

# PRIVATIZING EMPLOYMENT PROTECTIONS

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Among the many struggles and victories of the movement for LGBT equality in the United States, securing employment protections at the federal level has proven to be a persistent challenge. The “Employment Non-Discrimination Act” (ENDA)<sup>1</sup> would prohibit disparate treatment in employment on the basis of sexual orientation. This bill has been proposed several times in Congress but has never been enacted, despite public opinion that appears to overwhelmingly support employment protections for gay and lesbian workers.<sup>2</sup>

This Essay argues that while gay-rights advocates and supportive law makers continue to work for statutory protections, private commitments cannot only fill the gap, they can also hasten our progress toward full statutory protections. To be most effective, however, those private commitments should, to the extent possible, mirror our best predictions about the requirements and procedures that will obtain when statutes are eventually enacted. Such private imitation of potential public protection not only enhances the remedial benefits afforded by the private commitments in the short term, it also allows the private efforts to demonstrate what might happen in the longer term, when public protections are enacted.

This Essay focuses on a little-known piece of intellectual property, the certification mark, which provides a viable mechanism for employers to commit to

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1. H.R. 3285, 108th Cong. (2003). Just a few months before this Article went to press, Congressional sponsors introduced a new version of ENDA, one that would include gender identity as well as sexual orientation in the scope of protection. H.R. 2015, 110th Cong. (2007); see also Bob Roehr, *ENDA Reintroduced in Congress*, WINDY CITY TIMES, May 2, 2007, available at <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=14763> (last visited May 3, 2007). This development necessitates revisions to the licensing agreement. See *infra* pp. 596–597 (explaining wording and rationale for inclusion of gender identity in the revised Fair Employment Mark licensing agreement).

2. The Gallup Poll, *Homosexual Relations*, <http://www.galluppoll.com/content/?ci=1651> (last visited Aug. 21, 2007).


the exact substantive duties of ENDA. In earlier work, we introduced our certification mark, the “Fair Employment Mark”<sup>3</sup> along with its licensing agreement, which gives a licensee’s employees and applicants contract rights of action as third-party beneficiaries if the licensee discriminates on the basis of sexual orientation.<sup>4</sup> By signing a licensing agreement, an employer gains the right (but not the obligation) to display the mark and in return promises to abide by the word-for-word strictures of ENDA. Other certification marks (such as the Good Housekeeping Seal, the UL (Underwriters Laboratory), and the Orthodox Union (Kosher)) require the owner of the mark to police licensees,<sup>5</sup> but our proposed Fair Employment Mark allows employees and applicants to enforce the ENDA duties directly as express third-party beneficiaries of the license. The Fair Employment Mark thus replicates the core enforcement mechanism of ENDA by creating private causes of action for the same class of individuals who would benefit from the bill’s passage.

In this Essay, we will take up some issues we have heretofore addressed only in passing. First, we will discuss in greater detail the public good that might be produced by private contracting such as the Fair Employment Mark licensing agreement. Second, we will explain why, in addition to these public benefits, self-interest might drive employers to adopt the Fair Employment Mark as a means of litigation risk management. Third, we will consider the balance of public and private good when the fair employment license agreement—and most importantly, the associated rights of action in third-party beneficiaries of the agreement—become subject to arbitration clauses in employment contracts. Finally, we will discuss a few potential revisions to the licensing agreement.

### **I. PUBLIC GOOD CREATED BY FAIR EMPLOYMENT LICENSING AGREEMENT: PREDICTING THE EFFECTS OF A PROPOSED STATUTE**

In addition to the private benefits afforded employees who would gain protections they now lack, the Fair Employment Mark offers a surprising public benefit: it provides a mechanism for producing precedent about a statute even before the statute is enacted. The inevitable litigation that would arise under the mark would provide legislators with information about how courts might interpret ENDA if it were enacted, as well as a lower bound on the litigation rates it might engender.

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3.  See generally Ian Ayres & Jennifer Gerarda Brown, Fair Employment Mark, <http://www.fairemploymentmark.org> (last visited June 16, 2007) (information about the mark and certification process).

4. See generally Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006).

5. Underwriters Laboratories, <http://www.ul.com> (last visited May 3, 2007) (providing extensive information about UL safety standards and how products can be tested to earn the UL seal); Good Housekeeping Seal Directory, <http://www.goodhousekeepingseal.com> (last visited May 3, 2007) (information about Good Housekeeping seal); OU Kosher.org, <http://www.oukosher.org> (last visited May 3, 2007) (information regarding the “OU” kosher certification mark).

It is reasonable for readers to object at this point, “impossible—statutes must be enacted before they can be interpreted.” But the key to this puzzle lies in the fact that the licensing agreement explicitly adopts the words of a proposed statute in order to put its provisions into effect. The licensing agreement states its goal: “WHEREAS Licensee desires to privately commit to non-discrimination as defined in the Employment Non-Discrimination Act (ENDA) as proposed in S. 1705, 108th Cong., 1st Sess. (2003).” This version of the ENDA bill is attached to the license; the substantive “Standards of Fair Employment” included in the license are taken word-for-word from the bill. Thus, when a court is asked to interpret the meaning of the words in the license, it will be interpreting the same words that appear in the proposed bill. Even though the court will be interpreting a contractual promise, the foregoing “whereas” clause will lead the court to ask whether the employer’s conduct would have run afoul of ENDA had the bill been enacted.

Information about how courts will interpret ENDA can address legislative concerns about supporting the bill. In particular, it will address the concern that “activist judges” will extend the statute beyond its borders. Resolving these possible ambiguities can ease the bill’s passage, in part because the legislators can expressly approve or disapprove of the precedent that develops under the licensing agreement. Just as Congress expressly disapproved of some Supreme Court precedent and expressly approved of other precedent when it passed the Civil Rights Act of 1991,<sup>6</sup> so too Congress would have the option of explicitly embracing or rejecting particular court interpretations of the Fair Employment Mark licensing agreement when considering whether to pass ENDA. The substantive language of the nondiscrimination requirement in a future proposal of ENDA might even change in response to this precedent.

Of course, pre-passage license precedent and post-passage ENDA precedent would be distinct in important ways. As a formal matter, an interpretation of contractual language would not be binding on a court interpreting statutory language in a post-passage case. This is particularly true when different courts are involved. With the exception of a few federal cases brought under diversity jurisdiction, the bulk of the license precedent would come from state courts, while post-passage ENDA interpretations would be rendered by federal courts. Federal courts might be reluctant to defer to state court interpretations of federal statutory language—especially when those interpretations had occurred before the federal statute had been passed. Then again, if legislators affirmatively refer to these state court decisions in the congressional record when debating and enacting the eventual ENDA statute, the precedential value of the state court decisions would increase.

The flip side is that congressional action could also render this pre-passage precedent irrelevant. The language of many bills is significantly amended before passage, and the language of proposed legislation often changes from year to year as revised bills are introduced in successive legislative sessions. Our licensing agreement takes account of this possibility by allowing us to update the licensing language on an ongoing basis. We can thus attempt to keep pace with the

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6. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

legislative state of play, but changes may occur at such a fast pace or so much at the eleventh hour that, by the time the statute is actually enacted, it could be quite different from the version incorporated into our licensing agreement.

Still, the mark represents a new form of federalism. We traditionally think of federalism as competition among jurisdictions, with individual states acting as the laboratories for legal experimentation. Instead of jurisdictional federalism, the mark facilitates corporate federalism, whereby individual corporations experiment with taking on the duties of a proposed bill. The Fair Employment Mark is an example of “corporate federalism,” in which individual business organizations are allowed to experiment with different regulatory structures. Of course, any regime with freedom of contract allows corporate experimentation. But the Fair Employment Mark allows a type of structured experimentation. It is thus akin to corporate statutes that give individual businesses discrete choices, e.g., opting into particular “control transaction” protections or opting out of certain duties of care.<sup>7</sup>

This potential for corporate federalism suggests a broader social benefit that the mark might offer. A different theory is needed to explain why individual companies would benefit from the mark—and it is to this question that we now turn.

## II. LITIGATION RISK MANAGEMENT: EMPLOYER INCENTIVES TO ADOPT THE MARK<sup>8</sup>

In the approximately two years that have passed since we first proposed the Fair Employment Mark,<sup>9</sup> the most frequent—and spirited—push back we face is skepticism that employers would have any incentive to sign the licensing agreement. “Why on earth,” the question goes, “would any employer in its right mind sign on for increased potential liability?”

There are many reasons employers might adopt the mark—and the reasons vary according to the business environments in which the employers operate. Employers might sign the license (and thereby take on the risk of discrimination liability) to: 1) attract more customers,<sup>10</sup> including state and local EEO officers who are charged to contract only with non-discriminating employers;<sup>11</sup> 2) recruit employees, including gay and gay-friendly applicants;<sup>12</sup>

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7. Ayres & Brown, *supra* note 4, at 1647 & n.23.

8. This section of our Essay borrows heavily from Richard F. Ober Jr. & Ian Ayres, *The Hollow Promise: Sexual Orientation Nondiscrimination Policies*, ACC DOCKET, Oct. 2006, at 48 (arguing that, by rewriting their companies’ nondiscrimination policies or, better yet, adopting the Fair Employment Mark, counsel can enhance their companies’ images and even limit liability in the process).

9. Ayres & Brown, *supra* note 4, at 1641.

10. *Id.* at 1681–82.

11. For example, in 1997 San Francisco enacted the Equal Benefits Ordinance which requires city contractors to provide the same benefits to employees who have domestic partners and those that are married. Berkeley, Los Angeles, Oakland, San Mateo, Seattle, Minneapolis, Broward County, Florida, and Portland, Maine have all enacted similar statutes. See CYNTHIA G. GOLDSTEIN, SAN FRANCISCO HUMAN RIGHTS COMMISSION, FIVE YEAR REPORT ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (2002), available at [http://www.sfgov.org/site/sfhumanrights\\_page.asp?id=6295](http://www.sfgov.org/site/sfhumanrights_page.asp?id=6295) (last visited July 7, 2007).

and 3) appease input suppliers, including accreditation organizations and unions that already press for non-binding nondiscrimination provisions.<sup>13</sup>

Some employers might sign the license because their employees already have private rights of action under state law or local ordinance.<sup>14</sup> The litigation cost to such employers in states that have prohibited sexual orientation discrimination has been quite modest.<sup>15</sup>

Still others may sign simply because it is the right thing to do. Many, many employers have already included sexual orientation in their non-binding nondiscrimination policies. For such employers, signing the license may mean only that the employer will never defend a claim by denying that it promised not to discriminate.

Importantly (and at first blush somewhat paradoxically), some employers might sign to define and thus contain their potential discrimination liability, since the licensing agreement mirrors ENDA's limitations on certain aspects of liability (e.g., 180-day filing requirement, no disparate impact). Currently, in many jurisdictions employers have adopted nondiscrimination policies that expose

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*See generally* WAYNE VAN DER MEIDE, *LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES* (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/1999LegislatingEquality.pdf> (last visited July 3, 2007).

12. For example, "IBM . . . has a GLBT-employee network with 1,200 active members worldwide and uses these recruiting tactics to show MBAs that the company is a safe environment." Suzanne Robitaille, *B-Schools Gain a Lavender Tinge*, *BUSINESS WEEK*, August 5, 2004, available at [http://www.businessweek.com/bschools/content/aug2004/bs2004085\\_7225\\_bs001.htm](http://www.businessweek.com/bschools/content/aug2004/bs2004085_7225_bs001.htm) (last visited July 6, 2007). Moreover, in April 2004, big name companies, such as Ford Motor Co., Sun Microsystems, Citigroup, and Morgan Stanley, participated in a GLBT recruiting and networking conference known as "Reaching Out MBA." Patrick J. Kiger, *Diversity Aside, Does it Pay to Look For Gays?*, *WORKFORCE MANAGEMENT ONLINE*, March 2004, <http://www.workforce.com/archive/feature/23/65/32/index.php>.

13. The Association of American Law Schools requires member schools to include sexual orientation in their nondiscrimination policies as well as to stop discrimination by employers using the school's career facilities. ASSOCIATION OF AMERICAN LAW SCHOOLS, 2005 HANDBOOK bylaws 6-3(b), 6-3.2 (2005). In addition, an AFL-CIO affiliate, Pride at Work, has been successful with union negotiation. Ayres & Brown, *supra* note 4, at 1677.

14. *See, e.g.*, CAL. GOV'T CODE § 12940 (West 2004); CONN. GEN. STAT. ANN. § 46a-81c (West 2004); HAW. REV. STAT. § 378-2 (2004); 775 ILL. COMP. STAT. 5/1-102 (2006); ME. REV. STAT. ANN. tit. 5, § 4572 (2005); MD. ANN. CODE art. 49B, § 16 (2005); MASS. GEN. LAWS ch. 151B, § 4 (2004); MINN. STAT. ANN. § 363A.08 (West 2005); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2005); N.H. REV. STAT. ANN. § 354-A:7 (West 2005); N.J. STAT. ANN. § 10:5-12 (West 2002 & Supp. 2005); N.M. STAT. § 28-1-7 (2005); N.Y. EXEC. LAW § 296 (McKinney 2005); OR. REV. STAT. § 659A.030 (2003), amended by 2007 Or. Laws ch. 100; R.I. GEN. LAWS § 28-5-7 (2004); VT. STAT. ANN. tit. 21, § 495 (2005). As of 2002, 119 cities and 23 counties prohibited employment discrimination based on sexual orientation. Darren McKewen, *Will HR Executives Earn 'C-Level' Posts?*, *CAREERJOURNAL.COM*, <http://www.careerjournal.com/hrcenter/briefs/20030609-bna.html> (last visited Aug. 30, 2007).

15. *See* Ayres & Brown, *supra* note 4, at 1669–71.

employers to the possibility of open-ended substantive and procedural liability, including, for example, liability based upon the disparate impact of a policy or practice.<sup>16</sup> By adopting the mark, employers can actually restrict, better quantify, and better control their litigation risk.

For example, a policy that prohibits “discrimination” might be interpreted to give employees both “disparate treatment” and “disparate impact” causes of action. In such a state, a company might have to defend disparate impact suits challenging any policy (such as one refusing to provide medical benefits for HIV) that disproportionately disadvantages gay employees. In contrast, a move from unenforceable “policies” to explicit, enforceable “promises” can give employers more control over their potential exposure. Because ENDA would outlaw only disparate treatment, the licensing agreement expressly excludes disparate impact claims and affirmative action from its reach.<sup>17</sup> Thus, unlike a court’s interpretation of a general nondiscrimination policy, express promises (like those contained in the Fair Employment Mark licensing agreement) can be limited to disparate treatment.

Compared to a general nondiscrimination policy, express promises can also limit potential remedies. A licensing agreement can disclaim, for example, punitive damages, damages for emotional distress, or injunctive relief. A licensing agreement could cap compensatory damages or limit remedies to back wages.

A licensing agreement can be more effective than a general nondiscrimination policy in providing employers with procedural safeguards. The Fair Employment Mark agreement, for example, requires employees to give notice of claims within a certain period, consistent with the requirements of ENDA as most recently proposed.<sup>18</sup> Perhaps the most important procedural constraint desired by many employers faced with potential liability for discrimination is one that permits them to avoid courts entirely; these employers can opt instead to resolve employment disputes in arbitration. The next Section will consider the implications of this procedural “safeguard” in greater detail.

### III. ARBITRATING CLAIMS UNDER THE FAIR EMPLOYMENT MARK

Under ENDA, as is true under Title VII, discrimination disputes would be arbitrable so long as the arbitration agreement was conscionable.<sup>19</sup> Explicit

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16. Such a situation may occur where a policy that denies benefits to unmarried domestic partners could be said to have a disparate impact on LGBT employees, since these employees may not have the option of getting married and receiving benefits the way employees and their different-sexed partners can do. *See, e.g.,* Levin v. Yeshiva, 754 N.E.2d 1099 (N.Y. 2001) (holding students’ complaint sufficient to allege a disparate impact on basis of sexual orientation, in violation of New York City Civil Rights Law, where lesbian students in committed, long-term relationships were denied university housing as a result of their failure to provide proof of marriage).

17. Ayres & Brown, *supra* note 4, at 1696.

18. *Id.* at 1676, 1698.

19. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that a contract requiring arbitration of all employment disputes is enforceable under federal law), *remanded to* 279 F.3d 889 (9th Cir. 2001) (holding that ordinary principles of state contract law determine validity of agreement to arbitrate and, because arbitration agreement was

nondiscrimination promises could require that all discrimination claims be submitted to arbitration (or some other dispute resolution mechanism).

Indeed, arbitration clauses in employment contracts have been gaining in popularity, at least among employers.<sup>20</sup> Many enforceable arbitration agreements between employers and employees will be broadly worded to include “[a]ny controversy or claim arising out of or relating to this [employment contract].”<sup>21</sup> The agreement could encompass even distinct rights of action arising outside of, but related to, the employment contract, such as the employee’s claim as a third-party beneficiary of the Fair Employment Mark licensing agreement.<sup>22</sup> Broad arbitration clauses have the potential to remove many claims under the mark from the public fora of state courts to the privacy of arbitration tribunals. These tribunals may not produce a written opinion or, if an opinion is produced, the opinion may remain private. Arbitration thus has the potential to undermine the predictive/precedent-creating aspect of the Fair Employment Mark.<sup>23</sup>

To remedy this effect, the Fair Employment Mark licensing agreement could expressly exempt claims under the Fair Employment Mark from any otherwise applicable arbitration clause (effecting a limited, preemptive waiver of the arbitration clause by the employer). Such a waiver would preserve the ability of courts to create precedent interpreting substantive ENDA-like language but at the expense of procedural verisimilitude. If ENDA, once enacted, would create rights of action that would be covered by arbitration clauses, the experimental period of enforcing ENDA through the Fair Employment Mark should also incorporate arbitration. Artificially disabling arbitration agreements that would

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both procedurally and substantively unconscionable under California law, it was unenforceable), *cert. denied*, 535 U.S. 1112 (2002). We believe the same standards should generally apply to the licensing agreement, ENDA, and Title VII.

20. From 1998 until 2003, the number of employees required to arbitrate by AAA clauses increased from three to seven million. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1640 n.43 (2005).

21. See AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES—A PRACTICAL GUIDE 19 (2004), <http://www.adr.org/si.asp?id=4125>.

22. Arguably, since the licensing agreement does not include an arbitration clause, job applicants would be free to litigate claims arising from it. Even employees who signed employment contracts containing arbitration clauses might be able to litigate violations of the employment mark, qua third-party beneficiaries of the licensing agreement. The scope of the arbitration clause within the employment contract could be broad enough, however, to include the licensing agreement, since a violation of the licensing agreement would certainly “arise out of or relate to” the contract of employment.

23. In this respect, the Fair Employment Mark litigation could suffer the same fate as other attempts to develop the law when arbitration clauses potentially draw cases out of courts where precedent can be created. See Sternlight, *supra* note 20, at 1661–65 (arguing mandatory arbitration impedes the creation of public precedent). This concern may be overstated. Because fewer than five percent of civil cases are tried on the merits in federal courts, the absence of arbitration is no guarantee that cases will contribute to the creation of precedent. We should recognize, however, that cases need not be tried to create precedent. Rulings on motions to dismiss and for summary judgment often include important conclusions of law that contribute greatly to subsequent parties’ negotiations and other dealings.

otherwise be in force reduces the predictive value of litigation under the Fair Employment Mark.

The better solution would be to require that any arbitration of Fair Employment Mark claims must result in a written opinion that will be made publicly available. Such a provision strikes a balance between the two phenomena the mark seeks to demonstrate: the way decision makers will interpret ENDA's proposed employment protections and the reality that those decision makers will likely be private arbitrators as well as judges.

Still, a provision requiring written results will likely depart from conditions that would adhere once ENDA passed, since many employers would include in their employment contracts provisions requiring confidentiality and no written arbitration opinion.<sup>24</sup> It might be that Fair Employment Mark arbitrations with written opinions would render larger awards for employees than would emerge from confidential arbitrations after ENDA is enacted; arbitrators who go on record in a written opinion might be anxious not to appear to favor the employer, a repeat player.<sup>25</sup> But if a writing requirement for Fair Employment Mark arbitrations produces this sort of inaccuracy, we might consider the inaccuracy an advantage because it will show employers, courts, and legislators an outer bound on employer liability. If the Fair Employment Mark does not produce a flood of litigation or a string of runaway awards for employees, it is highly unlikely that ENDA will do so, since we are designing the procedure for mark-related litigation to be slightly more favorable for employees than ENDA litigation would be. Indeed, if the writing requirement in the licensing agreement does not produce dire consequences, this might suggest a legislative compromise to deal with the current controversy over mandatory arbitration of employment discrimination clauses. Perhaps Congress could amend Title VII to make clear that any arbitration of claims arising under Title VII must result in a written award available to the public.<sup>26</sup>

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24. *But see* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482–83 (D.C. Cir. 1997) (using five factors, including a written opinion, to evaluate an arbitration agreement).

25. The ability to channel employment disputes into arbitration has been important to many employers. Arbitration can also be a valuable way to manage risk and curtail potential liability, particularly for employers that are repeat players. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 209 (1997) (arguing that employees lose more often, and arbitrators award damages to employees less frequently and in lower amounts, when the employer is a repeat player); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 234 (1998) (noting that, on average, in repeat player cases employees recover only eleven percent of what they demand, but in cases against employers that are not repeat players they recover forty-eight percent of what they demand).

26. *See* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 971 (2006) (suggesting judicial approval of settlement agreements which would then become part of the public record); JAMS, JAMS POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 3 (2005), [http://www.jamsadr.com/images/PDF/Employment\\_Arbitration\\_Min\\_Std.pdf](http://www.jamsadr.com/images/PDF/Employment_Arbitration_Min_Std.pdf) (The policy requires an arbitration award to “consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, awarded as to each claim. The

The central tension in this discussion is between the mark's power to ameliorate the discrimination suffered by gay and lesbian workers and the mark's power to predict what might happen if Congress were to pass ENDA. We have chosen to constrain the remedial aspects of the mark in order to preserve some predictive power. In the next Section, we discuss revisions to our existing licensing agreement that might be necessary or advisable moving forward.

#### IV. REVISIONS TO THE FAIR EMPLOYMENT MARK LICENSING AGREEMENT

Given the balancing considerations discussed above, we are led to the first of our revisions to the current Fair Employment Mark licensing agreement. Henceforth, licensees will agree that if a claim under the mark is subject to arbitration, the arbitrator will produce a written opinion that will be available to the public. This provision will suspend otherwise enforceable confidentiality agreements in arbitration clauses with respect to claims under the mark.

Arbitration is not the only consideration of risk management that leads us to revise the Fair Employment Mark licensing agreement. To placate potential licensees further, we plan two additional revisions to the agreement. The first revision defines more explicitly the class of third-party beneficiaries entitled to sue under the mark. The second, in standard contractual form, uses a merger clause to reassure licensees that they will not inadvertently take on more litigation risk than necessary.

Nondiscrimination policies in force at many places of employment may fail to cover discrimination against rejected applicants; since the rejected applicant is not hired, courts find no enforceable promise between the applicant and the employer.<sup>27</sup> Applicants thus lose the chance to sue under the employer's nondiscrimination policy. The fair employment licensing agreement does include such people as third-party beneficiaries: it expressly grants rejected applicants rights to sue for discrimination. But what about people who fail even to apply for a job because an employer has expressed a discriminatory policy? This class of potential litigants cannot sue under the mark. They are not express third-party

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Arbitrator will also provide a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based." *But see* Am. Arbitration Ass'n, *Mediation & Arbitration of Statutory Disputes Arising out of the Employment Relationship*, <http://www.adr.org/sp.asp?id=28535> (1995) (not requiring a written award as part of its Due Process Protocols). Furthermore, Rule 26(a) of JAMS Employment Arbitration Rules and Procedures requires that "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision." JAMS, *JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES* (2007), [http://www.jamsadr.com/rules/employment\\_arbitration\\_Rules.asp#twenty-six](http://www.jamsadr.com/rules/employment_arbitration_Rules.asp#twenty-six).

27. The applicant might argue that even if there is not an employment contract, there was an independent application contract whereby the applicant agreed to apply in return for the employer's promise to consider the application on a non-discriminatory basis. But courts might resurrect the requirement that the applicant knew and actually relied on the employer policy.

beneficiaries. We plan revisions in the licensing agreement to make this clearer: “there are no other intended third-party beneficiaries” including customers, nonapplicants, or others. This language parallels Title VII and ENDA.

We also propose a somewhat self-protective revision for the licensing agreement: an integration clause. The language we propose is as follows:

This Agreement shall be governed by the laws of the State of Connecticut. This Agreement evidences the complete understanding and agreement of the Parties with respect to the transactions contemplated by this Agreement and supersedes and merges all previous understandings and agreements, whether oral or written, between the Parties relating to these transactions.

Each Party acknowledges that, in agreeing to enter into this Agreement, it has not relied on any representation, warranty, collateral contract or other assurance (except those set out in this Agreement and any documents referred to in it) made by or on behalf of any other Party or any other person whatsoever before the execution of this Agreement. This Agreement may not be modified except by a writing subscribed to by authorized representatives of both parties.

Our final, and perhaps most important, change in the licensing agreement is one that protects employees from discrimination based upon gender identity as well as sexual orientation. When we first proposed the Fair Employment Mark, we acknowledged that “[if] the next version of ENDA proposed in Congress includes gender identity, the argument for covering gender identity in the Fair Employment Mark would strengthen.”<sup>28</sup> In a subsequent and more detailed treatment of the mark, we said that “[o]ur intention is to conform the license to the potentially evolving language of ENDA as reflected in legislation embraced by major congressional cosponsors.”<sup>29</sup> Now that gender identity has been included in the most recent bill introduced by Barney Frank, long-time advocate for ENDA, along with dozens of cosponsors in the House of Representatives,<sup>30</sup> the time is right to change the language of the licensing agreement as well.

Therefore, the licensing agreement will be revised to provide that the licensee promises to abide by the following standards of fair employment:

**STANDARDS OF FAIR EMPLOYMENT.** Licensee promises not to engage in the following employment practices:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity; ENDA, H.R. 2015, 110th Cong. § 4(a)(1) (attached hereto); or

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28. IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 84 (2005).

29. Ayres & Brown, *supra* note 4, at 1658.

30. H.R. 3285, 108th Cong. (2003).

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity; ENDA, H.R. 2015, 110th Cong. § 4(a)(2) (attached hereto); or

(3) to discriminate against any individual because of the actual or perceived sexual orientation or gender identity of the individual in admission to, or employment in, any program established to provide apprenticeship or other training; ENDA, H.R. 2015, 110th Cong. § 4(d) (attached hereto); or

(4) to discriminate against an individual because such individual opposed any of the employment practices described in subsections (1) through (3), or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing concerned with this License; ENDA, H.R. 2015, 110th Cong. § 5 (attached hereto); or

The employment practices described in any of subsections (1) through (3) shall be considered to include an action described in that subsection, 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; ENDA, H.R. 2015, 110th Cong. § 4(e) (attached hereto).

These changes will bring the licensing agreement up to date with the current state of legislative play. Although the inclusion of gender identity in the protections of the Fair Employment Mark may discourage some employers from adopting it, there are others who will find the new version of the mark more consistent with their current policies and therefore more appealing. In any case, we are persuaded that this has become the gold standard for employment nondiscrimination. Moreover, the center of legislative gravity seems to have shifted decisively in favor of gender identity's inclusion, so that the mark will achieve greatest predictive power by also encompassing this characteristic in its protection.

### CONCLUSION

The Fair Employment Mark has the potential to significantly improve the work lives of many LGBT employees, creating rights of action they now lack for discrimination on the job. But the Fair Employment Mark is more than ameliorative. If a sufficient number of employers adopt the mark and some number are accused of violating it, we could create precedent about the meaning of ENDA before ENDA is enacted. Such "law in the shadow of bargaining"<sup>31</sup> may grow up

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31. This phrase is from Luke Nottage, *Bargaining in the Shadow of the Law and Law in the Light of Bargaining: Contract Planning and Renegotiation in the U.S., New Zealand, and Japan*, in Oñati International Institute for the Sociology of Law, *Interaction of Legal Cultures: Pre-Publications of the Workshop on Changing Legal Cultures* 113 (Johannes Feest & Volkmar Gessner eds.,

in ways that reap benefits far beyond those realized by the initial parties to the contract.

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1998). Jonathan Macey and Ben Depoorter have also used this phrase in presentations and unpublished work; we like the phrase for the way it flips the much more common construction, “bargaining in the shadow of the law.”