

PUBLICATION

End Around ENDA?

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For several years, lesbian, gay, bisexual and transgender (LGBT) rights groups have been lobbying Congress to pass the Employment Nondiscrimination Act (ENDA), which would prohibit sexual orientation and gender identity discrimination in all workplaces. The latest version of ENDA was passed in the Senate in November of 2013 (S. 815), but it is unlikely to see a vote in the House of Representatives.

Surprisingly, at least six national gay rights groups just recently withdrew their support for ENDA – not because of what the bill stands for, but because of a religious exemption that was added to the bill last year in a successful effort to attract Republican support in the Senate (which is identical to the religious exemption found in Title VII – see below). This withdrawal of support comes on the heels of the United States Supreme Court's *Hobby Lobby* decision that held that closely held companies can refuse on religious grounds to provide employees with contraceptive coverage (see related articles in this same issue). In a nutshell, these groups have voiced concerns over how ENDA's religious exemption could be interpreted in court challenges in the wake of *Hobby Lobby*. Not all gay rights advocacy groups, however, agree with this posture. The Human Rights Campaign argues that the passage of ENDA, even with the religious exemption, would provide workplace protections to millions of LGBT people.

Including a religious exemption in ENDA would not seem to be such a controversial issue, since Title VII of the 1964 Civil Rights Act, barring discrimination based on race, sex, religion and national origin, includes an exemption allowing religious organizations, companies and educational institutions to make employment-related decisions based on a worker's religion.

In any event, since ENDA stands little chance of being passed, why the commotion? As President Obama has made clear, if Congress will not act on legislation that he supports and if it is within the executive power, he will not hesitate to put pen to paper and draft an executive order that will at least apply to those entities that do business with the federal government. Consequently, on June 16, 2014, the White House announced that President Obama will issue an executive order banning sexual orientation and gender identity discrimination by federal contractors.

As of this writing, the executive order's scope and wording have not yet been announced. One reason for this may be the squabble over the wording of a religious exemption to be included in the executive order, or whether the executive order will even contain a religious exemption. A group of fourteen religious leaders wrote a letter to President Obama on July 1, 2014, urging him to include a religious exemption akin to the ones found in Title VII and the Senate-passed ENDA. These leaders argue that without such an exemption, the executive order would significantly and substantively hamper the work of religious organizations that have consistently served in common purpose with the federal government and would come at an unreasonable cost to the common good, national unity and religious freedom. On the other hand, some gay rights advocates contend that a religious exemption will provide a "blank check" for religiously-affiliated entities to engage in workplace discrimination against LGBT individuals.

Although the White House has supported ENDA with a religious exemption, some gay rights leaders believe that President Obama will not include a religious exemption in the planned executive order.

Stay tuned for further updates as we continue to follow developments in the executive branch that have a significant impact on the contracting community.