# Testimony of
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**before the U.S. House of Representatives**
**Committee on Education and Labor**
**Subcommittee on Health, Employment, Labor and Pensions**

**Hearing on H.R. 2015—The Employment Non-Discrimination Act of 2007**

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## Introduction

Mr. Chairman and members of the Committee, I want to thank you for this opportunity to share my views with respect to H.R. 2015—The Employment Non-Discrimination Act of 2007, or "ENDA"—as it is currently drafted.

First, a little background about myself and why I am here. I practice employment and labor law in Lincoln, Nebraska, and have served as an adjunct professor teaching employment law at the University of Nebraska College of Law. Most of my clients are small to medium-sized employers. We also represent several religious-affiliated organizations, including religious colleges and universities, high schools and elementary schools, as well as faith-based employers. Today I do not appear on behalf of any particular client or organization but, rather, to testify as an employment law practitioner who spends the bulk of his day answering questions from clients about how to navigate the myriad employment laws and regulations that employers must deal with on a daily basis. Unfortunately, in its current form H.R. 2015 would add yet another layer of confusion for these employers, especially religious and faith-based organizations.

## Is a Federal Remedy Necessary?

At the outset, I believe it is appropriate to ask the question: is a broad, new federal remedy for sexual orientation and gender identity employment discrimination such as that embodied in H.R. 2015 necessary at this time? As the Committee is aware, a significant number of employers have voluntarily adopted policies barring discrimination on the basis of sexual orientation and transgender status. In addition, several states and municipalities have enacted local regulatory schemes addressing sexual orientation and/or transgender discrimination in the workplace. For the last 32 years legislation has been introduced in Congress seeking to prohibit sexual orientation discrimination in employment. Meanwhile, it appears that the free market and local regulators are already addressing the issues raised by this legislation.

**Purported Exemption for Religious Organizations and Certain Employees Unnecessarily Narrow**

Predecessor legislation to H.R. 2015 provided blanket exemptions for religious organizations. For example, H.R. 3285 introduced in the 108th Congress by Messrs. Shays and Frank expressly provided that the legislation "shall not apply to a religious organization," which was broadly defined to include religious corporations, associations, societies, schools, colleges, universities and educational institutions. Although H.R. 2015 contains a section entitled "Exemption for Religious Organizations," in reality it contains no meaningful exemption at all.

Section 6 contains two exceptionally narrow avenues under which a religious or faith-based organization or individuals employed by such an organization may not be covered.

First, Section 6(a) contains what I will call the limited Religious Enterprise Exemption. This provision states that the "Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief."

Second, Section 6(b) contains what I will call the limited Individual Exemption, which applies to a narrow subset of individuals who are employed by employers not wholly exempt under the limited Religious Enterprise Exemption. The limited Individual Exemption provides that the "Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participating in religious ritual or worship." This appears to be an attempt to partially codify what is (inaccurately) called the "ministerial exception." *Rayburn v. Seventh-Day Adventists*, 772 F.3d 1164, 1169 (4th Cir. 1985).

It is important to note that the limited Religious Enterprise Exemption is far narrower than the religious exemption currently found in Title VII with respect to claims of religious discrimination:

| Title VII | H.R. 2015 |
|---|---|
| This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."<br><br>42. U.S.C. §2000e-1. | This Act shall not apply to ***any of the employment practices*** of a religious corporation, association, educational institution, or society ***which has its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.***<br><br>Section 6(a)(emphasis added). |

The proposed limited Religious Enterprise and Individual Exemptions raise a number of issues that would be of tremendous concern to religious and faith-based employers such as those I represent. Consider the following real life hypotheticals:

- Is a Catholic high school that markets itself as a "college preparatory learning institution" deemed to have as "its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" and therefore exempt under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the volleyball coach at that same Catholic high school who, in addition to coaching and mentoring student-athletes, also leads the team Bible study?
- Would a Lutheran university, with undergraduate and graduate degree programs ranging from art to chemistry to business to theology, fall under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the Lutheran university provost position, whose essential duties include the administration of university's academic as well as ministry programs?
- Would a Jewish child care, affiliated with and housed adjacent to a Jewish synagogue, have as "its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" and therefore be exempt under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the child care teacher assigned to the three-year olds?
- Does the limited Religious Enterprise Exemption cover a social services organization affiliated with the Southern Baptist Church whose mission statement is "to bring compassion and justice to the world's poorest people"?

- How would caregiving employees for the Red Crescent Society, a Muslim-affiliated charitable organization, be treated under the Act?
- Would a charitable foundation affiliated with a Christian congregation have as "its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief" and therefore be exempt under the limited Religious Enterprise Exemption?
- If the answer is "no," then would the limited Individual Exemption apply to the development director employed by that same charitable foundation if her primary duties are to advise potential donors on estate planning issues and raise funds for the foundation, which benefits the Christian congregation?

These scenarios all seek to highlight some of the problems with the two limited exemptions as currently drafted. The most important flaw that needs to be addressed is each exemption's reliance on a "primary purpose" or "primary duties" test. Both of these tests are vague and highly fact-specific, thereby making it extremely difficult to advise religious and faith-based clients as to their duties and obligations. A similar "primary duty" standard has been used for purposes of the Part 541 overtime exemptions for the Fair Labor Standards Act, *see* 29 C.F.R. §541.700 (2006), and has been the source of significant uncertainty, high noncompliance rates and endless litigation. Use of the same or similar standard for purposes of the religious exemptions in H.R. 2015 will likely have the same costly result.

In addition, the proposed "primary purpose" and "primary duties" tests raise significant constitutional issues that must be considered. Courts generally recognize that government probing or examination of the affairs of religious organizations is to be avoided. *Scharon v. St. Luke's Episcopal Presbyterian Hosps*., 929 F.3d 360 (8th Cir. 1991). Given the vague and fact-specific nature of these two tests, it is inevitable that courts will be called upon to delve into church or religious matters to determine the "primary purpose" of a religious organization or the "primary duties" of a particular employee of a faith-based organization. Whether this anticipated entangling of government in religious affairs is constitutionally permissible must be addressed.

Finally, it is curious why the limited Religious Enterprise Exemption, unlike the Title VII religious exemption, exempts the "employment practices" of the religious organizations rather than the religious organizations themselves. The intent of this distinction requires exploration.

Obviously, the blanket exemption for religious organizations found in prior versions of ENDA provides greater certainty and is less problematic for religious and faith-based employers, as well as the judiciary.

While the main focus of my testimony is the problems I have identified with the purported religious exemptions, I do wish to comment on a few other issues with respect to the proposed legislation.

**Definition of "Gender Identity" is Vague and Overly Broad**

Unlike prior versions of this legislation, H.R. 2015 seeks to add a new protected class for actual or perceived "gender identity." The term "gender identity" is defined by the legislation 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." This definition is exceptionally vague and problematic.

For example, based upon the proposed definition, it appears that an employee can self-identify what their gender is, and that this subjective declaration can change an unlimited number of times without notice to the employer. Moreover, the expansiveness of this new protected class is demonstrated by protection of individuals because of a "perceived" gender identity.

The amorphous nature of the definition of "gender identity" is further compounded by the legislation's prohibition on "association" discrimination. Section 4(e) of H.R. 2015 prohibits adverse employment actions being taken against "an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated." Thus, in addition to protecting individuals based on their actual or perceived gender identity, the legislation protects individuals who presently associate or *at some point in time* associated with that individual.

**Shared Shower or Dressing Facilities Requirement Problematic**

Section 8(a)(3) of H.R. 2015 establishes requirements for covered employers with respect to access to certain shower or dressing facilities based on an individual's actual or perceived gender identity. Specifically, this section provides that it is not "an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being fully clothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later." This provision is problematic in at least two respects.

First, this provision requires an employer to accommodate an employee undergoing or having undergone gender transition. However, there is no requirement for the employee to provide advance notice to the employer of the gender transition so that adequate time exists for the employer to provide the required "reasonable access to adequate facilities . . . . " Moreover, the Committee should give consideration to adopting an "undue hardship" exception patterned after that found in the Americans with Disabilities Act under which such reasonable access could be denied where it would pose an "undue hardship" for the employer.

Second, at a minimum the phrase "in which being seen fully unclothed is unavoidable" should be deleted. Certainly there are shared shower or dressing facilities where being seen "fully unclothed" is not unavoidable, but where the presence of an employee undergoing gender transition may prove problematic for an employer.

**Significant Regulatory Cost for Employers**

If adopted in its current form, H.R. 2015 represents a significant new regulatory burden and cost for covered employers. In far too many instances the legislation adopts subjective or fact-specific standards that are subject to multiple interpretations. For example, as previously discussed, what is a particular organization's "primary purpose" for purposes of the limited Religious Enterprise Exemption. What is a particular employee's "primary duties" for purposes of the limited Individual Exemption? What exactly qualifies as association discrimination based upon the gender identity of someone the individual previously associated with? Under Section 8(a)(4), what is a "reasonable dress or grooming standard" that an employer may permissibly adopt? Why does Section 5 expand traditional retaliation protections to protect employees who oppose any practice the individual "reasonably believed" was unlawful under H.R. 2015, even though it perhaps was not? Because of this uncertainty and subjectivity, employers will be forced spend scarce resources seeking legal guidance on employment actions. Furthermore, given the fact-specific and subjective standards, it would be more difficult for employers to have meritless litigation under the Act dismissed prior to incurring the cost of a full-blown trial. While the cost is not insurmountable for large companies—many of which have voluntarily adopted protections based on sexual orientation—it could prove to be for employers of 20, 50 or even 100 employees, and especially those religious and faith-based organizations that have been swept within the Act's coverage.

**Conclusion**

I would like to thank the Committee for the opportunity to present my views on H.R. 2015 as currently drafted.

I strongly urge the Committee to give due consideration to returning to the broad blanket exemption for all religious organizations that was used in prior versions of this legislation. In addition, I urge the Committee to eliminate, where possible, the vague, fact-specific and subjective standards found throughout the bill.

Thank you.