EMPLOYEE BENEFITS LAW: THE HIDDEN GAP ENABLING SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT

JASON E. SHAPIRO*

INTRODUCTION

Thomas Bryant—a temporary employee at a cell phone supplies warehouse in Indiana—demonstrated his value to his supervisors as a "good employee."[1] Even while being considered for a permanent position at the warehouse, Bryant's employers entrusted with him the responsibility of training fifty new employees to handle expensive technological equipment.[2] After Bryant filed a complaint with the Human Resources Department citing harassment, the company manager fired him, alleging that he smashed an expensive piece of equipment just before filing the complaint.[3] Despite Bryant's and other witnesses' statements denying that he smashed the piece of equipment, the warehouse manager remained steadfast in his decision to discharge Bryant anyway on the basis of his "attitude" and for having "provided misleading or inaccurate statements during investigation of his harassment claim."[4] At this point, Bryant had worked there for over eight months, only 200 hours away from being eligible for a permanent employee position.[5]

The difference between Bryant and his co-workers was that he was openly gay at work, and had filed a sexual harassment complaint for a co-worker's overt anti-gay comments: deliberately calling homosexuals "fags" on four occasions in Bryant's presence.[6] Bryant, after seeking remuneration for being discriminated

* Executive Editor, CARDOZO J. L. & GENDER; J.D. Candidate 2013, Benjamin N. Cardozo School of Law, Class of 2013; B.S. School of Industrial and Labor Relations, Cornell University 2010. The American College of Employee Benefits Counsel awarded the Author the Clarin M. Schwartz Memorial Award for this Note in its 2012 National Writing Competition. This Note is dedicated to the Author's parents and brother for their unwavering support and inspiration. The Author would like to thank Professor Peter Goodrich and Allegra C. Wiles, Esq. for their insightful feedback and encouragement throughout the writing process, as well as Carolyn D. Richmond, Esq., Jason Lewis, Scott Farbish, and the Journal staff for their assistance in developing and editing this Note.

1 DEBORAH J. VAGINS, WORKING IN THE SHADOWS: ENDING EMPLOYMENT DISCRIMINATION FOR LGBT AMERICANS, 17 (2007).

2 *See id.*

3 *See id.* at 18.

4 *See id.*

5 *See id.*

6 VAGINS, *supra* note 1, at 18.

against on the basis of his sexual orientation, was informed that there was no law in Indiana protecting individuals from discrimination on the basis of their sexuality.[7]

Bryant's story is not an isolated instance of discrimination based on sexual orientation, and it is certainly not limited to Indiana.[8] In Virginia, a law firm refused to hire an attorney after she made the firm's hiring staff aware of her marriage to another woman, telling her that the firm would not hire a lesbian.[9] In Texas, J.C., an openly gay and distinguished[10] senior director of marketing at a travel agency, was fired—despite receiving consistently high performance reviews at work—due to alleged "departmental restructuring," which took place immediately after his new boss discovered that he was gay.[11] In Maine, an insurance company terminated Brad Nadeau—a closeted homosexual—on the same day that an agency executive discovered that Nadeau was gay, in contravention of the company's policy of progressive discipline and Brad's polished performance reviews.[12]

In the current political discourse, there remains debate over whether major issues affecting the LGBT community should be addressed by the states or the federal government, including matters of school bullying and marriage.[13] A number of public figures contend that such issues should be left for the states to govern.[14] However, one lingering issue concerning employee pension and welfare benefit plans, governed under the federal Employee Retirement Income Security Act of 1974 ("ERISA"),[15] appears to have quietly raised the issue of employment discrimination based on sexual orientation to the national stage.[16]

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[7] *Id.*

[8] *See generally* VAGINS, *supra* note 1.

[9] *Employment Non-Discrimination Act: Stories of Discrimination*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/employment-non-discrimination-act-stories-of-discrimination (last visited Aug. 12, 2012).

[10] J.C. earned two promotions and scored top performance ratings, including a "rare perfect performance rating." VAGINS, *supra* note 1, at 22.

[11] *Id.* at 23.

[12] *Id.* at 19-20.

[13] *See e.g.*, Chris Johnson, *Bachman: Anti-Gay Bullying "Not a Federal Issue,"* WASH. BLADE (Sept. 17, 2011), http://www.washingtonblade.com/2011/09/17/bachmann-anti-gay-bullying-not-a-federal-issue/ (gay bullying); Ivan Moreno, *Rick Perry: Gay Marriage a States' Rights Issue*, HUFFINGTON POST (July 22, 2011, 11:02 PM), http://www.huffingtonpost.com/2011/07/23/rick-perry-gay-marriage-a_n_907685.html (gay marriage).

[14] *See supra* note 13.

[15] 29 U.S.C. § 1001 (1974). "The Employee Retirement Income Security Act of 1974 (ERISA) provides a comprehensive federal scheme for the regulation of employee pension and welfare benefit plans offered by private-sector employers. ERISA contains various provisions intended to protect the rights of plan participants and beneficiaries in employee benefit plans. These protections include requirements relating to reporting and disclosure, participation, vesting, and benefit accrual, as well as plan funding." PATRICK PURCELL & JENNIFER STAMAN, CONG. RESEARCH SERV., RL 34443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 34 (2009) [hereinafter PURCELL], *available at* http://aging.senate.gov/crs/pension7.pdf.

[16] *See infra* Part III.

The former examples of discriminatory practices are all instances in which the employer intentionally discriminated against an individual because of his or her sexuality.[17] However, there are also instances, notably in ERISA-governed employee benefits, in which employers must discriminate against homosexuals, regardless of the employer's intent.[18] Because the federal Defense of Marriage Act only recognizes marriage between members of the opposite sex and because employee benefit plans are generally governed by ERISA, which is a federal law, employees married to a person of the same sex are not provided the same federal tax treatment of benefits provided to opposite-sex spouses, even in states like New York which prohibit employment discrimination based on sexual orientation.[19] As a result, unlike with opposite-sex spouses, "the value of any employer-provided health coverage for a same-sex spouse" will be taxable income to the employee, and "any premiums the employee pays for same-sex spouse coverage must be paid with *after*-tax dollars."[20] Thus, in addition to the social discrimination issues highlighted in the paragraphs above, there may also be unintentional economic discrimination issues that result from current federal legislation.

Further, while the denial of same-sex spousal benefits has technically been ruled to be a discriminatory employment practice,[21] the courts have found that there is no protection from employment discrimination under ERISA or Title VII and other federal anti-discrimination laws, nor are there any remedies available thereunder.[22] As an example, the recent Massachusetts District Court decision in *Partners Healthcare System v. Sullivan* sheds light on the ineffectiveness of state laws to protect workers from sexual orientation discrimination in the employment context.[23] Ironically, this case involved a claim of reverse discrimination: an employee complained that his employer, Partners Healthcare System ("Partners"), discriminated on the basis of sexual orientation for offering employee welfare benefit plans governed by ERISA to same-sex, but not to heterosexual, unmarried domestic partners.[24] The employee relied on Chapter 151B, section 4 of the Massachusetts General Laws, which bars sexual orientation discrimination in the workplace, alleging that granting benefits to same-sex couples and not to heterosexual couples constituted illegal discrimination.[25] The court ruled in favor

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17 *See generally* VAGINS, *supra* note 1.

18 *See* Davis & Gilbert LLP, *Impact of New York's Marriage Equality Act on Employers*, DAVIS & GILBERT LLP, 1 (Aug. 2011), http://www.dglaw.com/images_user/newsalerts/Benefits_New_York_Marriage_Equality_Act.pdf.

19 *See infra* Table A.

20 *See* Davis & Gilbert LLP, *supra* note 18. Note that such federal tax treatment does not apply where the same-sex spouse is otherwise considered a federal tax dependent.

21 Bob Egelko, *Same-Sex Benefits Denial Is Ruled Discriminatory*, S.F. CHRON. (Apr. 5, 2012, 4:00 AM), http://www.sfgate.com/bayarea/article/Same-sex-benefits-denial-is-ruled-discriminatory-3460386.php.

22 *See infra* Part III.E.

23 *See* Partners Healthcare System v. Sullivan, 497 F. Supp. 2d 42 (D. Mass 2007).

24 *See id.*

25 *Id.* at 32.

of Partners and prohibited Webster and state officials from pursuing any subsequent legal action based on the state's sexual orientation anti-discrimination law because: (1) the federal ERISA statute preempted[26] the Massachusetts anti-discrimination law where it "related to" the administration of ERISA plans;[27] and (2) without any federal legislative protection against sexual orientation discrimination that covers private sector workers, there is no cause of action that could be brought against the employers for the discrimination alleged.[28]

Provided the continual, invidious, and recognized history of discrimination based on sexual orientation in the United States,[29] this Note explores the background of the United States system of employment law[30] and focuses both on ERISA's treatment of state laws that prohibit sexual orientation discrimination in employment, as well as on the effect of federal anti-discrimination laws on ERISA litigation.[31] The purpose of this Note is two-fold: first, to demonstrate how, vis-à-vis the current body of ERISA law, state anti-discrimination laws are ineffective to fully protect individuals against sexual orientation discrimination in employment; and second, how this issue alone raises the issue of sexual orientation discrimination to the federal level, demonstrating the need for federal legislation to proscribe such action.

This Note will proceed as follows: Part I will provide a snapshot of the pervasiveness of sexual orientation discrimination in the American workplace that persists to this day; Part II will examine the foundations and present state of United States employment law, demonstrating the dearth of adequate protection for lesbian, gay, and bisexual individuals in the workplace, as well as the status of potential federal legislation relating to employment discrimination based on sexual orientation; Part III will explain the ERISA statute, review the present treatment of its preemption clause, and discuss, in further detail, the *Partners* case and the impact of ERISA preemption of state anti-discrimination laws protecting employees from discrimination based on sexual orientation. Finally, this Note concludes that the gap in employment discrimination law, providing employers

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[26] The legal doctrine known as "preemption," based on the United States Constitution's Supremacy Clause, provides, in part, that state laws, as far as they contradict federal laws, will not be the controlling law in the particular legal dispute. *See generally* Altria Group, Inc. v. Good, 555 U.S. 70 (2008). The U.S. Constitution's Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. IV, § 2, cl. 3. In one of the first U.S. Supreme Court articulations of the legal doctrine known as "preemption," Chief Justice Marshall wrote: "the constitution and the [federal] laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States." McCulloch v. Maryland, 17 U.S. 316, 426 (1819). In *Altria Group, Inc.*, the U.S. Supreme Court noted: "state laws that conflict with federal law are 'without effect.'" 555 U.S. at 76.

[27] *See infra* Part III.

[28] *See Sullivan*, 497 F. Supp. at 45-46.

[29] *See infra* Part I.A.

[30] *See infra* Part II.

[31] *See infra* Part III.

with immunity to discriminate on the basis of sexual orientation, including with respect to claims under ERISA-governed employee benefit plans, can only be eliminated by federal legislative action that prohibits discrimination on the basis of sexual orientation in employment.[32]

I. BACKGROUND

A. Statistics on Sexual Orientation Discrimination

A large body of statistical evidence demonstrates the pervasiveness of discrimination against lesbian, gay, and bisexual ("LGB")[33] individuals in the workplace. According to the 2008 General Social Survey ("GSS"),[34] a national probability survey utilizing a nationally representative sample of LGB-identified people, 27.1 percent of all LGB employees experienced at least one form of discrimination between 2003 and 2007, which for purposes of the survey includes harassment and termination of employment.[35] Of the eighty sexual minority respondents who completed the GSS, forty-two percent of them experienced—at some point in their lives—at least one form of employment discrimination due to their sexual orientation.[36] A 2009 survey conducted by the Human Rights Campaign Foundation ("HRC")[37] noted that seventeen percent of lesbian, gay,

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[32] This is assuming that ERISA's preemption clause remains intact. There is an alternative measure that Congress can take to resolve this issue: amend ERISA to no longer preempt state laws concerning sexual orientation discrimination. However, considering the Congressional intent of ERISA, specifically, the notion that the statute is purposed to create uniform regulation over employee benefit plans that do not vary across the States, this would not appear to be a viable or plausible alternative. *See infra* Part III.

[33] This Note is solely focused on discrimination based on a person's sexual orientation. While there is a significant amount of documented discrimination in the workplace and elsewhere as a result of individuals' gender identities as well as against transgender individuals, such topics are not included in this Note as this generally requires a more comprehensive legal and sociopolitical analysis.

[34] Conducted by the National Opinion Research Center at the University of Chicago. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST., 1 (July 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf. The GSS is the second most frequently analyzed source of information in the social sciences after the United States Census, and is the largest project funded by the Sociology Program of the National Science Foundation. *About GSS*, GENERAL SOC. SURVEY, http://www3.norc.org/GSS+Website/About+GSS/ (last visited Feb. 27, 2012). The mission statement of GSS is the following: "The General Social Survey (GSS) conducts basic scientific research on the structure and development of American society with a data-collection program designed to both monitor societal change within the United States and to compare the United States to other nations." GENERAL SOCIAL SURVEY, http://www3.norc.org/GSS+Website/ (last visited Feb. 27, 2012).

[35] Sears & Mallory, *supra* note 34, at 1-2 (including both LGB individuals "out" at work and not "out" at work, 37.7% and 10.4% of whom experienced discrimination respectively). In the aggregate, 27.1% of the instances involved workplace harassment and 7.1% involved discharges from work. *Id.* at 1.

[36] *Id.* at 4.

[37] The HRC is an organization dedicated to the goal of achieving equality for the LGBT community in the United States, and engages in lobbying efforts, in part, to advocate for equal rights and benefits in the workplace. HUM. RTS. CAMPAIGN, http://www.hrc.org/ (last visited Feb. 27, 2012). The HRC publishes a Corporate Equality Index, collects statistics on current sociological data involving the LGBT community, and also tracks both federal and state legislation as a part of its lobbying efforts across the United States. *Id.*

bisexual, and transgender ("LGBT") individuals were not open about their sexuality as a result of their "fear of getting fired."[38] In addition, the survey found that almost ten percent of LGBT employees heard their supervisor make negative comments about LGBT individuals.[39] In 2009, the Out & Equal Workplace Survey determined that forty-four percent of LGBT individuals experienced some form of discrimination in the workplace as a result of their sexual orientation.[40]

Furthermore, there is strong evidence of wage disparities between homosexual and heterosexual co-workers based on studies that accounted for productivity characteristics.[41] While the wage gaps identified in the studies vary, heterosexual workers' earnings ranged from ten percent to thirty-two percent greater than similarly situated homosexual workers' earnings.[42] Such evidence illustrates that sexual orientation discrimination results in substantial economic harm to LGB individuals, potentially "reducing their earnings by thousands," presumably annually.[43] Additionally, a 2002 study indicated that gay men earned eleven percent to twenty-seven percent less than the average national wage, and lesbians earned five percent to fourteen percent less than the average national wage.[44]

B. Government and Academic Acknowledgments of LGB Discrimination

Aside from statistical analyses, a variety of judicial opinions and legal scholars throughout the United States have acknowledged a history and pattern of discrimination based on sexual orientation in the country, including in the

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[38] Hum. Rts. Campaign, *Degrees of Equality*, HUM. RTS. CAMPAIGN, 15 (2009), http://www.hrc.org/files/assets/resources/DegreesOfEquality_2009.pdf

[39] *Id.* at 21.

[40] *2009 OUT & EQUAL WORKPLACE SURVEY*, OUT & EQUAL, 2 (OCT. 5, 2009), http://outandequal.org/documents/2009Out&EqualWorkplaceSurvey.pdf. This is out of a sample size of 2,709 adults with 378 self-identified LGBT individuals. *Id.*

[41] Sears & Mallory, *supra* note 34, at 14. *See e.g.*, *The Employment Non-Discrimination Act of 2007: Hearing on H.R.2015 Before the House Comm. on Educ. and Labor and the H. Sub. Comm. on Health, Emp't, Labor, and Pensions*, 110th Cong. 41 (2007) (written testimony of M.V. Lee Badgett, Research Director, Williams Inst.), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37637/pdf/CHRG-110hhrg37637.pdf.

[42] Sears & Mallory, *supra* note 34, at 14. *See also The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the House Comm. on Educ. and Labor and the H. Sub. Comm. on Health, Emp't, Labor, and Pensions*, 110th Cong. 41 (2007) (written testimony of M.V. Lee Badgett, Research Director, Williams Inst.).

[43] *The Employment Non-Discrimination Act of 2007: Hearing on H.R.2015 Before the House Comm. on Educ. and Labor and the H. Sub. Comm. on Health, Employ't, Labor, and Pensions*, 110th Cong. 41 (2007) (written testimony of M.V. Lee Badgett, Research Director, Williams Inst.). Notably, there is evidence from the 2000 Census suggesting that state-level nondiscrimination laws reduced this wage gap, which found that gay men and lesbians earned 2-4% higher wages when living in states with sexual orientation non-discrimination laws. *Id.*

[44] Julie A. Baird, *Playing it Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L. J. 31, 65 (2002) (citing *Overview: Employment Discrimination of the Basis of Sexual Identity and Orientation*, RELIGIOUS TOLERANCE, http://www.religioustolerance.org/hom_empl1.htm (last visited Jan. 21, 2002)).

workplace. In determining whether a prosecutor's references to the defendant's homosexuality inhibited the jury's ability to render a fair decision in a criminal trial,[45] the majority opinion by Chief Judge Tacha of the 10th Circuit noted that "gays and lesbians are routinely subject to invidious bias in all corners of society."[46] In the opinion, the court referred to Richard A. Posner's[47] book, *Sex and Reason*, which states: "The history of social policy toward homosexuals in Western culture since Christ is one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."[48] Chief Judge Tacha's opinion also referred to intolerance of homosexuals at the highest level of government by citing U.S. Supreme Court Chief Justice Burger's concurring opinion in *Bowers v. Hardwick*,[49] where Justice Burger noted that:

> Condemnation of [homosexual sodomy] is firmly rooted in Judeo-Christian moral and ethical standards . . . Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." . . . To hold the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.[50]

More recently, the opinion in *Perry v. Schwarzenegger*[51] referenced testimony by Kenneth Miller, a political scientist, who stated that, "there are some gays and lesbians who are fired from their jobs, refused work, paid less, and otherwise discriminated against in the workplace because of their sexual orientation."[52] Overall, nineteen state and federal courts in twenty-six different judicial opinions have concluded that LGB individuals have faced a history of discrimination as a result of their sexual orientation.[53]

Other branches of the federal government have also acknowledged that members of the LGB community face widespread workplace discrimination. Congresswoman Tammy Baldwin, in support of enacting federal legislation to prohibit discrimination based on sexual orientation, said before a session of

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[45] *See* Neil v. Gibson, 278 F.3d 1044 (10th Cir. 2001).

[46] *Id.* at 1066.

[47] Richard A. Posner is a noted legal scholar, regarded for his contributions to the law and economics movement, statutory interpretation analysis, and the law and literature movement, as well as engendering the pragmatist revival in legal scholarship. William N. Eskrige, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L. J. 333, 333-34 (1992).

[48] *Neil*, 278 F.3d at 1066. (citing RICHARD A. POSNER, SEX AND REASON 290 (1992)).

[49] Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (affirming the constitutionality of Georgia's anti-sodomy law), *overruled by* Lawrence v. Texas, 539 U.S. 123 (2003) (holding anti-sodomy laws to be unconstitutional under the Due Process Clause).

[50] *Neil*, 278 F.3d at 1066 (citing *Bowers*, 478 U.S. at 196-97).

[51] Perry v. Schwarzenegger, 704 F. Supp.2d 921 (N.D. Cal. 2010) (holding that California's constitutional amendment limiting marriage to heterosexual couples – Proposition 8 – unconstitutional per the 14th Amendment's equal protection clause).

[52] *Id.* at 982 (citations omitted).

[53] Sears & Mallory, *supra* note 34, at 9 (citations omitted).

Congress that there is a "clear record demonstrating [] employment discrimination based on sexual orientation[.]"[54] In regards to the Defense of Marriage Act,[55] U.S. Attorney General Eric H. Holder, Jr., delivered a statement—on behalf of President Barack Obama—recognizing "a documented history of discrimination" against sexual minorities.[56] The statement specifically relates to President Obama's decision to no longer defend its constitutionality.[57]

II. PRESENT STATE OF EMPLOYMENT LAW

A. Presumption of Employment At Will

With the exception of Montana,[58] the prevailing doctrine of United States employment law is the concept of "employment at will."[59] In a classic statement of the employment at will doctrine, Judge Ingersoll wrote:

> men must be left . . . to discharge or retain employes [*sic*] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employe [*sic*] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.[60]

In laymen's terms, Charles J. Muhl described it as an employment relationship that is "terminable by either the employer or employee for any reason whatsoever."[61] Under a purely employment at will scheme, employees may be lawfully terminated because of their sexual orientation.[62] While employment at will generally does not control in employment relationships that are governed by employment contracts

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[54] *The Employment Non-Discrimination Act of 2007: Hearing on H.R.2015 Before the House Comm. on Educ. and Labor and the H. Sub. Comm. on Health, Emp't, Labor, and Pensions*, 110th Cong. 7 (2007) (written testimony of M.V. Lee Badgett, Research Director, Williams Instit.), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37637/pdf/CHRG-110hhrg37637.pdf.

[55] The Defense of Marriage Act, also known as "DOMA," defines a legal marriage as one between a man and a woman, thereby rendering same-sex marriages illegal under federal law. *See* 1 U.S.C. § 7 (1996).

[56] *Statement from Attorney General on Litigation Involving Defense of Marriage Act*, NAT'L J. (Feb. 23, 2011, 12:58 PM), http://www.nationaljournal.com/statement-from-attorney-general-on-litigation-involving-defense-of-marriage-act-20110223.

[57] *Id.*

[58] MONT. CODE ANN. §39-2-904 (1987) (providing, *inter alia*, that discharge is wrongful if it "was not for good cause").

[59] *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. OF STATE LEGISLATURE, http://www.ncsl.org/?tabid=13344.

[60] Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 518-19 (1884) (emphasis omitted) (overruled on other grounds). Other jurisdictions have accepted similar statements of the law. *See e.g.*, Prince v. St. John Med. Ctr., 957 P.2d 563, 565 (Okla. Civ. App. 1998); Hausman v. St. Croix Care Ctr., 571 N.W.2d 393, 396 (Wis. 1997); Sheets v. Knight, 779 P.2d 1000, 1006 (Or. 1989) ("[g]enerally an employer may discharge an employee at any time and for any reason, absent a contractual, statutory or constitutional requirement [to the contrary]. Termination of employment ordinarily does not create a tortious cause of action.") (citations omitted).

[61] Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3.

[62] *Id.*

that either specify a definite term of employment[63] or provide a clause limiting termination to "just cause,"[64] it is the rare case that an employee will have sufficient bargaining power to exact promises from the employer to "alter[] the presumptively at will nature of the employment relationship."[65]

B. State Common Law Exceptions to Employment At Will

Beginning in 1959 with *Petermann v. International Brotherhood of Teamsters*,[66] state courts adopted common law exceptions to the at will employment doctrine to protect employees from discharge for "bad cause."[67] However, these exceptions still fail to provide adequate protection for employees from sexual orientation discrimination in employment.[68] There are three major exceptions to the employment at will doctrine.[69] First, the "public policy" exception, which is also the most widely accepted exception,[70] provides that an employee may not be discharged when the termination violates an explicit, well-established public policy of the state.[71] The ambiguousness of the phrase "public policy" has led some courts to reject the exception entirely,[72] while most courts have limited the exception to policies "clearly enunciated"[73] in a state's constitution, statute, or administrative rules.[74] Since less than half of the states

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[63] *Id.*

[64] Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410 (1967) ("'[J]ust cause' provisions typically found in collective [bargaining] agreements [of] unions not only protect their constituents from discharges for ulterior purposes, but also prohibit discharges for no reason or for reasons erroneously believed by the employer to be justified.") (citations omitted). "Just cause" provisions may also be found in individually negotiated agreements. *Id.* at 1411.

[65] *Id.*

[66] *See* Muhl, *supra* note 61, at 4. *See also,* Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. App. 1959) (holding that an employee could not be discharged for failing to heed his employer's demand to commit perjury in court because it violated public policy).

[67] Gary E. Murgh & Clifford Scharman, *Employment At Will: Do Exceptions Overwhelm the Rule?*, 23 B.C. L. Rev. 329, 330 (1982).

[68] *See infra* Part II.B.

[69] Muhl, *supra* note 61, at 4.

[70] *Id.* (43 out of the 50 States recognize the "public policy" exception to the employment at will doctrine).

[71] *Id.*

[72] *See, e.g.*, Pacheo v. Raytheon Co., 623 A.2d 464 (R.I. 1993); Murphy v. American Home Prod. Corp., 58 N.Y.2d 293, 448 N.E.2d (1983). Seven states, including Alabama, Florida, Georgia, Louisiana, Nebraska, New York, and Rhode Island, have rejected the "public policy" exception. Muhl, *supra* note 61, at 6.

[73] Muhl, *supra* note 61, at 5.

[74] *Id.* at 4. *See e.g.*, Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983). The court limited the application of the "public policy" exception to public policy evidenced by a constitutional or statutory provision and not to include either legislative policy or "judicially conceived and defined notions of public policy." The court affirmed the legality of Brockmeyer's termination from employment for testifying against his employer in a sex discrimination suit fell under the employment at-will rule, holding that there was no claim under the "public policy" exception since there was no existing law that prevented the discharge of an employee because of their testifying in a manner contrary to his employer's interests. *Id. See also* Webb v. Puget Sound Broadcasting Co., 1998 Wash. App. LEXIS 1795, 93 Wash. App. 1042 (Wash. Ct. App. 1998) (holding that the "public policy" exception

have express laws prohibiting workplace discrimination based on a person's sexual orientation,[75] it follows that the "public policy" exception will not prove especially helpful in protecting LGB individuals from workplace discrimination on the basis of their sexual orientation.[76]

Second, the "implied-contract" exception is established when an employer conveys a statement, either orally or in writing, to an employee regarding job security or specific procedures that the employer will follow prior to a worker's termination of employment.[77] While the majority of "implied-contract" cases are based on specific terms and conditions set forth in the employer's handbook,[78] employers "can effectively disclaim any implied contractual obligation arising from such provisions" merely by including provisions in the employee handbook that employment at the workplace remains at will and that the employee handbook is not a contract.[79] The other common basis of an "implied-contract" claim comes from oral representations made by a hiring official to a potential employee.[80] Considering that only thirty-eight states recognize the "implied-contract" exception as well the relative ease with which an employer can avoid an "implied-contract" obligation, either by not making oral representations or including limiting provisions in employee handbooks, it is not a practical means to effectively prohibit employment discrimination against LGB individuals.

Third, the "covenant of good faith" exception, which is only recognized in eleven states,[81] creates a cause of action for breach of contract where a contracting party acts to deprive another party of the benefit of the contract—*i.e.,* conduct which will have the effect of destroying or injuring the right of the other party to

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did not include discrimination based on sexual orientation even where plaintiff cited municipal and county law prohibiting such discrimination).

[75] *Sexual Orientation,* AFL-CIO, http://www.aflcio.org/Issues/Civil-and-Workplace-Rights/Your-Rights-at-Work/Sexual-Orientation (last visited Nov. 10, 2011).

[76] In states where only localities prohibit employment discrimination against LGB individuals, courts will not recognize such discrimination as falling within the "public policy" exception. *See e.g.,* Greenwood v. Taft, Stettinius & Hollister, 663 N.E.2d 1030 (Ohio Ct. App. 1995) (holding that a municipal ordinance prohibiting discrimination based on sexual orientation was not sufficient to create a "public policy" tort claim for Greenwood to sue for damages suffered in connection with his termination of employment because he is a homosexual).

[77] Muhl, *supra* note 61, at 7.

[78] *Id.* at 8.

[79] Boulton v. Inst. of Int'l Educ., 808 A.2d 499, 505 (D.C. 2002) (finding that the employee handbook's provisions that employees remain "at-will" and that the handbook "not to be considered as creating terms and conditions of an employment contract" precluded the creation of an "implied-contact" obligation by an employee who alleged, *inter alia,* that he was discriminated against on the basis of his sexual orientation). A sample disclaimer, which must be clear and unambiguous in the handbook or police, reads: "This policy is not intended as a contractual obligation of the company. The company reserves the right to amend this policy from time to time at its discretion and in accordance with applicable law." Muhl, *supra* note 61, at 11 n.25.

[80] Muhl, *supra* note 61, at 8. Examples of a situation creating the basis for an "implied-contract" exception would include an employer stating, in the presence of the employee, that employment will continue as long as the employee's performance is adequate, which may create an implied agreement to terminate only for "just cause." *Id.*

[81] *Id.* at 10.

receive the fruits of the contract.[82] Where the jurisdiction recognizes this exception, the covenant of good faith is implied into every employment relationship.[83]

This exception has been interpreted to limit employers' ability to discharge employees with the purpose of frustrating the employee's contractual right to receive particular "fruits" or benefits of their employment agreement.[84] For example, in *Fortune v. National Cash Register Co.*, the Massachusetts court found that Fortune, a salesman whose employment was terminated the day after making a $5 million sale resulting in a 100% commission earned by Fortune, could bring suit for a breach of good faith and fair dealing against his employer National Cash Register—despite the fact that he was an employee at will—because Fortune provided evidence suggesting that the employer sought to deprive Fortune of all the compensation due to him from his commissioned sale, which demonstrated bad faith.[85]

The "covenant of good faith" exception applies only when an employer strategically times an employee's termination in order to prevent the vesting of benefits or compensation for the purpose of destroying or otherwise injuring the right of the employee to receive those benefits, compensation, or other fruits of the contract.[86] Accordingly, this does not serve to protect individuals from discriminatory employment actions motivated because of the individual's sexual orientation.[87] This, compounded with the fact that thirty-nine states do not recognize this exception, leaves a dearth of protection for LGB individuals in the workplace. Even when considering the less popular common law exceptions to at will employment, including "intentional infliction of emotional distress, intentional interference with a contract, and promissory estoppel or detrimental reliance on employer representations,"[88] there remains a substantial lack of common law protection for LGB employees from workplace discrimination.

C. Constitutional Protection Against Discrimination

The original text of the Constitution provides no protection for individuals from discrimination.[89] However, in 1868, the passage of the Fourteenth Amendment provided a constitutional safeguard against certain types of state-

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[82] *See* Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

[83] Muhl, *supra* note 61, at 10.

[84] *See* Guz v. Bechtel Nat'l, Inc., 63 Cal.Rptr.2d 572 (Cal. Ct.App. 1997).

[85] *See* Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

[86] *See id.*

[87] *See id.*

[88] Muhl, *supra* note 61, at 11.

[89] *See generally* U.S. CONST. In fact, the Constitution condoned discrimination. *See* art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2 (counting slaves as three-fifths of a person when apportioning seats in the House of Representatives)

governmental discrimination with the passage of the Equal Protection Clause.[90] While the Fourteenth Amendment was introduced during the Reconstruction Era after the Civil War, which would appear to imply that its purpose was solely to prohibit discrimination based on race, the Supreme Court interpreted the Equal Protection Clause to apply in cases involving government-created distinctions that confer a benefit to one group of individuals to the detriment of another.[91] In such cases, depending on the type of government classification in question, the government must at least prove that the legally created distinction promotes a valid and legitimate state interest, also known as "rational basis scrutiny;"[92] however, where the government classification is more suspect, the Equal Protection Clause requires that the government provide a stronger state interest—*i.e.*, a more significant reason for discriminating—to justify the more contentious basis of discrimination.[93] A government classification is more or less suspect depending on certain considerations, including: whether the distinction is based on an immutable characteristic, like race or gender;[94] the ability of the group to protect itself through the political process;[95] as well as the history of discrimination against the group[96]—*e.g.*, disabled individuals.[97] This constitutional safeguard to be protected from unjustified discrimination was extended to distinctions created by the federal government in *Bolling v. Sharpe*, in which the Court incorporated the Equal Protection Clause against the federal government through the Fifth Amendment's Due Process Clause under the theory that the concepts of equal protection and due process stem from the "American ideal of fairness."[98]

The courts have applied the Equal Protection Clause to governmental distinctions that treat individuals disparately on the basis of sexual orientation.[99] In

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[90] U.S. CONST. amend. XIV, § 1 (1868) ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

[91] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (race-based distinction); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (distinction between methadone users and non-users); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (disability-based distinction); U.S. v. Virginia, 518 U.S. 515 (1996) (gender-based distinction).

[92] *See e.g.*, Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (classification of people by age); U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (classification of households into those which have and do not have all residents related to each other).

[93] *See e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (classifications based on race); United States v. Virginia, 518 U.S. 515 (1996) (classifications based on gender).

[94] *See e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496 (1980); Kahn v. Shevin, 416 U.S. 351, 356 (1974).

[95] *See e.g.*, Graham v. Richardson, 403 U.S. 365, 367 (1971).

[96] *See e.g.*, *Cleburne*, 473 U.S. at 440.

[97] *See id.*

[98] Bolling v. Sharpe, 347 U.S. 497, 498 (1954).

[99] While the 6th Circuit Court of Appeals in *Equality Foundation of Greater Cincinnati v. Cincinnati*, 54 F.3d 261 (6th Cir. 1995), found that LGB individuals should not be covered under the Equal Protection Clause, contending that "[t]hose persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class" because they are "an unidentifiable group . . . whose identity is denied by subjective and unapparent characteristics," the United States Supreme Court

Romer v. Evans, the United States Supreme Court reviewed the constitutionality of Colorado's "Amendment 2" of its state constitution,[100] which prohibited any Colorado government[101] from "enforc[ing] any statute, regulation, ordinance or policy" that protects LGB individuals from discrimination on the basis of their sexual orientation and also prohibited the inclusion of sexual orientation as a protected class in Colorado's general anti-discrimination laws, policies, and regulations.[102] In the Court's majority opinion, Justice Kennedy found "Amendment 2" unconstitutional under the Fourteenth Amendment's Equal Protection Clause because of the lack of any legitimate government interest supporting the government-created distinction based on sexuality; on the contrary, the Court found that the law was merely "born of animosity"[103] and the "bare . . . desire to harm a politically unpopular group,"[104] since the majority could not surmise any possible legitimate purpose for the constitutional amendment in question.[105] The majority noted that mere animosity, without more, is not a sufficient governmental purpose to survive the equal protection clause's requirement that governmental regulations have at least a "legitimate" purpose.[106] Recently, in *Perry v. Brown*,[107] a case regarding the constitutionality of California's Proposition 8 banning same-sex marriage, the Ninth Circuit applied a "heightened rational basis scrutiny derived from *Romer v. Evans*."[108]

Despite the protection that the Fourteenth Amendment provided in *Romer*, it is not a sufficient guarantee against discrimination on the basis on sexual orientation in the workplace, as it does not apply beyond state and federal government actions. The *Romer* Court noted that the Fourteenth Amendment does not provide Congress with the authority "to prohibit discrimination in public accommodations"[109] and, in *Shelley v. Kramer*, the Court noted that the "[Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[110] According to a survey conducted by the Bureau of Labor Statistics in 2010, there are 107.8 million people employed in the private

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recognized sexual orientation to be a cognizable class for purposes of the Fourteenth Amendment's Equal Protection Clause in *Romer v. Evans*, 517 U.S. 620 (1990). 54 F.3d at 267.

[100] *See Romer*, 517 U.S. 620.

[101] Amendment 2 included "branches or departments . . . agencies, political subdivisions, municipalities or school districts." *Id.* at 620.

[102] *Id.* at 630.

[103] *Id.* at 634.

[104] *Id.*

[105] *Id.* at 635.

[106] Romer v. Evans, 517 U.S. 620, 634 (1990).

[107] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[108] Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in* Perry v. Brown, 64 STAN L. REV. ONLINE 111 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-111.pdf.

[109] *Romer*, 517 U.S. at 628.

[110] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

sector in the United States.[111] Provided that there is no "special right" to be free from discrimination[112] as derived from either the U.S. Constitution or common law,[113] it is left to the courts and the legislature to provide for anti-discrimination legislation, policy, or regulations.[114]

D. Federal Prohibitions of Discrimination Based on Sexual Orientation

In response to the "harshness" of the employment at will doctrine, as well as the insufficiency of constitutional protection, Congress enacted a number of statutory exceptions to allay public dissatisfaction with the doctrine.[115] Most, if not all, of these federal statutes—which place limitations on the types of causes for which employees may be discharged[116]—do not protect employees from discrimination on the basis of their sexuality.[117] Title VII of the Civil Rights Act of 1964 ("Civil Rights Act") provides that: "It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin[.]"[118] An individual's sexual orientation is not a protected class under the Civil Rights Act.[119] While at one point there may have been an open question as to whether "sexual orientation" could be incorporated into "sex" as a protected class under Title VII, the almost unanimous response of the U.S. Circuit Courts has been in the negative.[120] For

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[111] GERALD MAYER, SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS 2 (2011).

[112] *Romer*, 517 U.S. at 631.

[113] *See* Adair v. United States, 208 U.S. 161 (1908) (holding that the Erdman Act, federal legislation prohibiting employment discrimination on the basis of an employee's membership in a labor organization, was unconstitutional after finding that anti-discrimination laws in employment restricted an employer's Fifth Amendment Due Process. According to the Court, due process provides employers the right to discriminate against employees for any reason, effectively making employment at will a constitutional doctrine, and thus, neither Congress nor the States have the right to proscribe employers' right to terminate the employer relationship for any reason on the basis of the "freedom of contract."). *See also* Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Meyer v. Nebraska, 262 U.S. 390 (1923). However, the United States Supreme Court, in a rare instance, reversed this line of cases, thereby paving way for federal and state anti-discrimination laws. *See* Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992).

[114] *Romer*, 517 U.S. at 627-28.

[115] Sheets v. Knight, 779 P.2d 1000, 1006 (Or. 1989).

[116] *Id.*

[117] *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 158(a)(3), 159-168, (1935) ("It shall be an unfair labor practice for an employer – by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . ."); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 631 (2000) (prohibiting discrimination on the basis of age of individuals "at least 40 years of age"); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, 12102(3)-(4) (2000) (prohibiting discrimination on the basis of one's "disability" or as a result of "being regarded as having such an impairment").

[118] Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-1 to -17 (2000).

[119] *Id.*

[120] *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751-52 (4th Cir. 1996);

example, in 2001, the Third Circuit noted that "[i]t is clear, however, that Title VII does not prohibit discrimination based on sexual orientation."[121]

In 1998, President Clinton amended Section 1 of Executive Order 11478[122] to include "sexual orientation," thereby prohibiting discrimination on the basis of one's sexual orientation.[123] However, this Order is explicitly limited to the Executive Branch's civilian employment.[124] While the Executive Order "does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity (EEO) Commission),"[125] it led Cabinet-level agencies to issue similar policy statements prohibiting discrimination based on sexual orientation.[126] In fact, "[s]ome of the agencies have developed parallel EEO complaint procedures allowing federal employees to file EEO complaints based on sexual orientation within their agencies."[127]

Aside from the inherently limited executive order, the single piece of enacted federal legislation that is aimed at preventing discrimination which includes discrimination based on sexual orientation, although not explicitly, is the Civil Service Reform Act of 1978.[128] Section 105(b)(10) of the Act, prohibiting certain government agencies[129] from "discriminat[ing] . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others,"[130] has been interpreted by the U.S. Office of Personnel Management[131] to prohibit discrimination on the basis of one's sexual orientation.[132]

Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir.1979).

121 Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001).

122 "It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin[.]" Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969).

123 Exec. Order No. 13,087, 63 Fed. Reg. 30097 (1998).

124 *See Addressing Sexual Orientation Discrimination In Federal Civilian Employment*, U.S. OFF. OF PERSONNEL MGMT., http://www.opm.gov/er/address2/guide01.asp (Nov. 11, 2011).

125 Statement by the President, Office of the Press Secretary, The White House (May 28, 1998), http://clinton6.nara.gov/1998/05/1998-05-28-statement-on-amendment-to-eeo-executive-order.html.

126 *Facts About Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 17, 2001), http://www.eeoc.gov/federal/otherprotections.cfm.

127 *Id.*

128 CHUCK STEWART, HOMOSEXUALITY AND THE LAW: A DICTIONARY 105 (2001).

129 5 U.S.C. § 2302(a)(2)(B). Under this section the Act does not cover, *inter alia*, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, any Executive agency or unit thereof relating to foreign intelligence or counterintelligence agencies as the President sees fits, and the Government Accountability Office. *Id.*

130 5 U.S.C. § 2302(b)(10).

131 The U.S. Office of Personnel Management oversees the enforcement of personnel practices within the federal government. *See generally Addressing Sexual Orientation Discrimination in Federal Civilian Employment*, U.S. OFF. OF PERSONNEL MGMT., http://www.opm.gov/er/address2/Guide04.asp (last visited Nov. 11, 2011).

132 *Id.*

In consideration of the "the history and widespread pattern of discrimination on the basis of sexual orientation" as well as the lack of protective legislation to prevent employment discrimination on the basis of sexual orientation "by private sector employers and local, State, and Federal Government employers," Congress has considered enacting legislation to outlaw sexual orientation discrimination in employment.[133] As a primary example, Representative Barney Frank introduced the Employment Non-Discrimination Act ("ENDA") into the House of Representatives on April 6, 2011.[134] ENDA would make it unlawful for employers to "fail or refuse to hire or to discharge any individual, or otherwise 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."[135] The Bill would also protect employees from employer retaliation for asserting their rights under the Act.[136] Employers covered under the provisions of the Act include: private sector employers with fifteen or more employees,[137] labor organizations,[138] and most "employers covered by Title VII, including the states."[139] ENDA provides for the same powers of enforcement of the Act as Title VII and sections 302 and 304 of the Government Employee Rights Act of 1991.[140] The Bill is presently in the House Judiciary's Subcommittee on the Constitution.[141] ENDA is "consistent with existing federal law and requires no changes in enforcement mechanisms.[142] This Bill, if passed, would grant the Equal Employment Opportunity Commission ("EEOC") and other appropriate agencies the power to enforce its provision," while also allowing for private action if the employee's complaint is not resolved by the EEOC.[143]

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[133] *See supra* note 98.

[134] H.R. 1397, 112th Cong. (1st Sess. 2011). The ENDA Bill was first introduced into Congress in 1997, which died in committee. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CENTER FOR AMERICAN PROGRESS (July 19, 2011), http://www.americanprogress.org/issues/2011/07/enda_history.html. The Bill was later re-introduced to Congress in 2009, but failed yet again. *Id.*

[135] H.R. 1397, 112th Cong. § 4(a)(1) (1st Sess. 2011).

[136] H.R. 1397, 112th Cong. § 5 (1st Sess. 2011).

[137] H.R. 1397, 112th Cong. § 4(a) (1st Sess. 2011).

[138] H.R. 1397, 112th Cong. § 4(c) (1st Sess. 2011).

[139] Employment Discrimination - Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity. - Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009). *See also Congress Considers Bill To Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity*, 123 Harv. L. Rev. 1803, 1806 (2010).

[140] H.R. 1397, 112th Cong. § 10(a)(1) (1st Sess. 2011).

[141] *Bill Summary and Status: HR 1397*, LIBR. OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01397:@@@L&summ2=m& (last visited Nov. 12, 2011).

[142] *Id.*

[143] *Testimony of the National Gay and Lesbian Task Force Action Fund*, NAT'L GAY AND LESBIAN TASK FORCE ACTION FUND at 13, http://www.thetaskforce.org/issues/nondiscrimination/ENDA_main_page.

Presently, there is no federal statute prohibiting employment discrimination on the basis of an employees' sexuality in the private sector.[144] As a result, a large number of Americans are left unprotected from discrimination as a result of their sexual orientation; furthermore, the states and local municipalities are left to decide whether to pass statutes and ordinances to protect employees in state employment and the private sector.[145]

E. Prohibitions of Workplace Discrimination Based on Sexual Orientation Among the States and the District of Columbia

After *Romer v. Evans*, state legislation or state constitutional amendments that preclude state legislatures and lower-level state governments from enacting or enforcing anti-discrimination laws that protect LGB individuals have been deemed unconstitutional under the Equal Protection Clause of the 14th Amendment.[146] Only twenty-three states and the District of Columbia have provided some form of protective measure for LGB individuals in the face of employment discrimination due to their sexuality.[147] However, some of the state anti-discrimination laws are limited in scope by restricting their application only to public employees.[148] All state laws that prohibit sexual orientation discrimination exempt religious organizations, and many exempt specific non-profit or tax-exempt organizations as well.[149] Table A, below, provides a state-by-state review of the anti-discrimination legislation, policies, or lack thereof, in each state.

TABLE A[150]

* The term "limited" refers to laws that only apply to a limited sector of employment.

	No Statewide Prohibition Against Sexual Orientation Discrimination	Statewide Sexual Orientation Anti-Discrimination Law	Limited* Sexual Orientation Anti-Discrimination Law
Alabama	X[151]		
Alaska	X[152]		
Arizona	X[153]		

144 *See Sexual Orientation, supra* note 75.

145 *Id.*

146 Romer v. Evans, 517 U.S. 620, 627-28 (1996).

147 *See infra* Table A.

148 *Id.*

149 *Id.*

150 The author thanks the HRC for providing the background research to aid in compiling Table A's information.

151 *Alabama Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/alabama-non-discrimination-law (last updated Feb. 26, 2007).

152 *Alaska Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/alaska-non-discrimination-law (last updated Mar. 12, 2007).

Arkansas	X[154]		
California		X[155]	
Colorado		X[156]	
Connecticut		X[157]	
Delaware		X[158]	
District of Columbia		X[159]	
Florida	X[160]		
Georgia			X[161]
Hawaii		X[162]	
Idaho	X[163]		
Illinois		X[164]	

[153] *Arizona Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/arizona-non-discrimination-law (last updated Mar. 14, 2007). *See also* ARIZ. REV. STAT. § 23-425 (LexisNexis1972).

[154] *Arkansas Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/arkansas-non-discrimination-law1 (last updated Mar. 9, 2007). The Arkansas Civil Rights Act of 1993 does not covers employment discrimination based on an employee's sexuality. *See* ARK. CODE ANN. § 16-123-102 (2001).

[155] California prohibits employment discrimination on the basis of sexual orientation in the public and private employment sectors. *See* CAL. CIV. CODE § 51 (Deering 2006). *See also* CAL. GOV. CODE § 12920 (Deering 2011).

[156] Colorado law makes it unlawful to discriminate or "to refuse to hire, to discharge, to promote or demote, to harass" on the basis of the employee's sexuality. COLO. REV. STAT. § 24-34-402 (2011). *See also* COLO. REV. STAT. § 24-34-401 (2011).

[157] "It shall be a discriminatory practice . . . to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation or civil union status." CONN. GEN. STAT. § 46a -81c (2007).

[158] "It shall be an unlawful employment practice . . . [to] [f]ail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, marital status, genetic information, color, age, religion, sex, sexual orientation, or national origin." DEL. CODE ANN. tit. 19, § 711 (2009).

[159] Under D.C. Human Rights Law, it is unlawful for employers to "fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion" on the basis of the employee's sexual orientation. D.C. CODE § 2-1402.11(a)(1) (2006).

[160] *Florida Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/florida-non-discrimination-law1 (last updated Mar. 9, 2007). *See also* Smith v. City of Jacksonville Corr. Inst., 1991 Fla. Div. Adm. Hear. LEXIS 5990 (1991).

[161] *Georgia Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/georgia-non-discrimination-law (last updated Mar. 9, 2007). GA. CODE § 45-19-29 (1995) (limited to public sector employees).

[162] Hawaii law makes it unlawful for employers "to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment" on the basis of sexual orientation. HAW. REV. STAT. § 378-1-3 (2012).

[163] *Idaho Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/idaho-non-discrimination-law (last updated Aug. 29, 2004).

[164] Under the Illinois Human Rights Act, make it unlawful for employer "to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for

Indiana	X[165]		
Iowa		X[166]	
Kansas	X[167]		
Kentucky	X[168]		
Louisiana	X[169]		
Maine		X[170]	
Maryland		X[171]	
Massachusetts		X[172]	
Michigan	X[173]		
Minnesota		X[174]	
Mississippi	X[175]		

training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of" and employee's sexual orientation. 775 ILL. COMP. STAT. 5/2-102 (2008). *See also* 775 ILL. COMP. STAT. 5/1-102 (2008).

165 *Indiana Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/indiana-non-discrimination-law1 (last updated Aug. 30, 2004).

166 Iowa law makes it unlawful for employers "refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the . . . sexual orientation . . . of such applicant or employee." IOWA CODE § 216.6 (1996).

167 *Kansas Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/kansas-non-discrimination-law (last updated Aug. 30, 2004). Kansas does not have a law explicitly prohibiting discrimination based on sexual orientation. Kansas non-discrimination laws extend only to "race, religion, color, sex, disability, national origin or ancestry." KAN. STAT. ANN. § 44-1001 (2001).

168 *Kentucky Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/kentucky-non-discrimination-law1 (last updated Mar. 12, 2007). Sexual orientation is not included in the state's anti-discrimination law. KY. REV. STAT. ANN. §344.020 (LexisNexis 1994).

169 *Louisiana Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/louisiana-non-discrimination-law1 (last updated Aug. 20, 2008).

170 The Maine Human Rights Act makes it unlawful for employers "to fail or refuse to hire or otherwise discriminate against any applicant for employment because of . . . sexual orientation." ME. REV. STAT. tit. 5, § 4572 (2005).

171 According to Maryland law, employers may not "fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of the individual's . . . sexual orientation." MD. CODE ANN., STATE GOV'T §20-606 (LexisNexis 2009).

172 Massachusetts law provides that it is unlawful for an employer "to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" on the basis of the person's sexual orientation. MASS. GEN . LAWS ch. 151B, § 4 (2010).

173 *Michigan Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/michigan-non-discrimination-law1 (last updated Mar. 13, 2007). In the 1993 case Barbour v. Michigan Dept. of Soc. Servs., 497 N.W.2d 216 (Mich. Ct. App. 1993), the court held that "harassment or discrimination based upon a person's sexual orientation" is not protected under the Michigan Civil Rights Act. This ruling remains in effect. "Race, color, religion, national origin, sex or blindness" are the only classifications addressed under the Michigan penalty enhancement accommodation non-discrimination law. MICH. COMP. LAWS § 750.147 (2002).

174 Under Minnesota's Human Rights Law, it is unlawful for an employer "to discriminate against a person seeking membership or a member with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" because of the employee's sexual orientation." MINN. STAT. § 363A.08.

Missouri	X[176]		
Montana	X[177]		
Nebraska	X[178]		
Nevada		X[179]	
New Hampshire		X[180]	
New Jersey		X[181]	
New Mexico			X[182]
New York		X[183]	
North Carolina	X[184]		
North Dakota	X[185]		

[175] *Mississippi Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/mississippi-non-discrimination-law (last updated Mar. 13, 2007). State non-discrimination laws extend to categories of "race, religious principles, color, sex, national origin, ancestry and handicap." MISS. CODE ANN. §§ 25-9-103, 43-33-723 (2001).

[176] *Missouri Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/missouri-non-discrimination-law1 (last updated Mar. 13, 2007). Missouri non-discrimination laws addresses "race, color, religion, national origin, ancestry, sex and age." MO. REV. STAT. § 213.030 (2001).

[177] *Montana Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/montana-non-discrimination-law (last updated Mar. 14, 2007).

[178] *Nebraska Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/nebraska-non-discrimination-law1 (last updated Mar. 15, 2007). Nebraska prohibits discrimination based on categories that include "race, color, religion, national origin, familial status or sex" in areas of employment, public accommodations and housing. NEB. REV. STAT. §§ 48-1101, 20-132, 20-318, (2002).

[179] Nevada law makes it unlawful for employers to "fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her . . . sexual orientation." NEV. REV. STAT. § 613.330 (2003).

[180] New Hampshire law defines the "opportunity to obtain employment without discrimination because of that person's . . . sexual orientation" to be a "civil right." N.H. REV. STAT. ANN. § 354-A:6 (LexisNexis 2002). No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of the person's sexual orientation. N.H. REV. STAT. ANN. § 21-I:52 (LexisNexis 2002).

[181] "All persons shall have the opportunity to obtain employment . . . without discrimination because of . . . sexual orientation." N.J. REV. STAT. § 10:5-4 (2007).

[182] Under New Mexico's Human Rights act, it is unlawful for "an employer . . . to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of . . . sexual orientation or gender identity," but, as opposed to distinctions based on "race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition," sexual orientation discrimination is only unlawful if the "employer has fifteen or more employees." N.M. STAT. ANN. § 28-1-7 (LexisNexis 2003).

[183] Under New York Human Rights Law, it is unlawful for an employer "to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" on the basis of the person's sexual orientation. N.Y. EXEC. LAW § 296 (McKinney 2010).

[184] *North Carolina Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/north-carolina-non-discrimination-law1 (last updated Mar. 14, 2007). North Carolina non-discrimination laws address race, religion, color, national origin, age, sex or handicap. *See, e.g.*, N.C. GEN. STAT. §§ 131A-8, 143-422.2, 41A-4 (2001).

Ohio	X[186]		
Oklahoma	X[187]		
Oregon		X[188]	
Pennsylvania	X[189]		
Rhode Island		X[190]	
South Carolina	X[191]		
South Dakota	X[192]		
Tennessee	X[193]		
Texas	X[194]		
Utah	X[195]		
Vermont		X[196]	
Virginia	X[197]		
Washington		X[198]	

185 *North Dakota Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/north-dakota-non-discrimination-law (last updated Mar. 15, 2007).

186 *Ohio Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/ohio-non-discrimination-law1 (last updated Mar. 19, 2007). Ohio anti-discrimination law is limited to "race, color, religion, sex, military status, national origin, disability, age, [and] ancestry." OHIO REV. CODE ANN. § 4112.01 (LexisNexis 1999).

187 *Oklahoma Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/oklahoma-non-discrimination-law1 (last updated Mar. 16, 2007).

188 Oregon law makes it unlawful for employers "to refuse to hire or employ the individual or to bar or discharge the individual from employment" on the basis of the person's sexuality. OR. REV. STAT. § 659A.303 (2008).

189 *Pennsylvania Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/pennsylvania-non-discrimination-law (last updated Feb. 27, 2007).

190 Rhode Island law provides that it is unlawful for employers "to refuse to hire any applicant for employment . . . [or] to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment" on the basis of the person's sexual orientation. R.I. GEN. LAWS ANN. § 28-5-7 (West 2003).

191 *South Carolina Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/south-carolina-non-discrimination-law1 (last updated Mar. 26, 2007). Race, color, religion, sex, national origin, age, familial status, weight and disability are among the classifications recognized under South Carolina's non-discrimination laws. S.C. CODE ANN. §§ 1-13-80, 31-21-40 (1976).

192 *South Dakota Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/south-dakota-non-discrimination-law1 (last updated Mar. 26, 2007).

193 *Tennessee Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/tennessee-non-discrimination-law (last updated Mar. 23, 2007).

194 *Texas Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/texas-non-discrimination-law (last updated Mar. 23, 2007).

195 *Utah Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/utah-non-discrimination-law (last updated Mar. 27, 2007).

196 Vermont law makes it unlawful for employers "to discriminate against any individual because of . . . sexual orientation." 21 VT. STAT. ANN. tit. 21, § 495 (West 2007).

197 *Virginia Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/virginia-non-discrimination-law1 (last updated Mar. 14, 2007).

198 Washington law prohibits makes it unlawful for employers to "refuse to hire," "discharge or bar," or "discriminate against any person in compensation or in other terms or conditions employment"

West Virginia	X[199]		
Wisconsin		X[200]	
Wyoming	X[201]		

III. THE CURRENT STATUS OF ERISA LITIGATION

A. An Overview of the ERISA Statute

ERISA creates "a comprehensive federal scheme for the regulation of employee pension[202] and welfare benefit plans offered by private-sector employers,"[203] and it effectively serves to create minimum standards for employee benefit plans that are created in the private sector.[204] ERISA also requires that participants be regularly informed about their benefit plans, imparts accountability of plan fiduciaries, and provides participants with the right to sue for benefits and breaches of fiduciary duty.[205]

The United States Supreme Court in *Egelhoff v. Egelhoff* described that the purpose of ERISA "is to enable employers to establish a uniform [federal] administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits."[206] More specifically, its intended purposes are to: create a "comprehensive statute for the regulation of employee benefit plans;" protect "participants and beneficiaries in private-sector employee benefit plans;"[207] and assure that participants receive promised benefits

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on the basis of the person's sexuality. WASH. REV. CODE ANN. § 49.60.180 (West 2007).

[199] *West Virginia Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/west-virginia-non-discrimination-law (last updated Mar. 27, 2007).

[200] Wisconsin law makes it unlawful for employer "[t]o refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership" because of the person's sexuality. *See* WIS. STAT. ANN. § 111.322 (West 2011). Wisconsin law explicitly prohibits discrimination based on sexual orientation in employment. WIS. STAT. ANN. § 111.31 (West 2011).

[201] *Wyoming Non-Discrimination Law*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/laws-and-legislation/entry/wyoming-non-discrimination-law (last updated Mar. 13, 2007).

[202] ERISA governs two types of pensions plans: "defined benefit plans" and "defined contribution plans." *Retirement Plans, Benefits & Savings*, U. S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/retirement/typesofplans.htm (last visited Aug. 25, 2012). Defined benefit plans promise a specified monthly benefit at retirement—e.g., $100 per month at retirement—whereas a defined contribution plan does not promise a specific amount of benefits at retirement, but rather the employee, the employer, or both contribute to the employee's individual account under the plan at a set rate, and the contributions are invested on the employee's behalf, leaving the employee to ultimately receive the balance of the account—e.g., 401(k) plans, 403(b) plans, and employee stock ownership plans. *Id.*

[203] PURCELL, *supra* note 15, at ii.

[204] *Compliance Assistance By Law – The Employee Retirement Income Security Act*, U.S DEP'T OF LABOR, http://www.dol.gov/compliance/laws/comp-erisa.htm (last visited Aug. 25, 2012).

[205] *Id.*

[206] Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001) (quoting Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 9 (1987).).

[207] PURCELL, *supra* note 15, at 34. *See also* Silvera v. Mutual Life Ins. Co. of New York, 884 F.2d

from their employers.[208] To achieve the latter two aims, ERISA "provid[es] for appropriate remedies, sanctions, and ready access to the federal courts."[209] While employers are not required to provide pension or welfare benefit plans, those private employers that choose to do so must comply with the statute.[210]

ERISA regulates "employee benefit plans," which encompasses retirement plans and welfare benefit plans, which further includes plans providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . ."[211] Additionally, ERISA may regulate "severance pay arrangements" and "supplemental retirement income payments," which calculates cost of living adjustments into the pension benefits of retirees.[212] However, employee benefit plans maintained to comply with "applicable workmen's compensation laws or unemployment compensation or disability insurance laws" as well as plans that are "maintained outside of the United States" are explicitly exempted from ERISA's purview of authority.[213]

ERISA section 502(a) provides a private right of action against employers who fail to comply with the statutory requirements regulating employee benefit plans.[214] The ERISA statute provides individuals with the right to file a civil suit under ERISA in order to, *inter alia*: (1) "redress the failure of a plan administrator to provide information required by ERISA's reporting and disclosure requirements;"[215] (2) recover benefits due under the terms of the plan, to enforce rights under the plan, or to clarify rights to future benefits under the terms of the plan;[216] (3) "receive appropriate relief due to breaches of fiduciary duty;"[217] (4) "enjoin any act or practice which violates ERISA or the terms of the plan, as well as to obtain other appropriate equitable relief to redress such violations;"[218] and (5) "collect civil penalties."[219]

The ERISA statute does not contain any anti-discrimination provisions in regards to the creation, application, or provision of employee benefit plans[220] with

423 (9th Cir. 1990) (group benefits insurance policy purchased for employees by municipality held to be a governmental plan exempt from ERISA).

208 *See* 29 U.S.C. §1001 (2012).

209 *Id.* §1001(b).

210 *Id.*

211 29 U.S.C. § 1002(1) (2012).

212 *Id.* § 1002(2)(b).

213 29 U.S.C. § 1003(b)(3)-(4) (2012).

214 *See* 29 U.S.C. § 1132 (2012) (effective April 1, 2009). *See also* PURCELL, *supra* note 15, at 34.

215 PURCELL, *supra* note 15, at 34. *See also* 29 U.S.C. § 1132(a)(1)(A) (2012).

216 *See* 29 U.S.C. §1132(a)(1)(B) (2012).

217 PURCELL, *supra* note 15, at 34. *See also id.* §1132(a)(2).

218 PURCELL, *supra* note 15, at 34. *See also* 29 U.S.C. §1132(a)(3) (2012).

219 29 U.S.C. § 1132(a)(6) (2012).

220 *See* 29 U.S.C. § 1001 (2012).

the exception of two provisions addressing age discrimination.[221] First, ERISA prohibits actions if "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age."[222] Second, there is a provision stating that allocations to an employee's account may not cease or decrease on the basis of the individual's age for defined contribution plans.[223]

B. ERISA Preemption and Federal Anti-Discrimination Law

While ERISA does not contain anti-discrimination clauses on subjects other than age discrimination, employers do not have carte blanche to discriminate against statutorily protected classes of individuals.[224]

Notably, ERISA section 514(d) provides that federal laws are not preempted by ERISA and ERISA should not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."[225] As a result, federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, apply to employee benefit plans concurrently with ERISA.[226] For example, in *Shaw v. Delta Air Lines*, the United States Supreme Court held that Title VII is applicable to employee benefit plans governed by ERISA, meaning the distribution of ERISA-governed benefits cannot violate Title VII.[227]

In fact, the Court's unanimous opinion in *Shaw* recognized that ERISA was passed by Congress with the intention that federal anti-discrimination laws govern over employee benefit plans.[228] Analyzing the legislative history of the statute, the *Shaw* Court noted that Senator Williams, in response to a question over whether the ERISA bill should require "non-discrimination" in ERISA plans, said that such an amendment was unnecessary and undesirable since Title VII already prohibited discrimination in benefit plans.[229] The Court also acknowledged Senator Williams' statement that "the thrust toward centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing

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221 PURCELL, *supra* note 15, at 13. *See* 29 U.S.C. §§ 1054(b)(1)(H), 1054(b)(2)(A) (2012).

222 29 U.S.C. § 1054(b)(1)(H) (2012).

223 29 U.S.C. § 1054(b)(2)(A) (2012).

224 Jeffrey Lewis et. al, *ERISA Preemption*, A.B.A, 1-9 (2009) [hereinafter Lewis], http://www2.americanbar.org/calendar/19th-%20Annual-%20National-%20Institute-%20on-%20ERISA%20-Litigation/Meeting%20Materials/A_Preemption.pdf.

225 29 U.S.C. § 1144(d) (2012) (effective Aug. 17, 2006).

226 *See id. See also* Lewis, *supra* note 224, at 9.

227 *See* Shaw v. Delta Air Lines, 463 U.S. 85 (1983). *See also* Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (holding that a pension plan which collects equal contributions from men and women, but pays lower benefits to the women retirees based upon the actuarially more costly life expectancy of women, violates Title VII).

228 *Shaw*, 463 U.S. at 104.

229 *See id.*

law."[230] The Court also recognized similar sentiment on the floor of the House by Representatives Abzug and Dent.[231] In the Court's own words, "these exchanges demonstrate only the obvious: that §514(d) does not preempt federal law."[232]

C. ERISA Preemption and State Laws Generally

ERISA is generally recognized as having a broad preemption clause.[233] ERISA section 514(a) provides that the statute will "supersede any and all State laws insofar as they . . . *relate to* any employee benefit plan [covered by ERISA]."[234] While "relate to" was initially given an expansive interpretation, the preemption clause has been limited in slight ways both statutorily and jurisprudentially.[235] The *Shaw* Court recognized that while "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan,"[236] it held that generally a law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a "connection with or reference to" such a plan."[237] For example, when employing this definition, the *Shaw* Court found that the New York State Human Rights Law—which prohibited employers from discriminating on the basis of pregnancy when structuring employee benefit plans—"clearly 'relate[d] to' benefit plans" as it would generally affect the administration of ERISA plans.[238] The Court also stressed that the ERISA preemption language in section 514(a) should be construed in a "broad sense" since it otherwise "would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in §514(b)[.]"[239] In 1997, the United States Supreme Court in *California Division of Labor Enforcement v. Dillingham Construction, N.A.* affirmed its holding in *Shaw* that a law "relates to" an employee benefit plan if it (1) "has a connection with," or (2) "reference to" an employee benefit plan.[240]

The *Dillingham* Court held that to determine if a state law has a "connection with" an ERISA plan, courts will look to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,"[241] as

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230 *Id.* (citing 119 Cong. Rec. 30409 (1973).

231 *Id.* (citing 120 Cong. Rec. 4726 (1974).

232 *Id.* at 105.

233 Lewis, *supra* note 224, at 1. *See also* Shaw v. Delta Air Lines, 463 U.S. 85, 90 n.20 (1983).

234 29 U.S.C. § 1144(a) (2012) (emphasis added).

235 Lewis, *supra* note 224, at 4.

236 *Shaw*, 463 U.S. at 100 n.21.

237 *Id.* at 96-97.

238 *Id.* at 97.

239 *Id.* at 98.

240 Lewis, *supra* note 224, at 4-5.

241 Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., 519 U.S. 316, 325 (1997) (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995)).

well as to the "nature and effect of the state law on" an ERISA plan.[242] In *Mackey v. Lanier Collection Agency & Service, Inc.*, the Supreme Court further held that state laws "reference" ERISA plans if the law specifically refers to the plan, or if the existence of the plan "is essential to the law's operation."[243] The *Mackey* Court held that state laws which "reference" ERISA plans are automatically preempted, regardless of whether they are consistent or inconsistent with the goals of ERISA,[244] except for state laws regulating insurance, banking, and securities, which are explicitly exempted by statute.[245]

Notably, there was a shift in the judicial treatment of ERISA's preemption of state laws beginning with the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*[246] Before the *Travelers* decision in 1995, the Court's analysis of ERISA preemption began with the notion that Congress intended to preempt state laws broadly.[247] However, in *Travelers*, the Court began its analysis of ERISA preemption of state laws with the "presumption that Congress does not intend to supplant state laws."[248] Additionally, the Court noted that the "basic thrust of the pre-emption . . . clause, then, was to avoid a multiplicity of regulation in order to permit nationally uniform administration of employee benefit plans."[249] Thus, all things considered, the Court found that state laws dealing with areas expressly covered by ERISA, including funding, reporting, and disclosure, are preempted under *Travelers*, so state laws that: (1) mandate benefits, structures or their administration; (2) bind employers or administrators to particular choices or preclude uniform administrative practice, thereby regulating ERISA plans; or (3) provide alternate enforcement mechanisms, are preempted.[250]

D. ERISA Preemption of State Anti-Discrimination Laws

Shaw, mentioned briefly above, served as one of the first and most integral cases concerning the issue of ERISA's preemptive force over state anti-discrimination laws, and its holding directly illustrates the inability of states to effectively prohibit employment discrimination as it relates to ERISA-governed benefit plans.[251] *Shaw* involved the case of three female employees who filed suit against their respective employers for failing to include benefits for employees

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242 *Dillingham*, 519 U.S., at 325.

243 *Id.* at 324-25.

244 *Id.* ERISA's "savings clause" provides that state laws which "relate to" an employee benefit plan will not be preempted if it regulates insurance. 29 U.S.C. §1144(a) (2012).

245 29 U.S.C. § 1144(b)(2)(A) (2012).

246 *Travelers Ins. Co.*, 514 U.S. 645.

247 *See* Ronald G. Dean & Lissa J. Paris, *ERISA Basics: Preemption*, A.B.A., 1-2 (2000) [hereinafter *ERISA Basics*], http://apps.americanbar.org/labor/lel-aba-annual/papers/2000/paris.pdf.

248 *Id. See also Travelers Ins. Co.*, 514 U.S. at 654.

249 *Travelers Ins. Co.*, 514 U.S. at 657.

250 *ERISA Basics*, *supra* note 247, at 5.

251 *See generally id.* at 10.

disabled as a result of pregnancy in their ERISA plans.[252] One employee filed suit against the employers using New York State Human Rights Law, which protected individuals from discriminatory employment actions—including in employee benefit plans—on the basis of an employees' sex, which had been interpreted by the New York Court of Appeals to include the disparate treatment of pregnancy from other non-occupational disabilities.[253]

The *Shaw* Court faced the question of whether the New York State anti-discrimination law could be applied to ERISA plans or whether ERISA preempted the state law.[254] In the Court's analysis of ERISA preemption, it looked to the scope of Title VII at the time of the lawsuit.[255] The Court noted that at the time the ERISA-covered plans were created, the state anti-discrimination law had exceeded the protections of Title VII, which did not then proscribe employment discrimination on the basis of an employee's pregnancy.[256] It was not until afterward that the Pregnancy Discrimination Act of 1978 added a provision to the Civil Rights Acts of 1964 to prohibit discrimination based on pregnancy, and thus it did not preside over the employee benefit plans in question.[257] After recognizing the breadth of the ERISA preemption clause based on the language of the statute as well as its legislative history,[258] the Court held that the New York State anti-discrimination law was preempted by ERISA for the following two reasons: (1) the state law "relate[d] to" the ERISA plans as noted above;[259] and (2) there were no statutory exceptions to ERISA section 514(a)'s preemption clause to save the law from preemption.[260]

While the Court's reasoning for the first prong is noted above,[261] Justice Blackmun's analysis of the second prong began with an analysis of the ERISA preemption clause itself.[262] Again, ERISA section 514(d) provides that the statute shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any [federal law]."[263] However, the Court acknowledged that Title VII expressly preserves state anti-discrimination laws, considering that "Title VII expressly preserves nonconflicting state laws"[264] and "Title VII requires recourse to available state administrative remedies."[265] Given the EEOC's reliance on state

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252 Shaw v. Delta Airlines, 463 U.S. 85, 88 (1983).
253 *Id.*
254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.* at 92.
258 Shaw v. Delta Airlines, 463 U.S. 85, 95-96 (1983).
259 *Id.* at 97-100.
260 *Id.* at 100-101.
261 *See supra* Part IV.C.
262 *Shaw*, 463 U.S. at 100-101.
263 *Id.* (citing ERISA §514(d)).
264 *Id.* at 101 (citing 42 U.S.C. § 2000e-7).
265 *Id.*

agencies to handle federal discrimination claims brought by employees, Justice Blackmun, in a unanimous opinion, held that state anti-discrimination laws may not be preempted where they provide the same protections as those provided for in federal anti-discrimination laws.[266]

The *Shaw* Court described how the EEOC relies on state law and agencies in processing discrimination claims. Title VII claims brought before the EEOC are referred to the respective state agencies and the EEOC often defers to state administrative determinations.[267] Considering the EEOC's reliance on state agencies, the unanimous Court opinion noted that "[g]iven the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII *to the extent that the Human Rights Law provides a means of enforcing Title VII's commands.*"[268]

Justice Blackmun described that before ERISA's enactment, employees claiming discrimination in connection with a benefit plan would have their complaints referred to the New York State Division of Human Rights. As a result, if ERISA preempted Human Rights Law entirely with respect to covered benefit plans, "the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency." Thus, to preempt state anti-discrimination laws entirely would, in the Court's opinion, "frustrate the goal of encouraging joint state/federal enforcement of Title VII"[269] and "[s]uch a disruption of the enforcement scheme contemplated by Title VII would, in violation of Section 514(d), 'modify' and 'impair' federal law."[270] As a result, in the Court's view, ERISA section 514(d) does not preempt state anti-discrimination laws where they provide the same protections as those provided for in federal anti-discrimination laws.[271]

However, in a decision that continues to control over ERISA preemption cases, Justice Blackmun addressed how the ERISA statute would treat state anti-discrimination laws that prohibit conduct that is currently legal under federal law.[272] Justice Blackmun noted that where "state laws prohibit employment practices that are lawful under Title VII [and other federal anti-discrimination laws[273]] . . . pre-emption would not impair Title VII within the meaning of Section 514(d).[274] Although Title VII does not itself prevent States from extending their

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266 *Id.* at 101-02.

267 *Id.*

268 *Shaw*, 463 U.S. at 100-01. (emphasis added).

269 *Id.*

270 *Id.* at 101-02.

271 *Id.*

272 *Id.* at 103.

273 This case took place in 1983 before many of the other federal anti-discrimination laws were put in place, but the Congressional record suggests that ERISA preemption was intended to include all federal anti-discrimination law. *See supra* Part III.B.

274 *Shaw*, 463 U.S. at 103.

nondiscrimination laws to areas not covered by Title VII . . . it in no way depends on such extensions for its enforcement."[275]

To explain its reasoning for this decision, the Court noted that although Title VII did not preempt state anti-discrimination laws that proscribed additional forms of discrimination or extended the reach of Title VII protections, since Title VII does not depend on the state's anti-discrimination laws in these cases for enforcement, such state laws are preempted by ERISA without violating Section 514(d); notably, Section 514(d) only provides that federal law must not be "construed to alter, amend, modify, invalidate, impair, or supersede [federal anti-discrimination law]."[276] The force behind this decision is again based on Congress' intent: to establish benefit plans "as exclusively a *federal* concern"[277] and to "minimize[] the need for interstate employers to administer their plans differently in each State in which they have employees."[278]

The *Shaw* decision contains a number of practical effects on the American workplace, and, more specifically, employment discrimination law.[279] As a result of this decision, ERISA Section 514(d) will preempt state anti-discrimination employment laws that legislate in areas beyond the coverage of federal fair employment laws.[280] Therefore, in cases regarding ERISA-governed plans, courts and states will first have to determine whether employment practices that are unlawful under the state law are also prohibited by federal law, and "[i]f they are not, the state law will be superseded and the [EEOC] will lack authority to act."[281]

As a result, provided that there is no federal legislation prohibiting employment discrimination based on sexual orientation in the private sector, state anti-discrimination laws prohibiting such discrimination are ineffective as applied to ERISA-governed plans, leaving employers free to make such discriminatory actions.[282] The Court rationalized the possibility that this would allow employers to continue to discriminate in administering ERISA plans on bases not prohibited by federal law, even if they are prohibited by state law, by stating:

> To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of congressional choice and should be addressed by congressional action. To give § 514(d) the broad construction advocated by appellants would

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275 *Id.*

276 *Id.*

277 *Id.* at 105 (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)) (emphasis added).

278 *Id.*

279 *Id.* at 105-06.

280 *Shaw*, 463 U.S. at 105.

281 *Id.* at 105-06.

282 *Id.*

defeat the intent of Congress to provide comprehensive pre-emption of state law.[283]

E. The Current Status of ERISA Preemption Over State Anti-Discrimination Laws Prohibiting Discrimination Based on Sexual Orientation

Despite the *Travelers* decision which somewhat narrowed the scope of ERISA preemption,[284] the legacy of *Shaw* continues to preside over ERISA litigation today, as evidenced by *Partners Healthcare System, Inc. v. Sullivan et al.*, a recent federal district court decision in Massachusetts.[285] *Partners* involved a Massachusetts law prohibiting discrimination on the basis of sexual orientation and associational sex discrimination in relation to ERISA plans.[286] *Partners* is one of the first cases related to state sexual orientation anti-discrimination law and ERISA preemption, and the court held that ERISA preempted the Massachusetts anti-discrimination law prohibiting discrimination based on sexual orientation.[287]

In *Partners*, Jason Webster ("Webster") complained of reverse discrimination on the basis of his sexual orientation against Partners Healthcare System Inc. ("Partners Healthcare") over Webster's ERISA plan.[288] Webster, a heterosexual, alleged that Partners Healthcare discriminated on the basis of sexual orientation by providing ERISA-governed benefits to same-sex domestic partners who shared financial responsibility for a joint residence, but not providing the same benefits to domestic partners of different sexes.[289] The district court adopted the Sixth Circuit's ruling in *Vickers v. Fairfield Medical Ctr.*[290] as persuasive authority that sexual orientation is not protected by Title VII of the Civil Rights Act of 1964.[291] After recognizing that Title VII does not proscribe Partners Healthcare's ERISA administration, even assuming it had discriminated on the basis of sexual orientation, Judge Tauro, writing the majority opinion, noted that "the only correct action is for this court is to enjoin the preempted state claims."[292] As a result, the court granted Partners Healthcare's summary judgment motion, prohibiting state officials from "investigating or adjudicating the question of the compliance of Plaintiff's ERISA benefit plans with Massachusetts state sexual orientation . . . anti-discrimination law."[293]

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283 *Id.* at 106.

284 PURCELL, *supra* note 15, at 42.

285 *See, e.g.*, Partners Healthcare System, Inc. v. Sullivan, 497 F. Supp. 2d 42 (D. Mass. 2007).

286 *Id.*

287 *Id.* at 46.

288 *Id.* at 42.

289 *Id.* at 44.

290 Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006).

291 Partners Healthcare System, Inc. v. Sullivan, 497 F. Supp. 2d 42, 44 (D. Mass. 2007).

292 *Id.* at 46.

293 *Id.*

Professor Catherine L. Fisk, discussing sexual orientation discrimination in relation to ERISA-covered plans, noted that "[a] pervasive form of sexual orientation discrimination in employment is the refusal of employers to provide fringe benefits to same-sex domestic partners on the same terms as benefits are provided to spouses."[294] Professor Fisk explained that even where states and local governments provide domestic partner benefits to state and city employees, most private sector employers assume that ERISA would preempt such an application of law and therefore do not provide such benefits.[295]

Professor Fisk recognized that the City of San Francisco passed legislation in 1997 that prohibited sexual orientation discrimination in employment and required that city contractors provide the same benefits to employees' domestic partners as are provided to employees' spouses.[296] United Airlines resisted providing domestic partner benefits to its employees, and the Air Transport Association—the trade association for the principal U.S. airlines—sued the City to invalidate the ordinance. The United States District Court for the Northern District of California held, unsurprisingly, that ERISA preempted the parts of the City's ordinance that "related to" benefits covered by ERISA on the same basis as the *Shaw* Court did.[297]

A similar case took place in Hawaii.[298] In July 1997, the State of Hawaii enacted legislation that required the extension of benefits to same-sex partners in the private and public sectors.[299] The law "allowed an unmarried adult to designate another unmarried adult as a 'reciprocal beneficiary' ('RB'), and the law required public and private employers to provide legally designated RBs a variety of benefits on the same terms as spouses."[300] However, several employers challenged the law in federal court, and United States District Judge David Ezra held that the "health coverage for the partners of private employees" is preempted by ERISA, which is a statute in place to ensure "uniformity in employee benefit laws from state to state."[301]

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[294] Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267, 267 (1998).

[295] *Id.* at 269-70.

[296] *Id.* at 270 (citing S.F. CAL. ADMIN. CODE § 62 (West 1997)) (noting that San Francisco has a domestic partnership registration program that allows city residents to register their same-sex partner as a domestic partner).

[297] Fisk, *supra* note 294, at 271. *See also* Air Transp. Ass'n of Am. v. City & Cnty. of San Francisco, No. 97-1763, 1998 U.S. Dist. LEXIS 4837, at *135 (N.D. Cal. Apr. 10, 1998).

[298] *See* Linda Hosek, *Draft Bill Will Try to Extend Benefits*, HONOLULU STAR-BULL. (Sept. 27, 1997), http://archives.starbulletin.com/97/09/26/news/satnews.html. *See also* Fisk, *supra* note 294, at 271.

[299] *See* Susan Essoyan, *Hawaii's Domestic-Partner Law a Bust; Ambiguity Blamed*, L.A. TIMES (Dec. 23, 1997), http://articles.latimes.com/1997/dec/23/news/mn-143. *See also* Fisk, *supra* note 294, at 271.

[300] *See* Fisk, *supra* note 294, at 271.

[301] *Id.* (noting, however, that the decision did not affect the extension of ERISA-covered plans to public sector workers). While the court's decision in this case is not officially reported, such a decision makes sense under the current state of ERISA law since ERISA is limited in coverage to private sector

CONCLUSION

In the United States' employment at will system, protection from employment discrimination requires proactive judicial or legislative action, which still has yet to protect all of America's workforce from employment discrimination.[302] Statistics broadly suggest that discrimination in employment against LGB individuals is pervasive throughout the United States, including those states that do and do not prohibit such action.[303] While employment discrimination based on sexual orientation is illegal in twenty-three states and Washington D.C., in the other twenty-seven states, absent local law to the contrary, it is perfectly legal for employers to discriminate against individuals in hiring, promotion, wages, and benefits—even explicitly—on the basis of their sexuality.[304]

One of the main purposes of this Note is to shed light on an area of law that has been largely overlooked. There is a hidden gap in the United States' anti-discrimination laws, which allows employers, their benefits directors, and or plan administrators to discriminate, whether intentionally or not, on the basis of sexual orientation when managing employee benefit plans covered by ERISA without any federal, state, or local culpability or repercussion.[305] The aforementioned cases demonstrate that this is the case even where the state itself—where the employer is located—prohibits discrimination based on sexual orientation.[306] Thus, even in the twenty-three states that prohibit such discrimination,[307] employers are free to discriminate with respect to ERISA-governed employee benefit plans—a broad definition which includes pension and welfare benefit plans providing health benefits, disability benefits, death benefits, prepaid legal services, vacation benefits, day care centers, scholarship funds, apprenticeship and training benefits, or other similar benefits.[308]

While Congress' purposes in creating a broad ERISA preemption clause were to create a nationally uniform policy for ERISA-governed plans[309] and regulate

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employers. *See* PURCELL, *supra* note 15, at ii.

[302] *See supra* Part II.

[303] *See supra* Part I.A.

[304] *See* Table A.

[305] *District Court Finds Discrimination Claim Under MCAD Investigation ERISA-Preempted*, SEYFARTH SHAW LLP (July 2007), http://www.seyfarth.com/dir_docs/news_item/ec094be0-56b2-4ffb-93c7-bfea2b882cf6_documentupload.pdf. "The [*Sullivan*] decision signals to Massachusetts employers, their benefits directors and plan administrators, and their counsel that employees or former employees who challenge benefit plan designs as discriminatory under state anti-discrimination laws may find themselves limited to remedies under ERISA, with their claims decided by a judge (rather than a jury) applying a very deferential standard of review to a plan administrator's interpretation of benefit plan terms." *Id.*

[306] *See supra* Parts III.D, III.E.

[307] *See* Table A.

[308] 29 U.S.C. §1002(1) (2012).

[309] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995).

them "as exclusively a federal concern,"[310] it had the effect of forestalling progressive social reform in relation to the rights of the lesbian, gay, and bisexual community in the workplace. This is especially so considering the legacy of the United States Supreme Court's decision in *Shaw*, wherein the Supreme Court held that state anti-discrimination laws that exceed current federal law protections are preempted by ERISA so far as they "relate to" ERISA-governed plans.[311]

While the Employment Non-Discrimination Act's future is presently unclear, it appears that there is only one course of action that can feasibly be taken to ensure that state laws protecting LGB employees are fully effective in achieving the goal of eradicating sexual orientation discrimination in employment. This requires noting two important considerations: first, since states and municipalities are powerless to prohibit discriminatory practices in the administration of ERISA-governed plans after *Shaw v. Delta Airlines, Inc.*,[312] the resolution of this issue can only be effectuated by federal congressional action;[313] and second, considering Congress' judicially recognized intent that ERISA plans be governed only by federal—as opposed to state—anti-discrimination laws,[314] it appears that the only way to fully protect LGB individuals in employment is to create federal legislation prohibiting employment discrimination based on sexual orientation as opposed to amending ERISA.

Regardless of whether such a bill is passed as its own law or whether Title VII is amended to include sexual orientation, it is clear that the only means to fill the hidden gap enabling employers to continue to discriminate on the basis of sexual orientation is through federal legislative action. Such a law would not only allow state anti-discrimination laws to stand in court as applied to ERISA-governed plans, but it would also enable individuals living in states without such protections to hold their employers accountable for prejudicial and discriminatory conduct which continues to persist in present-day American society.

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310 See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981), as cited in *Travelers Ins. Co.*, 514 U.S. at 656.

311 *See generally* Shaw v. Delta Airlines, 463 U.S. 85 (1983).

312 *See generally id.* at 85.

313 This idea was also expressly acknowledged in the *Shaw* decision. *See supra* note 263-67.

314 *Shaw*, 463 U.S. at 104. The implication that arises from this is that Congress would not weaken ERISA's preemption clause to permit state anti-discrimination laws to control, as this would be contrary to the purposes of creating a nationally uniform benefits law. *See id.*