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Washington, DC 20548

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July 9, 2002

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

*Subject: Sexual Orientation-Based Employment Discrimination:  
States' Experience with Statutory Prohibitions*

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. Twelve states<sup>1</sup> and the District of Columbia<sup>2</sup> have enacted laws that prohibit discrimination in employment on the basis of sexual orientation. As principal sponsors of S. 1284, the Employment Non-Discrimination Act of 2001 (ENDA), a bill that would make such discrimination a violation of federal law, you asked us to study these states' laws and report on the states' experiences with enforcing them. Specifically, you asked us to (1) examine the characteristics, coverage, and exclusions of the laws, including how they compare with provisions of ENDA and (2) gather information concerning the number of complaints filed with the states.

In response to your request, we reviewed ENDA and the laws in the 13 states. We collected data from each state on the numbers of employment discrimination complaints filed, and the proportion of those complaints involving sexual orientation, for fiscal years 2000 and 2001. All data are as reported by the state agency; we did not verify these data. We have also incorporated information contained in our earlier reports on this subject.<sup>3</sup> We conducted our review between April and June 2002.

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<sup>1</sup>California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin.

<sup>2</sup>Except where otherwise specified, we use the word "state" throughout this correspondence to refer to the District of Columbia as well as to the 12 states.

<sup>3</sup>U.S. General Accounting Office, *Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions*, GAO/OGC-98-7R (Washington, D.C.: Oct. 23, 1997); *Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions Since 1997*, GAO/OGC-00-27R (Washington, D.C.: Apr. 28, 2000); *Sexual-Orientation-Based Employment Discrimination: State and Federal Status*, GAO-02-665R (Washington, D.C.: Apr. 19, 2002).

In summary, although the state laws differ in some respects, they generally share a number of features with one another and with ENDA. For example, ENDA and the majority of states define “sexual orientation” to mean homosexuality, heterosexuality, and bisexuality and provide that the term includes both actual and perceived sexual orientation. All the state laws and ENDA exempt religious organizations; many of the states and ENDA exempt specific nonprofit or tax-exempt organizations as well.

For those states where the law has taken effect, relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints in the state. Moreover, the state statistics generally do not show any trend in the volume of employment discrimination cases based on sexual orientation over the periods we examined.

### **Significant Features of State Laws Prohibiting Employment Discrimination on the Basis of Sexual Orientation**

ENDA and most state laws that protect against employment discrimination on the basis of sexual orientation do so in ways that differ in detail but that generally address the same basic issues. The state laws and ENDA also contain features relating to coverage, including whether employers below a certain size are exempt and whether certain kinds of organizations, such as religious groups, nonprofit, or tax-exempt entities are covered. ENDA and the states have a definition of “sexual orientation” that establishes the general scope of protection.

#### Definitions of “Sexual Orientation”

The definition of sexual orientation in the laws of the 13 states prohibiting such discrimination in employment generally establishes the basis for the protection they provide. The majority of states provide in some form that “sexual orientation” means heterosexuality, homosexuality, or bisexuality.<sup>4</sup> Except for Vermont and the District of Columbia, all the definitions include people who are perceived by others to be in, or are identified with, those three categories, whether or not they actually fall within one of them. An effect of this is to prohibit discrimination not only against an employee who is homosexual, for example, but also against an employee whom the employer wrongly believes is homosexual.

Two of the state laws (Massachusetts and Minnesota) explicitly say, in connection with the definition of sexual orientation, that the protection of the law does not extend to pedophiles. Some state laws that do not have an explicit limitation of that kind have provisions that may have the same effect; they provide, for example, that the state prohibition against employment discrimination on the basis of sexual

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<sup>4</sup>Minnesota’s statute defines “sexual orientation” in part as “having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person,” or “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Rhode Island is the only other state that statutorily bars discrimination based upon gender identity.

orientation does not protect conduct that is otherwise unlawful under state law. In addition, some state laws provide that the definition describes the status of certain persons but does not constitute legislative approval of that status.

ENDA uses the same terminology—heterosexuality, homosexuality, bisexuality—in its definition as do most of the state laws and, like most of those laws, bars discrimination on the basis of either real or perceived sexual orientation. (Table 1 lists the definitions of sexual orientation in ENDA and the state laws.)

**Table 1: Definitions of Sexual Orientation in ENDA and State Statutes**

Bill/state law	Definition
ENDA	“Homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.” sec. 3(9)
California	“Heterosexuality, homosexuality, and bisexuality,” including “a perception that the person has [any of these characteristics]” Cal. Gov. Code § 12926(q)
Connecticut	“Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but exclud[ing] any behavior which constitutes a violation” of state criminal laws regarding offenses such as sexual assault, rape, and prostitution. <sup>a</sup> Conn. Gen. Stat. § 46a-81a
District of Columbia	“Male or female homosexuality, heterosexuality and bisexuality, by preference or practice.” D.C. Code § 2-1401.02(28)
Hawaii	“Having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences,” provided that sexual orientation “shall not be construed to protect conduct otherwise proscribed by law.” HRS § 378-1
Maryland	“The identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality.” Md. Ann. Code art. 49B, § 15(j)
Massachusetts	“Having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality,” but not including persons “whose sexual orientation involves minor children as the sex object.” Mass. Ann. Laws ch. 151B, § 3
Minnesota	“Having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness,” but not including “a physical or sexual attachment to children by an adult.” Minn. Stat. § 363.01 subd. 41a
Nevada	“Having or being perceived as having an orientation for heterosexuality, homosexuality, or bisexuality.” Nev. Rev. Stat. Ann. § 613.310(6)
New Hampshire	“Having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality,” provided that the definition “is intended to describe the status of persons and does not render lawful any conduct prohibited by the [state’s] criminal laws” or “confer legislative approval of such status.” RSA 354-A:2(XIV-a)
New Jersey	“Affectional or sexual orientation means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.” <sup>b</sup> N.J. Stat. § 10:5-5(hh)
Rhode Island	“Having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality”, provided that the definition “is intended to describe the status of persons and does not render lawful any conduct prohibited by the [state’s] criminal laws” or “confer legislative approval of such status.” R.I. Gen. Laws § 28-5-6(13)
Vermont	“Female or male homosexuality, heterosexuality, or bisexuality,” provided that the law “shall not be construed to protect conduct otherwise proscribed by law.” 1 V.S.A. § 143
Wisconsin	“Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.” Wis. Stat. § 111.32(13m)

<sup>a</sup>Connecticut’s law also provides that nothing in it condones homosexuality or bisexuality; authorizes promotion of either, or requires the teaching of either, as acceptable lifestyles; authorizes the recognition or right of same-sex marriages; or establishes sexual orientation as a “specific and separate cultural classification.”

<sup>b</sup>New Jersey defines heterosexuality, homosexuality, and bisexuality as “affectional, emotional physical attraction, or behavior which is primarily directed toward persons of,” respectively, the other gender, the same gender, or both genders.

**Discrimination on the Basis of Association**

Two states have provisions that expressly prohibit associational discrimination. California’s statute barring unlawful employment practices on the basis of sexual orientation includes instances where “the [employee] is associated with a person who has, or is perceived to have” any of the characteristics on which basis it is illegal to discriminate, such as sexual orientation. Minnesota, the other state with such a statutory provision, makes it an unfair discriminatory practice for an individual who

participated in alleged discrimination to intentionally engage in a reprisal against any person because that person, among other things, associated with a person or group of persons who are of a different sexual orientation. A reprisal against an individual includes refusing to hire the individual, departing from a customary employment practice, or transferring or assigning the individual to a lesser position.<sup>5</sup> Similarly, ENDA bars discrimination in employment on the basis of not only the sexual orientation of the employee but also the sexual orientation of anyone with whom the employee associates or has associated.

## Coverage

### Size of Employer's Business

Under the state laws, as is also the case under the existing federal laws and ENDA, the size of the employer's business is a factor in determining coverage. State nondiscrimination laws set a minimum number of employees, and employers with fewer employees than this threshold are not covered. Generally, the state laws set the minimum lower, and thus cover more small businesses, than their federal counterparts. Six states we reviewed include, in effect, all employers regardless of the business' size. In the other seven states, the minimum number of employees that triggers coverage ranges from as few as 3 (Connecticut) to as many as 15 (Maryland and Nevada). ENDA would cover employers with 15 or more employees, as do title VII of the Civil Rights Act and the Americans With Disabilities Act.

### Nature of Employer's Business or Activity

The nature of the work is a factor in determining coverage in all states. Various types of organizations may be expressly subject to the law or exempt on the basis of the nature of their business or activities.

An exemption for religious organizations exists in all the states. Although the state exemptions vary in language, most states have exemptions that are broad in scope. They generally permit religious organizations to give preference to those of the same religion, or to people whose employment is in accord with the tenets of their religions. One state (Minnesota) has an exemption that does not apply to secular business activities engaged in by religious associations. In five states, the exemptions are specific to statutory provisions providing protection from discrimination on the basis of sexual orientation and may be in addition to broader exemptions that apply to employment discrimination provisions in general. ENDA has a broad exemption for religious organizations, similar to most of the states.

A slight majority of states includes nonprofit organizations in the coverage of their sexual orientation nondiscrimination statutes. Two states (Nevada and New Hampshire) have broad exemptions for nonprofit or tax-exempt organizations, while

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<sup>5</sup>Although other states do not have explicit statutory provisions on associational employment discrimination, according to several state officials we spoke with, the absence of such a provision would not necessarily preclude a person from filing an associational discrimination complaint.

four states exempt specific nonprofit or tax-exempt organizations from coverage. For instance, the District of Columbia exempts organizations operated for charitable purposes that are controlled by a political organization. Minnesota exempts service organizations whose primary function is providing occasional services to minors. Massachusetts exempts exclusively social or fraternal clubs if they are not organized for private profit. Thus, in these states, some nonprofit organizations would be exempt if they meet the statutory definition, while the state's sexual orientation nondiscrimination provisions would cover others.

The corresponding provision in ENDA exempts any "bona fide private membership club (other than a labor organization)" that is exempt from federal income taxation. ENDA's exemption seems to be a bit narrower than most state exemptions. One state (Maryland) has an identically worded exemption. Further, the exemption in ENDA for employers with fewer than 15 employees would likely result in the exemption of additional small nonprofit organizations. (Table 2 compares coverage under ENDA and the various state laws for certain features.)

### Other Conditions

Certain kinds of work and certain classes of workers are exempt from coverage under the state laws. Although only one state law explicitly exempts volunteers from coverage under the sexual orientation protection, a number of the state laws have the effect of doing so, for example, by defining "employee" to include only those who receive compensation. ENDA explicitly exempts uncompensated volunteers.

Another exemption based on the nature of the work exists in the states that exempt domestic workers from protection. ENDA does not have the same specific exemption, but, in many instances, the 15-employee minimum set by ENDA would presumably have much the same effect: A person who employs as many as 14 domestic workers would be exempt from coverage under ENDA.

In some states, the nondiscrimination law does not apply when there is a close family relationship between the employer and the employee. The definition of such a relationship differs among the states, but typically the laws exempt people employed by a parent, a spouse, or a child. ENDA has no corresponding provision, but here, too, the 15-employee minimum would have the same effect as these state exemptions on small family businesses.

**Table 2: Comparison of Selected Coverage Features of ENDA and State Statutes**

S. 1284, Employment Non-Discrimination Act of 2001 (ENDA)/ State employment nondiscrimination statutes	Feature		
	Minimum no. of employees for coverage	Religious organizations	Nonprofit or tax-exempt organizations
ENDA	15	Exempt	Exempt <sup>a</sup>
California	5	Exempt	Covered
Connecticut	3	Exempt	Covered
District of Columbia	1	Exempt	Exempt <sup>a</sup>
Hawaii	1	Exempt	Covered
Maryland	15	Exempt	Exempt <sup>a</sup>
Massachusetts	6	Exempt	Exempt <sup>a</sup>
Minnesota	1	Exempt	Exempt <sup>a</sup>
Nevada	15	Exempt	Exempt
New Hampshire	6	Exempt	Exempt
New Jersey	1	Exempt	Covered
Rhode Island	4	Exempt	Covered
Vermont	1	Exempt	Covered
Wisconsin	1	Exempt <sup>b</sup>	Covered

<sup>a</sup>Exempts at least one category of nonprofit or tax-exempt organizations.

<sup>b</sup>Wisconsin statute does not have an express exemption; however, a statutory provision allows religious organizations, under some circumstances, to give preference to an applicant or employee who “adheres to the religious association’s creed.”

### **Relatively Few Complaints Have Followed Enactment of State Sexual Orientation Protection Laws**

We found that, in those states with a law making it illegal to discriminate in employment on the basis of sexual orientation, relatively few complaints of such discrimination have been made. The statistics do not show any trend in the number of complaints over time.

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

Of the 13 state statutes prohibiting discrimination in employment on the basis of sexual orientation, 7 have been in effect for at least 10 years. The earliest, in the District of Columbia, took effect in 1977. The most recent is Maryland’s, which took effect in October 2001.

Detailed information on the state laws’ effective dates and numbers of complaints by fiscal year for the 12 states with complaint experience is shown in table 3. Data shown through fiscal year 1999 have been provided in our previous reports. We have updated that data for fiscal years 2000 and 2001 for each state except Maryland,

which has not yet compiled complaint statistics on sexual orientation because its law recently went into effect on October 1, 2001.

**Table 3: Data on States' Experience With Sexual Orientation Employment Discrimination Complaints**

Fiscal year	Total employment discrimination cases under state law	Sexual orientation employment discrimination cases <sup>a</sup>	Sexual orientation cases as a percentage of total employment discrimination cases
<b>California (law effective 1993)</b>			
2001	17,668	596	3.4
2000	17,757	362	2.0
1999	18,644	154	0.8
1998	18,892	127	0.7
1997	18,752	151	0.8
1996	17,164	173	1.0
1995	16,206	161	1.0
1994	15,730	159	1.0
1993	13,362	159	1.2
<b>Connecticut (law effective 1991)</b>			
2001	2,006	44	2.2
2000	1,981	35	1.8
1999	2,100	28	1.3
1998	2,107	48	2.2
1997	2,355	41	1.7
1996	2,262	44	1.9
1995	2,668	23	0.9
1994	2,404	32	1.3
1993	2,035	20	1.0
<b>District of Columbia (law effective 1977)<sup>b</sup></b>			
2001	210	19	9.0
2000	198	9	4.5
1999	289	11	3.8
1998	287	7	2.4
1997	277	6	2.1
1996	230	7	3.0
1995	337	8	2.4
1994	344	3	0.9
1993	304	9	3.0
1992	214	7	3.3
<b>Hawaii (law effective 1991)</b>			
2001	535	9	1.7
2000	577	10	1.7
1999	491	6	1.2
1998	537	6	1.1
1997	483	10	2.0
1996	415	11	2.7
1995	396	15	3.8
1994	367	13	3.5
1993	364	6	1.6
1992	555	12	2.2



Fiscal year	Total employment discrimination cases under state law	Sexual orientation employment discrimination cases <sup>a</sup>	Sexual orientation cases as a percentage of total employment discrimination cases
<b>Massachusetts (law effective 1989)<sup>c, d</sup></b>			
2001	4,006	100	2.5
2000	4,350	113	2.6
1999	4,180	113	2.7
1998	4,558	169	3.7
1997	5,173	148	2.9
1996	4,990	155	3.1
1995	5,144	146	2.8
1994	4,592	142	3.0
1993	4,372	135	3.0
1992	3,225	73	2.2
1991	3,496	83	2.3
1990	3,232	43	1.3
<b>Minnesota (law effective 1993)</b>			
2001	1,047	31	3.0
2000	944	25	2.6
1999	1,268	32	2.5
1998	1,299	26	2.0
1997	1,436	34	2.3
1996	980	24	2.4
1995	886	34	3.8
<b>Nevada (law effective October 1, 1999)</b>			
2001	1223	32	2.6
2000	968	5	0.5
<b>New Hampshire (law effective 1998)</b>			
2001	246	8	3.3
2000	233	8	3.4
1999	241	8	3.3
1998	220	2	0.9
<b>New Jersey (law effective 1992)</b>			
2001	1,337	18	1.3
2000	1,097	20	1.8
1999	1,202	21	2.0
1998	1,495	27	2.0
1997	1,580	35	2.0
1996	1,277	20	1.6
1995	2,127	30	1.4
1994	1,919	25	1.3
1993	2,159	20	0.9
1992	2,712	17	0.6

Fiscal year	Total employment discrimination cases under state law	Sexual orientation employment discrimination cases <sup>a</sup>	Sexual orientation cases as a percentage of total employment discrimination cases
<b>Rhode Island (law effective 1995)<sup>e</sup></b>			
2001	307	6	2.0
2000	298	9	3.0
1999	337	5	1.4
1998	428	5	1.1
1997	449	14	3.1
1996	317	2	0.6
<b>Vermont (law effective 1991)<sup>c</sup></b>			
2001	154	6	3.9
2000	156	4	2.6
1999	150	4	2.7
1998	200	6	3.0
1997	115	6	5.2
1996	129	2	1.6
1995	152	2	1.3
1994	136	5	3.7
1993	139	4	2.9
<b>Wisconsin (law effective 1982)</b>			
2001	3,250	56	1.7
2000	3,235	62	1.9
1999	3,598	65	1.8
1998	4,073	64	1.6
1997	4,619	61	1.4
1996 <sup>f</sup>	3,653	43	1.2

<sup>a</sup>Generally, a complainant can allege other bases—sex, race, or religion, for example—in a complaint that also alleges employment discrimination on the basis of sexual orientation. In this table, a case is counted as a sexual orientation case whether or not other bases are also alleged in the same complaint.

<sup>b</sup>The District of Columbia uses the federal October–September fiscal year.

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

<sup>d</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, although the state told us that typically around 85 percent of all discrimination complaints are employment discrimination complaints.

<sup>e</sup>The numbers listed for sexual orientation employment discrimination complaints include only those complaints where sexual orientation is listed as the only or the primary basis for complaint. The numbers do not include complaints where sexual orientation is listed as a secondary basis for complaint.

<sup>f</sup>Data were not readily available for fiscal years before 1996.

Overall, the states' data showed that relatively few complaints of discrimination in employment on the basis of sexual orientation were filed annually, whether measured in absolute numbers or as a percentage of all employment discrimination complaints under state law. Also, our analyses of the data obtained from the states generally did not show any trends in the number of these complaints over time.

As shown in table 3, the states' percentages of employment discrimination complaints on the basis of sexual orientation relative to the total number of employment discrimination cases generally ranged from 0.5 percent (fiscal year 2000, Nevada) to 9 percent (fiscal year 2001, District of Columbia) a year for 2000 and 2001. Only six states reported cases of discrimination in employment on the basis of sexual orientation equal to or exceeding 3 percent of total employment discrimination cases for either 2000 or 2001. The District of Columbia reported the two highest percentages: 4.5 percent of all employment discrimination cases in fiscal year 2000 contained sexual orientation as a basis for complaint, and 9 percent of all employment discrimination cases in fiscal year 2001 included a sexual orientation

basis. During the same period, the number of complaints filed in the District of Columbia increased from 198 to 210.

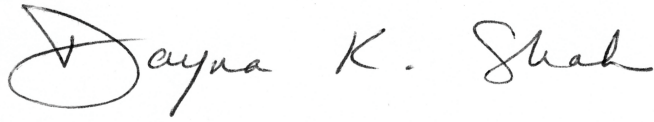
By far, California has had the highest number of total employment discrimination complaints. The number of sexual orientation complaints, however, has been relatively low until recently; the number of sexual orientation complaints has gone from 154 in fiscal year 1999 to 596 in fiscal year 2001. Complaints of employment discrimination on the basis of sexual orientation were 1.0 percent of total employment discrimination complaints filed during fiscal years 1994 through 1996, less than 1.0 percent for fiscal years 1997 through 1999, but have increased in both fiscal year 2000 (2.0 percent) and fiscal year 2001 (3.4 percent). These increases occurred despite the fact that the overall number of employment discrimination complaints went down in fiscal years 2000 and 2001 compared to the previous three years. A California state official told us that the reason the number of sexual orientation complaints increased for fiscal years 2000 and 2001 was because the deadline for filing sexual orientation discrimination complaints increased from 30 days to one year starting on January 1, 2000. The percentage of sexual orientation complaints, however, can still be considered relatively low (3.4 percent for fiscal year 2001) when compared with data from the other states.

In Massachusetts, the data indicate that the number of sexual orientation complaints has generally increased from 1990, the year after the state law became effective, until 1998. In each of the past 3 years, the number of sexual orientation complaints has either decreased or remained constant. Although the number of total discrimination complaints has also decreased, the percentage of sexual orientation complaints has gone from 3.7 percent of total complaints in 1998 to 2.5 percent of complaints in 2001.

The two states that have most recently passed sexual orientation nondiscrimination laws for which data are available—New Hampshire and Nevada—had very few complaints in the first year following passage of their laws. The number of sexual orientation complaints in these states rose following the first year. These two states generally mirror other states' experiences with regard to the number of sexual orientation complaints filed immediately following passage of a state law. Complaint numbers for the first year tend to be low but then rise in subsequent years. This is understandable since the number of complaints might be expected to go up after the first year as more people become aware of the state statute.

James Rebbe, Senior Attorney; Veronica Sandidge, Legal Assistant; and Richard Burkard, Assistant General Counsel, prepared this report.

If you have any questions about this letter, please contact me on (202) 512-8208.

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 Shah  
Associate General Counsel