

Sexual Orientation Nondiscrimination Policies

The Hollow Promise

By Richard F. Ober Jr.
and Ian Ayres

Many companies—more than 90 percent of the Fortune 500 and all but one of the Fortune 50—have adopted policies prohibiting discrimination on the basis of sexual orientation. Maybe your company is one of them. If it is, should your policy carry the following hollow promise disclaimer?

Notwithstanding our policy, in the interest of full disclosure, we advise you that depending on the state in which you work, this policy may be totally hollow in that you have no legal recourse or enforceable rights if you are discriminated against on the basis of sexual orientation or several of the other grounds listed above.

The reality is that despite the lofty-sounding language in nondiscrimination policies, employees in most states have found them difficult to enforce. It may seem inconceivable that a company would announce a sexual orientation nondiscrimination policy and then argue in court that it has a legal right to discriminate, but in fact some companies have done just that—and successfully. But the hollowness of these promises benefits neither your company nor its employees. A far better approach is to make these promises enforceable in a way that can both enhance your company's image and potentially even limit its liability.



Hollow Promises: The Nonenforcement of Nondiscrimination Policies

Only 17 states (and the District of Columbia) have seen fit to prohibit workplace discrimination by private employers on the basis of sexual orientation. (See “States Barring Sexual Orientation Discrimination in Private Employment,” on p. 52.) In other states, although discrimination policies that include sexual orientation are becoming increasingly prevalent, they are often difficult to enforce. In Texas, for example, AT&T successfully argued that its employee handbook policy banning sexual orientation discrimination—the first in the nation—did not create a contractual obligation. The Fifth Circuit agreed, finding that under Texas law “absent an express reciprocal agreement dealing with procedures for discharge, employee handbooks ‘constituted no more than general guidelines,’ and did not create a contractual right in the employees.”¹

Even though courts are showing an increasing tendency to enforce promises in corporate policies and human resources manuals, to this day, enforceability of nondiscrimination clauses is, at best, hit-or-miss. Since 1995, the New York Stock Exchange, the Methodist Church, New Balance Shoe, and the New York Metropolitan Transit Authority have all persuaded courts to refuse to enforce nondiscrimination policies on the grounds that they are too vague or were not intended to be legally enforceable. In one court’s view, such a policy “is merely a general statement of adherence . . . to existing antidiscrimination laws. It does not create a separate and independent contractual obligation.”²

One of the most recent of these cases was discussed in *USA Today*, on May 10, 2006, featuring the battle of Jennifer Harris, a three-time *USA TODAY* high school basketball selection, against Penn State and its coach. Harris alleges she was kicked off the team due to the coach’s harassment of her for appearing to be a lesbian. There may be some truth to Harris’s allegations, as, according to the article, the University found that the coach created a ‘hostile, intimidating and offensive environment’ because of Harris’ perceived sexual orientation, fined the coach \$10,000, and required her to undergo diversity and inclusiveness training. Nevertheless, the University is defending Harris’ lawsuit on the basis that its nondiscrimination policy did not give rise to an enforceable contractual duty.

Plaintiff [Harris] contends that Penn State’s non-discrimination policies are part of an enforceable contract between herself and the University. It is true



RICK OBER is vice president, general counsel, and secretary of TerraCycle, Inc., a start-up selling plant food in Home Depots and Wal-Marts across the US and Canada. Previously, Rick was executive vice president, general counsel, and secretary of Summit Bancorp, an S&P 500 company. He is a graduate of Princeton and Yale Law School and a past president of the New Jersey Corporate Counsel Association. Rick can be reached at rickober@terracycle.net.



IAN AYRES is Townsend Professor at Yale Law School. He is a member of the American Academy of Arts & Sciences. Ayres is a regular commentator on National Public Radio’s *Marketplace* and a columnist for *Forbes* magazine. He has published over 100 articles and eight books, including *Straightforward: How to Mobilize Heterosexual Support for Gay Rights*.

that Pennsylvania courts have held that the relationship between a student and a private college is generally contractual in nature, and that in determining the provisions of such a contract, the courts may look at the written guidelines, policies and procedures distributed to the student over the course of his or her enrollment. However, numerous courts have declined to find that non-discrimination policies of the type at issue in this case rise to the level of an enforceable contract term.³

The Problem with Hollow Promises And Some Solutions

As corporate counsel, why should we care about a group of potential plaintiffs who cannot find a cause of action against our clients? There are two problems—on opposite sides of the enforcement coin—with the nonenforceability of these policies. First, the hollowness of the promises is not only ethically troubling; it could become an embarrassment for the companies making them. Customers might begin to worry: “if you disclaim the enforceability of that promise, what should I make of all the representations you made to me?” Second, a court might treat one of these policies as an open-ended promise, subjecting the company to some surprising and expensive forms of open-ended liability.

The fact that a court might treat a company’s promises (of any sort) as hollow might at first sound like good news for a company. But while getting a discrimination suit dismissed quickly seems like a good result for corporate clients, some ways of winning are embarrassing. Few employers today would publicly acknowledge that they retain a legal right to discriminate on the basis of sexual orientation. However, attorneys for employers with nondiscrimination policies have stood up in court after the fact and argued just this. In today’s networked, instant message-enabled world, publicity about such an action will spread (via websites like www.lambdalegal.org) through the gay community in days, if not minutes, with the accompanying risks of protests, boycotts, and lawsuits, not to mention the negative effect on the morale of gay employees and nongay employees who have gay loved ones.⁴

Our solution to the hollow promise problem: Make the policies enforceable—and do so through the “fair employment” certification mark program, which we describe further below. Most corporate counsel, on hearing this

(continued on p. 54)

States Barring Sexual Orientation Discrimination in Private Employment

STATE	CITATION & DATE	PUBLIC EMPLOYMENT	PUBLIC ACCOMMODATIONS	PRIVATE EMPLOYMENT	EDUCATION	HOUSING	CREDIT	UNION PRACTICES
California	Labor Code §§ 1101, 1102 & 1102.1 (1992)	X	X	X	X			
Connecticut	Public Act 91-58 (5/29/91)	X	X	X	X	X	X	X
Hawaii	Rev. Stats., §§ 368-1 & 378-2 (3/21/91)	X	X	X		X		X
Illinois	Illinois Human Rights Act as amended by SB3186 in January 2005	X	X	X		X	X	
Maine	112nd Maine Leg. Bill LD No.1146. (eff. 6/29/05)	X	X	X	X	X	X	
Maryland	Senate Bill 205, Anti-discrimination Act of 2001 (5/15/2001).	X	X	X		X		X
Massachusetts	Gen. L., Ch. 151B, §§ 3-4 (West 1995)	X	X	X	X	X	X	
Minnesota	Ch. 22, H.F. No. 585 (4/2/93)	X	X	X	X	X	X	
Nevada	NRS 610.010 et seq. (Eff. 10/1/99). 1999 Nev. Assem. Bill No. 311	X		X				X
New Hampshire	RSA 21 (as amended by H.B. 421, 3/19/97)	X	X	X		X		
New Jersey	Ch. 519, L.N.J. 1991; Hum Rts. Law [C.10: 5-3] (1/92)	X	X	X	X	X		
New Mexico	HB277 (2004) covers sexual orientation and gender identity	X	X	X		X	X	
New York	The Sexual Orientation Non-Discrimination Act (S.720/A.1971); as amended 1/16/03	X	X	X	X	X	X	
Rhode Island	95-H 6678 Sub.A (5/22/95)	X	X	X		X	X	
Vermont	Hum. Rts. Law (4/23/92)	X	X	X	X	X	X	X
Washington, DC	Human Rights Act, 1977, D.C.L. 2-38, D.C. Code §1-2541(c) 12/13/77	X	X	X	X	X	X	X
Wisconsin	Laws of 1981, Ch. 112	X	X	X	X	X	X	X

Source: Lamda Legal, www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=185

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proposal, will ask themselves: Why convert “policies” which are not legally enforceable into “promises” which are? Isn’t my client better off knowing that as a good corporate citizen it will ultimately abide by its nondiscrimination policy?

But in fact, trusting to your own good citizenship is an unwise gamble in a world where the nondiscrimination policy *might* be enforced in ways that you never intended. This is the problem of open-ended enforcement.

Imagine your client has just been sued. The plaintiff’s claims are tenuous and financial demands outrageous. If you don’t settle, your client will be accused of refusing to abide by its nondiscrimination policy. In your state, courts are prepared to recognize employee handbooks and policies as contracts in some circumstances, and there is no statutory parallel to your client’s nondiscrimination policy—increasing the chance that the court will craft a new, open-ended form of liability. For example, a policy that prohibits “discrimination” might be interpreted to give employees both “disparate treatment” and “disparate impact” causes of action. In such a state, a company might have to defend disparate impact suits challenging any policy (such as one refusing to provide medical benefits for HIV) that disproportionately disadvantages gay employees.

In contrast, a move from unenforceable “policies” to explicit, enforceable “promises” can give employers more control over their potential exposure.⁵ Unlike a court’s interpretation of a general nondiscrimination policy, express promises can:

- be limited to disparate treatment;
- limit potential remedies by disclaiming, for example,

punitive damages, damages for emotional distress, and injunctive relief, or by capping compensatory damages or limiting remedies to back wages;

- provide employers with procedural safeguards;
- require employees to give notice of claims within a certain period, like state and federal analogs in other civil rights arenas;
- require that all discrimination claims be submitted to arbitration (or some other dispute resolution mechanism).

Make Sexual Orientation Policies Enforceable Without Opening a Pandora’s Box of Litigation

What, then, is the best way to reach this desired goal, to move away from vague and potentially dangerous policies on nondiscrimination and toward explicit, but limited, promises of nondiscrimination?

The traditional approach: Federal legislation

The traditional way would be to carefully craft a statute which would give teeth to nondiscrimination policies without giving class-action plaintiffs’ lawyers a license to run wild. Ideally, such a statute would allow disparate treatment claims (while disclaiming disparate impact and affirmative action duties) and permit arbitration agreements and waivers of class action rights, while having a relatively short statute of limitations.

Such a statute has been written and has been languishing in Congress since 1993: ENDA, the Employment Non-Discrimination Act.⁶ (See “ENDA: A History,” on this page.)

One alternative: Narrow your policy

For employers in states that enforce employee handbooks and policies, one solution might be to abandon their general policy on nondiscrimination and to adopt a specific policy that explicitly follows the limitations of ENDA. A general policy can be dangerously vague, and might be more broadly interpreted than you expect by an aggressive court. In contrast, a policy that follows the contours of ENDA by, e.g., explicitly limiting your liability to disparate treatment claims (and not disparate impact), waiving class action rights, and having a relatively short “statute of limitations,” would do a much better job of limiting and defining your company’s liability.

But it’s worth remembering that employee handbooks and policies don’t just exist to limit your liability; they also play an important role in establishing the relationship you have with your employees. A limited nondiscrimination policy may well seem to be more about the limitations than about the value of nondiscrimination; instead of looking principled, your company might come off looking stingy, despite its best intentions. We think there is a better way.

ENDA: A History

In 1975, Bella Abzug introduced the first comprehensive gay civil rights bill in the history of the Congress. From then until 1993, legislative efforts to protect homosexuals from employment discrimination focused on amending Title VII to include sexual orientation in the list of protected categories. In 1993, ENDA was proposed as an alternative. The text was based on a draft by Chai Feldblum, who now teaches at Georgetown Law School. In 1996, Senate leaders agreed to a floor vote on ENDA in exchange for allowing a vote on the Defense of Marriage Act (DOMA). ENDA failed in the Senate by a single vote, 49–59, and has never been given a full vote in the House. ENDA has been reintroduced several times since then, most recently in 2003.

A more elegant solution: The fair employment mark

In 1998, recognizing that efforts by mainstream bar associations to encourage diversity in the profession were falling short within the in-house legal community for a variety of reasons, Charles R. Morgan, executive vice president and general counsel of BellSouth Corporation, initiated a circular letter entitled "Diversity in the Workplace—A Statement of Principle," which has since been signed by the CLOs of over 500 companies, including coauthor Ober.⁷ Roderick Palmore, GC of Sara Lee,

followed this in 2004 with "A Call to Action: Diversity in the Legal Profession," which already has over 90 signatories.⁸ This article is a call to action by corporate counsels to make the same commitment to sexual orientation non-discrimination, in a way that limits their potential liability to certain definite obligations.

To make it easier for an employer to move to a more certain but limited promise of nondiscrimination, coauthor Ayres, together with Jennifer Brown, has created a simple contractual mechanism that allows employers to commit to the exact substantive duties of ENDA, even as we hope for congressional action that would make those duties mandatory. A little-known piece of intellectual property, the certification mark, gives employers a way to promise not to discriminate on the basis of sexual orientation. To act as such a certification mark, Ayres and Brown have created a symbol called the "Fair Employment" mark shown on this page.

Ayres and Brown have formally applied to the United States Patent and Trademark Office to register this symbol as a certification mark. With just a few clicks of a mouse at www.fairemploymentmark.org (and without paying any fee), any employer can make a limited promise not to discriminate on the basis of sexual orientation.

The idea is simple. By signing the licensing 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. Displaying the mark signals to knowing consumers and employees that the company manufacturing the product or providing the service has committed itself not to discriminate on the basis of sexual orientation.

Think of the Fair Employment mark as a Good Housekeeping Seal for equality. Other certification marks (such as the Underwriters Laboratory® and the Orthodox Union marks) require the mark holder to police the certification to insure compliance with the requirements of the licensing agreement. But the licensing agreement for the Fair Employment mark allows employees and applicants to enforce the ENDA duties directly as express third-party beneficiaries of the agreement.⁹ The Fair Employment mark thus replicates the core enforcement mechanism of ENDA by creating private causes of action in the same class of individuals who would gain protection under the statute. (For a discussion of how the Fair Employment mark employs the third-party beneficiary approach, see "A Different Type of Certification," on p. 58.)



ACC International Resources on . . . Employment Law

Docket articles:

- Lisa Catanzaro and Peter Holt, "Process and Prejudice: UK Terminations for the Uninitiated," *ACC Docket* 23, no. 8 (September 2005): 88-104. www.acca.com/protected/pubs/docket/sept05/prejudice.pdf.
- Richard Mosher and Owen Warnock, "All for One and One for All: Navigating Trade Unions and Works Councils in Europe," *ACC Docket* 23, no. 2 (February 2005): 48-67. www.acca.com/protected/pubs/docket/feb05/union.pdf.
- "Terminating an Overseas Distributor or Agent: How to Make the Divorce Less Painful," *ACC Docket* 24, no. 2 (Feb. 2006). www.acca.com/resource/v66695.

InfoPAKs:

- Canadian Labour and Employment Law (2006), www.acca.com/resource/v7267
- Employment and Labor Laws in Mexico (2006), www.acca.com/resource/v7326.

Webcasts:

The following ACC webcasts are available via <http://webcasts.acca.com/>.

- Key Distinguishing Features of Canadian Employment and Labour Law (September 19, 2006).
- Twenty-five Basic Employment Law Questions and Answers for Managing Non US-based Employees (March 21, 2006)

Also available via ACC Online:

- The ^{PLC}Cross-border Labour and Employee Benefits Handbook, (2005/06), a Global Counsel resource, www.acca.com/practice/global.php.

Paragraph 4 of the licensing agreement sets out these substantive duties:

STANDARDS OF FAIR EMPLOYMENT.

Licensee promises not to engage in the following employment practices:

1. *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual*

with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's sexual orientation; ENDA, S. 1705, § 4 (a)(1) or

2. *to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of*

A Different Type of Certification

Although certification marks enjoy a long tradition, two aspects of the Fair Employment mark are quite nontraditional. First, the licensing agreement designates third-party beneficiaries as the sole enforcers of the agreement. (The agreement is available at www.fairemploymentmark.org.) In return for the right to use the mark, an employer expressly grants third-party beneficiary status to the same parties who could sue to enforce ENDA. Paragraph 5 of the License reads:

THIRD-PARTY BENEFICIARIES. *Licensee and Licensor agree to designate as express third-party beneficiaries of this agreement all persons and entities that would be entitled to sue if ENDA were in effect (including governmental civil rights enforcement agencies). In particular, Licensee and Licensor designate as express third-party beneficiaries all persons who are or have been employed by the Licensee or applied for employment with the Licensee during the term of the license. The Licensee and Licensor intend that these third-party beneficiaries will have the right to sue the Licensee for any breach of this agreement and have a legal right to the same remedies (including damages and injunctive relief) to which they would be entitled if ENDA were in effect.*

While contract promises (including intellectual property licensing agreements) traditionally require a return element of consideration in order to be enforceable, it is well settled that express third-party beneficiaries can acquire enforceable contractual rights without providing consideration themselves. So long as the consideration is provided by another party to the contract—in this case, by the mark owner in granting the licensee the right to use the mark—the beneficiaries' right to nondiscrimination is enforceable.

The use of these third-party beneficiaries also massively reduces what the licensor of the mark needs to certify. While traditional certification mark owners go out into the world and monitor licensees to make sure they are complying with the requirements of the mark, the license agreement is structured so that there is no need to inspect the licensee's employment practices. Indeed, under the licensing agreement, the owners

(coauthor Ayres and Brown) certify almost nothing. They do not certify that the employer does not discriminate. Instead, they only certify two crucial facts:

1. the employer has *promised not to discriminate* in employment on the basis of sexual orientation; and
2. the employer has granted all of its employees and applicants *express third-party beneficiary status* to remedy any breaches of the nondiscrimination promise.

Because the licensing agreement expressly includes both of these elements, the licensors can truthfully certify these matters merely by certifying that the licensee has signed the license. The beauty of this structure is that any employer who gains a right to use the mark by signing the licensing agreement by the same act meets the minimum requisites for certification.

This minimalist certification structure has three advantages. First, it allows a mark owner to provide meaningful certification with virtually no expense. Even though the licensor does not certify that the employer does not discriminate, it is able to credibly certify that the employer holds itself open to private suits for discrimination. Second, this structure is transparent. It makes clear to employers that the mark owners are not profiting from the mark. Because of this structure, employers can obtain a license to use the mark without paying the owners a licensing fee. Third, this licensing structure allows the mark to emulate more closely the ENDA private cause of action. Employers need not worry that the mark owners will engage in vexatious litigation, because mark owners do not have a right to sue for violations of the nondiscrimination promise.

As an aside, note that the promotional benefits of the Fair Employment mark come subject to the laws and regulations (e.g., those of the FTC) that govern other forms of commercial advertising. Although a full exploration of this subject is beyond the scope of this article, the fact that the mark merely certifies that employer has made a legally enforceable promise not to discriminate (and not that employer does not or has never discriminated) suggests that the risk of a false advertising claim would be negligible.

- employment or otherwise adversely affect the status of the individual as an employee, because of such individual's sexual orientation; ENDA, S. 1705, § 4 (a)(2)*
3. *to discriminate against any individual because of the sexual orientation of the individual in admission to, or employment in, any program established to provide apprenticeship or other training; ENDA, S. 1705, § 4(d)*
 4. *to discriminate against an individual because such individual opposed any of the employment practices described in subsections (1) through (3), or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing concerned with this License. ENDA, S. 1705, § 5*
 5. *The employment practices described in any of subsections (1) through (3) shall be considered to include an action described in that subsection, taken against an individual based on the sexual orientation of a person with whom the individual associates or has associated. ENDA, S. 1705, § 4 (e)*

But unlike Title VII, the Fair Employment license follows ENDA in expressly limiting its coverage to claims of disparate treatment. Like ENDA, the licensing agreement expressly disclaims disparate impact and affirmative action duties, and employers are not required to provide employee benefits to domestic partners.

Cleaving to the contours of ENDA allows employers to limit their litigation exposure and make it more certain.

- *Arbitration.* Under ENDA (as with Title VII), discrimination disputes would be arbitrable so long as the arbitration agreement was conscionable. We believe the same standards should generally apply to the licensing agreement, ENDA, and Title VII. Thus, since ENDA would allow arbitration agreements, the license does as well. But although the licensing agreement allows arbitration agreements, it does not include one; therefore job applicants would be free to litigate claims arising from the licensing agreement, unless subjected to a separate preemployment arbitration agreement.

Is it Possible to Create Precedent *Before* a Statute is Enacted?

If a sizeable number of employees are eventually covered by the Fair Employment mark, legislators would learn about how ENDA would likely be interpreted by courts if it were enacted. The Fair Employment mark allows courts for the first time to create persuasive statutory precedent *before the statute is passed*. At first this seems impossible—statutes must be enacted before they are interpreted. And if it were possible, why would this be the first time it ever happened? The simple answer is that the licensing agreement is to our knowledge the first private contract that explicitly adopts the words of a proposed statute. As shown in the appendix, the licensing agreement expressly states its goal:

WHEREAS Licensee desires to privately commit to non-discrimination as defined in the Employment Non-Discrimination Act (ENDA) as proposed in S. 1705, 108th Cong., 1st Sess. (2003).

This version of the ENDA bill is attached to the license; the substantive “Standards of Fair Employment” included in the license are taken word-for-word from the bill. Thus, when a court is asked to interpret the meaning of the words in the license it will be literally interpreting the same words that are included in the proposed bill. Even though the court will be interpreting a contractual promise, it will (because

of the foregoing “whereas” clause) be asking whether the employer’s conduct would have run afoul of ENDA had the bill been enacted.

Information about how courts will interpret ENDA can help quell legislative concerns about supporting the bill. Even though the next section will show that the bill is an incredibly narrow prohibition of disparate treatment alone, legislators may still worry that “activist judges” will extend the statute beyond its borders. The statute does not reach discrimination on the basis of gender identity and expression, so legislators may be concerned that ENDA will restrict employers’ ability to regulate employee appearance and conduct. Resolving these possible ambiguities can ease the bill’s passage—in part because the legislators can expressly approve or disapprove of this prior precedent. Just as Congress expressly disapproved of some Supreme Court precedent and expressly approved of other precedent when it passed the Civil Rights Act of 1991, so too Congress would have the option of explicitly embracing or rejecting particular court interpretations of the fair employment mark licensing agreement when considering whether to pass ENDA. The substantive language of the nondiscrimination requirement in a future proposal of ENDA might even change in response to this prior precedent.

- *Class actions.* Since ENDA would allow waiver of class action rights, so does the Fair Employment license. Note that many arbitration agreements waive class action rights. As long as the arbitration agreement is not found to be unconscionable, waivers of class action rights will be upheld.
- *Limitations.* Since ENDA would require filing of claims within 180 days of the occurrence of a violation, so does the license.¹⁰
- *Coverage.* And finally, note that the decision to remain within the boundaries of ENDA also means that the certification promise does not cover transgendered persons or require the payment of partner employee benefits.¹¹ The license is also more limited than ENDA with regard to questions of enforcement and remedies. First, the Fair Employment license does not grant government civil rights agencies an independent ability to enforce. Second,

How Much Would A Promise Cost?

The United States General Accounting Office (GAO) has already compiled valuable information on the number of complaints filed under state statutes that prohibit employment discrimination on the basis of sexual orientation. In 2000, the GAO analyzed the claim rates in 11 states with statutory prohibitions. The study reported the number of claims of sexual orientation discrimination made in each state in each year. Combining the GAO claim data with information from the Bureau of Labor Statistics on yearly levels of state employment, Ayres and Brown estimated the incremental litigation risk created by prohibitions on sexual orientation discrimination. (See Table 1, below.)

Table 1 shows that overall the rate of complaining is extremely low. Averaging over the 67 state-year observations in the data, Ayres and Brown found almost 60,000 workers for every sexual orientation complaint filed. The lowest claiming rate was New Hampshire in 1998, where there was only 1 complaint for every 294,550 employees (the highest claiming rate was found in Massachusetts in 1999, where there were still over 18,000 employees for every complaint).

To get a handle on the economic costs to employers of such complaints, Table 1 also reports the average costs per employee, assuming that the expected average costs for an employer of responding to a complaint (including costs of diverted

attention, attorney fees, legal damages, etc.) is \$100,000. This is a ballpark estimate (possibly generous), which is only an attempt to measure the probable magnitude of the costs of this new type of liability. Table 1 suggests that the overall costs to date have been low. The average cost of these laws per employee is less than \$2 per year (\$1.67). This analysis suggests that the state statutes have not substantially increased the overall wage bill. The incremental cost of explicitly promising not to discriminate for employers who have nondiscrimination policies or who are located in states that independently prohibit employment discrimination is going to be even lower.

NOTES

1. GAO letter, Sexual Orientation Based Employment Discrimination: States' Experience with Statutory Prohibitions Since 1997 to the Honorable James M. Jeffords, Chairman, Committee on Health, Education, Labor and Pensions (April 28, 2000).
2. *Id.* at 7 (these were that states that had claim data available).
3. The number of employees comes from the U.S. Department of Labor, Bureau of Labor Statistics and can be accessed at <http://data.bls.gov/PDQ/outside.jsp?survey=sm>. The employment number used is the total number of non-agricultural employees for a given state in a given year. Employment numbers are given on a monthly basis, so we used the average monthly employment for our annual data.

Table 1: Analysis of Litigation Rates and Expected Costs of State Prohibitions

	Employees Per Complaint	Gay Employees Per Complaint	% of Gay Employees Filing Complaints	Cost Per Employee	Cost Per Gay Employee
Average	59,739	1792	0.06%	\$1.67	\$55.80
Maximum (NH)	294,550	8,837	0.18%	\$5.32	\$177.22
Minimum (MA)	18,809	564	0.01%	\$0.34	\$11.32
Standard Deviation	55.309	1,659	0.04%	\$1.23	\$41.09


Notes: Complaint Data taken from GAO Report, OGC-00-27R; Employment Data taken from Bureau of Labor Statistic Report, Current Employment Statistics Survey. In the end there were 67 state-year observations. "Gay Employee" calculations assume 3% of employees are gay or lesbian. "Cost" calculations assume that employer expects average complaint to cost \$100,000.

the license cannot create federal court jurisdiction. Third, even if punitive damages would be available to plaintiffs under ENDA, courts may be unwilling to grant them to plaintiffs for breach of the licensing agreement. Similar logic may restrict courts' willingness to grant certain types of injunctive relief. Specific enforcement of promises is at times restricted by a variety of doctrines (such as the irreparable harm rule), which are not at play in remedying statutory civil rights claims. Finally, the licensee gives employers the power to change their minds. While the term of the license is five years (and by default automatically renews), licensees can terminate the agreement at any time and for any reason.

There is a strong case for explicit promises based simply on a desire to limit and make certain prospective litigation risk. And surprisingly, the proposed ENDA statute provides a wonderfully limited template for such a promise that does no more than prohibit traditional disparate treatment. Dozens of companies have endorsed ENDA—a good indication that this is a workable standard.¹²

But the business case for adopting more explicit promises goes beyond litigation risk management. Making a credible commitment not to discriminate is a power-

ful way to attract both equality-minded consumers and employees. Eighty-eight percent of respondents in Gallup polls oppose employment discrimination against gay and lesbian workers. And consumers aren't put off by employers who stand up for equality. Research from Wharton shows that employers with an inclusive workplace have lower recruiting costs and higher employee productivity that ultimately benefit corporate shareholders.¹³

The movement toward nondiscrimination policies is almost complete; it is high time that corporate counsel be clear about what they are and what they are not actually promising. 

Have a comment on this article? Email editorinchief@acca.com.

NOTES

1. *Joachim v. AT & T Information Systems*, 793 F.2d 113 (5th Cir. 1986).
2. *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 208. (S.D.N.Y. 1998).
3. Brief in Support of Motion to Dismiss of Defendants Curley and The Pennsylvania State University, Case 1:05-CV-26 (M.D. Pa. 2006) [citations omitted].
4. Gay advocacy sites that in-house counsel should be aware of include, for example, the lists of allegedly antigay compa-

- nies at <http://gratefulread.net/archives/cat/001331.html>, www.turnleft.com/out/boycott.html, www.hrc.org/Template.cfm?Section=Press_Room&CONTENTID=28963&TEMPLATE=/ContentManagement/ContentDisplay.cfm. There also is a very active gay rights bar. See www.lambdalegal.org/cgi-bin/iowa/cases/index.html; Lesbian/Gay Law Notes, www.nyls.edu/pages/3876.asp. There are also important organizations supporting the families and friends of gay men and women. For example, see www.pflag.org for Parents, Families and Friends of Lesbians and Gays, an organization with over 440 chapters, over 200,000 members and a permanent staff of over 15 in Washington, DC.
5. But see Ian Ayres and Jennifer Gerarda Brown, "Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark," 104 *Michigan Law Review* 1639 (2006) for a more extensive rationale for making the nondiscrimination promise a binding policy.
 6. J. Banning Jasiunas, Note, "Is ENDA the Answer? Can a 'Separate But Equal' Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?," 61 *Ohio St. L.J.* 1529 (2000). In using the language of ENDA, the mark places the words of Chai Feldblum, one of its principal drafters, into our licensing agreement.
 7. Charles R. Morgan, "Leading General Counsel—And Their Law Firms—Up The Path To Diversity," www.acca.com/gcadvocate/diversitystmt.html.
 8. Melanie Lasoff Levs, "Call to Action—Sara Lee's General Counsel: Making Diversity A Priority," www.mcca.com/site/data/magazine/2005-01/saralee0105.shtml.
 9. To access the licensing agreement, go to www.fairemploymentmark.org.
 10. There is one dimension in which our license arguably goes beyond ENDA. ENDA would require private plaintiffs to file a charge with EEOC and obtain a "right to sue" letter before suing in federal court. (A similar duty to file with the state human rights commission is in place in California under its state non-discrimination statute). Plaintiffs under our license would not need to exhaust this administrative remedy before filing suit. While this might impose fewer procedural burdens on license-based plaintiffs, it is important to remember that exhaustion of administrative remedies does not substantively burden plaintiffs—because plaintiffs in any case retain a right to sue. Therefore the substantive effects of ENDA/Title VII and the license agreement should be the same.
 11. The Human Rights Campaign decided in 2004 only to support ENDA if it prohibited discrimination against transgendered protections as well. See www.hrc.org/Template.cfm?Section=Employment_Non-Discrimination_Act&CONTENTID=22157&TEMPLATE=/ContentManagement/ContentDisplay.cfm. However, see Ayres and Brown, *supra*, 104 *Michigan Law Review* at 1688, for the pragmatic arguments for cleaving to ENDA.
 12. http://www.hrc.org/Template.cfm?Section=Endorsing_ENDA&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17977.
 13. Ian Ayres and Louis Thomas, "Embracing Equality," www.equalityforum.org/press-20050909.cfm (Sept. 9, 2005).

ACC and Other Extras on . . . Diversity and Discrimination

ACC Committees:

More information about these ACC committees is available on ACC OnlineSM at www.acca.com/networks/committee.php, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com.

- Employment & Labor Law

InfoPAKs:

- Achieving Diversity (2005), www.acca.com/resource/v5748.
- Responding to EEO Agency Charges of Discrimination (2006), www.acca.com/resource/v7268.

Docket articles:

- Kris McVey, "The Twilight Zone: The Challenges of Employing Older Workers," *ACC Docket* 24, no. 4 (April 2006): 56–68, www.acca.com/resource/v7111.
- Bradley S. Paskievitch and David B. Kahng, "When the Employment Class Action Comes Knocking: Avoiding One If Possible, and Reducing Risks Once Suit Is Threatened or Filed," *ACC Docket* 23, no. 2 (February 2005): 68–81. www.acca.com/protected/pubs/docket/feb05/knocking.pdf.

Leading Practice Profile:

- Law Department Diversity (2005), www.acca.com/resource/v5898.

Annual Meeting Material:

Program material is available from the following courses at ACC's 2005 Annual Meeting, at www.acca.com/am/05/material.php.

- Bill Proudman, Arin Reeves, and Veta Richardson, "Managing Diversity for All Employees," course 605.

Webcast:

- What's So Risky About Diversity and Inclusion? (2005), www.acca.com/resource/v6053.