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Privatizing Gay Rights with Non-discrimination Promises Instead of Policies

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Summary

Firms that are committed to employment equality for gay and lesbian workers don't need to wait for state or federal legislation. A little-known type of intellectual property can allow individual corporations to privately opt into non-discrimination duties. We see this as a potential model for other civil rights or policy implementation.

KEYWORDS: employment discrimination, gay rights

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Introduction

Civil rights legislation that aims to prevent discrimination based on sexual orientation has run into a brick wall—with legislative progress halted or non-existent in many states.

Moreover, legislation may not be the ideal solution anyway: In most matters, economists champion private ordering, not government mandates.

Can private contracting play a role in creating new civil rights—in particular, rights against discrimination based on orientation? We think it can.

Legislative Progress On Gay Rights Has Been Modest to Poor

Americans strongly support the simple idea that employers should not discriminate against gays and lesbians. In a 2003 Gallup poll, a whopping 88 percent of respondents said that “homosexuals should . . . have equal rights in terms of job opportunities.” And even prominent conservatives—such as George W. Bush—at least give lip service to the idea that employment discrimination on the basis of sexual orientation is wrong.

But gay rights advocates have made only limited legislative progress on this issue. Fifteen “blue” states have prohibited employment discrimination against gays and lesbians. But the other thirty-five—both “red” and “blue”—have not.

At the federal level, matters are, if anything, worse. A seemingly modest bill, the “Employment Non-Discrimination Act” (ENDA) has been introduced several times in Congress without success. ENDA only prohibits disparate treatment on the basis of sexual orientation; it does not take aim at policies that disparately impact gays. Yet ENDA has virtually no chance of passing during the Bush administration.

Corporations That Support ENDA Need Not Wait for Its Passage to Act

A boatload of prominent corporations—including the likes of AT&T, Coors, IBM and General Mills—have already endorsed ENDA. But corporations that are committed to the idea of employment equality for gay and lesbian

workers don't have to wait for federal or state legislation. They can, in effect, privately adopt the legislation themselves.

Virtually all the corporate endorsers of ENDA already have nondiscrimination policies that include sexual orientation. But the pretty words of nondiscrimination policies sometimes turn out to be only that. If an employer discriminates against an applicant because she is gay, it is far from certain that the employer would be liable for breach of contract—even if the employer has a non-discrimination policy.

Thus, while anti-discrimination policies seem to create rights, that may be an illusion; and even if rights are created by such policies, remedies remain unspecified: Will a violation lead to back pay awards, compensatory damages, punitive damages, or no remedy at all?

The bottom line is that rights without remedies are pretty worthless. So instead of merely promulgating non-discrimination *policies*, we think corporations should adopt non-discrimination *promises* that replicate the rights and responsibilities of the civil rights legislation that has yet to become law.

A New Certification Mark Helps Make Corporate Promises Enforceable

A little-known piece of intellectual property, the certification mark, provides a viable mechanism for employers to commit to the exact substantive duties of ENDA.

We have created a symbol we call the “Fair Employment” mark: an “FE” inside a circle:



We have formally applied to the United States Patent and Trademark Office to register this symbol as a certification mark. Moreover, we've created a nifty on-line licensing site.

At www.fairemploymentmark.org, with just a few clicks of the mouse and without paying any licensing fee, any employer can turn its policy into a legally enforceable promise. And with the publication of this article, we are hereby launching a campaign to bring 100,000 employees under the mark's protection in the next 12 months.

The idea is simple, really. By signing the royalty-free license agreement, an employer gains the right (but not the obligation) to use the mark, and in return promises to abide by the word-for-word strictures of ENDA. It would thus allow employees to sue seeking the core compensatory remedies that ENDA would, if enacted, give them. (We did not try to improve on ENDA here, just to copy it. Since ENDA requires a filing of claims within 180 days, so does our license. Since ENDA would allow arbitration agreements, our license would as well.)

Displaying the mark on a product or service signals to knowing consumers and employees that the company has committed itself not to discriminate on the basis of sexual orientation. That means gays' and lesbians' and their straight friends' and relatives' considerable purchasing power can be brought to bear to convince more corporations to adopt the mark.

ENDA Compliance Can Be Enforced Directly, Not By Outside Policing

Other certification marks (such as the Good Housekeeping Seal, the Underwriters Laboratory, and the Orthodox Union marks) require the mark holder—that would be us—to police the certification to ensure compliance with the requirements of the licensing agreement. Obviously, we don't have the resources to do that—and we believe, in any event, that employees are among the best situated to police violations of their own rights.

So the licensing agreement for the Fair Employment mark allows employees and job applicants to enforce the ENDA duties *directly* (in legal speak, they are “express third-party beneficiaries” of the agreement).

The Fair Employment mark thus replicates the core enforcement mechanism of ENDA by creating private causes of action that could be brought by the same class of individuals who would have gained protection under the statute, had it been passed by Congress.

Advantages of the Mark Include Encouraging Congress to Pass ENDA

The mark represents an incremental strategy in the struggle for equality. It's incremental, because the employers who use the mark will be the ones who choose to because they are already in favor of gay rights in employment (or who opt to do so to improve their marketing).

Arguably, the employers that most need to use the mark, will be the ones who eschew it—refusing to use the mark even if to do so would help their revenue. Eventually, though, those employers, too, may end up being legally required to comply with ENDA—in part, because of the mark.

The mark—in addition to providing protection against discrimination to potentially millions of workers and applicants who are currently uncovered—also will have a “demonstration” effect. That is, it will provide Congress with information that might quell concerns about ENDA.

That's because the mark provides a mechanism for producing case law about the language of a statute before the statute is ever enacted. The mark thus will provide legislators with information about the ways a statute might be interpreted by courts, as well as the rates of litigation the statute might engender.

The now-publicly-available facts of specific cases may also illustrate the invidiousness of, and harm caused by, sexual orientation discrimination. Facts that might have been the stuff of private griping, can now become the stuff of judicial rulings.

Use of the mark may also demonstrate to society's homophobes—as state-sanctioned gay marriages recently have—that the world won't fall apart when measures are taken to remedy employment discrimination on the basis of sexual orientation.

Similar Marks May Be Able to Privatize Other Rights and Policies

It is somewhat surprising, but to the best of our knowledge, this license will count as the first time that private contractors have intentionally taken the language of proposed legislation and inserted it into private agreement. We hope it will set precedent for other, similar licenses.

The Fair Employment mark is, of course, centrally about promoting equal employment rights. But it also raises more general questions about the possibility of privatizing law, in many other contexts.

Following Tiebout, economists often talk about the experimental benefits of state and local laws that let people vote with their feet. But the Fair Employment mark suggests the possibility for a new type of experimentalism. Before passing non-contractible mandates, Congress might set up trials where willing companies or individuals could “opt into” a law; meanwhile, others who do not want to opt in may temporarily avoid the law’s application to them, while evidence is gathered as to its practical effect.

Why Would An Employer Voluntarily Take On Greater Vulnerability to Lawsuits?

Of course, these benefits of the mark require that employers actually sign the license agreement. Ay, there’s the rub. Why would any employer in its right mind take on this potential legal liability? Lots of reasons.

First and foremost, committing to equality is good business. Fully 88% of the public opposes employment discrimination against gay and lesbian workers. And licensing the fair employment mark could be a great recruiting tool as well as a great marketing tool.

An employer might nonetheless worry that the threat of consumer or employee boycotts would outweigh any benefits of pro-equality patronage. But particularly in markets with lots of sellers, there is a strong incentive for, at a minimum, some fringe firms to adopt the license. Even in a world where opponents of employment equality substantially outnumber equality advocates, there will be robust incentives for a few of the firms to adopt the mark.

To see how this works, let’s imagine a stylized market consisting of 10 hammer makers. Suppose that hammers are so uniform that consumers are completely indifferent about the source of hammers they buy; consumers purchase randomly, so each manufacturer gets 10% of the market.

Suppose further that 5% of customers support equal employment rights for gay men and lesbians so strongly that they will go out of their way to buy hammers from the company that treats gay employees fairly. (We are not assuming that 5% would give their right arms to further gay rights, but simply

that—other things being equal, such as price—they would strongly prefer sellers who promised not to discriminate.)

But imagine also that four times as many consumers—20%—actively dislike or disapprove of gays (enough that they'll avoid purchasing from companies that treat gay employees fairly).

Finally, suppose that the remaining seventy five per cent of the consumers don't care one way or the other—at least, not enough to base their purchasing decisions on their feelings.

Now consider what happens to the first company adopting the Fair Employment mark. Even if that company loses all of its business from the anti-gay consumers, that difference is more than made up by the pro-gay consumers who choose to buy products bearing the mark.

The first mover increases from a market share of 10% (before using the mark) to a 12.5% market share after adopting the Fair Employment mark. This increase in demand results *despite the fact that the company loses its share of the anti-gay customers' business*. That's because the company is still getting its random tenth of the consumers who don't care (one-tenth of 75% = 7.5%), plus *all* of the consumers who support gay rights (5%).

How can this be—that a firm has an incentive to adopt the mark when consumers who dislike the mark outnumber those who like it four to one? The answer is that most of the opponents weren't going to buy from the first-adopter firm anyway.

Because there were 10 identical firms in the market, the first adopter only had a 10% chance of getting *any* consumer to buy. From the first-adopter's perspective, the anti-gay consumers fall from a 10% chance to a 0% chance of buying. But the pro-gay consumers rise from a 10% chance to a 100% chance of buying.

Because of this disproportionate change in shifting probabilities, the *boycott* effect is likely to be much stronger than the boycott effect for first-adopters in markets with many firms. Of course, in the real world the pro-gay consumers will not go all the way to a 100% probability of buying—but the underlying idea that first-adopters will not be deterred, even in the face of considerable anti-gay consumer sentiment, still holds true.

In short, there may be a real market demand for adoption by at least a fraction of sellers—and this is before we begin to consider the potential benefits in recruiting employees, and in selling to government entities that mandate sexual orientation non-discrimination by their contractors.

The Cost of The Private Suits Created by the License Would Be Modest

But wouldn't the first-adopter lose more, in the cost of lawsuits, than it gained in greater sales and improved recruitment?

Absolutely not. In fact, the cost of allowing private suits is incredibly low.

The GAO studied 11 states that had already prohibited employer discrimination. In the average year only 6/100th of a percent of employees brought claims of sexual orientation discrimination. Even if an average claim costs an employer \$100,000, this would represent an extra cost per employee of only \$1.67 per year.

Employers who voluntarily sign up are probably even less likely to face liability; they are already sensitive to issues of sexual orientation discrimination, as demonstrated by their “opting in” in the first place. Also, employers who operate in the 16 states and dozens of municipalities that independently prohibit this type of discrimination have no additional exposure—but can use the mark to communicate their beliefs to their customers.

Most importantly, promising not to discriminate is the right thing to do. Licensing the mark doesn't mean that an employer can't contest meritless or weak claims of discrimination. It just means that the business can't stand up in court and say “we have a right to discriminate against gay and lesbian employees if we feel like it.”

A Call to Action: Going Beyond Symbolism, to Enforceable Commitments

We should demand more than non-discrimination symbolism from employers. If non-discrimination means anything, it should mean that an employer legally commits not to engage in disparate treatment.

The current policies (in employee handbooks and the like) are too close to “cheap talk” that can actually border on a kind of fraud, by suggesting employees have rights they do not actually possess.

An applicant can read the pretty words of non-discrimination and then be surprised to learn that, since she was never in contractual privity with the employer vis-à-vis this policy, she has no cause of action.

In sum, non-discrimination rights should have legal remedies, and the Fair Employment mark is designed to create them.

So this article is literally a call to action. We want your help. The next time you are at a meeting and you hear your own employer extol its non-discrimination policy, you should speak up and ask “Are you promising not to discriminate?”

We are not posing a hypothetical. We call upon our academic readers to challenge their Deans and University presidents (as well as the non-profit boards on which they sit): “Is this institution willing to promise not to discriminate?” We suggest that those outside Academe do the same.

What are they going to say in response? “We take our non-discrimination policy very seriously, but no, we’re not willing to promise not to discriminate on the basis of sexual orientation.” We are about to have a test—and you, gentle reader, are one of the subjects.

Still think no business in its right mind would sign? Well, we’re pleased to announce that the Watton Law Group, a small law firm in Wisconsin, is the first sign up. Who is willing to step up to the plate next?

Lots of businesses say they oppose this kind of discrimination. They adopt policies and endorse ENDA. Few employers, given the chance, would publicly opt out of race discrimination laws. Few employers would choose to suffer the adverse publicity from publicly opting out of ENDA if a waivable version were enacted.

Now, with the Fair Employment mark, these employers have the opportunity to opt in.

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Letters Commenting on this piece or others may be submitted at