the Williams INSTITUTE

Chapter 15: Analysis of Scope and Enforcement of State Laws and Executive Orders Prohibiting Employment Discrimination Against LGBT People

This chapter compares and analyzes the definitions, scope of coverage, required procedures, remedies, and implementation of ENDA and of each state's anti-discrimination statute that prohibits employment discrimination on the basis of sexual orientation and/or gender identity. The chapter concludes with a discussion of gubernatorial executive orders enunciating a policy against sexual orientation and/or gender identity discrimination in state employment where no such statutory protection exists. Key findings of this section include:

- **ENDA** ENDA prohibits employment discrimination by state and local government employers as well as private employers based on actual or perceived sexual orientation and gender identity.
    - ENDA does not provide a remedy for disparate impact claims and does not require preferential treatment or quotas, the construction of new or additional facilities, that unmarried couples be treated in the same manner as married couples for purposes of employee benefits, or the collection of statistics on actual or perceived sexual orientation or gender identity.

- ENDA requires state employees to exhaust all administrative remedies before bringing an action in court and that complaints be filed within 180 days of the alleged unlawful employment practice.
- The remedies for state employees under ENDA include equitable relief, compensatory damages subject to graduated caps, and attorney's fees, but not punitive damages.

- **State Statutes.** Twenty-nine states do not have anti-discrimination statutes that prohibit sexual orientation discrimination and 38 do not have statutes that explicitly prohibit gender identity discrimination. Of the states that do have anti-discrimination statutes that prohibit discrimination on these bases:
  - Three do not prohibit discrimination on the basis of perceived sexual orientation;
  - Five either do not provide for compensatory damages or subject such damages to caps that are lower than ENDA's;
  - Four do not provide for attorney's fee's, and another five only provide for them if the employee files a court action as opposed to an administrative action; and
  - In 2008 and 2009, when asked to provide statistical data about complaints by state employees, statutorily designated enforcement agencies in only 13 of these states were able to do so and only six were able to provide redacted copies of such complaints--often citing a lack

of resources and staff, or contrary to explicit requirements of the state's anti-discrimination statute.

- **Executive Orders.** In 10 other states that do not offer statutory protection for sexual orientation or gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees. However, these orders provide little enforcement opportunities and lack permanency:
    - Most notably, none of these orders provide for a private right of action;
    - Only six confer any power to actually investigate complaints; and
    - Executive orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have been in flux during the last 15.

A. ENDA

1. Summary

The Employment Non-Discrimination Act of 2009 ("ENDA") prohibits employment discrimination on the basis of actual and perceived sexual orientation and gender identity. ENDA applies to private and public sector employees with certain exceptions and limitations. The remedies provided for in ENDA generally track those available to an aggrieved employee who files a claim under Title VII of the Civil Rights Act of 1964. Public and private sector employees may recover economic damages under ENDA. Non-equitable relief for all employees is subject to graduated caps, and employees of a State or the United States[1] cannot recover punitive damages. Equitable relief is available to all public and private sector employees.

2. Definitions

ENDA prohibits discrimination on the basis of actual and perceived sexual orientation and gender identity.[2] "Sexual orientation" is defined in the Act as "heterosexuality, homosexuality, and bisexuality."[3] "Gender identity" is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[4]

3. Scope of Coverage

ENDA applies to public and private sector employers.[5] ENDA does not apply to any employer with fewer than 15 employees or to any bona fide private membership club

[1] When the United States is mentioned herein as an employer, it does not include the Armed Forces, to which ENDA does not apply. "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard. Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 7(a) (2009).
[2] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 4(a) (2009).
[3] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 3(a)(9) (2009).
[4] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 3(a)(6) (2009).
[5] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. §§ 3(a)(4), 11 (2009).

that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.[6] ENDA contains a broad religious organization exemption which excludes from coverage any organization that is allowed to restrict employment based on religion under Title VII of the Civil Rights Act of 1964.[7] Organizations exempted from Title VII include any "religious corporation, association, educational institution, or society."[8] A school, college, university, or other educational institution or institution of higher learning is exempt under this provision if it is "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, of if the curriculum of such school, college, university, or other educational institution or institution of higher learning is directed toward the propagation of a particular religion."[9]

4. Required Procedures

Under ENDA, an employee must exhaust administrative remedies before bringing an action in court.[10] The employee must file the complaint within 180 days of the alleged unlawful employment practice, unless the employee initially institutes proceedings with a State or local agency with authority to grant or seek relief from such practice, in which case the complaint must be filed within 300 days.[11] For purposes of this report, it will be assumed that the 180-day statute of limitations applies to a complaint filed under ENDA.

5. Remedies

---

[6] *Id*.
[7] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 6 (2009).
[8] Title VII of the Civil Rights Act of 1964 § 702(a), 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* the Civil Rights Act of 1991, 42 U.S.C. § 1981a.
[9] Title VII of the Civil Rights Act of 1964§ 703(e), 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* the Civil Rights Act of 1991, 42 U.S.C. § 1981a.
[10] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10 (2009).
[11] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009); Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* The Civil Rights Act of 1991, 42 U.S.C. § 1981a.

ENDA authorizes economic and non-economic damages[12] to the same extent as Title VII.[13] All employees may recover compensatory damages subject to graduated caps.[14] Compensatory damages available to an employee bringing a Title VII action, and therefore under ENDA, do not include back pay, interest on back pay, or front pay.[15] Thus, the compensatory damage caps apply to only non-pecuniary and future pecuniary losses.[16] All employees are entitled to the same equitable relief, including injunctive relief, reinstatement or hiring with or without back pay, and any other equitable relief the court deems appropriate.[17] ENDA also authorizes the award of attorney's fees to the prevailing party, except where the prevailing party is the Equal Employment Opportunity Commission or the United States.[18]

Under Title VII and ENDA, private sector employee plaintiffs may qualify for punitive damages, but state and federal employees may not recover punitive damages in a suit against a State or the United States as employer.[19] An employee of a State or the United States may recover compensatory damages up to the caps specified in section 102 of the Civil Rights Act of 1991.[20] For employees who are not employed by the United States or a State, the caps apply to the combined punitive and compensatory damages that

[12] Economic damages include back pay, interest on back pay, and front pay. Non-economic damages include punitive damages, future pecuniary losses, and non-pecuniary losses. EEOC Decision No. N-915.002 (July 14, 1992).
[13] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009).
[14] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009); Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* the Civil Rights Act of 1991, 42 U.S.C. § 1981a.
[15] Civil Rights Act of 1991 § 102(b), 42 U.S.C. § 1981a.
[16] *Id*.
[17] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009).
[18] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 12 (2009).
[19] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(d)(1) (2009); Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a.
[20] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(d)(2) (2009).

may be recovered.[21] Thus, an employee from either the public or private sector cannot be awarded compensatory damages greater than the caps delineated in section 102 of the Civil Rights Act of 1991.

6. Implementation

The Equal Employment Opportunity Commission's administration and enforcement powers under ENDA are identical to its powers under Title VII.[22] Its major powers and duties include the authority to investigate complaints and initiate litigation, the responsibility to monitor and report compliance by all employers, and oversight of activities of the federal government in its capacity as an employer.

Regarding employees who are not employed by the Federal government, when a complaint is filed with the EEOC, the agency initiates an investigation.[23] In investigating a charge, the EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred.[24] The EEOC can seek to settle a charge or select the charge for mediation at any stage of the investigation if the complainant and the employer express an interest in doing so.[25] The EEOC may dismiss a charge at any point and issue the charging party a Right to Sue if, in the agency's best judgment, further investigation would not establish a violation of the law.[26]

[21] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(a)(6)(A) (2009); Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a.
[22] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10 (2009).
[23] http://www.eeoc.gov/charge/overview_charge_processing.html.
[24] *Id.*
[25] *Id.*
[26] *Id.*

If the evidence obtained in the investigation does not establish that discrimination occurred, the charge is dismissed and the charging party is issued a Right to Sue.[27] If the evidence obtained in the investigation establishes that discrimination has occurred, the EEOC will attempt conciliation with the employer to develop a remedy for the discrimination.[28] If the case is successfully conciliated, mediated, or settled, neither the EEOC or the charging party may file a complaint in court against the employer unless the agreement is not honored.[29] If the case cannot be conciliated, mediated, or settled, the EEOC will decide whether to bring suit in federal court on behalf of the complainant or to issue a Right to Sueso that the complainant may bring suit on his or her own behalf.[30]From fiscal year 1999 through fiscal year 2008, the EEOC resolved 657,013 charges of discrimination under Title VII.[31] During the ten-year period, the EEOC administratively recovered approximately $1.6 billion for aggrieved employees.[32] In the same ten-year period, the EEOC reports that it filed 4256 "merits" lawsuits on behalf of employee complainants.[33] "Merits" lawsuits include direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements.[34] Of the 4256, 3246 were Title VII claims.[35] Through these lawsuits, the EEOC recovered $784.4 million for aggrieved employees who had filed an administrative complaint under Title VII.[36]

---

[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] http://www.eeoc.gov/stats/vii.html.
[32] *Id*.
[33] http://www.eeoc.gov/stats/litigation.html.
[34] http://www.eeoc.gov/abouteeoc/plan/par/2008/managements_discussion.html#litigation.
[35] http://www.eeoc.gov/stats/litigation.html.
[36] This figure is in addition to the $1.6 billion recovered administratively; *id*.

The EEOC also publishes annual Performance and Accountability reports, a limited number of Commission appellate and amicus briefs filed in U.S. Courts of Appeals, Federal sector appellate decisions issued by the EEOC, statistical reports on charges filed and dispositions, and other reports and documents pertinent to administrative accountability.[37]

Regarding federal employees, the EEOC must review and evaluate all agency equal employment opportunity programs and is responsible for obtaining and publishing agency progress reports.[38] The EEOC must establish programs to train principal operating officials of each agency in Title VII compliance.[39] The EEOC is ultimately responsible for handling administrative complaints alleging a violation of Title VII brought by federal employees.[40] A federal employee alleging discrimination must first file a complaint with his or her agency employer.[41] If the complaint cannot be resolved within the agency, the employee may file a complaint with the EEOC.[42] The EEOC may award compensatory damages and equitable relief pursuant to a decision of an administrative judge following a hearing.[43]

---

[37] http://www.eeoc.gov.
[38] Title VII of the Civil Rights Act of 1964 § 717(b), 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* The Civil Rights Act of 1991, 42 U.S.C. § 1981a.
[39] *Id*.
[40] http://www.eeoc.gov/facts/fs-fed.html.
[41] *Id*.
[42] *Id*.
[43] *Id*.

B. State Statutes Overall

1. Summary

Although 21 states have enacted anti-discrimination statutes that include sexual orientation, including 12 states that also cover gender identity discrimination, there are many discrepancies between these state laws and ENDA. Of the 21 state statutory schemes, three do not prohibit discrimination based on *perceived* sexual orientation, and nine do not prohibit discrimination based on gender identity. Though equitable relief is available in every state, compensatory damages are unavailable or are capped lower than under ENDA in five states. Punitive damages are not available at all in seven states and only available in an eighth state depending on the jurisdiction in which the case is filed. Attorney's fees are unavailable in five states, and in five more are only available if the employee files suit in court.

Similarities also exist. All the state statutes apply to public and private sector employers, and all have an exemption for religious organizations. No state exempts any employers of 15 or more employees and many states have a lower threshold for compliance. In 13 states, employees must exhaust their administrative remedies before filing suit in court.

2. Definitions

Twenty-one states prohibit discrimination on the basis of actual sexual orientation.[44] Eighteen of the 21 also prohibit discrimination on the basis of perceived

[44] California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

sexual orientation.[45] All but six of the 21 states that prohibit discrimination on the basis of sexual orientation offer some legal protection for persons discriminated against on the basis of gender identity.[46] In the 15 states offering gender identity protection, 12 do so by explicit statutory protection. In the other three states, lower courts or administrative agencies have ruled that individuals discriminated against on the basis of gender identity can state a claim under the state anti-discrimination statute for sex discrimination.[47]

3. Scope of Coverage

All state statutes that prohibit sexual orientation discrimination apply to public and private sector employers. Every state that prohibits discrimination based on sexual orientation includes an exemption for religious organizations. Seventeen state anti-discrimination statutes prohibiting sexual orientation discrimination apply to employers with fewer than 15 employees.[48] In eight of these states, the statute applies to all employers regardless of size.[49] The anti-discrimination statutes of the remaining four states apply to only employers with 15 or more employees.[50] Thirteen states[51] exclude people in domestic service from their definitions of covered employees. Eleven states[52]

[45] All of the above mentioned states except Delaware, Vermont, and Washington explicitly prohibit discrimination based on perceived sexual orientation.
[46] Delaware, Hawaii, Maryland, Nevada, New Hampshire, and Wisconsin offer no protection from discrimination on the basis of gender identity.
[47] Connecticut (*see* CT Commission on Human Rights and Opportunities: Declaratory Ruling on Behalf of John/Jane Doe, 2000), Massachusetts (*see Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412 (Mass. Super. 2002); *Jette v. Honey Farms Mini Market*, 2001 Mass. Comm. Discrim. LEXIS 50 (Mass. Comm'n Against Discrimination 2001)), New York (*see Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996); *Buffong v. Castle on the Hudson*, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 2005)).
[48] California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.
[49] Colorado (no restriction), Hawaii (no restriction), Maine (no restriction), Minnesota (no restriction), New Jersey (no restriction), Wisconsin (no restriction), Oregon (one or more), and Vermont (one or more).
[50] New Mexico, Illinois, Maryland, and Nevada.
[51] California, Colorado, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, and Washington.
[52] California, Connecticut, Maine, Massachusetts, Minnesota, New Hampshire, New York, Oregon, Rhode Island, Washington, and Wisconsin.

exclude those employed by a close family member from their definitions of covered employees.[53]

4. Required Procedures

Employees in thirteen states with statutes that prohibit discrimination on the basis of sexual orientation must exhaust their administrative remedies before they are permitted to file a complaint in court.[54] In Connecticut a private sector employee is required to exhaust administrative remedies while a public sector employee may bring a claim directly in court without first exhausting administrative remedies. In Wisconsin, the administrative agency must render a final decision in the case before an employee is permitted to go to court. Employees in the remaining six of the 21 states prohibiting sexual orientation discrimination in employment may file directly in court.[55]

Nine states provide an administrative filing window of more than 180 days after the alleged unlawful practice.[56] Eleven states require that an administrative complaint is filed either within 180 days or the nearly equivalent period of six months of the alleged unlawful practice.[57] Delaware is the only state with a statute of limitations on administrative filings of less than 180 days, requiring that the complaint be filed within 120 days of the alleged unlawful practice.

5. Remedies

[53] Though ENDA's coverage is not similarly expressly limited, the fact that ENDA applies to employers of only 15 or more employees and only to those employers whose industry "affects commerce" likely excludes employees who are domestic service workers and family employees .
[54] California, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, and Rhode Island.
[55] Minnesota, New Jersey, New York, Oregon, Vermont, and Washington.
[56] California (300 days), Massachusetts (300 days), Minnesota (one year), New Mexico (300 days), New York (one year), Oregon (one year), Rhode Island (one year), Vermont (unspecified, but according to Attorney General's Office, one year), and Wisconsin (300 days).
[57] Colorado (six months), Connecticut (180 days), Hawaii (180 days), Illinois (180 days), Iowa (180 days), Maine (six months), Maryland (six months), Nevada (180 days), New Hampshire (180 days), New Jersey (180 days), and Washington (six months).

Compensatory damages are not available under the anti-discrimination laws of two states.[58] In four other states,[59] compensatory damages are available, but only if the aggrieved employee files a complaint in court. Similarly, in Vermont, compensatory damages are available to state employees, but they are only available to an employee of an entity other than the state if he or she files a complaint in court. Wisconsin permits an employee to file a civil action to recover compensatory damages only after the administrative agency has rendered a final decision in the case, and does not permit local government employees to recover compensatory damages under any circumstances. Of the states that do provide for compensatory damages through either an administrative proceeding or a civil action, three of them impose caps that would be less favorable than ENDA's caps in certain circumstances.[60]

Punitive damages are not available under the anti-discrimination laws of eight states[61] and are sometimes unavailable in Connecticut, where there is a split of authority on whether or not a court can award punitive damages under the statute.[62] Further, in eight states[63] that do provide for punitive damages, plus Connecticut, they are only available if a complainant files in court and not if he or she proceeds through the administrative process. In Wisconsin, punitive damages are available only to an employee who files a complaint in court after having obtained a final decision from the

[58] Colorado and Nevada.
[59] Massachusetts, Maine, Wisconsin, and Connecticut. *See Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 113 (D. Conn. 2000) (though compensatory damages are not explicitly authorized by Connecticut's Fair Employment Practices Act, a court may award them because they fall within "such legal and equitable relief the court deems appropriate").
[60] California, Minnesota, and Washington.
[61] California, Colorado, Illinois, Iowa, Nevada, New Mexico, New York, and Washington.
[62] *Shaw v. Greenwich Anesthesiology Associates, P.C.*, 200 F. Supp. 2d 110, 117 (D. Conn. 2002) (where statute authorizes "such legal and equitable relief which the court deems appropriate," some courts have found that punitive damages are available and other courts have found that they are not available due to the absence of express statutory language).
[63] Maryland, Connecticut, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, New Hampshire, and Wisconsin.

enforcing agency and are not available to employees of a local government. In Minnesota, although available through either civil action or administrative proceeding, they are capped at $8,500 (significantly lower than ENDA's caps).[64]

Attorney's fees are not available in five states.[65] Further, in five states that do provide for attorney's fees, they are only recoverable if the employee elects to file a complaint in court.[66] Similarly, in Vermont, although an employee of the state can recover attorney's fees through either the administrative process or in court, any other employee must bring his or her case in court to recoup attorney's fees.

6. Implementation

Each state has designated a state agency to receive and investigate administrative complaints of employment discrimination. In four states prohibiting employment discrimination on the basis of sexual orientation or gender identity, the anti-discrimination statute does not permit the administrative agency to take any action on its own initiative to eliminate discrimination.[67] In a fifth state, the agency is not vested with the power to issue a complaint or to file lawsuit, but may litigate on behalf of a plaintiff who so requests.[68] Agencies in the other eighteen states may, by statute, issue an administrative complaint, file a lawsuit, or do both, on behalf of the agency itself or on behalf of an aggrieved employee.

As for reporting and compliance, research conducted by the Williams Institute suggests that many state agencies lack the capacity to provide information of the same

[64] ENDA's caps, which apply to the sum of compensatory damages for future pecuniary and non-pecuniary losses and punitive damages, are as follows: up to 100 employees: $50,000; 101-200 employees: $100,000; 201-500 employees: $200,000; 500+ employees: $300,000.
[65] Colorado, Maryland, Nevada, New Hampshire, and New York.
[66] California, Connecticut, Oregon, and Washington, and Wisconsin.
[67] Colorado, Iowa, Nevada, and New Hampshire.
[68] Massachusetts.

quantity or quality as that made public by the EEOC. Pursuant to requests for information made by the Williams Institute to state agencies responsible for implementing anti-discrimination statutes, only 13 states could break down statistical data on employment discrimination complaints filed on the basis of sexual orientation or gender identity into those filed against public sector and those filed against private sector employers. Seven of the remaining eight states with statutory protection for sexual orientation and/or gender identity in employment refused to provide data based on a confidentiality provision in the statute or failed to respond to written and phone requests altogether. The eighth state, Delaware, was not approached for data because protection went into effect in July 2009 and thus a data collection period of at least one year had not yet elapsed at the time of this report.

Of the 13 states that provided statistical data, five provided copies of the actual complaints filed or a record of the case dispositions. Additionally, Rhode Island provided copies of the actual complaints filed for cases which had been closed at the time of the request, but was unable to tabulate data on filings. See Chapter 11 "Administrative Complaints on the Basis of Sexual Orientation and Gender Identity."

C. State Statutes by State

1. California

i. Summary

California's Fair Employment and Housing Act ("FEHA") reaches a class of small employers that would not be covered by ENDA. ENDA offers more generous monetary remedies than the FEHA for aggrieved employees under certain circumstances.

ii. Definitions

ENDA and the FEHA both define "sexual orientation" as "heterosexuality, homosexuality, and bisexuality" and extend protections to employees based on perceived sexuality.[69] California's FEHA, as amended January 1, 2004, includes "a person's gender" within its definition of "sex" to protect employees who do not conform to their "assigned gender" and requires covered employers to allow employees "to appear or dress consistently with the employee's gender identity."[70] ENDA also prohibits employment discrimination based on gender identity and includes an equally broad definition of the term.

iii. Scope of Coverage

FEHA applies to state and local government employers and private employers.[71] FEHA applies to employers of five or more persons, while ENDA only applies to employers of fifteen or more people.[72] FEHA and ENDA completely exempt qualifying religious organizations from coverage. The FEHA exception applies to "any religious association or corporation not organized for private profit," which may construed more

[69] CAL. GOV. CODE 12926(m), (q) (2003).
[70] CAL. GOV. CODE §§ 12926(p), 12949.
[71] CAL. GOV. CODE § 12926(d).
[72] *Id.*

broadly by courts than ENDA's definition, which does not reference profit-making activities.[73] FEHA also exempts "any individual employed by his or her parents, spouse, or child" and individuals "employed under a special license in a non-profit sheltered workshop or rehabilitation facility" under the definition of employee.[74] ENDA's definition of "employee," borrowed from Title VII, does not expressly contain a similar limitation.[75]

vi. Required Procedures

Under both FEHA and ENDA, an employee must exhaust administrative remedies before bringing an action in court.[76] Subject to a few narrow exceptions, an aggrieved employee must file his or her complaint under FEHA within one year of the unlawful practice.[77] ENDA's statute of limitations is shorter, requiring that the employee file the claim within 180 days of the unlawful practice.

v. Remedies

ENDA and FEHA authorize some similar relief, including back pay, compensatory damages, equitable relief, and attorney's fees (except that under FEHA, attorney's fees are not authorized in an action against a public agency or a public official, acting in an official capacity).[78] However, in addition, ENDA authorizes punitive damages (subject to a cap and not available in a suit against the United States or a State), while this remedy is available only for an aggrieved California employee who seeks redress in court on a tort theory.[79]

---

[73] *Id*.
[74] CAL. GOV. CODE § 12926(e).
[75] *See* 42 U.S.C. § 2000e(f).
[76] CAL. GOV. CODE § 12960(b).
[77] CAL GOV. CODE § 12960(d).
[78] 42 U.S.C. §§ 2000e *et seq.*; Cal. Gov. Code § 12970.
[79] 42 U.S.C. §§ 2000e *et seq.*; *Rojo v. Klinger*, 53 Cal. 3d 65, 80-81 (Cal. 1990).

The amount of compensatory damages for non-pecuniary losses available under FEHA and ENDA are subject to different caps, which, in some circumstances, would allow for a Californian proceeding under FEHA to recover more than under ENDA and vice-versa. Under the FEHA, the administrative agency is required to cap non-pecuniary damages at $150,000, without regard to the size of the employer.[80] In contrast, ENDA provides four separate caps on the total award for future pecuniary and non-pecuniary damages based on the employer's size: for employers of up to 100 employees, a cap of $50,000; for employers of 101-200 employees, a cap of $100,000; for employers of 201-500 employees, a cap of $200,000; and for employers of more than 500 employees, a cap of $300,000.[81] Thus, ENDA potentially provides greater relief for employees of larger entities who would be subject to the $100,000 cap under FEHA. However, California employees of employers who fall into the first two brackets could potentially recover more by pursuing a cause of action under FEHA as opposed to ENDA. It should be noted that ENDA's caps apply to the sum of compensatory (for future pecuniary and non-pecuniary losses) and punitive damages awarded.

vi. Implementation

The Department of Fair Employment and Housing ("the Department") has the power to receive, investigate, and conciliate complaints alleging that an unlawful practice has taken place.[82] The Department may issue accusations and may itself prosecute those accusations in hearings before the Fair Employment and Housing Commission.[83] If an accusation is served on an employer by the Department that includes a prayer either for

[80] CAL. GOV. CODE § 12970.
[81] 42 U.S.C. §§ 2000e *et seq.*
[82] CAL. GOV. CODE § 12930(f).
[83] CAL. GOV. CODE § 12930(h).

damages for emotional injuries and/or for administrative fines, the employer may chose to transfer the proceedings to a court rather than proceed administratively.[84] In this situation, DFEH must file itself, or through the Attorney General, a civil action in its own name on behalf of the employee.[85] The Department may seek judicial enforcement where a respondent has not complied with an order of the Fair Employment and Housing Commission or with an agreement entered into by the parties.[86]

The Department provided the number of employment discrimination complaints filed against the state and private sector employers from 2000 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.[87] The Department was unable to provide statistics for those employment discrimination complaints filed on the basis of gender identity because the Department codes them as sex discrimination and was unwilling to comb through the sex discrimination cases to extract those based on gender identity.[88]

The Department reported a total of 5254 complaints filed on the basis of sexual orientation against the state and private sector employers from 2000 through 2007. In 2000, 16 complaints were filed against the state and 440 were filed against private sector employers. In 2001, 22 complaints were filed against the state and 616 were filed against private sector employers. In 2002, 23 complaints were filed against the state and 574 were filed against private sector employers. In 2003, 27 were filed against the state and 646 were filed against private sector employers. In 2004, 24 were filed against the state

[84] CAL. GOV. CODE § 12965(c)(1).
[85] CAL. GOV. CODE § 12965(c)(2).
[86] CAL. GOV. CODE § 12964.
[87] E-mail from Karen Gilbert, Research Analyst, Department of Fair Employment & Housing, to Christy Mallory, the Williams Institute (Sept. 18, 2008, 15:22:52 PST) (on file with the Williams Institute).
[88] *Id*.

and 615 were filed against private sector employers. In 2005, 22 were filed against the state and 692 were filed against private sector employers. In 2006, 26 were filed against the state and 696 were filed against private sector employers. In 2007, 23 were filed against the state and 792 were filed against private sector employers.

Additionally, the Department provided copies of 42 case files for proceedings instituted against the state. Twenty-six cases were administratively closed because the complainant requested an immediate Right to Sue. Two cases were administratively closed on other grounds. No probable cause was found in 14 cases. Twenty-nine of the 72 cases against the state were withheld by the agency for unknown reasons.

2. Colorado

i. Summary

ENDA offers remedies to aggrieved employees—including damages and attorney's fees—that are unavailable through Colorado's administrative procedure. Colorado's anti-discrimination law affords protection to employees of small employers that would be excluded under ENDA.

ii. Definitions

ENDA and Colorado's anti-discrimination statute prohibit discrimination on the basis of sexual orientation, including actual or perceived "heterosexuality, homosexuality, or bisexuality."[89] Both ENDA and Colorado's anti-discrimination statute also prohibit discrimination based on gender identity. The definition of "sexual orientation" in Colorado's anti-discrimination provisions affords protection for employees based on the "person's transgendered status" while ENDA protects gender identity separately from sexual orientation, defining "gender identity" as "the gender-

[89] COLO. REV. STAT. § 24-34-401(7.5) (2008).

related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[90]

iii. Scope of Coverage

Colorado's anti-discrimination provisions apply to state and local government employers and private employers.[91] In contrast to ENDA, which applies only to employers of 15 or more employees, Colorado's anti-discrimination provisions do not restrict application to any employers based on size.[92] Furthermore, Colorado's religious exemption could be interpreted more narrowly than ENDA's, because it expressly subjects those "religious organizations or associations supported in whole or in part by money raised by taxation or public borrowing" to coverage, but exempts any other "religious organization or association."[93] Colorado's anti-discrimination statute does not extend to employees who are in domestic service while ENDA does not explicitly exempt such employees.[94]

iv. Required Procedures

Under both ENDA and Colorado's anti-discrimination laws, employees must exhaust their administrative remedies before bringing an action in court.[95] An aggrieved employee must file an administrative complaint under Colorado's anti-discrimination provisions within six months of the alleged unlawful practice.[96] This is approximately the same filing period an employee is given under ENDA (180 days).

v. Remedies

---

[90] COLO. REV. STAT. § 24-34-401(7.5).
[91] COLO. REV. STAT. § 24-34-401(3).
[92] *Id*.
[93] *Id*.
[94] COLO. REV. STAT. § 24-34-401(2).
[95] COLO. REV. STAT. § 24-34-306(1); *Brooke v. Restaurant Svcs.*, 906 P.2d 66, 70 (Colo. 1995).
[96] COLO. REV. STAT. § 24-34-403.

By statute, successful complainants in an administrative hearing under Colorado law are limited to various forms of equitable relief, including back pay—the statute does not provide for attorney's fees or compensatory or punitive damages.[97] Though subject to caps, successful complainants proceeding under ENDA are entitled to compensatory and punitive damages (though not in suits against a State or the United States) in addition to the same equitable relief and injunctive relief through an administrative hearing in Colorado.

vi. Implementation

The Colorado Civil Rights Commission ("the Commission") has the power to receive, investigate, and hold hearings upon charges alleging unfair or discriminatory practices.[98] The Commission may, on its own initiative, seek judicial enforcement where a party has not complied with the terms of a final order.[99]

The Commission was unable to provide the number of complaints or any copies of actual complaints filed on the basis of sexual orientation or gender identity because, as of the date requested, the statute was enacted too recently to have compiled and maintained the data in a way that would have made tabulation and release feasible. The statute does, however, require that decisions rendered be kept in a central file available for public inspection during regular business hours.[100]

3. Connecticut

i. Summary

[97] COLO. REV. STAT. §§ 24-34-405; 24-34-306; 24-50-125.5.
[98] COLO. REV. STAT. § 24-34-305(1)(b), (d)(I).
[99] COLO. REV. STAT. § 24-34-307(1).
[100] COLO. REV. STAT. § 24-34-306(12).

The Connecticut Fair Employment Practices Act ("CFEPA") covers small employers that would be excluded under ENDA, and allows State employees to bring an action directly in court. However, the remedies available through Connecticut's administrative process are much more limited than those available through an administrative hearing under ENDA. In addition, ENDA prohibits discrimination based on gender identity in addition to sexual orientation.

ii. Definitions

The CFEPA definition of "sexual orientation" is almost identical to the ENDA definition, prohibiting discrimination based on either an employee's "sexual preference for heterosexuality, homosexuality or bisexuality" or an employee's perceived sexual orientation—in the words of the CFEPA, "being identified with such preference."[101] CFEPA also explicitly protects individuals who have a "history of such preference," while ENDA does not include such language, perhaps extending coverage under the CFEPA to individuals that would be excluded under ENDA.[102] ENDA explicitly prohibits discrimination based on gender identity, while CFEPA does not. However the Connecticut Human Rights Commission has ruled that transgender individuals may pursue anti-discrimination claims under the category of sex discrimination in CFEPA.[103]

iii. Scope of Coverage

CFEPA applies to state and local government employers and private employers.[104] CFEPA's definition of employer is broader than the ENDA definition, while its religious organization exemption may be narrower, thus affording protection to

[101] COLO. REV. STAT. § 46a-81a.
[102] CONN. GEN. STAT. § 46a-81a (2007 & Supp. 2008).
[103] *CHRO Declaratory Ruling on behalf on John/Jane Doe* (2000).
[104] CONN. GEN. STAT. § 46a-51(10).

more employees than ENDA. CFEPA covers employers of three or more employees, while ENDA only covers employers of 15 or more employees.[105] CFEPA's definition of "religious organization" is arguably as broad as ENDA's, encompassing any "religious corporation, entity, association, educational institution or society," but the CFEPA exemption is limited to religious organizations "with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association."[106] Though it is unclear from CFEPA what work is considered to be "connected with the carrying on…of [the religious organization's] activities," there is a possibility that this definition does not cover every employee of every religious organization. Also, CFEPA excludes from its definition of "employee" "any individual employed by such individual's parents, spouse, or child, or in the domestic service of any person."[107] ENDA does not contain this exclusion.

iv. Required Procedures

ENDA requires all employees to exhaust their administrative remedies, and CFEPA requires employees of an employer other than the State to exhaust administrative remedies, before bringing a civil suit.[108] CFEPA does not appear to require Connecticut's state employees to exhaust their administrative remedies before bringing a civil action.[109] CFEPA and ENDA both require that an employee who chooses to file or

[105] *Id*.
[106] CONN. GEN. STAT. § 46a-81p.
[107] CONN. GEN. STAT. § 46a-51(9).
[108] *See* CONN. GEN. STAT. §§ 46a-99, 46a-82.
[109] *See id.*.

must file an administrative complaint do so within 180 days of the alleged unlawful practice.[110]

v. Remedies

Under CFEPA, successful complainants proceeding through an administrative hearing are limited to certain forms of equitable relief and back pay.[111] Employees who elect to bring an action in court based on an employer's violation of CFEPA are by statute entitled to "such legal an equitable relief which the court deems appropriate" and "attorney's fees and costs."[112] A federal district court found that this language is broad enough to encompass compensatory damages.[113] While no state courts have rejected this decision, there is a split of authority in Connecticut courts on whether or not punitive damages are authorized by the same language.[114] Under ENDA, an employee may recover compensatory damages (subject to cap), punitive damages (subject to cap and not available in suit against the United States or a State), and attorney's fees and costs, in addition to the equitable relief and back pay.

vi. Implementation

The Connecticut Commission on Human Rights and Opportunities ("the Commission") has the power to receive, initiate, investigate and mediate discriminatory practice complaints.[115] The Commission itself may issue a complaint if it has reason to believe that any person has been engaged or is engaging in a discriminatory practice.[116] Further, if either party elects a civil action in lieu of a civil hearing after a reasonable

[110] CONN. GEN. STAT. § 46a-82(e).
[111] CONN. GEN. STAT. § 46a-86(a), (b).
[112] CONN. GEN. STAT. § 46a-104.
[113] *See Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 113 (D. Conn. 2000).
[114] *Shaw v. Greenwich Anesthesiology Associates, P.C.*, 200 F. Supp. 2d 110, 117 (D. Conn. 2002).
[115] CONN. GEN. STAT. § 46a-54(8).
[116] CONN. GEN. STAT. § 46a-82(a).

cause determination has been made, the Commission or the Attorney General shall commence an action on behalf of the employee.[117] The Commission may bring an action in court to enforce a final order where a party has not complied with its terms.[118]

The Commission provided the number of employment discrimination complaints filed from 1999 through 2007 pursuant to a request from the Williams Institute.[119] The Commission was able to break down the total number of complaints into those filed by State employees and all other employees, but was unable to break down the number by year filed. The Department reported a total of 507 employment discrimination complaints filed on the basis of sexual orientation from 1999 through 2007; 44 of those complaints were filed by state employees. The Commission was unresponsive to a request for copies of the actual complaints or a record of the case dispositions.

4. Delaware

i. Summary

Delaware's Discrimination in Employment Act ("DEA"), amended in July 2009 to include sexual orientation, offers protection to employees of small employers that would be unprotected under ENDA and authorizes more remedies than ENDA in certain circumstances. However, the scope of "sexual orientation" in DEA is more limited than that of ENDA and, unlike ENDA, does not prohibit employment discrimination on the basis of gender identity.

ii. Definitions

[117] *Id*.
[118] CONN. GEN. STAT. § 46a-95(a).
[119] E-mail from Constance Sakyi, Connecticut Commission on Human Rights and Opportunities, to Christy Mallory, the Williams Institute (Sept. 16, 2008, 07:13:45 PST) (on file with the Williams Institute).

ENDA and DEA prohibit discrimination based on "sexual orientation" defined in both as "heterosexuality, homosexuality, or bisexuality."[120] However, DEA does not explicitly prohibit discrimination on the basis of perceived sexual orientation, while ENDA does. In fact, DEA states that sexual orientation "*exclusively* means heterosexuality, homosexuality, or bisexuality."[121] ENDA, unlike DEA, also prohibits discrimination based on gender identity.

iii. Scope of Coverage

DEA applies to state and local government employers and private employers.[122] DEA applies to employers of four or more employees while ENDA applies only to employers of 15 or more employees.[123] DEA and ENDA both provide broad religious organization exemptions, with Delaware exempting "religious corporations, associations or societies whether supported, in whole or in part, by government appropriations, except where the duties of employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under § 511(a) of the Internal Revenue Code of 1986."[124] DEA also exempts any employee employed in agriculture or in the domestic service of any person or employed by his or her parents, spouse, or child; these exemptions are not explicitly contained in ENDA.[125]

iv. Required Procedures

Under both ENDA and DEA, aggrieved employees must exhaust administrative remedies before filing a civil action.[126] An employee must file an administrative

[120] DEL. CODE ANN. tit. 19 § 710 *et seq*. (2009).
[121] DEL. CODE ANN. tit. 19 § 710(18) (emphasis added).
[122] DEL. CODE ANN. tit. 19 § 710(6).
[123] *Id*.
[124] *Id*.
[125] DEL. CODE ANN. tit. 19 § 710(5).
[126] DEL. CODE ANN. tit. 19 § 712(c)(1).

complaint under DEA within 120 days of the alleged unlawful practice; ENDA's statute of limitations for filing an administrative complaint is 180 days.[127]

v. Remedies

Under DEA, the administrative agency is not entitled to award damages or injunctive relief and may only force the employer to engage in conciliation.[128] An aggrieved employee who files a civil action under the Delaware statute is entitled to the same relief available under ENDA, including compensatory and punitive damages, injunctive relief, and attorney's fees.[129] Compensatory and punitive damages available under ENDA and DEA are subject to the caps and other limitations imposed by Title VII.

vi. Implementation

The Delaware Department of Labor ("the Department") has the power to receive, investigate, and conciliate complaints of unlawful employment practices.[130] The Department is also vested with the power to commence civil actions in a superior court for violations of the anti-discrimination provisions.[131] Additionally, any time the Attorney General has reasonable cause to believe that a violation of the anti-discrimination law has occurred, it too may, on its own initiative, file an action in the Delaware Court of Chancery against the offending entity.[132]

The DEA amendment extending protection for sexual orientation in employment was passed on July 2, 2009.[133] Because passage was so recent, data on complaints filed were not collected. It appears likely that the Department would not have released copies

[127] *Id*.
[128] DEL. CODE ANN. tit. 19 § 712(c)(3).
[129] DEL. CODE ANN. tit. 19 § 715.
[130] DEL. CODE ANN. tit. 19 § 712.
[131] DEL. CODE ANN. tit. 19 § 712(a)(3).
[132] DEL. CODE ANN. tit. 19 § 713(a).
[133] S.B. 122, 145th Gen. Assem., Reg. Sess. (Del. 2009) (enacted).

of the actual complaints because the statute requires that the Department not make public the charge of discrimination except to parties, counsel, or witnesses.[134]

5. Hawaii

i. Summary

Hawaii's Employment Practices Act ("HEPA") and ENDA are similar in remedies and in scope, except that HEPA applies to small employers that would not be subject to ENDA, and Hawaii's religious exemption may be construed more narrowly than ENDA's exemption. However, ENDA protects employees who would not be covered under HEPA because it prohibits discrimination based on gender identity in addition to sexual orientation, while HEPA does not.

ii. Definitions

Both ENDA and HEPA define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality."[135] ENDA prohibits discrimination based on gender identity as well as an employee's perceived sexual orientation, while HEPA does not.

iii. Scope of Coverage

HEPA applies to state and local government employers and private employers.[136] HEPA applies to employers regardless of the number of employees, while ENDA applies only to employers of fifteen or more employees.[137] The religious exemption contained in HEPA is arguably more restrictive than that contained in ENDA. While ENDA's definition of religious organization is broad and does not differentiate with respect to the nature of the work an employee does for the organization, Hawaii's exemption does not

[134] DEL. CODE ANN. tit. 19 § 712(c)(4).
[135] HAW. REV. STAT. § 378-1 (1991).
[136] *Id*.
[137] *Id*.

prohibit "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from…making a selection calculated to promote the religious principles for which the organization is established or maintained."[138] Though it is not clear which employment selections are "calculated to promote the religious principles" of an organization, it is possible that not every employee of the religious organization would fall into this definition. Also, HEPA excludes "services by an individual employed as a domestic in the home of any person" from its definition of "employment."[139] ENDA does not explicitly contain a similar exclusion.

iv. Required Procedures

Under both ENDA and HEPA, aggrieved employees are required to exhaust their administrative remedies before filing a civil action.[140] HEPA and ENDA both require that an administrative complaint be filed within 180 days of the alleged unlawful practice.[141]

v. Remedies

ENDA and HEPA authorize almost identical remedies—including back pay, compensatory damages, punitive damages (but not for employees of the State or United States under ENDA), attorney's fees, and equitable relief.[142] However, HEPA has no statutory cap on compensatory damages or punitive damages, while ENDA imposes the

[138] HAW. REV. STAT. § 378-3(5).
[139] HAW. REV. STAT. § 378-1.
[140] HAW. REV. STAT. § 378-4.
[141] HAW. REV. STAT. § 368-11.
[142] HAW. REV. STAT. §§ 378-5; 368-178.

same caps as Title VII for these damages, and the administrative agency and the court may award identical remedies under HEPA.[143]

vi. Implementation

The Civil Rights Commission ("the Commission") has the power to receive, investigate, and conciliate complaints alleging an unlawful discriminatory practice.[144] The Commission is also empowered to hold hearings to resolve employment discrimination charges and may commence a civil action in a circuit court to seek relief on behalf of a complainant or to enforce any commission order, conciliation agreement, or predetermination settlement.[145] Additionally, the Commission may intervene in a civil action brought by a complainant who had been issued a Right to Sue by the Commission if the case is of general importance.[146]

The Commission would not release to the Williams Institute any data on complaints filed, citing the confidentiality provision in HEPA.[147]

6. Illinois

i. Summary

The Illinois Human Rights Act ("IHRA") provides fewer remedies than ENDA, but provides protection for some public sector employees who would not be covered by ENDA and has an arguably narrower religious exemption.

ii. Definitions

Both ENDA and IHRA prohibit discrimination based on actual and perceived "sexual orientation" defined as "heterosexuality, homosexuality, or bisexuality."[148] Both

[143] *Id*.
[144] HAW. REV. STAT. § 368-3(1).
[145] HAW. REV. STAT. § 368-3(2),(3).
[146] HAW. REV. STAT. § 368-12.
[147] HAW. REV. STAT. § 368-4.

also protect employees from discrimination based on gender identity.[149] IHRA covers "gender related identity, whether or not traditionally associated with the person's designated sex at birth," while ENDA defines "gender identity" as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[150]

iii. Scope of Coverage

IHRA applies to state and local government employers and private employers.[151] IHRA only applies to private sector employers that employ 15 or more people, which is the same employer size requirement imposed by ENDA.[152] However, while the 15-employee restriction applies to both public and private employers under ENDA, there is no employee minimum for application of the IHRA in the public sector.[153] The religious organization exemption under IHRA allows religious employers to limit hiring to individuals of a particular religion "to perform work connected with the carrying on by [a religious organization]."[154] This limitation is similar to that contained in Title VII.[155] Though the effect of the importation of Title VII language into ENDA is unclear, it was likely intended that only the definition of "religious organization" from Title VII carry over into ENDA. Thus, if ENDA excludes any qualifying religious employer from ENDA but IHRA really only allows discrimination based on religious faith, the IHRA is much narrower than ENDA. Furthermore, as discussed in the Connecticut statute analysis above, it is unclear what type of work performed in a religious institution would

[148] 775 ILCS 5/1-102(O-1) (2007).
[149] *Id*.
[150] *Id*.
[151] 775 ILCS 5/1-101(B)(1)(a).
[152] *Id*.
[153] 775 ILCS 5/1-101(B)(1)(c).
[154] 775 ILCS 5/2-101(B)(2).
[155] 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2).

not be considered to be "connected with the carrying on," and whether this language might act to exempt religious organizations as far as employing people in some positions, but not others. This would make ILCS's statute even narrower than if only the "particular religion" clause were included. IHRA also excludes from its definition of "employee" 1.) domestic servants in private homes; 2.) elected public officials or members of their immediate personal staffs; 3.) principal administrative officers of the State or any political subdivision, municipal corporation or other governmental unit or agency; 4.) a person in a vocational rehabilitation facility certified under federal law who has been designated as an evaluee, trainee, or work activity client.[156] ENDA also provides a similar exclusion for elected public officials, etc., but not expressly for domestic servants.

iv. Required Procedures

Under both IHRA and ENDA, aggrieved employees must exhaust their administrative remedies before filing a civil action.[157] Both IHRA and ENDA require that an administrative complaint be filed within 180 days of the alleged unfair practice.[158]

v. Remedies

ENDA and IHRA provide similar remedies including back pay, actual damages, attorney's fees, and equitable relief.[159] IHRA, however, does not cap any damages while ENDA caps compensatory damages for future pecuniary and non-pecuniary losses at amounts that depend on the size of the employer. While ENDA provides for punitive damages (subject to caps and not available in suits against the United States or a State),

[156] 775 ILCS 5/2-101(A).
[157] 775 ILCS 5/7A-102(A), (A-1).
[158] 775 ILCS 5/7A-102(A-1).
[159] 775 ILCS 5/8A-104.

IHRA authorizes "any other action necessary to make the Complainant whole" but does not explicitly provide for punitive damages.[160] IHRA is silent as to remedies available to an employee bringing a civil suit under the Act and, because the IHRA was recently amended (on January 1, 2008) to permit an employee to bring a civil action for violation of the Act, there is currently no case law identifying remedies available through civil action.

vi. Implementation

The Department of Human Rights ("the Department") has the power to issue, receive, investigate, conciliate, settle and dismiss charges filed under IHRA.[161] The Department may also file complaints with the Illinois Human Rights Commission ("the Commission") for IHRA violations on its own initiative.[162] The Department may seek judicial intervention to enforce orders of the Commission.[163]

The Department responded to requests from the Williams Institute for complaint data by reporting that it does not create or maintain the sort of information requested.[164] The Department was also unwilling to provide copies of the actual complaints filed.

7. Iowa

i. Summary

The Iowa Civil Rights Act ("ICRA") protects employees of small employers that would be unprotected under ENDA and offers much, but not all, of the same relief offered by ENDA through both administrative and civil actions.

[160] 775 ILCS 5/7A-104.
[161] 775 ILCS 5/7-101(B).
[162] 775 ILCS 5/7-101(D).
[163] 775 ILCS 5/7-101(E).
[164] Letter from Donyelle L. Gray, Deputy General Counsel, Illinois Human Rights Commission, to Christy Mallory, the Williams Institute (Oct. 30, 2008) (on file with the Williams Institute).

ii. Definitions

ICRA and ENDA define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality" and protect employees from discrimination based on actual or perceived sexual orientation.[165] ICRA and ENDA also prohibit discrimination based on gender identity.[166] ICRA definition of "gender identity," the "gender-related identity of a person, regardless of the person's assigned sex at birth," may be narrower in practice than ENDA's definition, which explicitly covers "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth."[167]

iii. Scope of Coverage

ICRA applies to state and local government employers and private employers.[168] ICRA, which applies to all employers of four or more employees, reaches small employers that would not have to comply with ENDA which only applies when an employer has fifteen or more employees.[169] Further, while ICRA exempts "any bona fide religious institution or its educational facility, association, corporation, or society," the exemption is limited to employment decisions based on "religion, sexual orientation, or gender identity when such qualifications are related to a religious purpose."[170] Without language in ENDA to carve out an exemption only where the employment is related to a "religious purpose," the exemption in ENDA would likely render employees unprotected who would be protected under ICRA. ICRA also excludes "individuals who work within

[165] IOWA CODE § 216.2(14) (2008).
[166] IOWA CODE § 216.2(10).
[167] *Id*.
[168] IOWA CODE § 216.2(6).
[169] *Id*.
[170] *Id*.

the home of the employer if the employer or members of the employer's family reside therein during such employment or individuals who render personal service to the person of the employer of members of the employer's family" from the definition of "employee."[171] ENDA does not expressly contain a similar exclusion.

iv. Required Procedures

Under both ENDA and ICRA, aggrieved employees must exhaust administrative remedies before filing a civil action.[172] Both ICRA and ENDA require that an administrative complaint be filed within 180 days of the alleged unfair practice.[173]

v. Remedies

Employees are entitled to almost identical relief under ICRA and ENDA.[174] Under ICRA, damages available through an administrative hearing or a civil action include actual damages (not subject to cap), costs and attorney's fees, and equitable relief. Under ENDA, punitive damages are available in addition to all of the relief authorized by ICRA (but not in a suit against the United States or a State), though the sum of compensatory damages and punitive damages is subject to a cap.[175] ICRA also allows a respondent to collect attorney's fees and costs through a civil action if the complainant's action was frivolous.[176]

vi. Implementation

The Iowa Civil Rights Commission ("the Commission") has the power to receive, investigate, mediate, and determine the merits of complaints alleging discriminatory

[171] *Id*.
[172] IOWA CODE § 216.15(8).
[173] IOWA CODE § 216.15(12).
[174] IOWA CODE §§ 216.15(8), 216.16(5).
[175] *Id*.
[176] IOWA CODE § 216.16(5).

practices.[177] The Commission may also attempt to eliminate discrimination by conciliation or may hold a hearing to resolve the complaint.[178] The Commission may obtain an order of the court for enforcement if the respondent has not complied with the Commission order.[179]

The Commission provided the number of employment discrimination complaints filed between July 1, 2007 and June 30, 2008 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.[180] The Commission did not respond to requests for copies of the actual complaints filed or for dispositions of the cases.

The Commission reported that 22 cases had been filed with the Commission on the basis of sexual orientation or gender identity discrimination in employment from July 1, 2007 through June 30, 2008. Of the six cases filed on the basis of gender identity, four were against private employers, one was against state or local government, and one was against a public school. Of the 16 cases filed on the basis of sexual orientation, 14 were against private employers, one was against state or local government, and one was classified as "other; miscellaneous personal services."

8. Maine

i. Summary

[177] IOWA CODE § 216.5(2).
[178] IOWA CODE § 216.5(3).
[179] IOWA CODE § 216.17(2).
[180] E-mail from Crystal Schrader, Iowa Civil Rights Commission to Ralph Rosenberg, Iowa Civil Rights Commission, forwarded to Christy Mallory, the Williams Institute (Sept. 12, 2008, 13:59:01 PST) (on file with the Williams Institute).

The Maine Human Rights Act ("MHRA") offers protection to employees of small employers that would be excluded from protection under ENDA and provides for the same array of remedies available under ENDA.

ii. Definitions

Like ENDA, MHRA includes within its definition of "sexual orientation" "heterosexuality, homosexuality, or bisexuality" and protects employees from discrimination based on either actual or perceived sexual orientation.[181] Both ENDA and MHRA prohibit discrimination based on "gender identity." ENDA separately defines gender identity as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth," while MHRA includes "gender identity or expression" in its definition of "sexual orientation."[182] There is a current Citizen Initiative to remove sexual orientation from protection under the MHRA through the Maine Human Rights Referendum (2009).[183] The measure will appear on the 2010 ballot.[184]

iii. Scope of Coverage

MHRA applies to state and local government employers and private employers.[185] MHRA does not restrict its application based on the size of the employer, unlike ENDA, which applies to only employers of 15 or more employees.[186] While perhaps not textually as broad as ENDA's blanket religious exemption, but likely as broad in practice, the MHRA religious exemption allows "any religious or fraternal corporation or

[181] ME. REV. STAT. ANN. tit. 5 § 4553(9-C) (2007).
[182] *Id*.
[183] http://www.maine.gov/sos/cec/elec/pets02/pets02-1.htm.
[184] *Id*.
[185] ME. REV. STAT. ANN. tit. 5 § 4553(4).
[186] ME. REV. STAT. ANN. tit. 5 § 4553(4).

association, not organized for private profit and in fact not conducted for private profit" to restrict employment to "members of the same religion, sect, or fraternity" and also to "require that all applicants and employees conform to the religious tenets of that organization." [187] MHRA excludes from its definition of "employee" an "individual employed by that individual's parents, spouse, or child."[188] ENDA does not expressly include a similar limitation.

iv. Required Procedures

Under both MHRA and ENDA, aggrieved employees are required to exhaust their administrative remedies before filing a civil action.[189] In contrast to the administrative procedure in many states, employees in Maine are not offered the option of proceeding through an administrative hearing to seek relief, but may either obtain a Right to Sue from the administrative agency, or if a conciliation attempt fails, may be awarded relief through court in a civil action brought by the administrative agency on the employee's behalf.[190] The MHRA requires an aggrieved employee to file an administrative complaint within six months of the unlawful practice; approximately the same as ENDA's 180-day statute of limitations.[191]

v. Remedies

The remedies available through a civil action under the MHRA are the same as those offered by ENDA including actual damages, punitive damages (though not available in suits against the State or United States under ENDA), attorney's fees and

[187] *Id*.
[188] ME. REV. STAT. ANN. tit. 5 § 4553(3).
[189] ME. REV. STAT. ANN. tit. 5 §§ 4611, 4622.
[190] ME. REV. STAT. ANN. tit. 5 § 4613(2).
[191] ME. REV. STAT. ANN. tit. 5 § 4611.

costs, and equitable relief.[192] Like ENDA, MHRA caps the sum amount available for compensatory future pecuniary and non-pecuniary losses and punitive damages.[193] The MHRA caps are as follows: for employers of 14-100 employees, a cap of $50,000; for employers of 101-200 employees, a cap of $100,000; for employers of 201-500 employees, a cap of $300,000; and for employers of more than 500 employees, a cap of $500,000.[194] It is unclear under the MHRA whether employees of employers of fewer than 14 people are entitled to recover compensatory and/or punitive damages.[195]

vi. Implementation

The Maine Human Rights Commission ("the Commission") has the power to investigate all forms of invidious discrimination, attempt to eliminate discriminatory practices by conciliation, and to hold hearings to resolve complaints of employment discrimination.[196] Additionally, if conciliation is unsuccessful, the Commission may file a civil action in the superior court on behalf of the complainant.[197]

The Commission provided the number of employment discrimination complaints filed in 2006 and 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.[198] The MHRA did not provide copies of the actual complaints or a record of the dispositions of the cases.

Because the Commission coded all sexual orientation and gender identity complaints as "sexual orientation" complaints, the numbers reported represent all such complaints filed. In 2006, two complaints were filed against the State, three complaints

[192] ME. REV. STAT. ANN. tit. 5 § 4613(2).
[193] ME. REV. STAT. ANN. tit. 5 § 4613(2)(b).
[194] *Id*.
[195] *See id*.
[196] ME. REV. STAT. ANN. tit. 5 §§ 4566, 4612.
[197] ME. REV. STAT. ANN. tit. 5 § 4612(4)(A).
[198] Letter from Charil Mairs, Case Controller, Maine Human Rights Commission, to Christy Mallory, the Williams Institute (Oct. 15, 2008) (on file with the Williams Institute).

were filed against public sector employers other than the State, and 10 complaints were filed against private sector employers. In 2007, two complaints were filed against the State, three complaints were filed against public sector employers other than the State, and 13 complaints were filed against private sector employers.

9. Maryland

i. Summary

Maryland's anti-discrimination law is similar to ENDA in its definition of "sexual orientation" and its employer size limitation. However, unlike under ENDA, it does not provide for attorney's fees to a successful claimant. In addition, the state law does not protect against gender identity discrimination. Maryland's religious organization exemption might be more narrowly construed than ENDA's.

ii. Definitions

Maryland's anti-discrimination law defines "sexual orientation" as "the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality."[199] While ENDA describes sexual orientation similarly, it also expressly prohibits discrimination based on perceived sexual orientation, which the Maryland statute does not (though it is possible that perceived sexual orientation is covered by "identification"). ENDA also prohibits discrimination based on gender identity while Maryland's statute does not.

iii. Scope of Coverage

Maryland's anti-discrimination provisions apply to state and local government employers and private employers.[200] Both ENDA and Maryland's statute apply only to

[199] MD. ANN. CODE art. 49B § 15(j) (2008).
[200] MD. ANN. CODE art. 49B § 15(b).

employers of 15 or more employees.[201] Maryland's religious organization exemption, which is likely narrower than ENDA's, covers any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work with the carrying on by such [organization]."[202] ENDA's religious exemption applies to religious institutions rather than particular activities. Further, ENDA and Maryland's statute also both exempt any tax-exempt "bona fide private membership club" from coverage.[203]

iv. Required Procedure

Under both ENDA and Maryland's anti-discrimination statute, an aggrieved employee must first exhaust administrative remedies before filing a civil action.[204] The statute of limitations for filing an administrative complaint under Maryland's anti-discrimination statute and ENDA is approximately the same, six months and 180 days, respectively.[205]

v. Remedies

The remedies available under Maryland's statute are similar to those available under ENDA, except that attorney's fees are not available under the Maryland statute. Through an administrative hearing under Maryland's statute, a successful complainant may be awarded back pay, compensatory damages, and equitable relief.[206] Compensatory damages for future pecuniary losses and non-pecuniary losses are subject to the same caps as imposed by ENDA.[207] In a civil action under Maryland's statute, a

[201] *Id*.
[202] MD. ANN. CODE art. 49B § 18(2).
[203] MD. ANN. CODE art. 49B § 15(b), (e).
[204] MD. ANN. CODE art. 49B § 9A(a).
[205] *Id*.
[206] MD. ANN. CODE art. 49B § 11.
[207] *Id*.

successful employee is entitled to punitive damages in addition to the relief available through an administrative hearing, however, as under ENDA, the same caps as stated above apply to the sum of punitive damages and compensatory damages for future pecuniary and non-pecuniary losses.[208] Maryland's statute, like ENDA, also provides for attorneys fees and costs.[209]

vi. Implementation

The Maryland Human Relations Commission ("the Commission") has the power to receive and investigate claims of discriminatory practices and may endeavor to eliminate discrimination through conciliation.[210] Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged in any discriminatory practice it may, on its own motion, issue a complaint.[211] If conciliation fails, the Commission has the power to require the respondent to answer the charges at a hearing.[212] Further, if conciliation fails, the complainant, the respondent, or the Commission itself may elect to have the claims asserted in the complaint determined in a civil action.[213] If a respondent refuses to comply with an order of the Commission, the Commission may institute litigation to seek judicial enforcement of the order.[214]

The Commission advised the Williams Institute to send a written request for information about discrimination complaints to the Executive Director of the Maryland

[208] *Id*.
[209] MD. ANN. CODE art. 49B § 11D.
[210] MD. ANN. CODE art. 49B §§ 9A, 10, 11A.
[211] MD. ANN. CODE art. 49B §§ 9A(b), 10(a).
[212] MD. ANN. CODE art. 49B § 11(a).
[213] MD. ANN. CODE art. 49B § 11A(a)(1), (b).
[214] MD. ANN. CODE art. 49B § 12(a).

Commission on Human Rights, Mr. Henry B. Ford.[215] The information was not provided in response to the written request.

10. Massachusetts

i. Summary

Massachusetts's Fair Employment Practices Law ("FEPL") offers protection to employees of small employers that would not be protected under ENDA and offers similar, but possibly less extensive, relief to ENDA. ENDA explicitly prohibits discrimination based on gender identity, while FEPL does not.

ii. Definitions

Both ENDA and FEPL prohibit discrimination based on actual or perceived "sexual orientation" defined in both acts as "heterosexuality, homosexuality, or bisexuality."[216] FEPL does not explicitly prohibit discrimination based on gender identity, although courts in Massachusetts have held that transgender individuals can pursue a claim for sex or disability discrimination in violation of FEPL.[217] ENDA explicitly protects against gender identity discrimination.

iii. Scope of Coverage

FEPL applies to state and local government employers and private employers.[218] FEPL applies to employers of six or more employees, while ENDA only covers employers of 15 or more employees.[219] Further, ENDA's blanket religious organization exemption is likely broader than that contained in FEPL, which exempts "religious

[215] Letter from Christy Mallory, the Williams Institute, to Henry B. Ford, Executive Director, Maryland Commission on Human Rights (Oct. 14, 2009) (copy on file with the Williams Institute).
[216] MASS. GEN. LAWS ch. 151B, § 3(6) (2008).
[217] *Lie v. Sky Publishing Corp*., 15 Mass. L. Rptr. 412 (Mass. Super. 2002); *Doe v. Yuntis*, 15 Mass. L. Rptr. 278 (Mass. Super. 2001); *Jette v. Honey Farms Mini Market*, 2001 Mass. Comm. Discrim. LEXIS 50 (Mass. Comm'n Against Discrimination 2001).
[218] MASS. GEN. LAWS ch. 151B, § 1(5).
[219] *Id*.

organizations," defined as "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated or controlled in connection with a religious organization, and which limits membership, enrollment, admission or participation to members of that religion," so long as the employment action is "calculated by such organization to promote the religious principles for which it is established or maintained."[220] FEPL, unlike ENDA, explicitly excludes from its definition of "employee" "any individual employed by his parents, spouse or child or in the domestic service of any person."[221] Like ENDA, FEPL does not cover "a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit."[222]

iv. Required Procedures

Under both ENDA and FEPL an aggrieved employee must exhaust administrative remedies before filing a civil action.[223] FEPL requires that an aggrieved employee file an administrative complaint within 300 days of the alleged unlawful practice; ENDA's statute of limitations is shorter at 180 days.[224]

v. Remedies

Damages authorized under FEPL are similar to those available under ENDA. Remedies available though an administrative hearing under the FEPL are limited to back pay, attorney's fees and costs, and equitable relief.[225] The court, however, may award actual damages or punitive-like damages in addition to the relief available through the

[220] *Id*.
[221] MASS. GEN. LAWS ch. 151B, § 1(6).
[222] MASS. GEN. LAWS ch. 151B, § 1(5).
[223] MASS. GEN. LAWS ch. 151B, § 5.
[224] *Id*.
[225] *Id.*

administrative agency.[226] While ENDA provides for future pecuniary and non-pecuniary damages and punitive damages (though not available in suits against the United States or a State) subject to caps depending on employer size, under FELP the court can award the amount of actual damages or "up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the anti-discrimination provisions" (ENDA's standard for punitive damages is malice or reckless indifference).[227] In addition to such damages, the court may award the relief available through the administrative agency.[228]

vi. Implementation

The Massachusetts Commission Against Discrimination ("the Commission") has the power to receive, investigate, and pass upon complaints of unlawful practices in violation of FEPL.[229] If, after a finding of probable cause, either the complainant or respondent elects to have the matter determined in court rather than by administrative hearing, the Commission is to notify the Attorney General who shall then commence the action on behalf of the complainant.[230] If the case is instead handled administratively, the Commission has the power to seek conciliation, and if it fails, to hold hearing.[231] The Commission may, on its own initiative, obtain a court order for enforcement where there has not been compliance with an order of the Commission.[232]

[226] MASS. GEN. LAWS ch. 151B, § 9.
[227] *Id.*
[228] *Id*.
[229] MASS. GEN. LAWS ch. 151B, § 3(6).
[230] MASS. GEN. LAWS ch. 151B, § 5.
[231] *Id*.
[232] MASS. GEN. LAWS ch. 151B, § 6.

The Commission did not respond to the Williams Institute's written request for data pertaining to employment discrimination complaints filed on the basis of sexual orientation.[233]

11. Minnesota

i. Summary

The Minnesota Human Rights Act ("MHRA") protects employees that would be unprotected by ENDA based on its employer size restriction, but does not cover employees of youth organizations that may be covered under ENDA. Similar damages are available under MHRA and ENDA, although the caps imposed by MHRA are more restrictive than those imposed by ENDA.

ii. Definitions

MHRA defines "sexual orientation" as "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[234] This definition is likely intended to extend protection for gender identity.[235] ENDA also prohibits discrimination on the basis of gender identity defining "gender identity" as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth."

iii. Scope of Coverage

---

[233] Letter from Christy Mallory, the Williams Institute, to Keith Healy, the Massachusetts Commission Against Discrimination (Mar. 26, 2009) (copy on file with the Williams Institute).
[234] MINN. STAT. § 363A.03 subd. 44 (2008).
[235] *Id*.

MHRA applies to state and local government employers and private employers.[236] MHRA applies to all employers regardless of number of employees, while ENDA applies only to employers of 15 or more employees.[237] MHRA's religious organization exemption, which applies to any "religious or fraternal corporation, association, or society", is likely more restrictive than ENDA's blanket exemption because it only applies "when religion or sexual orientation shall be a BFOQ for employment."[238] While ENDA, along with several states, excludes "bona fide private membership clubs" from the definition of employer, MHRA expressly exempts "any non-public service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys' or girls' clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, including 4-H clubs, and other youth organizations, with respect to qualifications of employees or volunteers based on sexual orientation."[239] MHRA, but not ENDA, further excludes from its definition of "employee" "any individual employed by the individual's parent, grandparent, spouse, child, or grandchild or any individual in the domestic service of any person."[240]

iv. Required Procedures

Unlike ENDA, MHRA does not require an aggrieved employee to exhaust administrative remedies before bringing a civil action; an employee may file a complaint directly in court.[241] The MHRA requires that a civil action be commenced or an

[236] MINN. STAT. § 363A.03A subd. 16.
[237] *Id*.
[238] MINN. STAT. § 363A.20 subd. 2.
[239] *Id*.
[240] *Id*.
[241] MINN. STAT. § 363A.33 subd. 1.

administrative complaint filed within one year of the alleged unlawful practice.[242] Under ENDA, the aggrieved employee must file an administrative complaint within 180 days of the alleged unlawful practice.

v. Remedies

Remedies available under MHRA are similar to the remedies available under ENDA, but the caps on monetary damages under MHRA are much more restrictive than under ENDA. A successful complainant in an administrative hearing under the MHRA is entitled to back pay, compensatory damages, damages for mental anguish and suffering, punitive damages, attorney's fees, and equitable relief.[243] However, compensatory damages awarded cannot exceed three times the amount of actual damages sustained and punitive damages are capped at $8,500.[244] Under ENDA, an employee may not recover punitive damages in a suit against a State or the United States. The MHRA allows punitive damages to be assessed against a political subdivision, although however, no member of a governing body may be held personally liable for punitive damages.[245] A successful plaintiff in a civil action under MHRA is entitled to the same relief that is available through the administrative agency.[246]

vi. Implementation

The Department of Human Rights ("the Department") has the power to issue complaints, receive and investigate charges alleging unfair discriminatory practices, and determine whether or not probable cause exists for a hearing.[247] The Department may

[242] MINN. STAT. § 363A.28 subd. 3.
[243] MINN. STAT. § 363A.25 subds. 4, 5.
[244] *Id.*
[245] MINN. STAT. § 363A.29 subd. 4(b).
[246] MINN. STAT. § 363A.33 subd. 6.
[247] MINN. STAT. § 363A.06 subd. 8.

attempt by means of conciliation to eliminate unfair discriminatory practices and, if conciliation fails, may attempt to resolve the complaint through an administrative hearing.[248] The Department, on its own initiative, may bring a civil action seeking redress for an unfair discriminatory practice in a district court.[249] Further, when a respondent fails or refuses to comply with a final decision of the Department, the commissioner may obtain judicial enforcement of the order.[250]

The Department provided data on employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.[251] Because both sexual orientation complaints and gender identity complaints are coded by the Department as "sexual orientation," the numbers reported encompass complaints on both bases.

The Department reported a total of 244 complaints on the basis of sexual orientation or gender identity from 1999 – 2007. In 1999, two complaints were filed against the State, two were filed against public sector employers other than the State, and 28 were filed against private sector employers. In 2000, one complaint was filed against the State, four were filed against public sector employers other than the State, and 19 were filed against private sector employers. In 2001, no complaints were filed against the State, two were filed against public sector employers other than the State, and 29 were filed against private sector employers. In 2002, one complaint was filed against the State, three were filed against public sector employers other than the State, and 29 were filed against private sector employers. In 2003, three complaints were filed against the State,

[248] MINN. STAT. §§ 363A.06 subd. 10, 363A.29 subd.1.
[249] MINN. STAT. § 363A.33 subd. 1.
[250] MINN. STAT. § 363A.30 subd. 3.
[251] E-mail from Jeff Holman, Minnesota Department of Human Rights, to Christy Mallory, the Williams Institute (Oct. 30, 2008 12:31:17 PST) (on file with the Williams Institute).

five were filed against public sector employers other than the State, and 19 were filed against private sector employers. In 2005, no complaints were filed against the State, four were filed against public sector employers other than the State, and 23 were filed against private sector employers. In 2006, no complaints were filed against the State or other public sector employer and 27 were filed against private sector employers. In 2007, one complaint was filed against the State, one was filed against a public sector employer other than the State, and 19 were filed against private sector employers.

Despite the fact that the statute makes public those portions of closed cases that do not contain identifying data on a person other than the complainant or respondent, the Department did not respond to requests for the actual complaints or a record of the dispositions of those cases.[252]

12. Nevada

i. Summary

Nevada's anti-discrimination statute is more limited in scope and remedies than ENDA. It lacks gender identity protection, and provides far more limited remedies than ENDA. However, Nevada has a more limited religious exemption. Nevada's restricted administrative procedure differs from most states and that required by ENDA.

ii. Definitions

Both ENDA and Nevada's anti-employment discrimination statutes prohibit discrimination based on actual and perceived sexual orientation, and both define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality."[253] ENDA also prohibits

[252] MINN. STAT. § 363A.35 subd. 3.
[253] NEV. REV. STAT. § 613.310(6) (2008).

discrimination based on gender identity, while Nevada's anti-discrimination statute does not.

iii. Scope of Coverage

Nevada's anti-discrimination statutes apply to state and local government employers and private employers.[254] Both ENDA and the Nevada statutes apply only to employers of 15 or more employees, and both exclude from the definition of "employer" "any tax-exempt bona fide private membership clubs."[255] Nevada's statute exempts "any religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of religious activities."[256] This exemption, which appears to allow only discrimination based on certain religious beliefs, is narrower than ENDA's blanket exemption for religious organizations.

iv. Required Procedure

Under ENDA and Nevada's anti-discrimination statutes, an aggrieved employee must exhaust administrative remedies.[257] Unlike many states and ENDA, which allow a complainant to elect to proceed through the administrative body or to seek a Right to Sue (subject to certain procedural restrictions) in order to file a complaint in court, complainants in Nevada must proceed through the administrative process and can only seek judicial review through appeal of a final order issued by the administrative agency.[258] Both ENDA and Nevada's anti-discrimination statutes require that an

[254] NEV. REV. STAT. § 613.310(2).
[255] NEV. REV. STAT. §§ 613.310(2), 613.320(1)(c).
[256] NEV. REV. STAT. § 613.320(1)(b).
[257] NEV. REV. STAT. § 613.405.
[258] NEV. REV. STAT. §§ 613.405, 223.170(2), 613.420.

aggrieved employee subject to the administrative filing requirement file a complaint within 180 days of the alleged unlawful practice.[259]

v. Remedies

The relief available under Nevada's statutes is much more limited than that available under ENDA, including only "restoration of rights including, but not limited to, rehiring, back pay, annual leave time, sick leave time or pay, other fringe benefits or seniority, with interest."[260] If a complainant seeks judicial review of a final order of the administrative agency, the court may "restor[e] rights to which complainant is entitled," which presumably authorizes no more relief than that available through the administrative agency.[261]

vi. Implementation

The Nevada Equal Rights Commission ("the Commission") has the power to accept complaints of and investigate practices of discrimination and may conduct hearings and mediations with regard thereto.[262] If the respondent fails to comply with a final order of the Commission, the Commission may obtain judicial enforcement of the order on its own initiative.[263]

The Commission provided the number of employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.[264] The Commission was unable to break down public sector complaints into those filed against the State and those filed against other public sector

[259] NEV. REV. STAT. § 613.430.
[260] NEV. REV. STAT. § 233.170(3)(b).
[261] NEV. REV. STAT. § 613.420.
[262] NEV. REV. STAT. §§ 233.150(1)(b), (c); 233.157.
[263] NEV. REV. STAT. § 233.170(4).
[264] E-mail from Maureen Cole, Deputy Administrator, Nevada Equal Rights Commission, to Christy Mallory, the Williams Institute (Oct. 8, 2008 11:42:44) (on file with the Williams Institute).

employers. The Commission was unable to release copies of the actual complaints filed or a record of the case dispositions because the Commission's records are not public until and unless a case goes to public hearing or to state or federal court. The Nevada Equal Rights Commission Deputy Administrator in contact with the Williams Institute reported that she was not aware of any sexual orientation cases that had gone to a public hearing; the Commission does not track cases that are subsequently filed in state or federal court.[265]

The Commission reported a total of 267 employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation. In 1999, the year protection for sexual orientation was added to the anti-discrimination statutes, no complaints were filed. In 2000, two complaints were filed against public sector employers and 15 complaints were filed against private sector employers. In 2001, four complaints were filed against public sector employers and 40 complaints were filed against private sector employers. In 2002, three complaints were filed against public sector employers and 36 complaints were filed against private sector employers. In 2003, three complaints were filed against public sector employers and 43 complaints were filed against private sector employers. In 2004, three complaints were filed against public sector employers and 39 complaints were filed against private sector employers. In 2005, three complaints were filed against public sector employers and 23 complaints were filed against private sector employers. In 2005, three complaints were filed against public sector employers and 23 complaints were filed against private sector employers. In 2006, three complaints were filed against public sector employers and 19 complaints were filed

[265] E-mail from Maureen Cole, Deputy Administrator, Nevada Equal Rights Commission, to Christy Mallory, the Williams Institute (Oct. 8, 2008 12:44:08) (on file with the Williams Institute).

against private sector employers. In 2007, five complaints were filed against public sector employers and 25 complaints were filed against private sector employers.

13. New Hampshire

i. Summary

Though New Hampshire's anti-discrimination statutes defines key terms similarly to ENDA, it covers smaller employers. However, the remedies available under New Hampshire statutes are more limited than those available under ENDA, and ENDA expressly prohibits discrimination based on gender identity while New Hampshire's statutes do not.

ii. Definitions

New Hampshire's anti-discriminations statutes and ENDA define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality," and both prohibit discrimination on the basis of either actual or perceived sexual orientation.[266] ENDA also expressly prohibits discrimination based on gender identity, while New Hampshire's anti-discrimination statutes do not.

iii. Scope of Coverage

New Hampshire's anti-discrimination statutes apply to state and local government employers and private employers.[267] New Hampshire's anti-discrimination statutes apply to employers of six or more employees, while ENDA applies to employers of 15 or more employees.[268] New Hampshire's statutes, like ENDA, provide a broad religious organization exemption, excluding "any fraternal or religious association or corporation, if such association or corporation is not organized for private profit," and, also like

[266] N.H. REV. STAT. Ann. § 354-A:2(XIV-c) (2008).
[267] N.H. REV. STAT. Ann. § 354-A:2(VII).
[268] N.H. REV. STAT. Ann. § 354-A:2(VII).

ENDA, exempt "any exclusively social club if such club is not organized for private profit."[269] New Hampshire's statutes also do not cover "any individual employed by a parent, spouse or child, or any individual in the domestic service of any person."[270]

iv. Required Procedures

Under both New Hampshire's anti-discrimination statutes and ENDA, an aggrieved employee must exhaust administrative remedies before filing in court.[271] Under both New Hampshire's anti-discrimination statutes and ENDA, an aggrieved employee must file an administrative complaint within 180 days of the unlawful practice.[272]

v. Remedies

If a complainant is successful at an administrative hearing under New Hampshire's statute, the agency may award back pay, compensatory damages, and equitable relief.[273] If the complainant instead proceeds through a civil action, the court may award the same relief available through the administrative agency, except that, in lieu of an administrative fine, the court may award enhanced compensatory damages to the plaintiff if the "defendant's conduct was taken with willful or reckless disregard for the plaintiff's rights" (basically the same as ENDA's punitive damages standard).[274]

vi. Implementation

The State Commission for Human Rights ("the Commission") has the power to receive, investigate, and pass upon complaints alleging discriminatory employment

[269] *Id*.
[270] *Id*.
[271] N.H. REV. STAT. Ann. §§ 354-A:21(I)(a), 354-A:21-a(I).
[272] N.H. REV. STAT. Ann. §354-A:21(III).
[273] N.H. REV. STAT. Ann. § 354-A:21(d).
[274] N.H. REV. STAT. Ann. § 354-A:21-a(I).

practices.[275] The Commission may attempt conciliation and hold hearings to resolve claims.[276] The Commission may, by its own initiative, obtain a judicial order for enforcement where a party has not complied with an order of the Commission.[277]

The Commission did not respond to requests made by the Williams Institute for data on filed employment discrimination complaints.

14. New Jersey

i. Summary

New Jersey's Law Against Discrimination ("LAD") is broader in scope than ENDA and many other state laws. Further, LAD offers remedies which could, in certain circumstances, exceed those available under ENDA.

ii. Definitions

LAD's definition of "sexual orientation" is similar to that of ENDA, but may cover employees who would be excluded under ENDA. LAD includes within its definition of sexual orientation "affectional" orientation and prohibits discrimination based not only on actual or perceived "heterosexuality, homosexuality, or bisexuality" (like ENDA) but also explicitly on "having a history of [heterosexuality, homosexuality, or bisexuality]" and on one's domestic partnership status.[278] Both ENDA and LAD expressly prohibit discrimination based on "gender identity," defined in ENDA as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth" and in

[275] N.H. REV. STAT. Ann. § 354-A:5(VI).
[276] N.H. REV. STAT. Ann. § 354-A:5(VII), (VIII).
[277] N.H. REV. STAT. Ann. § 354-A:22(I).
[278] N.J. STAT. § 10:5-5(hh) (2008).

LAD as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth."[279]

iii. Scope of Coverage

LAD applies to state and local government employers and private employers.[280] LAD, unlike ENDA, which applies only to employers of 15 or more employees, has no applicability restriction based on employer size.[281] Additionally, LAD's religious organization exemption is narrower than ENDA's. LAD exempts "any religious association or organization utilizing religious affiliation in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee" whereas ENDA provides a blanket exemption for "religious organizations."[282] LAD also excludes "any individual employed in the domestic service of any person" from its definition of "employee."[283]

iv. Required Procedure

Unlike under ENDA and most other state statutes, LAD does not require an aggrieved employee to exhaust administrative remedies before filing a civil action.[284] LAD and ENDA both require that an employee who chooses to or must file an administrative complaint, do so within 180 days of the alleged unlawful practice.[285]

v. Remedies

[279] N.J. STAT. § 10:5-5(rr).
[280] N.J. STAT. § 10:5-12(11)(a).
[281] *Id*.
[282] *Id*.
[283] *Id*.
[284] N.J. STAT. § 10:5-13.
[285] N.J. STAT. § 10:5-18.

A complainant who files a claim with the administrative agency and proceeds through an administrative hearing under LAD may be awarded back pay, equitable relief, attorney's fees and costs, and damages for emotional distress to the same extent they are available in common law tort actions.[286] A complainant who files a complaint in court may be awarded all common law tort remedies (which presumably include punitive damages, which also can be available under ENDA) in addition to all remedies which are available through the administrative agency.[287]

vi. Implementation

The Division of Civil Rights ("the Division") has the power to conduct investigations, receive complaints and conduct hearings thereon for unlawful discriminatory practices.[288] The Commissioner of Labor and the Attorney General are both vested with the power to make and file a complaint when it believes a discriminatory practice has taken place.[289] If an order of the Division has not been complied with, the Attorney General or the director of the Division may seek judicial enforcement of the order on its own initiative.[290]

The Division provided data on employment discrimination complaints filed from 1999 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.[291] The request for data was made in September 2008 and at that point there were no data for complaints of employment discrimination based on gender

[286] N.J. STAT. §§ 10:5-17(16), 10:5-27.1(6).
[287] N.J. STAT. § 10:5-13.
[288] N.J. STAT. § 10:5-8(h).
[289] N.J. STAT. § 10:5-13.
[290] N.J. STAT. §§ 10:5-14.1, 10:5-19.
[291] E-mail from Ralph Menendez, New Jersey Division on Civil Rights, to Christy Mallory, the Williams Institute (Sept. 16, 2008 6:56:53 PST) (on file with the Williams Institute).

identity. The Division did not respond to a request for the actual complaints or a record of the dispositions of the cases filed.

The Division reported a total of 109 employment discrimination complaints filed on the basis of sexual orientation from 1999 through 2007. In 1999, two complaints were filed against the State, none were filed against public sector employers other than the State, and eight were filed against private sector employers. In 2000, no complaints were filed against the State, one was filed against a public sector employer other than the State, and four were filed against private sector employers. In 2001, no complaints were filed against the State, one was filed against a public sector employer other than the State, and 15 were filed against private sector employers. In 2002, no complaints were filed against the State, two were filed against public sector employers other than the State, and 12 were filed against private sector employers. In 2003, one complaint was filed against the State, none were filed against public sector employers other than the State, and five were filed against private sector employers. In 2004, no complaints were filed against the State, one1 was filed against a public sector employer other than the State, and 14 were filed against private sector employers. In 2005, two complaints were filed against the State, two were filed against public sector employers other than the State, and 13 were filed against private sector employers. In 2006, two complaints were filed against the State, three were filed against public sector employers other than the State, and 12 were filed against private sector employers. In 2007, no complaints were filed against the State, one complaint was filed against a public sector employer other than the State, and eight were filed against private sector employers.

15. New Mexico

i. Summary

The New Mexico Human Rights Act ("NMHRA") has less relief than that available under ENDA. NMHRA is similar in scope to ENDA except that its religious organization may be narrower.

ii. Definitions

NMHRA and ENDA both define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality" and both prohibit discrimination based on actual or perceived sexual orientation.[292] Both ENDA and NMNRA also explicitly prohibit discrimination based on "gender identity," defined in ENDA as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth" and in NMHRA as "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."[293]

iii. Scope of Coverage

NMHRA applies to state and local government employers and private employers.[294] NMHRA and ENDA apply to only employers of 15 or more employees.[295] NMRHA contains a narrower religious organization exemption than does ENDA, which applies to religious institutions rather than particular activities. NMRHA exempts from coverage "any religious or denominational institution or organization that is operated,

[292] N.M. STAT. § 28-1-2(P) (2008).
[293] N.M. STAT. § 28-1-2(Q).
[294] N.M. STAT. § 28-1-7(A).
[295] *Id*.

supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory employment practices that are based on sexual orientation or gender identity." . However, the provisions of NMHRA regarding sexual orientation and gender identity do apply to "for profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986" and "nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986".[296]

iv. Required Procedures

Under both ENDA and NMHRA, aggrieved employees must exhaust administrative remedies before filing a civil action.[297] Under NMHRA, an aggrieved employee must file an administrative complaint within 300 days of the alleged unlawful practice.[298] Under ENDA, the employee has 180 days to file an administrative complaint.

v. Remedies

Relief available through an administrative hearing under NMHRA includes actual damages, reasonable attorney's fees, and "such affirmative action as the Commission deems necessary."[299] NMHRA provides for recovery of only actual damages and attorney's fees for a successful plaintiff in a civil action.[300] Though there is no cap on actual damages, NMHRA, unlike ENDA (in a suit against an employer other than a State

[296] N.M. STAT. § 28-1-9(C).
[297] N.M. STAT. § 28-1-10(A).
[298] *Id*.
[299] N.M. STAT. § 28-1-11(E).
[300] N.M. STAT. §§ 28-1-13; 28-1-10(J).

or the United States), does not allow a successful complainant to recover punitive damages.[301]

vi. Implementation

The Human Rights Division ("the Division") has the power to receive and investigate complaints of alleged unlawful discriminatory practice.[302] The Division may seek to eliminate discrimination through conciliation or, by way of the Human Rights Commission ("the Commission"), seek to eliminate discrimination through an administrative hearing.[303] A member of the Commission who has reason to believe that discrimination has occurred may file a complaint with the Division on his or her own initiative.[304] If a respondent has failed to comply with an order of the Commission, the Attorney General or District Attorney may seek judicial enforcement of the order.[305]

The Division provided the number of employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.[306] Data on gender identity specifically, however, is not available for years prior to 2006 because the cases were coded as sexual orientation until that point.

The Division reported a total of 179 employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation and gender identity. As mentioned, gender identity became its own category for coding purposes in 2006. In 2006 and 2007 there were two gender identity complaints filed (one in each year) and

[301] *Id.*
[302] N.M. STAT. § 28-1-4(B)(1).
[303] N.M. STAT. § 28-1-4(B)(2), (A)(2).
[304] N.M. STAT. § 28-1-10(A).
[305] N.M. STAT. § 28-1-12.
[306] E-mail from Patricia Wolf, New Mexico Human Rights Division, to Christy Mallory, the Williams Institute (Oct. 20, 2008 10:13:01 PST) (on file with the Williams Institute).

both were against private sector employers. Of the 177 sexual orientation complaints filed from 2003 through 2007, the breakdown is as follows: in 2003, one complaint was against the State, three were against public sector employers other than the State, and 13 were against private sector employers. In 2004, three complaints were against the State, four were against public sector employers other than the State, and 32 were against private sector employers. In 2005, four complaints were against the State, four were against public sector employers other than the State, and 24 were against private sector employers. In 2006, five complaints were against the State, three were against public sector employers other than the State, and 37 were against private sector employers. In 2007, one complaint was against the State, three were against public sector employers other than the State, and 40 were against private sector employers.

Additionally, the Division provided copies of 13 case files for proceedings instituted against the state from 2003 through 2007. The fourteenth complaint could not be released because the case had not been closed at the time of the request. Three cases ended in settlement. In one case there was a finding of probable cause, but there is no record of remedies awarded. No probable cause was found in eight cases. One case was dismissed with a Right to Sue.

16. New York

i. Summary

New York's Sexual Orientation Non-Discrimination Act ("SONDA") covers employees of small employers that would be covered under ENDA, but, unlike ENDA, does not provide for punitive damages or attorneys fees, and does not expressly prohibit discrimination on the basis of gender identity.

ii. Definitions

SONDA, like ENDA, prohibits discrimination on the basis of either actual or perceived sexual orientation, which includes "heterosexuality, homosexuality, or bisexuality." SONDA also includes within its definition of "sexual orientation" "asexuality," which is not included in the ENDA definition or in any other state anti-discrimination statute.[307] Though SONDA does not explicitly prohibit discrimination based on gender identity, New York courts have held that transgendered individuals can pursue discrimination claims under the category of sex discrimination.[308] ENDA expressly prohibits discrimination based on gender identity.

iii. Scope of Coverage

SONDA applies to state and local government employers and private employers.[309] SONDA, which applies to employers of four or more employees, covers more employers than ENDA, which only applies to employers of 15 or more employees.[310] SONDA's religious organization exemption for "any religious or denominational institution or organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization" may be interpreted more narrowly than ENDA's exemption.[311] While ENDA provides a blanket exemption for any organization that fits into the definition of religious organization, SONDA excuses religious organizations when "limiting employment…to or giving preference to persons of the same religion or denomination or

[307] N.Y. EXEC. LAW § 292(27) (2008).
[308] *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996); *Buffong v. Castle on the Hudson*, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 2005).
[309] N.Y. EXEC. LAW § 292(5).
[310] *Id*.
[311] N.Y. EXEC. LAW § 296(11).

from taking action as is calculated by such organization to promote the religious principles for which it is established or maintained."[312] SONDA excludes from its definition of employee "any individual employed by his or her parents, spouse or child, or any individual in the domestic service of any person."[313] ENDA does not contain these exclusions.

iv. Required Procedures

Under ENDA, an aggrieved employee must exhaust administrative remedies before brining a civil action, but under SONDA the employee may elect either to file a complaint with the Commission or to file a complaint directly in court.[314] Under SONDA, an aggrieved employee who chooses to file an administrative complaint must do so within one year of the alleged unlawful practice.[315] Under ENDA, an aggrieved employee must file an administrative complaint within 180 days of the alleged unlawful practice.

v. Remedies

SONDA provides for the same relief whether the employee proceeds through an administrative hearing or instead chooses to file a complaint in court, , including compensatory damages, back pay, and other equitable relief.[316] SONDA, unlike ENDA, does not cap compensatory damages, but it also does not authorize punitive damages.[317] Under SONDA, unlike ENDA, attorney's fees are not available in cases of employment discrimination.[318]

---

[312] *Id*.
[313] N.Y. EXEC. LAW § 292(6).
[314] N.Y. EXEC. LAW § 297.
[315] N.Y. EXEC. LAW § 297(5).
[316] N.Y. EXEC. LAW §§ 297(4)(c), (9).
[317] *Id.*
[318] *See* N.Y. Exec. Law § 297(10).

vi. Implementation

The Division of Human Rights ("the Division") has the power to receive, investigate, and pass upon complaints alleging violations of this article and may, upon its own motion, file complaints alleging violations of SONDA.[319] The Division has the power to hold hearings and attempt to conciliate charges of discrimination.[320] The Division may take appropriate action to ensure compliance with any order issued.[321]

The Division provided the number of employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.[322]

The Division reported a total of 794 employment discrimination complaints filed from 2003 through 2007 on the basis of sexual orientation. In 2003, two complaints were filed against the State, 16 complaints were filed against public sector employers other than the State, and 100 were filed against private sector employers. In 2004, five complaints were filed against the State, 19 were filed against public sector employers other than the sSate, and 139 were filed against private sector employers. In 2005, five complaints were filed against the State, 16 were filed against public sector employers other than the State, and 131 were filed against private sector employers. In 2006, two complaints were filed against the State, 24 were filed against public sector employers other than the State, and 133 were filed against private sector employers. In 2007, 10

[319] N.Y. EXEC. LAW § 295(6).
[320] N.Y. EXEC. LAW §§ 295(7), 297(3).
[321] N.Y. EXEC. LAW § 297(7).
[322] Email from Richard Brill, New York State Division of Human Rights, to Christy Mallory, the Williams Institute (Sept. 18, 2008 8:25:38 PST) (on file with the Williams Institute).

complaints were filed against the State and 192 were filed against private sector employers.[323]

Additionally, the Division provided copies of 15 case files for proceedings instituted against the State from 2004 through 2007. Two cases ended in settlement. No probable cause was found in 12 cases. One case was withdrawn by the complainant. The other nine cases filed against the State on record between 2003 and 2007 could not be released because the State no longer retained the files or the cases had not been closed at the time of the request.[324]

17. Oregon

i. Summary

The Oregon Equality Act ("OEA") offers protection to employees of small employers not covered by ENDA, and, if the employee chooses to file the case in court under OEA (rather than proceeding through an administrative hearing), the employee can recover the same types of relief available under ENDA. In addition, because OEA imposes no caps on damages, the employee may be able to recover a greater amount of monetary damages than under ENDA.

ii. Definitions

OEA and ENDA both prohibit discrimination on the basis of sexual orientation, and both define "sexual orientation" as "heterosexuality, homosexuality, and bisexuality."[325] OEA's definition of "sexual orientation" includes gender identity, extending to employees "regardless of whether the individual's gender identity,

[323] The number of complaints filed against public sector employers other than the state in 2007 was unavailable at the time the request was made.
[324] Letter from Richard Brill, New York State Division of Human Rights, to Christy Mallory, the Williams Institute (Apr. 3, 2009) (on file with the Williams Institute).
[325] OR. REV. STAT. § 174.100(6) (2005).

appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."[326] ENDA also prohibits discrimination based on "gender identity," defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth."

iii. Scope of Coverage

OEA applies to state and local government employers and private employers.[327] Unlike ENDA, which only applies to employers of 15 or more employees, OEA does not restrict application based on the size of the employer.[328] OEA's religious organization exemption, which applies to "any bona fide church or other religious institution," is not likely to be interpreted as broadly as ENDA's exemption for religious institutions. Rather than exempt religious institutions altogether, OEA allows religious institutions to "take any employment action based on a bona fide religious belief about sexual orientation: : "(a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors, and support staff; (b) In employment positions in a non-profit religious school, non-profit religious camp, non-profit religious day care center, non-profit religious thrift store, non-profit religious bookstore, non-profit religious radio station, or non-profit religious shelter; or (c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the

[326] *Id*.
[327] OR. REV. STAT. § 169A.001(4).
[328] *Id*.

church or institution."[329] OEA's definition of employee does not include "any individual employed by the individual's parents, spouse, or child or in the domestic service of any person."[330] ENDA does not explicitly exclude these types of employees from coverage.

iv. Required Procedures

Unlike under ENDA, where an aggrieved employee must exhaust administrative remedies before filing in court, under OEA, an employee may file a complaint directly in court.[331] Under OEA, an aggrieved employee choosing to file and administrative complaint must do so within one year of the alleged unlawful practice.[332] The filing period for an administrative complaint under ENDA is 180 days.

v. Remedies

Under OEA, a successful complainant in an administrative hearing is limited to recovery of actual damages and equitable relief, but a successful plaintiff in a civil action can be awarded the same remedies available under ENDA, including compensatory damages, punitive damages (not available under ENDA in a suit against a State or the United States), and attorney's fees.[333] Unlike ENDA, however, OEA has no caps on damages.[334]

vi. Implementation

The Bureau of Labor and Industries ("the Bureau") has the power to receive complaints and conduct investigations where a violation of OEA is alleged.[335] If the Attorney General or the Commissioner of the Bureau has reason to believe that an

[329] OR. REV. STAT. § 659A.006(5).
[330] OR. REV. STAT. § 659A.001(3).
[331] OR. REV. STAT. § 659A.820.
[332] OR. REV. STAT. §§ 659A.820(1), 659A.875(1).
[333] OR. REV. STAT. §§ 659A.850, 659A.885(1), (3)(a), (7).
[334] *Id*.
[335] OR. REV. STAT. §§ 659A.820(1), 659A.830(1).

unlawful practice was committed in violation of OEA, he or she may file a complaint with the Bureau.[336] The Bureau may attempt to resolve the matter through conciliation and, if conciliation is unsuccessful, may hold a hearing on the matter.[337] If the Attorney General or the Commissioner has filed the complaint, he or she may elect to have the matter heard in circuit court.[338]

The Bureau provided the number of employment discrimination complaints filed on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.[339] Though statutory protection for sexual orientation and gender identity did not go into effect in Oregon until January 1, 2008, the Bureau received 15 complaints in 2007. One of the 15 complaints was filed against the State, one was filed against a public sector employer other than the State, and the other 13 were filed against private sector employers.

Additionally, the Bureau provided copies of the case files for the proceedings instituted against the State and local government (Lane County). Both cases were withdrawn when Right to Sues were issued by the Bureau.

18. Rhode Island

i. Summary

Rhode Island's anti-discrimination statutes protect more employees than are protected under ENDA, and offer the same range of relief as ENDA (so long as an employee files in court). In addition, because Rhode Island's statute does not cap

[336] OR. REV. STAT. § 659A.825(1).
[337] OR. REV. STAT. § 659A.845(1).
[338] OR. REV. STAT. § 659A.870(4)(c).
[339] Letter from Leticia Ellis, Oregon Civil Rights Division, to Christy Mallory, the Williams Institute (Feb. 17, 2009) (on file with the Williams Institute).

damages, a suit under Rhode Island law may result in a larger recovery for a prevailing employee.

ii. Definitions

Both ENDA and Rhode Island's statutes prohibit discrimination based on actual or perceived sexual orientation, which both define as "heterosexuality, homosexuality, or bisexuality."[340] Rhode Island's statutes and ENDA also both prohibit discrimination based on "gender identity," which is defined in ENDA as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth" and in Rhode Island's statutes as "a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related image, or gender-related expression is different from that traditionally associated with the person's sex at birth."[341]

iii. Scope of Coverage

Rhode Island's anti-discrimination provisions apply to state and local government employers and private employers.[342] While ENDA applies to only employers of 15 or more employees, Rhode Island's statutes apply to employers of four or more employees.[343] Rhode Island's religious organization exemption covers "any religious corporation, association, educational institution, or society," but limits an organization's ability to discriminate "to the employment of individuals of its religion to perform the

[340] R.I. GEN. LAWS § 28-5-6(15) (2008).
[341] R.I. GEN. LAWS § 28-5-6(10).
[342] R.I. GEN. LAWS § 28-5-6(7).
[343] *Id*.

work connected with the carrying on of its activities."[344] ENDA's religious exemption is broader, exempting religious institutions without the restriction based on religious activities. Rhode Island's statute excludes from its definition of employee "any individual employed by his or her parents, spouse, or child, or in the domestic service of any person." ENDA does not cover these kinds of employees.[345]

iv. Required Procedures

Under both ENDA and Rhode Island's anti-discrimination statutes, an aggrieved employee must exhaust administrative remedies before filing a complaint in court.[346] Under Rhode Island's anti-discrimination statutes, an aggrieved employee must file an administrative complaint within one year of the alleged unlawful practice.[347] Under ENDA, the employee must file within 180 days of the alleged unlawful practice.

v. Remedies

If an employee elects to file with the administrative agency and seek relief through an administrative hearing under Rhode Island's statute, the agency may award back pay, compensatory damages, attorney's fees, equitable relief, and "other appropriate affirmative action."[348] In addition to those remedies, a court may award punitive damages to a successful plaintiff, thus making available the same range of relief that is available under ENDA (though punitive damages are unavailable in suits against a State or the United States under ENDA).[349] However, unlike ENDA, Rhode Island's statute does not cap damages.[350]

---

[344] R.I. GEN. LAWS § 28-5-6(7).
[345] R.I. GEN. LAWS § 28-5-6(6).
[346] R.I. GEN. LAWS § 28-5-17.
[347] R.I. GEN. LAWS § 28-5-17(a).
[348] R.I. GEN. LAWS § 28-5-24(a).
[349] R.I. GEN. LAWS § 28-5-29.1.
[350] *Id*.

vi. Implementation

The Rhode Island Commission for Human Rights ("the Commission") has the power to receive, investigate, and pass upon charges of unlawful employment practices.[351] The Commission may attempt to resolve complaints of discrimination through conciliation or a hearing.[352] The Commission, on its own initiative, may make a charge of unlawful discriminatory practice.[353] The Commission may obtain judicial enforcement of any final order where the respondent has not complied.[354]

The Commission provided copies of actual complaints filed on the basis of sexual orientation or gender identity filed against public sector employers pursuant to a request from the Williams Institute. All seven complaints provided were filed on the basis of sexual orientation. One complaint was filed in 1997, one was filed in 1999, one was filed in 2000, two were filed in 2004, and two were filed in 2006. The complaints provided had been so heavily redacted that was impossible to discern whether they were filed against the State or local governments. The dispositions of the cases were not provided. Further, the Commission did not provide the number of complaints filed against private employers and the number filed against the State and other public sector employers, by year.

19. Vermont

i. Summary

The Vermont Fair Employment Practices Act ("VFEPA") applies to all employers without regard to the number of employees, while ENDA applies only to employers of 15

[351] R.I. GEN. LAWS § 28-5-13(6).
[352] R.I. GEN. LAWS §§ 28-5-13(7), 28-5-17.
[353] R.I. GEN. LAWS § 28-5-17(a).
[354] R.I. GEN. LAWS § 28-5-28.

or more employees. Depending on whether the employee seeks administrative remedies or files directly in court, VFEPA offers the same range of remedies available under ENDA, but without the caps on monetary damages mandated by ENDA.

ii. Definitions

VFEPA and ENDA both prohibit discrimination based on "sexual orientation," which is defined in both as "heterosexuality, homosexuality, or bisexuality."[355] In contrast to ENDA, VFEPA does not explicitly prohibit discrimination based on perceived sexual orientation. VFEPA and ENDA both prohibit discrimination based on "gender identity" (including perceived gender identity), which ENDA defines as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth" and which VFEPA defines as "any individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth."[356]

iii. Scope of Coverage

VFEPA applies to state and local government employers and private employers.[357] ENDA applies only to employer of 15 or more employees, and VFEPA applies to all otherwise non-exempt employers, regardless of size.[358] VFEPA's religious organization exemption seems textually narrower than ENDA's, although it may be equally broad in practice. VFEPA's exemption does not prohibit "any religious or denominational institution or organization, or any organization operated for charitable

[355] 1 VT. STAT. ANN. § 143 (2008).
[356] 1 VT. STAT. ANN. § 144.
[357] 21 VT. STAT. ANN. § 495d(1).
[358] *Id*.

purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained."[359] ENDA's religious exemption applies to religious institutions without regard to religious principles or activities.

iv. Required Procedures

Unlike under ENDA, an aggrieved employee need not exhaust administrative remedies before filing a civil action pursuant to VFEPA.[360] VFEPA has unique enforcement mechanisms which involve two separate agencies handling complaints, depending on whether a complaint is against a state agency or any other employer, and authorize different remedies against state agencies and other employers when a complainant elects to proceed through the administrative process. If an employee of a state agency files an administrative complaint pursuant to VFEPA, the Vermont Human Rights Commission ("the Commission") maintains jurisdiction and can ultimately seek relief in court on the complainant's behalf.[361] If an employee of any employer that is not a state agency files an administrative complaint pursuant to VFEPA, the Attorney General's Office has jurisdiction and, like the Commission, can ultimately seek relief in court on the complainant's behalf.[362]

VFEPA does not state a limitations period in which claims of employment discrimination must be filed if the employee chooses to proceed through the

[359] 21 VT. STAT. ANN. § 495(e).
[360] 21 VT. STAT. ANN. § 495b(b).
[361] 9 VT. STAT. ANN.. § 4552(b).
[362] 9 VT. STAT. ANN. § 4552(c).

administrative agency. However, the Legal Action Center was told by Ira Hammerslough from the Vermont Attorney General's Office on April 3, 2008 that "the Attorney General's Office has a policy of not accepting claims that exceed a year since the most recent alleged discriminatory act, unless the claim is very compelling."[363] The statute of limitations for filing an administrative claim under ENDA is 180 days.

v. Remedies

Under VFEPA, an employee of any state agency may recover, under the jurisdiction of the Commission, compensatory damages, punitive damages, attorney's fees and costs, equitable relief, and "other appropriate relief."[364] An employee of any employer that is not a state agency may recover, under the jurisdiction of the Attorney General's Office, back pay and other equitable relief, but not other compensatory or punitive damages.[365] If an aggrieved employee chooses to file an action directly in court (apparently whether a state agency or other employer), the court is authorized to award back pay, compensatory damages, punitive damages, attorney's fees and costs, equitable relief, and "other appropriate relief."[366] These are the same remedies that are available under ENDA (though punitive damages are not available in a suit against a State or the United States under ENDA). However, unlike ENDA, VFEPA does not impose caps on monetary damages.[367]

vi. Implementation

[363] http://www.lac.org/doc_library/lac/KYR-trainings/VT_KYR.pdf.
[364] 9 VT. STAT. ANN. § 4553(a)(6)(A).
[365] 21 VT. STAT. ANN. § 495b(a); 9 VT. STAT. ANN. § 2458.
[366] 21 VT. STAT. ANN. § 495b.
[367] *Id*.

The Commission has the power to investigate and enforce complaints of unlawful employment discrimination where the party complained against is a state agency.[368] An employee of the Commission may file a complaint with the Commission on behalf of an aggrieved employee.[369] The Commission may engage parties in conciliation, hold hearings, and, on its own initiative, file civil actions on behalf of complainants.[370] The Commission may seek judicial enforcement of conciliation agreements.[371]

The Attorney General's Office has the power to investigate and enforce complaints of unlawful employment discrimination where the party complained against is an employer other than the state.[372] If the Attorney General's Office has reason to believe that an unlawful employment practice has taken place, it may pursue a civil investigation.[373] The Attorney General's Office may bring, on its own intiative, a civil action on behalf of a complainant seeking permanent relief.[374]

The Commission provided the number of employment discrimination complaints filed against the state from 1999 through 2007 on the basis of sexual orientation, and the Attorney General's Office provided the number of employment discrimination complaints filed from 2002 through 2007 against local government employers on the basis of sexual orientation, pursuant to requests from the Williams Institute. Between July 1, 2007 (when statutory protection was extended to cover gender identity) and December 31, 2007, no employment discrimination complaints based on gender identity had been received by either office. Of the seven employment discrimination complaints

[368] 9 VT. STAT. ANN. § 4552(a).
[369] 9 VT. STAT. ANN. § 4554(b).
[370] 9 VT. STAT. ANN. § 4553(a).
[371] 9 VT. STAT. ANN. § 4553(a)(6)(A).
[372] 9 VT. STAT. ANN. § 4552(c).
[373] 9 VT. STAT. ANN. §§ 2460, 21 VT. STAT. ANN. § 495b(a).
[374] 9 VT. STAT. ANN. §§ 2458, 21 VT. STAT. ANN. § 495b(a).

filed against the State based on sexual orientation, one was filed in 2002, two in 2003, two in 2004, and two in 2006. Of the three employment discrimination complaints filed against local government on the basis of sexual orientation, one was filed in 2006 and two were filed in 2007.

The Commission is required by statute to keep confidential all complaints and investigative files.[375] The Commission refused to release copies of actual complaints filed against the State as employer pursuant to this section when a request was made for the information by the Williams Institute. Likewise, the Attorney General refused to release copies of actual complaints filed against employers other than the State.

20. Washington

i. Summary

The Washington State Law Against Discrimination ("WSLAD") applies to employers of eight or more employees, while ENDA applies to employers of 15 or more employees. If a complainant seeks redress through civil action, it offers the same remedies as ENDA does. However, WSLAD offers fewer remedies than ENDA if the complainant chooses to proceed through an administrative hearing.

ii. Definitions

WSLAD and ENDA both prohibit discrimination based on sexual orientation, which includes under both "heterosexuality, homosexuality, or bisexuality."[376] WSLAD, unlike ENDA, does not explicitly prohibit discrimination based on perceived sexual orientation. Both ENDA and WSLAD prohibit discrimination based on "gender identity," defined in ENDA as "the gender-related identity, appearance, or mannerisms or

[375] 9 VT. STAT. ANN. § 4555(a).
[376] WASH. REV. CODE § 49.60.040(15) (2008).

other gender-related characteristics of an individual with or without regard to the individual's designated sex at birth," and defined in WSLAD as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."[377]

iii. Scope of Coverage

WSLAD applies to state and local government employers and private employers.[378] WSLAD applies to employers of eight or more employees, while ENDA applies only to employer of 15 or more employees.[379] Like ENDA, WSLAD contains a blanket religious organization exemption under which the WSLAD exempts "any religious or sectarian organization not organized for private profit."[380] WSLAD also excludes from its definition of "employee" "any individual employed by his or her parents, spouse, or child, or in the domestic service of any person."[381] ENDA does not exclude this type of employee.

iv. Required Procedures

In contrast to ENDA, an aggrieved employee in Washington is not required to exhaust administrative remedies before bringing a civil action under WSLAD, and may file a complaint directly in court.[382] Under WSLAD, an aggrieved employee who chooses to file an administrative complaint must do within six months of the alleged

[377] *Id*.
[378] WASH. REV. CODE § 49.60.040(3).
[379] *Id*.
[380] WASH. REV. CODE § 49.60.040(3).
[381] WASH. REV. CODE § 49.60.040(4).
[382] WASH. REV. CODE § 49.60.030(2).

unlawful practice.[383] This period is approximately the same as ENDA's requirement of 180 days.

v. Remedies

A successful complainant in an administrative action under WSLAD is entitled to back pay, equitable relief, and "other action that could be ordered by a court."[384] Although this language suggests that the full range of relief offered by ENDA would also be available through an administrative action under WSLAD, WSLAD caps damages for "humiliation and mental suffering" at $20,000, which is lower than the cap for the smallest employer bracket under ENDA.[385] Though WSLAD explicitly provides for attorney's fees in a civil action, is silent as to whether they can be awarded through an administrative hearing. Such fees may be included within "action that could be awarded by a court." If an employee instead elects to proceed through filing a civil action under WSLAD, the court may award actual damages, attorney's fees, equitable remedies, and "any other appropriate remedy authorized by the statute or United States Civil Rights Act of 1964."[386] However, the Supreme Court of Washington has held that punitive damages are unavailable under WSLAD absent express authorization.[387]

vi. Implementation

The Washington State Human Rights Commission ("the Commission") has the power to receive, investigate, and pass upon complaints alleging discriminatory employment practices.[388] The Commission may engage parties to a complaint in

[383] WASH. REV. CODE § 49.60.230(2).
[384] WASH. REV. CODE § 49.60.250(5).
[385] *Id*.
[386] WASH. REV. CODE § 49.60.030(2).
[387] *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589 (Wash. 1996).
[388] WASH. REV. CODE § 48.60.120(4).

conciliation and may hold hearings.[389] The Commission, on its own initiative, may issue a complaint if it has reason to believe that any person has been or is engaging in an unfair practice.[390] The Commission may seek judicial enforcement where a respondent has not complied with a final order of the Commission.[391]

The Commission provided the number of employment discrimination complaints filed in 2006 and 2007 on the basis of sexual orientation or gender identity pursuant to a request from the Williams Institute.[392]

The Commission reported a total of 32 employment discrimination complaints filed in 2006 and 2007 on the basis of sexual orientation or gender identity. In 2006, one complaint was filed against the State, two were filed against employers other than the State, and 10 were filed against private sector employers. In 2007, two were filed against the State, two were filed against public sector employers other than the State, and 25 were filed against private sector employers.

Additionally, the Commission provided copies of eleven complaints filed against the State or local governments from 2006 through 2008. This number includes the seven complaints filed against the State and local governments in 2006 and 2007 as well as four complaints filed in 2008. The dispositions of the cases were not released.

21. Wisconsin

i. Summary

[389] WASH. REV. CODE §§ 49.60.140, 49.60.240.
[390] WASH. REV. CODE § 49.60.230(1)(b).
[391] WASH. REV. CODE § 49.60.260(4).
[392] E-mail from Les Smith, Washington State Human Rights Commission, to Christy Mallory, the Williams Institute (Sept. 15, 2008 14:49:43 PST) (on file with the Williams Institute).

Wisconsin's Fair Employment Law ("FEL") applies to all employers without regard to the number of employees, while ENDA only applies to employers of 15 or more employees. FEL does not offer nearly the same range of remedies as ENDA.

ii. Definitions

ENDA and FEL both prohibit discrimination based on actual or perceived sexual orientation.[393] Both include within the definition of "sexual orientation" "heterosexuality, homosexuality, bisexuality."[394] FEL, but not ENDA, prohibits discrimination against an employee for "having a history of a preference for heterosexuality, homosexuality, or bisexuality."[395] This definitional difference may have little effect in practice. ENDA also prohibits discrimination based on gender identity, while FEL does not expressly do so.

iii. Scope of Coverage

FEL applies to state and local government employers and private employers.[396] Unlike ENDA, which only applies to employers of 15 or more employees, FEL does not restrict application based on employer size.[397] Like ENDA, which does not apply to "bona fide private membership clubs," FEL exempts any "social club or fraternal society" -- but FEL's exemption applies only "if the particular job is advertised only within the membership."[398] FEL does not contain a blanket "religious organization" exemption like ENDA, but does exempt "any religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by

[393] WIS. STAT. § 111.32(13m) (2007).
[394] *Id*.
[395] *Id*.
[396] WIS. STAT. § 111.32(6)(a).
[397] *Id*.
[398] WIS. STAT. § 111.32(6)(b).

such a religious association to give preference to an applicant or employee who adheres to the religious association's creed, if the job description demonstrates that the position is clearly related to the religious teachings and beliefs of the religious association" or for the same to give preference to "a member of the same or similar religious denomination."[399] FEL also, unlike ENDA, excludes from its definition of "employee" "any individual employed by his or her parents, spouse or child."[400]

iv. Required Procedure

Under ENDA an aggrieved employee can exhaust administrative remedies and then file a civil action. By contrast, under FEL, the state agency has sole jurisdiction over all claims brought under the act and there is no opportunity for a complainant to obtain a Right to Sue and proceed in court. Only an administrative final order can be judicially reviewed and, in that situation, additional remedies can be awarded by the circuit court.[401] Under FEL, an aggrieved employee must file an administrative complaint within 300 days of the alleged unlawful practice.[402] Under ENDA, an aggrieved employee must file an administrative complaint within 180 days of the alleged unlawful practice.

v. Remedies

FEL offers limited administrative remedies and only allows an employee to bring a civil action after proceeding through the entire administrative process through to a final order. Under FEL, a successful complainant in an administrative hearing is entitled to

[399] WIS. STAT. § 111.337(2)(a), (am).
[400] WIS. STAT. § 111.32(5).
[401] WIS. STAT. §§ 111.39, 111.395, 11.397.
[402] WIS. STAT. § 111.39(1).

back pay and either reinstatement or compensation in lieu of reinstatement.[403] The statute also states that the agency may take "such action as will effectuate the purposes of this chapter," but the meaning of that phrase is unclear and not further explained in the statute.[404] Only after a final administrative decision has been issued may an aggrieved employee bring an action in circuit court to seek additional remedies.[405] In a civil suit filed after an administrative decision is rendered, the employee can seek compensatory damages, punitive damages, and attorney's fees and costs.[406] FEL imposes the same graduated caps on the sum of non-pecuniary and future pecuniary damages and punitive damages as ENDA.[407] An aggrieved employee of a local unit may not bring suit to seek remedies unavailable through an administrative hearing.[408]

vi. Implementation

The Department of Workforce Development ("the Department") has the power to receive and investigate complaints charging discrimination.[409] The Department may engage the parties to a complaint in conciliation and may hold hearings.[410] After an employee has proceeded through the full administrative process and a final decision has been rendered by the agency, the Department may file in circuit court on the employee's behalf to seek additional remedies.[411] Judicial enforcement may be sought to enforce a

[403] *Id.*
[404] *Id.*
[405] WIS. STAT. § 111.397(1)(a).
[406] *Id.*
[407] WIS. STAT. § 111.397(2)(a).
[408] "Local unit" is defined as a "a political subdivision of the state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision of special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing." Wis. Stat. §§ 111.397(a), 19.42(7u).
[409] WIS. STAT. § 111.39(1).
[410] WIS. STAT. § 111.39(4)(b).
[411] WIS. STAT. § 111.397(1).

final order of the Department; in which case the Department of Justice will represent the Department.[412]

The Department provided the number of employment discrimination complaints filed from 2002 through 2007 on the basis of sexual orientation pursuant to a request from the Williams Institute.[413]

The Department reported a total of 395 employment discrimination complaints filed from 2002 through 2007 on the basis of sexual orientation. In 2002, one complaint was filed against the State, two were filed against public sector employers other than the State, and 79 were filed against private sector employers. In 2003, five complaints were filed against the State, six were filed against public sector employers other than the State, and 59 were filed against private sector employers other than the State. In 2004, one complaint was filed against the State, two were filed against public sector employers other than the State, and 71 were filed against private sector employers. In 2005, two were filed against the State, three were filed against public sector employers other than the State, and 54 were filed against private sector employers. In 2006, three complaints were filed against the State, two were filed against public sector employers other than the State, and 46 were filed against private sector employers. In 2007, two complaints were filed against the State, two were filed against public sector employers other than the State, and 54 were filed against private sector employers.

Additionally, the Department provided copies of 12 case files for proceedings instituted against the State. Two cases ended in settlement. Probable cause was found in one case. No probable cause was found in six cases. Two cases were withdrawn and one

[412] WIS. STAT. § 111.395.
[413] Facsimile from LeAnna Ware, Wisconsin Department of Workforce Development, to Christy Mallory, the Williams Institute (Sept. 11, 2008 15:39 PST) (on file with the Williams Institute).

was dismissed for lack of jurisdiction. Case files for the other two proceedings against the State from 2002 through 2007 were not released because the cases had not been closed at the time of the request.

D. State Executive Orders That Prohibit Sexual Orientation and Gender Identity Discrimination

In 10 states that do not statutorily prohibit employment discrimination based on sexual orientation or gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees. Analysis of gubernatorial executive orders and their enactment histories reveals that executive order protection is unstable, often temporary, and generally unenforceable:

- None of these 10 executive orders in states without anti-discrimination statutes prohibiting sexual orientation and gender identity discrimination provides for a private right of action;
- Only two impose administrative enforcement schemes, and only one of them allows a complainant to file with the state agency responsible for enforcing other equal opportunity regulations;
- Only six confer any power to actually investigate complaints - -and none of those has provisions ensuring the confidentiality of the complainant; and
- Executive orders can be, and have been, revoked or allowed to expire on their own terms with no effort to reinstate the policies. Orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have been in flux during the last 15.

i. Protected Categories

Gubernatorial executive orders in 9 states ban employment discrimination on the basis of sexual orientation in state employment.[414] Of those 9 states, six also prohibit discrimination on the basis of gender identity in state employment.[415] One state, Delaware, prohibits sexual orientation discrimination by statute, and prohibits gender identity discrimination against state government employees by executive order.[416] All states but two leave the categories undefined, in contrast to the anti-discrimination statutes of states offering such protection.[417]

ii. Accountability Mechanisms

None of the 10 gubernatorial executive orders prohibiting employment discrimination on the basis of sexual orientation and/or gender identity provides for a private right of action. For example, Delaware's executive order explicitly states that it is not intended to and shall not create independent causes of action for or on behalf of persons who allege a lack of compliance.[418] Additionally, in early 2009, a Virginia court, hearing an appeal from an adverse administrative ruling,[419] held that Virginia's then-

[414] Alaska (Alaska Admin. Order No. 195 (Mar. 5, 2002)), Arizona (Ariz. Exec. Order 2003-22 (June 21, 2003)); Indiana (Ind. State Govt. Emp. Pol. Stmt. (Aug. 17, 2004)), Kansas (Kan. Exec. Order 07-24 (Aug. 31, 2007)), Kentucky (Ky. Exec. Order 2008-473 (June 2, 2008)), Michigan (Mich. Exec. Dir. No. 2007-24 (Nov. 21, 2007)), Montana (Mont. Non-Discrim. EEO 41-2008 (Nov. 14, 2008)), Ohio (Ohio Exec. Order 2007-10S (May 17, 2007), Pennsylvania (Exec. Order 2003-10 (July 28, 2003)).

[415] Indiana, Kansas, Kentucky, Michigan, Ohio, and Pennsylvania.

[416] Del. Exec. Order No. 8 (Aug. 11, 2009).

[417] Michigan's executive order defines gender identity or expression as "the perception by an individual or another person of the gender identity, appearance, behavior, or expression of the individual whether or not that gender identity, appearance, behavior, or expression traditionally associated with the sex assigned to the individual at birth" and Ohio's executive order defines sexual orientation and gender identity, respectively, as "a person's actual or perceived homosexuality; bisexuality; or heterosexuality, by orientation or practice, by and between adults who have the ability to consent" and "the gender a person associates with him or herself, regardless of the gender others might attribute to that person."

[418] Del. Exec. Order No. 8 (Aug. 11, 2009).

[419] Though the Office of Equal Opportunity ultimately determined that there was insufficient evidence to prove that Moore would not have been terminated but for his sexual orientation, it did find that there was "sufficient evidence to support that there was improper consideration of [his] sexual orientation." Va.

existing executive order banning sexual orientation discrimination in state employment "did not provide subject matter jurisdiction to the court nor create a cause of action."[420] Without a statutory prohibition on sexual orientation discrimination in employment, the aggrieved Virginia state employee had no effective form of redress.

Only Ohio's executive order allows an aggrieved employee to file a formal administrative complaint with the state's commission responsible for enforcing equal opportunity regulations. Delaware's executive order provides that an employee may file a complaint with the State Equal Employment Opportunity/Affirmative Action Program Administrator, who can attempt to reach a resolution. However, unlike claims that fall under Title VII, the ADA, the ADEA, the VEVRAA, or Delaware's anti-discrimination statutes, a complaint of gender identity discrimination will not be referred to the Office of Anti-Discrimination for investigation.[421] The executive orders of five states do not explicitly confer the power to investigate informal complaints to a department or the department head responsible for implementation of the policy.[422] Of the executive orders instituting an investigation procedure for informal complaints, none ensures confidentiality of the complaint. Two executive orders have not placed the authority to implement the policy in a single department or department head.[423] Scholars have argued

---

Dept. of Hum. Res. Mgmt. O.E.E.S, Priv. Ltr. Rul. 0107-038 (Jan. 7, 2009); Final Order, Moore v. Virginia Museum of Natural History, No. 690CL09000035-00 (Va. Cir, June 15, 2009).

[420] Fin. Ord. 1.

[421] Del. Exec. Order No. 8 (Aug. 11, 2009).

[422] Executive orders in Arizona, Indiana, Kansas, Kentucky, and Michigan do not explicitly grant the power to investigate. Ariz. Exec. Order 2003-22 (June 21, 2003), Ind. State Govt. Emp. Pol. Stmt. (Aug. 17, 2004), Kan. Exec. Order 07-24 (Aug. 31, 2007), Ky. Exec. Order 2008-473 (June 2, 2008), Mich. Exec. Directive No. 2007-24 (Nov. 21, 2007). However, though Arizona, Kansas, and Montana do not explicitly confer investigatory power, it may well be impliedly granted to heads or EEO officers of each state department (Ariz. Exec. Order 2003-22 (June 21, 2003), Kan. Exec. Order 07-24 (Aug. 31, 2007), Mont. Non-Discrim. EEO 41-2008 (Nov. 14, 2008).

[423] Arizona and Kansas. Ariz. Executive Order 2003-22 (June 21, 2003), Kan. Executive Order 07-24 (Aug. 31, 2007).

that failure to delegate oversight to one position or agency hinders effective implementation.[424]

Nine of the executive orders do not require the implementing department or accountable state agencies to furnish a discrimination report to the governor in order to monitor their efforts. Only the executive order of Delaware requires that the Governor receive a yearly report on the status of implementation.[425]

iii. Instability of Executive Orders

In several states, including those with anti-discrimination statutes and those without, gubernatorial executive orders addressing sexual orientation and/or gender identity discrimination in employment have been revoked or have expired by their own terms, rendering once-protected state employees vulnerable to discrimination. Executive order protection for sexual orientation and/or gender identity in Kentucky, Louisiana, Iowa, and Ohio has been in flux during the last 15 years, and the constitutionality of Virginia's order is currently in dispute.

a. Kentucky

Former Kentucky Governor Paul Patton signed an executive order on May 28, 2003, prohibiting discrimination against gay and transgender state employees. On Diversity Day in 2006, Former Governor Patton's order was rescinded by then Governor Ernie Fletcher, who removed language from the Kentucky Affirmative Action Plan that specifically prohibited discrimination on the basis of sexual orientation and gender identity. Defending his action, Governor Fletcher's administration relied on the

[424] *See* Roddrick A. Colvin, *Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation*, 20 REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 5, 12 (2000) (implementing agency must have jurisdiction over other governmental entities in order to ensure effective implementation of the policy).
[425] Del. Exec. Order No. 8 (Aug. 11, 2009).

questionable arguments that removing sexual orientation and gender identity categories as protected classes would further increase the number of women and blacks working in state government and that the previous affirmative action plan had left the state open to potential lawsuits since it would force state government to provide separate bathrooms and other facilities for transsexuals.[426]

In June 2008, Kentucky Governor Steve Beshear reinstated a ban prohibiting discrimination on the basis of sexual orientation or gender identity. The executive order barred state officials from making hiring or firing decisions based on sexual orientation or gender identity. In a statement describing the motivations behind the reinstatement, Governor Beshear said, "Experience, qualifications, talent and performance are what matter."[427]

b. Louisana

In 1992, former Louisiana Governor Edwin Edwards became the first Southern governor to issue an executive order protecting lesbian, gay, bisexual and transgendered persons from discrimination in state governmental services, employment and contracts.[428] This executive order expired in August of 1996 and was not renewed when the next governor, Mike Foster, took office.

On December 6, 2004, the then-Governor of Louisiana, Kathleen Blanco, issued a similar executive order barring state agencies from discriminating against employees because of their race, religion, gender, sexual orientation, national origin, political

[426] Joe Biesk, *Gay Rights Supporters Criticize Ky. Governor on Affirmative Action*, AP STATE & LOCAL WIRE, Apr. 11, 2006.
[427] The Equality Party, *Kentucky Governor Bans Discrimination for Sexual Orientation/Gender Identity*, June 3, 2008, *available at* http://equalityparty.blogspot.com/2008/06/kentucky-governor-bans-discrimination.html (last visited Dec. 4, 2008).
[428] La. Executive Order No. EWE 92-7.

affiliation or disability.[429] Governor Blanco's successor, Governor Jindal, did not renew the executive order, and it therefore expired in August 2008.[430] Explaining his rationale for letting the executive order expire, Governor Jindal said that it was "not necessary to create additional special categories or special rights" because these forms of discrimination are prohibited under existing state and federal laws.[431]

c. Ohio

Current Ohio Governor Ted Strickland issued an executive order prohibiting discrimination in public employment based on sexual orientation and/or gender identity in May 2007.[432] The order itself states that it will expire on Governor Strickland's last day as Governor of Ohio;[433] his current term expires in 2010.[434]

d. Iowa

On September 14, 1999, then Governor Tom Vilsack signed Executive Order No. 7, which explicitly prohibited the discrimination of people on the basis of their sexual orientation or gender identity in state employment.[435] Immediately after the Executive Order was issued, a group of law-makers began a campaign to have the order rescinded. Senate Majority Leader Stewart Iverson said, "Iowa should be on the cutting edge of

---

[429] La. Executive Order No. KBB 2004-54.
[430] Chris Johnson, "A step backwards for equality in Louisiana," August 21, 2008, *available at* http://www.hrcbackstory.org/2008/08/a-step-backwards-for-equality-in-louisiana/ (explaining that Gov. Jindal's position is not correct as Louisiana remains one of thirty states that does not prohibit discrimination based on sexual orientation and one of thirty eight states that does not prohibit discrimination based on gender identity).
[431] *Id.*
[432] OH Exec. Order No. 2007-10S (2007), *available at* http://www.wright.edu/admin/affirm/ExecutiveOrder2007-105.html (last visited Feb. 1, 2009).
[433] *Id*. unless rescinded before then.
[434] The Governor of Ohio serves a four-year term. Governor Strickland was elected in 2006. http://www.ohiohistorycentral.org/entry.php?rec=2127; http://www.governor.ohio.gov/AboutUs/AboutTed/tabid/55/Default.aspx.
[435] *See* Lambda Legal Iowa, http://www.lambdalegal.org/our-work/states/iowa.html (last visited Sept. 4, 2009).

educating our children, not the cutting edge of extending civil rights to transsexuals."[436] He dismissed the need for employment protections, saying, "I have friends who are homosexual, but they do their job and that isn't the issue. When you talk about gender identity and transsexuals, that is unbelievable…how far do you go in setting up special classes of people?"[437] Approximately one year after its issuance, Gov. Vilsack was forced to rescind the Executive Order after a state judge ruled that it constituted unconstitutional law-making in light of the fact that Iowa's ICRA did not at that time prohibit discrimination based on a person's sexual orientation or gender identity.

e. Virginia

In Virginia, Governor Tim Kaine and his predecessor Mark Warner issued and subsequently affirmed executive order protection for sexual orientation in state employment.[438] However, on February 24, 2006, shortly after Governor Kaine affirmed the inclusion of sexual orientation as a protected class in the executive order, Robert McDonnell, Attorney General of Virginia, released an official Opinion opining that Executive Order 1 was unconstitutional insofar as it established a policy against sexual orientation discrimination in state employment.[439]

In February 2009, Attorney General McDonnell resigned his position to run for governor and garnered 59% of the vote in his gubernatorial race.[440] He was sworn into office on January 16, 2010.[441] In February 2010, Governor McDonnell issued a new Executive Order, consistent with his position on sexual orientation discrimination as

[436] PEOPLE FOR THE AMERICAN WAY FOUNDATION, HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 184-185 (2000 ed.).
[437] *Id*.
[438] Va. Exec. Order No.1 (2006).
[439] Va. Atty Gen. Op. No. 05-094 (2006).
[440] Va. Office of the Governor, Governor Robert F. McDonnell- Bio., http://www.governor.virginia.gov/TheAdministration/mcdonnell-bio.cfm (last visited Mar. 11, 2010).
[441] *Id*.

Attorney General, stripping former executive order protections by omitting sexual orientation as a protected classification.[442] Attorney General Ken Cuccinelli, who took over the Attorney General's office following McDonnell's resignation, issued a letter in March 2010 telling public colleges that they could not enact policies prohibiting employment discrimination based on sexual orientation, and asking that all current policies to that effect be rescinded.[443] Following a period of public unrest caused by Cuccinelli's letter, Governor McDonnell issued a Directive to state agencies barring them from discriminating on the basis of sexual orientation.[444]

McDonnell's unique positioning on the issue is a result of believing that he would violate the separation of powers doctrine by issuing an executive order "changing" the Virginia Human Rights Act.[445] A gubernatorial Directive, the governor's office maintains, only applies to the executive branch and therefore does not pose the same constitutional problem as a further reaching executive order.[446]

[442] Va. Exec. Order 6 (2010); Samair Luther, Human Rights Campaign, *Virginia: State Employees Lose Protections from Anti-LGBT Discrimination*, Feb. 16, 2010, http://www.hrcbackstory.org/2010/02/virginia-state-employees-lose-protections-from-anti-lgbt-discrimination/ (last visited Mar. 11, 2010).
[443] Larry O'Dell, *Virginia Governor Counters State Attorney General's Advice on Gay People*, Mar. 11, 2010, http://miamiherald.typepad.com/gaysouthflorida/2010/03/virginia-governor-counters-state-attorney-generals-advice-on-gay-people.html.
[444] *Id*.; Va. Exec. Dir. 1 (2010).
[445] O'Dell, *supra* note 442.
[446] *Id*.