Congress has little time left on its legislative calendar, and it appears unlikely that it will tackle the Employment Non-Discrimination Act this year. ENDA would prohibit employment discrimination based on sexual orientation or gender identity. This law has long been a primary goal for LGBT activists, given the widespread and persistent discrimination that people face based on their sexual orientation or gender identity.

ENDA’s gender identity provision has been more controversial than its sexual orientation protections. This controversy exists in large part because many lawmakers are still unfamiliar with gender identity discrimination in particular and transgender people in general. There remains also a persistent group of extremely conservative lawmakers who oppose any legislative advancement of LGBT equality. Some members of Congress have suggested that passing ENDA would be more feasible if the gender identity protections were stripped from the bill, but most of the LGBT advocacy community remains committed to a bill that includes gender identity.

Lack of progress in Congress means that workers are at risk of being judged in the workplace based on their actual or perceived sexual orientation and gender identity instead of on the quality of their work. In 29 states, it remains legal to discriminate on the basis of sexual orientation, while only 13 states and Washington, D.C., offer protection from discrimination on the basis of gender identity or expression. What’s worse, incidents of harassment and even violence toward LGBT workers are widespread in many American workplaces. Absent clear and enforceable protections for LGBT workers, employers have few tangible reasons to promote tolerant and diverse workplaces or to change discriminatory practices.
Moreover, lack of federal action on ENDA has left the nation with an inconsistent patchwork of state and local laws that ban workplace discrimination on the basis of sexual orientation or gender identity. These laws are signs of progress, but they do not cover the entire country, which means many workers are left vulnerable to discrimination that is based purely on animus toward LGBT people.

For transgender workers, the situation is further complicated by the fact that several courts have applied existing sex and disability nondiscrimination statutes to cases involving discrimination claims based on gender identity or expression. This application has so far been rare, inconsistent, and unpredictable.

The resulting legal uncertainty has created an environment that is the worst of both worlds. Employers are unsure about how to avoid discrimination lawsuits from transgender or gender nonconforming workers, and these employees lack confidence that their job performance will be judged fairly and based solely on their skills and abilities. LGBT workers who do experience job discrimination also have no guarantee that they have any legal standing or recourse to remedy their situations.

Federal legislation that prohibits workplace discrimination based on sexual orientation and gender identity is necessary to restore clarity to employment disputes and require businesses to adopt management practices that welcome and support all employees. Understanding this reality could help persuade more members of Congress that ENDA’s sexual orientation and gender identity provisions are both critically important to our nation’s employers and workers.

This brief describes the current legal maze that employers and employees must navigate when dealing with issues of workplace discrimination based on actual or perceived sexual orientation and gender identity. Although we discuss both types of discrimination in this brief, we give more attention to gender identity to help educate lawmakers and others about this type of discrimination and the importance of establishing a national law to combat it.

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**Jumbled jurisprudence**

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.” Several major court decisions, however, have signaled a willingness on the part of some judges to include discrimination against transgender workers under the sex discrimination portion...
of Title VII. One of the most notable of these is the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, which held that Title VII prohibits employers from punishing employees for failing to conform to the gender stereotypes typically associated with their sex.

It appears that some federal and state courts are increasingly beginning to accept that the “sex” component of employment antidiscrimination law refers not only to an employee’s anatomical sex, but also to traits and characteristics typically associated with an employee’s gender. A federal district court judge in Washington, D.C., ruled in 2008 that the Library of Congress had engaged in sex discrimination when it rescinded a job offer from a potential employee, Diane Schroer, after learning she was transgender. Expert witnesses argued during the trial that “sex” is a notion composed of many different elements, with one’s mental gender identity being one of those elements.

These and other federal decisions have extended the limits of Title VII’s prohibition on sex discrimination, and some transgender plaintiffs have begun taking their complaints to the federal court system as a result. Jack Lord, a partner with Foley & Lardner in Orlando, Florida, sees this trend as unavoidable; “until ENDA passes and there’s solid protection, it’s the way transgender employees have to go.”

Several states have also begun to apply *Price Waterhouse’s* reasoning to their own antidiscrimination statutes. The Massachusetts Commission Against Discrimination ruled in the 2001 case *Millett v. Lutco, Inc.* that discrimination against a transgender person violates the prohibition against sex discrimination. The Florida Commission on Human Relations held in its 2006 case *Shepley v. Lazy Days RV Center, Inc.* that an employer who fired a transgender employee violated state law prohibiting sex discrimination.

Several other states, including California, Connecticut, New York, and Pennsylvania, have made similar moves, further complicating attempts by businesses and employees to adequately understand what constitutes “sex discrimination.” Transgender plaintiffs are beginning to realize that they have some chance of successfully pursuing employment discrimination complaints as “sex discrimination.” As Lord puts it, “they’re winning.”

This trend extends beyond complaints of employment discrimination based on gender identity. Gay, lesbian, and bisexual employees are also beginning to secure protections through federal and state sex discrimination statutes. While
most courts have held that discrimination on the basis of sexual orientation is not prohibited under the sex category, some judges are increasingly willing to recognize that certain forms of this type of discrimination are motivated by perceived failures to conform to gender stereotypes, thus falling within the scope of current sex discrimination laws.\textsuperscript{15}

For instance, in \textit{Oncale v. Sundowner Offshore Services, Inc.} in 1998 the U.S. Supreme Court unanimously ruled that Title VII is applicable to same-sex workplace harassment, regardless of the sexual orientation of those involved (the plaintiff is required to prove that the harassment occurred “because of sex”).\textsuperscript{16} Still, some courts have rejected this reasoning, arguing that the absence of a clear distinction between discrimination based on sexual orientation and discrimination based on gender nonconformity should cause judges to be highly suspicious of complaints filed by LGBT plaintiffs.\textsuperscript{17}

Judicial uncertainty in terms of gender identity does not end with questions of sex. Several states and cities have ruled that transgender workers are protected under disability statutes because they are sometimes clinically diagnosed with gender identity disorder, a diagnosis doctors give transgender or gender-nonconforming people as a prerequisite for transition-related medical care.\textsuperscript{18}

The Chicago Commission on Human Relations denied a defendant’s motion to dismiss a disability claim brought by a “transsexual” plaintiff in that 1996 case \textit{Evans v. Hamburger Hamlet & Forncrook}, for example.\textsuperscript{19} The New Hampshire Superior Court held in \textit{Jane Doe v. Electro-Craft Corp.} in 1988 that “transsexualism” is a disability within the meaning of the state employment discrimination statute.\textsuperscript{20} And Florida, Massachusetts, New Jersey, New York, and Washington have all interpreted their disability statutes to extend to transgender people in particular cases. The federal government has not adopted this approach to expand the scope of the Americans with Disabilities Act of 1990, however.

Beyond the courts, 13 states and the District of Columbia have passed legislation that prohibits against discrimination based on sexual orientation and gender identity, while 21 states and Washington, D.C., have policies based on sexual orientation only. More than 100 cities around the country have adopted measures to prohibit employment discrimination based on sexual orientation and gender identity, including Cleveland, Ohio; Detroit, Michigan; Gainesville, Florida; and Dallas, Texas.\textsuperscript{21} Local and state initiatives like these are likely to continue slowly popping
up around the country. They provide some limited relief for LGBT employees, but they also add to the difficulties that businesses face in attempting to understand and adapt to an ever-changing patchwork of antidiscrimination laws and ordinances.

The combination of these trends should point to a somber new reality for businesses that have thus far been unwilling to initiate antidiscrimination measures for gender nonconforming employees, and/or support ENDA’s passage. Lawsuits initiated by transgender workers are becoming inevitabilities for businesses that drag their feet in dealing with discrimination, and they will only become more common as the gay and transgender community’s frustration grows over ENDA’s lack of movement in Congress.22

The worst of both worlds

The absence of a national policy prohibiting employment discrimination based on sexual orientation and gender identity has created a situation in which legal uncertainty constrains both employees and employers. LGBT workers continue to lack access to clear and consistent protection from workplace discrimination while businesses become increasingly susceptible to costly and unpredictable lawsuits. It is true that some LGBT workers are afforded more legal protections today than they would have been when the Civil Rights Act was passed in 1964, but the vast majority still find themselves without recourse against workplace discrimination.

The most obvious problem with relying on existing protections for transgender workers especially is that no consensus exists on how or whether to extend antidiscrimination statutes to the transgender population.23 Courts have had mixed reactions to decisions like Price Waterhouse—some have continued to broaden Title VII protections to transgender plaintiffs in employment discrimination cases while others have refused to accept the Supreme Court’s reasoning, arguing instead that one’s status as being transgender deprives them of a stable “sex” required to qualify for Title VII protections.24

The District Court for the Eastern District of Louisiana dismissed a claim by a transgender plaintiff in the 2002 case Oiler v. Winn-Dixie La., Inc., stating that Title VII’s prohibition of discrimination on the basis of sexual stereotypes does not include “sexual identity or gender identity disorders.”25 Deviations from the standard established in Price Waterhouse are not out of the norm. Many courts have shown a willingness to group transgender plaintiffs into a distinct and unprotected class and then exclude them from antidiscrimination statutes based on that classi-
Judicial unpredictability on this issue is a major problem for transgender workers who must decide if they are willing to invest incredible amounts of time and money into potentially fruitless lawsuits.

What’s more, *Price Waterhouse* only provides protection for transgender employees in cases where there is clear evidence of discrimination based on gender stereotyping. *Price Waterhouse* was “a very traditional reading of Title VII,” said Lord, because the plaintiff in that case was clearly discriminated against solely for dressing and behaving in ways that were seen as being too masculine. The courts cannot use *Price Waterhouse* to extend Title VII protections in cases where an employer discriminates against a transgender employee simply for being transgender, or in cases where there isn’t sufficient evidence to prove discrimination was based on a failure to meet gender stereotypes.

Many transgender workers in states that have adopted *Price Waterhouse’s* reasoning are simply unaware of the new interpretations of old employment discrimination statutes. Even attorneys who practice discrimination law tend to know very little about how a particular policy is or might be interpreted by different judges. Decisions to expand the coverage of existing antidiscrimination laws mean very little if those who are most in need of protection aren’t aware of their right to it.

Seeking redress through the use of broadly interpreted disability statutes poses a series of other problems for transgender plaintiffs. Most transgender persons do not consider themselves to be mentally or psychologically “disabled.” And relying on the view that people with different gender identities are disabled can be highly confusing to employers and co-workers who may already have hesitations about having a transgender person in the workplace. What’s more, not all transgender people have actually been diagnosed with gender identity disorder. Transgender plaintiffs are typically required to have been clinically diagnosed as having a disorder in order to qualify as disabled under state antidiscrimination laws. Substantial portions of the transgender population are left unprotected even under broad interpretations of disability statutes.

State and city statutes explicitly prohibiting employment discrimination based on sexual orientation and gender identity are even inadequate in many cases. States typically lack the resources and infrastructure necessary to effectively implement antidiscrimination policies. Studies have demonstrated that federal antidiscrimination efforts tend to raise the income of targeted groups while state efforts typically do not. Many state laws will continue to fall short of offering complete
protection for LGBT workers absent a federal prohibition on sexual orientation and gender identity employment discrimination.

The absence of a federal prohibition on workplace transgender discrimination also poses a growing threat to businesses hoping to avoid damaging lawsuits. Due to the inconsistent application of antidiscrimination statutes to cases of LGBT employment discrimination many businesses are at risk of being utterly blindsided by lawsuits that force them to pay out tremendous sums of money in damages.

For example, a plaintiff may recover punitive damages in employment discrimination cases if the court decides that discriminatory conduct was intentional and engaged in with malice or reckless indifference to the plaintiff’s protected rights.

The Supreme Court established in the 1999 case Kolstad v. American Dental Association that discriminatory conduct does not need to be egregious in order to award punitive damages. Intentionally engaging in discriminatory conduct that violates federal law is sufficient to allow the plaintiff to seek punitive damages in a resulting discrimination suit.

Employers are largely unaware of the nuances in judicial interpretations of antidiscrimination statutes. The legal precedent established in state courts and local human rights commissions is hardly enough to inform employers of the protections extended to transgender employees. And employers must account for the antidiscrimination statutes in each individual city and state in which their businesses operate, further lowering the possibility that they will be able to fully understand and adapt to new legal developments.

The punishment for employers can be massive when transgender plaintiffs do win discrimination cases. The median award for all employment discrimination verdicts rose approximately 16 percent from $208,000 in 2008 to $241,119 in 2009. The median settlement amount grew to $90,000 in 2009, the highest in the past decade. The Library of Congress claimed in the case of Diane Schroer that it had the right to rescind a job offer from a transgender applicant because Title VII did not apply to discrimination based on gender identity or gender expression. A federal district court judge disagreed, and the Library of Congress was forced to pay nearly $500,000 in damages. If these trends continue, businesses will face increasingly severe punishments for failing to abide by an expanding and complicated hodgepodge of state laws, city ordinances, and court decisions.
Establishing protections and restoring predictability

Maintaining the current system of inconsistent and scattered protections for LGBT workers is unfair to all parties involved in employment discrimination disputes. Federal legislation explicitly prohibiting employment discrimination on the basis of sexual orientation and gender identity is essential to balancing the rights of LGBT employees with the economic interests of employers.

Businesses that fully understand employment discrimination law (and the penalties for failing to comply with it) have an incentive to develop programs and policies that shield them from potential lawsuits. Legal costs act as a major motivator for the development of inclusive business practices if there is a credible threat of being taken to court. LGBT employees will begin to see a real and meaningful improvement in their workplace conditions once businesses begin to understand that their financial well-being is intimately tied to the well-being of their typically marginalized workers.\(^{36}\)

If businesses decide not to support and welcome LGBT employees, federal legislation with a specific focus on sexual orientation and gender identity will at least give plaintiffs the knowledge and confidence that their cases will be properly addressed in federal court.

It is the employers, however, who would benefit most directly from a federal law that clarifies the boundaries of Title VII and establishes explicit protections for LGBT workers. National legislation would allow employers to adapt to unambiguous employment guidelines and greatly reduce the risk of a discrimination lawsuit facing many businesses.

Studies show that employers that institute formal mechanisms for avoiding and dealing with workplace discrimination are significantly less likely to see the initial filing of a lawsuit by an employee.\(^{37}\) Employer-initiated efforts to deal with discrimination can work to preempt legal action, quickly reducing a business’s legal expenses.

If an employee does decide to sue an employer for employment discrimination and wins, good-faith efforts to deal with bias in the workplace can help to reduce the amount of damages a business is required to pay. The Supreme Court held in _Kolstad_ that an employer’s efforts to enforce antidiscrimination policies in the workplace functionally shield the employer from punitive damages.\(^{38}\) Even modest efforts to deal with workplace discrimination, then, can allow employers to avoid tremendous penalties in court.
Conclusion

Those who argue against the expansion of sexual orientation and gender identity employment nondiscrimination laws fail to realize that some form of protection for LGBT workers is inevitable. Federal and state courts, state legislatures, and city councils across the country are increasingly recognizing that discrimination against LGBT is irrational and based on nothing more than animus.

The choice for policymakers now is between two paths. One path continues the current trend of scattered and inconsistent reform, providing delayed and inadequate protection to employees while subjecting businesses to crippling and unpredictable lawsuits. The other establishes a clear national standard for all businesses, resulting in the development of inclusive and respectful work environments and allowing employers to take proactive steps to avoid litigation. It is vitally important that Congress chooses the path that ensures fair treatment for employees and employers alike.

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Endnotes


2 Gender identity is generally understood to mean one’s internal, personal sense of being a man or a woman. This brief also discusses gender expression, which is the external manifestation of a person’s gender identity (including clothing, haircut, and voice or body characteristics). Although sexual orientation and gender identity legal protections in the workplace would especially help people who identify as LGBT, they would apply to all workers.

3 LaVictoire, “ENDA Stalled In Senate.”


Dawson v. Bumble & Bumble, 398 F.3d 211, 218-19 (2d Cir. 2005); Hamm v. Weyauwega Milk Products, 332 F.3d 1058, 1067 (7th Cir. 2003).


Evans v. Hamburger Hamlet & Farkook, 1996 WL 941676, No. 93-E-177 (Chi. Comm’n on Human Relations 1996). Our policy is usually to use the term “transgender” in place of “transsexual.” In this case, however, the Chicago Commission on Human Relations explicitly referred to the plaintiff as “transsexual” and stated that “transsexualism” was the disability that gave her standing to sue under local statutes.


Koch and Bales, “Transgender Employment Discrimination.”


Smith v. City of Salem, Ohio, No. 03-3399, U.S. Court of Appeals, Sixth Circuit (2004).


Ibid.

Koch and Bales, “Transgender Employment Discrimination.”


Ibid.


deLeon, Testimony on Intro. 754.


Hsieh, “Companies ramp up employee training.”


DLA Piper LLP, “Avoiding Punitive Damages in Employment Discrimination Cases.”