



FAMILY ISSUE FACT SHEET

No. 2008-16 (February 2008)

HB 2002 - Employment Nondiscrimination Act (ENDA)

EXECUTIVE SUMMARY

Disguised as a logical extension of the civil rights laws, ENDA (Employment Nondiscrimination Act) provides special rights to homosexuals, in potential opposition to an employer's deeply-held, constitutionally-protected freedoms of association and religion. Providing such rights as a gesture of "tolerance" towards homosexuals will also carry unintended consequences and create new forms of employment discrimination. The latest development is for the proposed ENDA measure to also cover "gender identity" and "gender expression," which would prohibit discrimination against cross-dressers and the "transgendered."

BACKGROUND

Since 1975, activists have attempted to amend the federal 1964 Civil Rights Act¹ in order to protect individuals from discrimination based on sexual orientation. In 2007, a federal ENDA bill was introduced in the House of Representatives, including a clause which also added "gender identity," in addition to "sexual orientation," as a protected class. When it became apparent that a version including "gender identity" could not pass, the bill was amended to remove that language. The bill passed 235 to 184 in November 2007. President Bush has pledged to veto ENDA if it passes the Senate.

In Arizona, ENDA legislation passed the Senate in 2001. No House vote was taken. Similar legislation has been routinely introduced since 2001 without garnering passage. Governor Napolitano signed an executive order in June 2003, effectively bringing ENDA to state government agencies. The order refers to "sexual orientation" but does not define its meaning.

Proponents of ENDA seek to portray society as oppressing a minority group by actively denying its basic civil rights. This argument hopes to strike a sympathetic chord among Americans whose decency and sense of justice demand that all people be treated fairly. However, a closer look at this issue reveals that homosexuals and transgendered persons are not oppressed minorities, and the injustices they claim are not comparable to those that motivated the civil rights laws. Further, providing special rights on the basis of sexual orientation or gender identity is contrary to Arizona's "at will" employment laws and encourages new forms of discrimination.

According to the Human Rights Campaign, twenty states and the District of Columbia have protections for sexual orientation, and twelve of those also protect "gender identity."² In Arizona,

the cities of Phoenix, Mesa, and Flagstaff provide special rights to their homosexual employees, and Scottsdale, Tempe, and Tucson, as well as Arizona State University and the University of Arizona, include both “sexual orientation” and “gender identity” in their nondiscrimination policies.³

TALKING POINTS

- **Homosexuals are not a true minority group.** True minority groups satisfy three criteria justifying the need for special rights: economic deprivation, political powerlessness, and immutable characteristics. None of these criteria is met here. Homosexuals are among the most economically-advantaged people in our country, possess significant political power, and claim minority status based on behavior, rather than immutable characteristics such as race, ethnicity, disability, or national origin.
- **Adding sexual orientation, gender identity, and gender expression as protected classes is contrary to Arizona’s “at will” employment practices.** Under Arizona law, all employment is at will, and the employer or employee may end the employment relationship at any time without cause. Being fired without cause is not discrimination. Under HB 2002, an employer will fear litigation if a homosexual is fired without cause. When employers are faced with a choice between laying off one of two employees, the heterosexual will lose his job, and the homosexual will not. The law of unintended consequences will operate to promote a new form of employment discrimination against heterosexual individuals.
- **Adding sexual orientation as a protected class opens the door for same-sex marriage.** The New Jersey Supreme Court relied on the state’s nondiscrimination law in ruling that the state must grant same-sex marriage or its equivalent to homosexual couples.⁴ The court reasoned that limiting marriage benefits is simply another form of sexual orientation discrimination that the state policy prohibited.
- **The religious exemption is inadequate to protect religious organizations and individual religious beliefs.** Making sexual orientation a protected class marginalizes Arizonans who have moral reservations about homosexual behavior by treating their deeply-held beliefs as discrimination.

CONCLUSION

HB 2002 bans employers from making employment decisions on the basis of sexual orientation, gender identity, or gender expression. It provides special rights that violate the freedom of association, as well as the religious or moral beliefs of the employer, and should be opposed.

¹ The 1964 Civil Rights Act protects individuals from discrimination on the basis of race, sex, national origin, color, or religion (42 U.S.C. § 2000a).

² Human Rights Campaign, *Statewide Employment Laws and Policies* (Nov. 26, 2007), http://www.hrc.org/documents/Employment_Laws_and_Policies_20071126.pdf.

³ Greater Phoenix Gay & Lesbian Chamber of Commerce, *What the Law Says in Arizona* (2005), www.gpglcc.org/relocation/law.htm; Lesley Wright, *Scottsdale Extends Protection for Gays*, Arizona Republic (Dec. 4, 2007); Arizona State University, *Equal Opportunity/Affirmative Action Policy*, http://www.eoaa.asu.edu/AAP/aa_Pres_policy_statement.htm; University of Arizona, *Nondiscrimination and Anti-harassment Policy*, http://web.arizona.edu/~policy/nondiscrim_antiharass.shtml.

⁴ *Lewis v. Harris*, 908 A. 2d 196, 217 (N.J. 2006).