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United States General Accounting Office
Washington, DC 20548

April 19, 2002

The Honorable Edward M. Kennedy
The Honorable Joseph E. Lieberman
The Honorable Arlen Specter
The Honorable James Jeffords
United States Senate

Subject: Sexual-Orientation-Based Employment Discrimination: State and Federal Status

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 and again in 2000, we reported on state¹ statutes prohibiting discrimination in employment on the basis of sexual orientation.²

As the principal sponsors of 107th Cong., S. 1284, the Employment Non-Discrimination Act of 2001 (ENDA-2001), a bill that would prohibit employment discrimination on the basis of sexual orientation, you asked us to provide some additional information. Specifically, you asked us for (1) a current list of states with statutes prohibiting discrimination in employment based on sexual orientation, (2) a brief description of Maryland's new non-discrimination statute in comparison with ENDA-2001, and (3) any major differences between ENDA-2001 and 106th Cong., S. 1276 (ENDA-99).

¹Throughout this correspondence, we use the term "state" to include the District of Columbia.

²Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions, GAO/OGC-98-7, Oct. 23, 1997; Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions Since 1997, GAO/OGC-00-27R, Apr. 28, 2000.

STATES WITH STATUTES PROHIBITING SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION

Thirteen states currently have laws that prohibit discrimination in employment on the basis of sexual orientation: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont, Wisconsin, and the District of Columbia.³ The content of these laws varies, but they share many significant features with one another.⁴ Twelve of the state laws were listed in our 2000 report.⁵ Maryland's statute took effect on October 1, 2001.

MARYLAND NON-DISCRIMINATION LAW SIMILAR TO ENDA-2001

Maryland's statute is broad in scope, prohibiting discrimination based on sexual orientation in public accommodations, housing, and employment. In many ways, its provisions relating to employment discrimination are similar to those of ENDA-2001.

--**The Maryland law** defines sexual orientation as "the identification of an individual as to male or female homosexuality, heterosexuality or bisexuality."

--**ENDA-2001** defines sexual orientation similarly: "homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived."

--**The Maryland law** applies to private employers with 15 or more employees, State and local public employers, employment agencies, and labor organizations.

--**ENDA-2001** generally applies to private employers with 15 or more employees, as well as employment agencies and labor organizations. Civilian federal employees, including the Congress, the White House, and the Executive Office of the President, are generally covered.

³Maine enacted a statute in 1997 that was repealed by ballot referendum in 1998. A second statute enacted in 2000 provided it would not take effect unless endorsed by a majority of those voting in the state's general elections; Maine voters defeated that initiative on Nov. 7, 2000.

⁴See GAO/OGC-98-7, Oct. 23, 1997, where we summarized provisions of twelve state statutes (including Maine's, which was subsequently repealed), and GAO/OGC-00-27R, Apr. 28, 2000, for a summary of Nevada's statute.

⁵In 2000, we also reported the number of formal complaints of employment discrimination based on sexual orientation filed in eleven of those states (Nevada's statute at the time was too new to have any significant data). The percentage of sexual orientation complaints relative to total discrimination complaints filed ranged in 1999 from 0.8 percent to 3.3 percent. We found no indication that the laws generated a significant amount of litigation.

--**The Maryland law** exempts tax-exempt private clubs, religious organizations for work connected with its activities, and religious educational institutions.

--**ENDA-2001** has very similar exemptions. It exempts tax-exempt “bona fide private membership” clubs (other than labor organizations), and all religious organizations, which is defined to include religious educational institutions.

--**The Maryland law** designates the Maryland Commission on Human Rights to handle discrimination complaints and provides for subsequent judicial enforcement.

--**ENDA-2001** 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.

--**The Maryland law** prohibits retaliation against complainants, witnesses, and others who assist in an investigation.

--**ENDA-2001** expressly prohibits both retaliation and coercion.

--**The Maryland law** provides a range of remedies, including cease and desist orders, affirmative action, reinstatement or hiring, with or without back pay, and “any other equitable relief” that is appropriate.

--**ENDA-2001** also permits a range of remedies, including back pay awards, punitive damages⁶ and attorneys’ fees. It specifically prohibits quotas and preferential treatment.

THERE ARE FEW DIFFERENCES BETWEEN ENDA-99 AND ENDA-2001

In comparing ENDA-99 with the current ENDA-2001, we find the bills are very similar. Significant among the few differences are:

ENDA-2001 exempts any religious organization from coverage regardless of employment activity. Under ENDA-99, this exemption was not available where an employee’s duties for a religious organization pertained solely to activities of the organization that generate unrelated business taxable income subject to taxation under section 511(a) of the Internal Revenue Code.

⁶Punitive damages are not available in actions against a federal or state employer.

ENDA-2001 contains for the first time a definition of “employee”. This definition incorporates definitions from the Civil Rights Act of 1964⁷, Government Employee Rights Act of 1991⁸, and the Congressional Accountability Act of 1995.⁹

ENDA-2001 provides that a state’s receipt or use of federal assistance for any state program or activity constitutes a waiver of sovereign immunity to a suit brought in federal court alleging discrimination in employment of that program or activity.

This report was prepared by Stefanie Weldon, Senior Attorney. Please call me at (202) 512-8208 if you or your staff have any questions.

A handwritten signature in black ink that reads "Dayna K. Shah". The signature is written in a cursive style with a large, looped initial 'D'.

Dayna K. Shah
Associate General Counsel

⁷42 U.S.C. §§ 2000e(f) and 2000e-16(a).

⁸2 U.S.C. §1202(a)(1).

⁹2 U.S.C. §1301.