and the number of sexual orientation complaints filed. The state does not keep separate records on the number of employment discrimination complaints. The figures are for calendar years.

<sup>d</sup> These are actual numbers of sexual orientation complaints filed between 1990 and 1999.

<sup>e</sup> Only one employment discrimination complaint on the basis of sexual orientation has been filed since the new law went into effect (fiscal year 2000). In fiscal year 1999, the total number of employment discrimination complaints for Nevada was 1,070.

<sup>f</sup> In our previous correspondence, the data for fiscal year 1997 were estimates.

<sup>g</sup> Data provided are for calendar years.

<sup>h</sup> Data were not readily available for these earlier fiscal years.

As table 1 indicates, complaints of employment discrimination based on sexual orientation have remained low as a portion of total discrimination complaints filed each year with the 12 states. The percentage of sexual orientation cases relative to total complaints ranged in 1999 from 0.8 percent to 3.3 percent. The highest percentage in the 1992-1999 period was 5.2 percent in Vermont in 1997. However, that percentage is the result, not of an unusually large number of complaints based on sexual orientation—six were filed, just as in the following year when they were 3 percent of the total—but rather of an unusually small number of total employment discrimination complaints, less than any of the other years.

#### Litigation under State Laws on Sexual Orientation Rare

In 1997, we found few decisions by courts under the states' laws prohibiting discrimination in employment on the basis of sexual orientation, and that has not changed in the intervening time. A current search of standard sources for the 12 states found few court rulings under the states' laws prohibiting discrimination in employment on the basis of sexual orientation since 1997. Follow-up discussions with state officials responsible for enforcing the prohibition against employment discrimination confirmed that since 1997, a small number of lawsuits have been filed in court under their employment discrimination statutes.

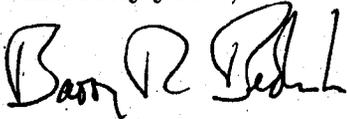
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As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to interested parties. We will make copies available to others upon request.

This report was prepared by Stefanie Weldon, Senior Attorney, and Dayna K. Shah, Assistant General Counsel. Please call me at (202) 512-8203 if you or your staff have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Barry R. Bedrick". The signature is written in a cursive style with a large initial "B".

Barry R. Bedrick  
Associate General Counsel

Enclosure



ENCLOSURE

ENCLOSURE

ENDA-97 and ENDA-99: Selected Provisions Compared

Provision	ENDA-97
Coverage	Law generally would apply to an employer with 15 or more employees (but not to a tax-exempt private membership club), to an employment agency, labor organization, joint labor-management committee, and certain other entities.
Sexual orientation	Homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived. Would also bar discrimination based on the sexual orientation of anyone with whom the employee has or is believed to have associated.
Discrimination prohibited	Proscribes conduct which subjects individuals to a different standard or treatment or otherwise discriminates
Enforcement Procedures	Procedures the same as those followed for employment discrimination complaints under Title VII of the Civil Rights Act of 1964
Enforcement and Remedies	Expressly bars quotas and preferential treatment as remedies Provides for all other remedies available under applicable civil rights laws (which do not include civil penalties)
Affirmative Action	No specific provision
Retaliation and Coercion Prohibited	Prohibits retaliation against individuals because they oppose an act or practice prohibited by the bill, or testified or assisted in an investigation
Disparate Impact	Fact that employment practice has a disparate impact on the basis of sexual orientation does not establish a prima facie violation of the Act.

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Provision	ENDA-99
Coverage	Coverage similar. Definitions of employer, employment agency, and labor organization now more closely track definitions in Title VII of the Civil Rights Act of 1964.
Sexual orientation	Same
Discrimination prohibited	By taking language directly from existing civil rights laws, it clarified and expanded what is proscribed conduct for employer practices, employment agency practices, labor organizations, and training programs. Such proscribed conduct includes failure or refusal to hire; discrimination respecting compensation, terms, conditions, and privileges of employment; or limiting, segregating, or classifying in a way that deprives or adversely affects opportunities. It also includes failure or refusal to refer for employment; exclusion or expulsion from membership in a labor organization; and exclusion from apprenticeship, training, and on-the-job programs.
Enforcement Procedures	Same
Enforcement and Remedies	Same
Affirmative Action	Affirmative action for a violation of this Act may not be imposed.
Retaliation and Coercion Prohibited	Same
Disparate Impact	Same

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