

PUBLICATION

Following the Road to LGBT Equal Protection

Authors: Nakimuli O. Davis-Primer

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This summer has been hot in temperature, but also in topics especially when it comes to balancing equal protection with sincerely held religious beliefs. A recent bill, Supreme Court decision, and Executive Order each show just how difficult reaching this balance is proving to be. The Employment Non-Discrimination Act (ENDA), a bill that would for the first time impose a federal ban on workplace discrimination based on sexual orientation or gender identity, was approved by the Senate last November by a 64-32 vote. The sponsor of the bill, Senator Jeff Merkley (D-OR), described the bill's passage as a "historic vote for equality and freedom." Merkley stated that "No one should be fired for who they are or who they love." The identical House bill, H.R. 1755, has not been as successful as the Senate bill, which was referred to the subcommittee on the Constitution and Civil Justice on January 8, 2014. The bill, although introduced in April 25, 2013, is currently stalled in the U.S. House of Representatives and has not been brought up for a vote.

In its latest version, the Senate bill S. 815 prohibits private and public employers from firing, refusing to hire, or discriminating against their employees or job applicants on the basis of their *perceived or actual sexual orientation or gender identity*, filling a gap in the existing discrimination laws like Title VII, which prohibits discrimination on the basis of race, color, religion, sex, and national origin. Like Title VII, however, ENDA would include a religious exemption that the Act "shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964." After the bill passed in the Senate, many LGBT advocacy organizations, including Lambda Legal, supported it despite their reservations about the religious exemption.

Over the summer, President Obama furthered efforts to ensure that sexual orientation and gender identity are legally protected characteristics. ;On June 21, President Obama signed an [Executive Order](#) barring gender identity and sexual orientation discrimination. The order would protect those employed by federal contractors, which is about 20 percent of the national workforce. After signing the order, President Obama urged Congress to act on the ENDA so that similar protection would extend to the remaining 80 percent of the workforce.

But the passage of ENDA may become even more difficult now that a number of LGBT advocacy organization's support for ENDA has shifted. After the Supreme Court's June 30, 2014 *Hobby Lobby* decision, several gay and transgender organizations withdrew their support for ENDA, claiming they would no longer tolerate the bill's exemption for religiously affiliated employers. In *Hobby Lobby*, the Supreme Court held that the owners of three closely held for-profit corporations were exempt from provisions of the Affordable Care Act of 2010 that requires employers' group health plans to furnish "preventive care and screenings" for women without "any cost sharing requirements." The Court held that because of the closely-held organizations' sincere Christian beliefs that life begins at conception and it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. The Supreme Court held that the regulations imposing the contraceptive mandate violated the Religious Freedom Restoration Act and substantially burdened their exercise of religion. In short, *Hobby Lobby* is not required to provide certain contraception – e.g. the morning after pill and intrauterine devices – at no cost to its female employees because of *Hobby Lobby's* religious beliefs.

Prior to signing the Executive Order and shortly after *Hobby Lobby*, President Obama received letters from religious and civic leaders requesting that he include a religious exemption, similar to the one in ENDA, in his then-anticipated executive order that would prohibit government contractors from discriminating against employees on the basis of his or her gender identity or sexual orientation. As seen by the July 21 Order, the President refused to include such an exemption. For now, federal contractors are prohibited from discriminating on the basis of sexual orientation or gender identity, regardless of their religious beliefs.