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Freedom of Religious Schools and Employers Threatened by ENDA

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The Employment Non-Discrimination Act of 2007 (ENDA, H.R. 3685) would prohibit employment discrimination on the basis of sexual orientation. ENDA would make it illegal for organizations with 15 or more employees to fire or to refuse to hire or promote an employee because of his or her actual or perceived sexual orientation. The legislation risks severe unintended consequences. ENDA does not provide adequate protection to religious institutions, would invite government entanglement in judging the religious character of educational organizations, and would impose new labor market restrictions that could harm the economy if the risk of post-severance litigation makes businesses more reluctant to hire workers in the first place.

Narrowing Religious Hiring Freedom. The freedom for religious organizations to make employment decisions on the basis of their faith-based missions is necessary to retain their religious identity and effectively carry out their work. Religious organizations have traditionally received exemptions from certain anti-discrimination laws to ensure their ability to hire those who support their missions.

The ENDA legislation under consideration in the House states that "This Act shall not apply to a religious organization," wording consistent with that contained in Title VII of the Civil Rights Act of 1964, but this broad exemption is narrowed elsewhere in the bill. The "Definitions" section of the bill specifies an additional condition for an educational institution to be classified as a religious organization: either a school has to be owned or controlled by a particular church, denomination, or religious order or its curriculum must be "directed toward the propagation of a particular religion." These conditions invite entanglement problems by placing government in the position of assessing a school's curriculum in terms of its religious nature. If the definition of a religious curriculum is interpreted narrowly, some faith-based institutions of learning would not be exempted from ENDA.

For example, a non-profit leadership development program may offer a curriculum integrated with religious teaching and grounded in a religious viewpoint. It may hire teachers and select applicants, in part, on the basis of their particular religious commitment and conviction. However, if that program is not owned or controlled by a particular church, and if its curriculum is characterized by a court as involving more character education and cultural engagement than "the propagation of a particular religion," it would not be exempt from ENDA's requirements. Ecumenical organizations not affiliated with one particular denomination and groups that engage in instruction and dialogue across several religious traditions would face the same risk and uncertainty.

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Congress should avoid this constitutional defect by removing the additional conditions, thereby protecting the religious freedom of all religious organizations, including those not owned or controlled by particular churches or denominations.

Labor Market Interference. ENDA would further increase government interference in the labor markets. A fundamental premise in American labor law is the doctrine of "at-will" employment. That doctrine states that businesses have no legal obligation to continue to employ a worker once they have hired him or her. Businesses employ workers "at will" and can replace them with another at any time they choose.

In other countries, such as France and Italy, companies do not have the legal right to lay off employees. Instead, workers are generally entitled to keep their job once they are hired. A company that hires a worker and finds that he is unproductive or not a team player faces great difficulty removing that employee. Similarly, a French company that becomes more efficient and needs fewer workers to get the job done cannot easily tailor its workforce to the demands of its tasks.

On the surface, this policy appears to help workers, because once hired they have little concern about losing their jobs. However, making it difficult for employers to lay off employees makes employers reluctant to hire new employees in the first place. Businesses do not want to take the risk of being stuck with unproductive or unneeded workers. France, Italy, and other countries that severely restrict at-will employment have far higher unemployment rates than the United States because their less flexible labor laws discourage employers from creating new jobs.[1]

ENDA would chip away at the at-will employment doctrine that has made the American labor market so strong and created so many jobs. It is not uncommon for employers to lay off workers for reasons such as not contributing to the overall team dynamic. Under ENDA, however, these employees could sue after being laid off, contending that they actually lost their jobs because of their sexual orientations. Even when the layoff occurred for purely business reasons, the employer would have the difficult task of proving that sexual orientation played no role in the subjective analysis that led to the firing.

The provisions protecting workers from being fired for their "perceived" sexual orientations would magnify the problem because businesses cannot prove their perceptions of a worker's orientation. Heterosexual workers, laid off after a subjective analysis of their performance, could claim that they actually lost their job because of their *perceived*—not actual—orientation. The risk of expensive lawsuits after laying off poor performers would make businesses more reluctant to take the risk of hiring new workers in the first place. Congress should protect the labor market flexibility that has allowed America to create far more jobs than European countries that restrict employers' flexibility.

Conclusion. ENDA does not adequately protect the right of all religious organizations to hire employees consistent with their missions. It creates government entanglement problems by placing a problematic condition for schools to qualify as religious organizations.

Moreover, vague standards involving *perceptions* of sexual orientation discrimination invite litigation. The risk of expensive litigation after firing an unproductive worker would hamper job creation, actually harming American workers.

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1. Hugo Hopenhayn and Richard Rogerson, "Job Turnover and Policy Evaluation: A General Equilibrium Analysis," *The Journal of Political Economy*, Vol. 101, No. 5, October 1993, pp. 915–938.