
Jennifer C. Pizer
Brad Sears
Christy Mallory
Nan D. Hunter

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EVIDENCE OF PERSISTENT AND PERVERSIVE WORKPLACE DISCRIMINATION AGAINST LGBT PEOPLE:
THE NEED FOR FEDERAL LEGISLATION PROHIBITING DISCRIMINATION AND PROVIDING FOR EQUAL EMPLOYMENT BENEFITS

Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter*

Lesbian, gay, bisexual, and transgender (LGBT) people have experienced a long and pervasive history of employment discrimination. Today, more than eight million people in the American workforce identify as LGBT, but there still is no federal law that explicitly prohibits sexual orientation and gender identity discrimination against them.

This Article begins by surveying the social science research and other evidence illustrating the nature and scope of the discrimination against LGBT workers and the harmful effects of this discrimination on both employees and employers. It then analyzes the existing legal protections against this discrimination, which include constitutional protections for public sector workers, court interpretations of Title VII’s

* Jennifer C. Pizer is Legal Director and Arnold D. Kassoy Senior Scholar of Law, the Williams Institute, UCLA School of Law. Brad Sears is Assistant Dean, UCLA School of Law and Executive Director and Roberta A. Conroy Scholar of Law and Policy, the Williams Institute. Christy Mallory is Legal Research Fellow, the Williams Institute. Nan D. Hunter is Professor of Law, Georgetown University Law Center and Legal Scholarship Director, the Williams Institute. Earlier versions of some material presented in this Article have been presented as testimony before Congress or made available through the Williams Institute website. BRAD SEARS ET AL., THE WILLIAMS INST., DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 1-1 (2009), available at http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/; BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 2 (2011), available at http://williamsinstitute.law.ucla.edu/research/workplace/documented-evidence-of-employment-discrimination-its-effects-on-lgbt-people.
ban on sex discrimination, state and local antidiscrimination laws, and corporate policies. This Article determines that, while these laws and policies provide important protection, the current system is incomplete, confusing, and inadequate. This Article next considers empirical research showing that employers do not offer employees with a same-sex spouse or partner the same access to family benefits that they offer to employees with a different-sex spouse, and it examines court decisions finding that a denial of equal benefits is unlawful employment discrimination.

Based on this research and legal analysis, the Article concludes that a federal law like the Employment Non-Discrimination Act (ENDA), a bill pending in Congress that would prohibit sexual orientation and gender identity employment discrimination, is needed. To serve its purpose consistently, however, the bill’s current exemption of employee benefits should be removed. To be sure, ending all forms of unequal treatment based on sexual orientation or gender identity is warranted and feasible, and doing so will have positive effects for both employees and employers.
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I. INTRODUCTION

In the American workforce, more than eight million people (or 4 percent of the U.S. workforce) identify as lesbian, gay, bisexual, or transgender (LGBT). Courts and historians repeatedly have acknowledged that LGBT workers have faced a long and pervasive history of employment discrimination. The first federal bill to prohibit discrimination in employment based on sexual orientation was introduced into Congress in 1973. Since then, similar bills have been introduced into nearly every Congress. Recently, they have included explicit protection against gender identity discrimination as well. The current bill is called the Employment Non-Discrimination Act (ENDA).

During this nearly four-decade-long period, public support for such protections has increased steadily; businesses voluntarily have adopted policies prohibiting discrimination against LGBT employees; states and local governments have added sexual orientation and/or gender identity to their nondiscrimination laws and


2. Id. at 6-1 to 6-25.


policies; and the proscription against sex discrimination in the federal employment nondiscrimination statute, Title VII of the Civil Rights Act of 1964 (“Title VII”), has been interpreted by courts in ways that offer some important protections to LGBT workers. Federal and state constitutional guarantees have been enforced in ways protective of LGBT public sector employees as well.

Despite these legal developments and changes in public opinion toward LGBT people since ENDA was first introduced, consideration of the best available data and analysis of current law lead us to conclude that the need still exists for a federal law prohibiting sexual orientation and gender identity discrimination such as ENDA that requires equal access to employee benefits. Our survey of social science research and other evidence of discrimination in Part II shows that employment discrimination based on sexual orientation and/or gender identity continues, with harmful effects for both employees and employers. In Part III, we find that the incompleteness, inconsistency, and lack of clarity of the existing legal protections have resulted in a system that is more confusing and less effective than would be possible with an explicit federal statute prohibiting sexual orientation and gender identity discrimination. In Part IV, we examine empirical research demonstrating that employees with a same-sex spouse or partner do not receive the same access to benefits that those with a different-sex spouse receive. We also review recent court decisions holding that denial of equal benefits is unlawful employment discrimination. Based on these findings, we conclude not only that a federal law prohibiting sexual orientation and gender identity discrimination such as ENDA is still needed but also that it should be expanded to ensure equal access to employee benefits.

II. OVERVIEW OF RESEARCH AND OTHER EVIDENCE DOCUMENTING EMPLOYMENT DISCRIMINATION AGAINST LGBT EMPLOYEES

Research conducted over the past four decades yields compelling evidence that employment discrimination against LGBT people exists and that it has a range of negative effects on LGBT

6. See id.
employees. The key findings of this body of research, which are discussed in more detail in the following parts, are:

- LGBT people and their heterosexual coworkers consistently report having experienced or witnessed discrimination based on sexual orientation or gender identity in the workplace.  

- As recently as 2008, the General Social Survey found that of the nationally representative sample of LG people, 37 percent had experienced workplace harassment in the last five years, and 12 percent had lost a job because of their sexual orientation.  
  8. DOCUMENTING DISCRIMINATION, supra note 1.

- As recently as 2011, 90 percent of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.  
  9. Id.

- Numerous reports of employment discrimination against LGBT people have been found in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books.  
  10. E.g., id.

- State and local governments and courts have acknowledged that LGBT people have faced widespread discrimination in employment.  
  11. SEARS & MALLORY, supra note 7, at 9.

- Discrimination and harassment in the workplace can have a negative impact on the wages and mental and physical health of LGBT people.  
We conclude that recent research findings show that discrimination against LGBT people in the workplace is persistent and pervasive and that a federal law prohibiting sexual orientation and gender identity discrimination in the workplace, such as ENDA, is still very much needed.

A. Social Science Studies of Workplace Conditions for LGBT Employees

1. Surveys of LGBT Employees and Their Non-LGBT Coworkers

In the last decade, several surveys using probability samples representative of the U.S. population have shown that a large proportion of LGBT people experience discrimination in the workplace because of their sexual orientation and/or gender identity. The 2008 General Social Survey (GSS), conducted by the National Opinion Research Center at the University of Chicago, has been a reliable source for monitoring social and demographic changes in the United States since 1972. The 2008 GSS marks the first time that survey participants were asked about their sexual orientation and included a module of questions about the experience of coming out, relationship status and family structure, workplace and housing discrimination, and health insurance coverage.\(^\text{13}\) Eighty sexual minority respondents completed all or some of the module questions, including fifty-seven LGB-identified respondents and twenty-three respondents who were non-LGB identified but reported having had same-sex sexual partners in the past.\(^\text{14}\) The results presented in this report are based only on the responses provided by LGB-identified individuals.

Results from the 2008 GSS include:
\begin{itemize}
\item Forty-two percent of the nationally representative sample of LGB-identified people had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives, and
\end{itemize}


\(^{14}\) Id. at 1.
27 percent had experienced such discrimination during the five years prior to the survey.\textsuperscript{15}

- Harassment was the form of sexual orientation-based discrimination most frequently reported by respondents who were open about being LGB in the workplace (35 percent reported ever having been harassed, 27 percent had been harassed within the five years prior to the survey), followed by losing a job (16 percent reported ever having lost a job, 7 percent had lost a job within the five years prior to the survey).\textsuperscript{16}

- One third (33 percent) of LGB employees were not open about being LGB to anyone in the workplace.\textsuperscript{17}

- Only 5.8 percent of bisexuals were generally open about their sexual orientation to their coworkers.\textsuperscript{18}

- Of respondents who reported that they were open in the workplace about being LGB, 56 percent had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives, and 38 percent had experienced employment discrimination within the five years prior to the survey.\textsuperscript{19}

- In comparison, of LGB respondents who reported that they were not open in the workplace about being LGB, 10 percent had experienced at least one form of sexual orientation-based discrimination within the five years prior to the survey.\textsuperscript{20}

- Twenty-five percent of LGB-identified respondents who were employed by federal, state, or local government reported having experienced employment discrimination because of their sexual orientation during the five years prior to the survey.\textsuperscript{21}

Results from other surveys using probability samples representative of the U.S. population include:

\textsuperscript{15} SEARS & MALLORY, supra note 7, at 4.
\textsuperscript{16} Id.
\textsuperscript{17} GATES, supra note 13, at 5.
\textsuperscript{18} SEARS & MALLORY, supra note 7, at 4.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
Eighteen percent of LGB respondents to a survey conducted in 2000 had experienced employment discrimination in applying for and/or keeping a job because of their sexual orientation.\textsuperscript{22} Ten percent of LGB respondents to a survey conducted in 2007 were fired or denied a promotion because of their sexual orientation.\textsuperscript{23} Fifty-eight percent of LGB respondents to a survey conducted in 2009 reported hearing derogatory comments about sexual orientation and gender identity in their workplaces.\textsuperscript{24}

Because there are few nationally representative surveys that gather data on employment discrimination against LGBT people, it is useful to look at results from national and local non-probability surveys for a more complete picture of the experiences of LGBT employees. Consistent with the nationally representative surveys, recent national and local non-probability surveys reveal a pattern of discrimination against LGBT workers.

Results from recent non-probability national surveys of LGBT people show the following:

- In 2005, 39 percent of LGBT respondents to a national survey had experienced employment discrimination at some point during the prior five-year period.\textsuperscript{25}
- In 2009, 19 percent of LGBT staff and faculty surveyed at colleges and universities across the country reported that they had “personally experienced exclusionary, intimidating, offensive,” “hostile,” and/or “harassing” behavior on campus—in the single year prior to the interview alone.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{22} Id. at 5.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{26} SEARS \& MALLORY, supra note 7, at 5.
\end{itemize}
• In 2009, 44 percent of LGBT respondents to a national survey reported having faced some form of discrimination at work.  

• In 2010, 43 percent of LGB people surveyed in Utah reported that they had experienced discrimination in employment; 30 percent had experienced some form of workplace harassment on a weekly basis during the previous year.

• In 2010, 27 percent of LG people surveyed in Colorado reported that they had experienced employment discrimination.

• In 2010, 30 percent of LGBT people surveyed in South Carolina reported that they had experienced employment discrimination based on their sexual orientation or gender identity.

LGBT respondents were asked more specific questions about the type of discrimination they had experienced in nine non-probability studies. Results range among the studies indicating that:

• Eight percent to 17 percent were fired or denied employment on the basis of their sexual orientation;

• Ten percent to 28 percent were denied a promotion or given a negative performance evaluation;

• Seven percent to 41 percent were verbally or physically abused, or had their work space vandalized; and

• Ten percent to 19 percent reported receiving unequal pay or benefits.

Even higher percentages of transgender people report experiencing employment discrimination or harassment. When


transgender respondents were surveyed separately in six non-probability studies conducted between 1996 and 2006, the percentages reporting employment discrimination based on gender identity ranged from 20 percent to 57 percent. Among the studies, rates of discrimination by type were within the following ranges:

- Thirteen percent to 56 percent were fired;
- Thirteen percent to 47 percent were denied employment;
- Twenty-two percent to 31 percent were harassed; and
- Nineteen percent were denied a promotion.

Results from more recent non-probability surveys are consistent with results from the older studies:

- A 2009 survey of transgender individuals in California revealed that 70 percent of respondents reported having experienced workplace discrimination related to their gender identity.
- In 2010, 67 percent of transgender respondents to a survey of LGBT Utah residents reported that they had experienced discrimination in employment; 45 percent had experienced workplace harassment on a weekly basis during the previous year.
- In 2010, 52 percent of transgender respondents from Colorado reported that they had experienced discrimination in employment.
- As recently as 2011, 78 percent of respondents to the largest survey of transgender people to date reported experiencing at least one form of harassment or mistreatment at work because of their gender identity; more specifically, 47 percent had been discriminated against in hiring, promotion, or job retention.

32. Id. at 560.
33. Id.
35. ROSKY ET AL., supra note 28, at 1.
36. ONE COLO. EDUC. FUND, supra note 29.
37. JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL
• Of Massachusetts respondents to the 2011 survey (above), 76 percent had experienced harassment, mistreatment, or discrimination in employment. More specifically, 20 percent had lost a job, 39 percent were not hired for positions they had applied for, and 17 percent were denied promotions. 38

These findings are consistent with the survey responses of the heterosexual coworkers of LGB people who reported witnessing sexual orientation discrimination in the workplace. Across these studies, 12 percent to 30 percent of heterosexual respondents reported having witnessed anti-gay discrimination in employment. 39

2. Controlled Experiments

In controlled experiments, researchers create scenarios that allow comparisons of the treatment of LGB people with treatment of heterosexuals. A review of published literature found nine studies that used controlled experiments to measure discrimination based on sexual orientation in employment or public accommodations. 40 Eight of the nine studies found evidence of discrimination. 41

In the studies that were focused on employment, researchers have sent out matched resumes or job applicants to potential employers with one resume or applicant indicating they are LGB and the other not. For example, in the most recently published study of this type, researchers sent 1,769 pairs of resumes to employers in seven states who had advertised openings for white-collar, entry-level jobs. 42 The resumes in each pair were matched in all respects, except that one resume indicated that the applicant had been involved with a gay campus organization, and the other did not. 43 Based on the number of interviews offered to the fictitious candidates, the study concluded that a heterosexual man would have to apply to fewer than


39. SEARS & MALLORY, supra note 7, at 8.


41. Badgett et al., supra note 31, at 590–93; Tilesik, supra note 40, at 586.

42. Tilesik, supra note 40, at 599–601.

43. Id.
nine different jobs to receive a positive response, while a gay man would have to apply to almost fourteen jobs.\textsuperscript{44} The study also found that discrimination was generally higher in states without sexual orientation-nondiscrimination laws and among employers who “emphasized [in the job advertisement] the importance of stereotypically male heterosexual traits.”\textsuperscript{45}

\textbf{B. Courts, Legislatures, and Administrative Agencies Have Acknowledged and Described Continuing Patterns of Discrimination Against LGBT People}

Evaluating the research summarized above, as well as other evidence of discrimination, courts, legislatures, administrative agencies, and scholars have reported continuing patterns of discrimination against LGBT people.

1. Findings by Courts and Legal Scholars

Numerous courts and legal scholars have acknowledged and documented the history and patterns of discrimination against LGBT people in this country. Every state and federal court that has substantively considered whether sexual orientation classifications should be presumed to be suspect for purposes of equal protection analysis—whatever they decided on that ultimate question—has recognized that LGBT people have faced a long history of discrimination.\textsuperscript{46} For example, in 2010, when considering whether an amendment to the California Constitution limiting marriage to different-sex couples (Proposition 8) violated the U.S. Constitution, the U.S. District Court for the Northern District of California found that “[g]ays and lesbians have been victims of a long history of discrimination” and that “[p]ublic and private discrimination against gays and lesbians occurs in California and in the United States.”\textsuperscript{47}

In 2009, the California Supreme Court determined that government classifications based on sexual orientation, including marriage restrictions, should be subject to heightened scrutiny under the equal protection clause of the California Constitution in part

\textsuperscript{44} \textit{Id.} at 605–06.

\textsuperscript{45} \textit{Id.} at 586, 606.


\textsuperscript{47} Perry, 704 F. Supp. 2d at 981.
because “sexual orientation is a characteristic . . . that is associated with a stigma of inferiority and second-class citizenship, manifested by the group’s history of legal and social disabilities.”\textsuperscript{48} Similarly, in 1995, the Sixth Circuit concluded, “Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.”\textsuperscript{49}

To date, at least twenty state and federal courts assessing whether classifications based on sexual orientation should receive heightened equal protection scrutiny under the federal or a state constitution have concluded, in more than two dozen judicial opinions, that LGBT people have faced a history of discrimination.\textsuperscript{50} Dozens of legal scholars have reached the same conclusion.\textsuperscript{51}

Additionally, in July 2011, the Ninth Circuit cited the history of discrimination against gay and lesbian people in its decision to lift its stay of a district court ruling that had held the military’s “Don’t Ask, Don’t Tell” policy of excluding openly gay service members unconstitutional under the First Amendment and the Due Process Clause of the U.S. Constitution.\textsuperscript{52}

2. Findings by Federal, State, and Local Governments

The federal government, as well as many state and local governments, similarly have concluded that LGBT people have faced widespread discrimination in employment. For example, the executive branch of the federal government in 2011 acknowledged a long history of systematic discrimination against gay men and lesbians. In February 2011, U.S. Attorney General Eric Holder issued a statement that President Obama had determined that classifications based on sexual orientation should receive heightened

\textsuperscript{48} \textit{In re Marriage Cases}, 183 P.3d 384, 442 (Cal. 2008).


\textsuperscript{50} See \textit{DOCUMENTING DISCRIMINATION}, \textit{supra} note 1, at 6-1 to 6-12; \textit{Perry}, 704 F. Supp. 2d at 981; \textit{see also In re Balas}, 449 B.R. 567, 574–76 (Bankr. C.D. Cal. 2011) (noting the history of discrimination against LGBT people in concluding that heightened scrutiny should apply to a rule prohibiting the filing of a joint bankruptcy petition by a married same-sex couple, and concluding that the rule violated the couple’s federal equal protection rights).

\textsuperscript{51} \textit{DOCUMENTING DISCRIMINATION}, \textit{supra} note 1, at 6-1, 6-13 to 6-25.

\textsuperscript{52} Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010), \textit{vacated}, 658 F.3d 1162 (9th Cir. 2011); Order, Nos. 10-56634, 10-56813, 2011 WL 2982102 (9th Cir. July 15, 2011).
equal protection scrutiny in part because of a “documented history of discrimination” against LGB people. In a letter to Congress conveying the president’s reasoning, Attorney General Holder explained that the executive branch would take this position, in particular, in pending cases considering the constitutionality of the Defense of Marriage Act (DOMA). “[f]irst and most importantly, [because] there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities.”

Accordingly, the Department of Justice (DOJ) submitted a brief in July 2011 in Golinski v. U.S. Office of Personnel Management, a case then pending in the U.S. District Court for the Northern District of California, explaining the Obama administration’s conclusion that DOMA unconstitutionally discriminates based on sexual orientation. In its analysis, the DOJ pointed to a “long and significant history of purposeful discrimination” against LGBT people by federal, state, and local governments, and by private parties.

In at least eight states, an executive order, statute, and/or an official document of a law-making body includes a specific finding of employment discrimination based on sexual orientation or gender identity; in at least five other states, government commissions that have undertaken studies of employment discrimination have issued findings of sexual orientation and gender identity discrimination in their reports. For example, the legislative findings set forth in New York’s Sexual Orientation Non-Discrimination Act include the statement, “[M]any residents of this state have encountered prejudice on account of their sexual orientation, and . . . this prejudice has severely limited or actually prevented access to employment,

57. SEARS & MALLORY, supra note 7, at 9.
58. Id. at 9.
housing, and other basic necessities of life, leading to deprivation and suffering."59 And, in 2007, the Iowa Civil Rights Commission said in support of an amendment adding sexual orientation and gender identity to the state’s antidiscrimination statute:

We no longer wish to see our children, neighbors, co-workers, nieces, nephews, parishioners, or classmates leave Iowa so they can work, prosper, live or go out to eat. Our friends who are gay or lesbian know the fear and pain of hurtful remarks, harassment, attacks, and loss of jobs or housing simply because of their sexual orientation or gender identity.60

3. Administrative Complaints and Other Documented Examples of Discrimination

a. Administrative complaints

Data from states that currently prohibit workplace discrimination on the basis of sexual orientation and/or gender identity demonstrate the continuing existence of discrimination against LGBT people and those perceived to be LGBT. For example, a 1996 study of data collected from state and local administrative agencies on sexual orientation employment discrimination complaints showed 809 complaints filed with state agencies in nine states that prohibited sexual orientation discrimination by statute or executive order.61 In 2002, the U.S. Government Accountability Office compiled a record of 4,788 state administrative complaints alleging employment discrimination on the basis of sexual orientation or gender identity filed between 1993 and 2001.62 And in 2008 and 2009, the Williams Institute conducted two studies of administrative complaints alleging sexual orientation and/or gender identity discrimination filed with state and local enforcement agencies.

agencies. The 2008 study gathered all complaints of sexual orientation and gender identity employment discrimination filed in the twenty states that then had sexual orientation and/or gender identity nondiscrimination laws. The study gathered a total of 6,914 complaints filed from 1999 to 2007.63

The 2009 study focused on employment discrimination against public sector workers and contacted the then 20 states and 203 municipalities with sexual orientation and gender identity nondiscrimination laws and ordinances. The responding states and municipalities provided a record of 460 complaints filed with state agencies from 1999 to 2007, and 128 complaints filed with local agencies from as far back as 1982 by state and local government employees.64 Because several state and local governments did not respond, or did not have complete records, this number most likely underrepresents the number of such complaints actually filed during that period.

Two other Williams Institute studies demonstrate that when the number of complaints is adjusted for the population size of workers who have a particular minority trait, the rate of complaints filed with state administrative agencies alleging sexual orientation discrimination in employment is comparable to the rate of complaints filed alleging race or sex discrimination. 65 Another Williams Institute study used a similar methodology to compare filing rates of sexual orientation discrimination complaints by public sector workers and by private sector workers. 66 The study found that sexual orientation filings were slightly lower, but similar, for

64. Documenting Discrimination, supra note 1, at 11-10 to 11-17.
65. The earlier study conducted in 2001, using the same methodology, found that in six of ten states surveyed, the incidents of sexual orientation filings fell between the incidence of sex and race discrimination filings. In two other states, the prevalence of sexual orientation filings exceeded that of both race and sex and in only two states did sexual orientation filings fall below race and sex filings. See William B. Rubenstein, Do Gay Rights Laws Matter?: An Empirical Assessment, 75 S. Cal. L. Rev. 65, 65–68 (2001).
employees in the public sector when compared to filings by employees in the private sector.\footnote{67. \textit{Id.} at 1.}

\textit{b. Other documented examples of discrimination}

The 2009 Williams Institute report on discrimination in the public sector found more than 380 documented examples of workplace discrimination by state and local government employers against LGBT people from 1980 through 2009.\footnote{68. \textit{Executive Summary}, in \textit{DOCUMENTING DISCRIMINATION}, supra note 1, at 12.} These examples had been culled from court opinions, administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books. The examples came from forty-nine of the fifty states and every branch of state government. Many of the workers in the examples had been subject to verbal harassment. The following is a very limited sampling of what LGBT people reported having been called in the workplace: an officer at a state correctional facility in New York, “pervert” and “homo”; a lab technician at a state hospital in Washington, a “dyke”; and an employee of New Mexico’s Juvenile Justice System, a “queer.” And there were countless instances of the use of “fag” and “faggot” in the report. The reported incidents frequently also included physical violence. For example, a gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her declaring that God wanted her to die.\footnote{69. \textit{Id.} at 13.} Many employees reported that, when they complained about this kind of harassment and requested help, they were told that it was of their own making, and no action was taken.\footnote{70. \textit{Id.}}

\textit{c. Indications of underreporting}

The record of discrimination in court cases, administrative complaints, and other documents should not be taken as a complete record of discrimination against LGBT people by state and local
governments. First, the researchers reported that not all of the administrative agencies and organizations that enforce antidiscrimination laws responded to their requests. Second, several academic studies have shown that state and local administrative agencies often lack the resources, knowledge, and willingness to consider sexual orientation- and gender identity-discrimination complaints. Similarly, legal scholars have noted that courts and judges often have been unreceptive to LGBT plaintiffs and reluctant to write published opinions about them, which reduces the number of court opinions and administrative complaints. Third, many cases settle before an administrative complaint or court case is filed. Unless the parties want the settlement to be public and the settlement is for a large amount, it is likely to go unreported in the media or academic journals. Fourth, LGBT employees are often reluctant to pursue claims for fear of retaliation or of “outing” themselves further in their workplace. Thus, for example, a study published in 2009 by the Transgender Law Center reported that only 15 percent of those who said they had experienced some form of discrimination said they had filed a complaint. Indeed, numerous studies have documented that many LGBT people are not “out” in the workplace due to fear of discrimination. This issue is discussed further in the next part.

C. Research Documents That Workplace Discrimination Negatively Affects the Income and Health of LGBT People

Social science research has documented not only the pervasiveness of sexual orientation and gender identity discrimination but also the negative effects of such discrimination on LGBT people. Because of discrimination, and fear of discrimination, many LGBT employees hide their identities, are paid less, and have fewer employment opportunities than non-LGBT employees do. Research studies also have documented that such discrimination, as

71. *Id.* at 13–14.
72. *Id.* at 14.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. See *infra* Part II.C.1 for a review of research showing that many LGBT people are not out in the workplace.
the expression of stigma and prejudice, exposes LGBT people to increased risk of poorer physical and mental health.

1. Concealing LGBT Identity in the Workplace

Numerous studies have documented that many LGBT people conceal their sexual orientation and/or gender identity in the workplace, which has been linked by research to poor workplace and health outcomes. Results from recent studies include:

- More than one-third of LGB respondents to the GSS reported that they were not out to anyone at work, and only 25 percent were generally out to their coworkers.\(^78\)
- Bisexual respondents to the GSS were much less likely to be out generally to their coworkers than gay and lesbian respondents were (6 percent vs. 38 percent respectively).
- A 2009 non-probability survey conducted across the U.S. found that 51 percent of LGB employees did not reveal their LGBT identity to most of their coworkers.\(^79\)
- A 2011 study found that 48 percent of LGBT white-collar employees were not open about their LGB identity at work.\(^80\)

Surveys have found that fear of discrimination is the reason many LGB employees choose to hide their LGB identity at work. Results from recent studies include:

- A 2005 non-probability national survey found that, of LGB respondents who were not out at work, 70 percent reported that they concealed their sexual orientation because they feared their employment would be at risk or that they would be harassed in the workplace.\(^81\)
- A national probability survey conducted in 2009 found that 28 percent of closeted LGB employees who were not out in the workplace concealed their sexual identity because they felt that it may be an obstacle to career

\(^{78}\) Gates, supra note 13, at 5.
\(^{81}\) Lambda Legal & Deloitte Fin. Advisory Servs. LLP, supra note 25, at 4.
advancement, and 17 percent believed they might be fired. Thirteen percent of closeted LGB respondents and 40 percent of transgender respondents were not open about their sexual orientation or gender identity in the workplace because they feared for their personal safety.82

• Over 26 percent of LGB respondents and 37 percent of transgender respondents to a 2010 survey of LGBT people in Utah reported that they feared discrimination by their current employer.83

The fear these respondents reported of being exposed to discrimination is in line with data showing that people who are out in the workplace are more likely to experience discrimination than people who conceal their sexual identity at work do.

But even in the absence of actual discrimination, staying closeted at work for fear of discrimination can have negative effects on LGBT employees, as recent studies have ascertained:

• A 2007 study of LGB employees found that those who most feared that they would be discriminated against if they revealed their sexual orientation in the workplace had less positive job and career attitudes, received fewer promotions, and reported more physical stress-related symptoms than those who were less fearful of discrimination.84

• A survey of 2,952 LGBT white-collar employees published in 2011 showed that, compared with employees who were out at work, employees who were not out were more likely to feel isolated and uncomfortable “being themselves,” were 40 percent less likely to trust their employer, and were less likely to achieve senior management status (28 percent who were not out had achieved senior management status, compared with 71 percent who were out).85

• Among the white-collar employees who felt isolated at work, closeted employees were 73 percent more likely to

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82. HUMAN RIGHTS CAMPAIGN FOUND., supra note 79, at 15.
83. ROSKY ET AL., supra note 28, at 1.
85. HEWLETT & SUMBERG, supra note 80, at 10.
say they planned to leave their companies within three years.\textsuperscript{86}

- Closeted respondents were more likely to feel stalled in their careers and unhappy with their rate of promotion. Those LGBT employees who were frustrated with their career advancement were three times more likely to say they planned to leave their company within the next year.\textsuperscript{87}

- The white-collar employee respondents who were out were more likely to think that LGBT people are treated unfairly because of their LGBT identity than those who were not out (20 percent of those not out, compared with 5 percent of those who were out).\textsuperscript{88}

2. Wage and Employment Disparities

Twelve studies conducted over the last decade show that gay male workers are paid significantly less on average than their heterosexual male coworkers with the same productivity characteristics, leading researchers to attribute the disparity to different treatment of workers by sexual orientation.\textsuperscript{89} The wage gap identified in these studies varies between 10 percent and 32 percent of the heterosexual men’s earnings.\textsuperscript{90} Lesbians generally earn the same as or more than heterosexual women, but less than either heterosexual or gay men.\textsuperscript{91}

While no detailed wage and income analyses of the transgender population have been conducted to date, six non-probability surveys of the transgender population conducted between 1999 and 2005 found that 6 percent to 60 percent of respondents reported being unemployed and 22 percent to 64 percent of the employed population earned less than $25,000 per year.\textsuperscript{92} Transgender respondents to a
2011 national survey were unemployed at twice the rate of the general population, and 15 percent reported a household income of under $10,000 per year.\textsuperscript{93} The unemployment rate for transgender people of color was nearly four times the national unemployment rate.\textsuperscript{94} In response to a 2010 survey, 25 percent of transgender respondents in Colorado reported a yearly income of less than $10,000.\textsuperscript{95}

3. Impacts on Mental and Physical Health

Research shows that experiencing discrimination can affect an individual’s mental and physical health.\textsuperscript{96} The “minority stress model” suggests that prejudice, stigma, and discrimination create a social environment characterized by excess exposure to stress, which, in turn, results in health disparities for sexual minorities compared with heterosexuals.\textsuperscript{97}

In considering experiences both inside and outside of the workplace, studies of LGB populations show that LGB people suffer psychological and physical harm from the prejudice, stigma, and discrimination that they experience. The ill effects of a homophobic social environment have been recognized by public health authorities including the U.S. Department of Health and Human Services in Healthy People 2010\textsuperscript{98} and Healthy People 2020,\textsuperscript{99} which set goals and objectives designed to improve the health of people in the United States through health promotion and disease prevention.\textsuperscript{100} Healthy People 2010 identified the gay and lesbian population among the

\textsuperscript{93} GRANT ET AL., supra note 37, at 2–3.
\textsuperscript{94} Id. at 3.
\textsuperscript{95} ONE COLO. EDUC. FUND, supra note 29, at 6.
\textsuperscript{96} David R. Williams et al., Racial/Ethnic Discrimination and Health: Findings from Community Studies, 98 AM. J. PUB. HEALTH S29, S29 (2008).
\textsuperscript{100} U.S. DEP’T OF HEALTH & HUMAN SERVS., supra note 98, at 16; U.S. DEP’T OF HEALTH & HUMAN SERVS., supra note 99.
groups to be targeted for reduction of health disparities. In explaining the reason for the inclusion of the gay and lesbian population as one of the groups requiring special public health attention, the Department of Health and Human Services noted, “The issues surrounding personal, family, and social acceptance of sexual orientation can place a significant burden on mental health and personal safety.” The Institute of Medicine of the National Academies, an independent body of scientists that advises the federal government on health and health policy matters, reiterated the point in its 2011 report *The Health of Lesbian, Gay, Bisexual and Transgender People*, in which it said, “LGBT people . . . face a profound and poorly understood set of . . . health risks due largely to social stigma.”

Research about mental and physical health outcomes of LGBT people has yielded findings that support the minority stress model. For example, a 2009 survey conducted by the Massachusetts Department of Public Health of state residents found that 83 percent of heterosexual respondents indicated they were in excellent or very good health compared to 78 percent of gay men or lesbians, 74 percent of bisexual respondents, and 67 percent of transgender respondents. A number of studies have demonstrated links between minority stress factors and physical health outcomes, such as immune function, AIDS progression, and perceived physical well-being. For example, studies have examined the impact of concealing one’s sexual orientation as a stressor. Thus, HIV-positive but healthy gay men were followed for nine years to assess factors that contribute to progression of HIV (e.g., moving from

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102. Id.
103. INST. OF MED., supra note 97, at 14.
104. Id. at 1–2, 7, 20–21.
asymptomatic HIV infection to a diagnosis with an AIDS defining disease, such as pneumonia). The researchers showed that HIV progressed more rapidly among men who concealed their gay identity than among those who disclosed it. This was true even after the investigators controlled for the effects of other potentially confounding factors, like health practices, sexual behaviors, and medication use. More recent studies, conducted in the context of availability of more effective HIV medications than were available to the men in the 1996 study, found, similarly, that concealment of one’s gay identity was associated with a lower CD4 count, a measure of HIV progression.

High levels of perceived discrimination or fear of discrimination among LGBT people also have been linked to higher prevalence of psychiatric disorders, psychological distress, depression, loneliness, and low self-esteem. And experiences of anti-gay verbal harassment, discrimination, and violence have been associated with lower self-esteem, higher rates of suicidal intention, anxiety, anger, post-traumatic stress, other symptoms of depression,

109. *Id.* at 224–25.
110. *Id.* at 226.
112. See, e.g., David M. Huebner et al., *Do Hostility and Neuroticism Confound Associations Between Perceived Discrimination and Depressive Symptoms?*, 24 J. SOC. & CLINICAL PSYCHOL. 723, 723 (2005); Mays & Cochran, *supra* note 12, at 1869.
Discrimination in the employment context specifically has been found to negatively affect the well-being of LGBT people. Results from studies focused on discrimination in the workplace include:

- According to a 1999 study, LGB employees who had experienced discrimination had higher levels of psychological distress and health-related problems. They also were less satisfied with their jobs and were more likely to contemplate quitting and to have higher rates of absenteeism.

- A 2010 study indicated that, although generally there are no differences between LGBT workers and non-LGBT workers in job performance, if LGBT employees are afraid of discrimination or preoccupied with hiding their LGBT identity, their cognitive functioning may be impaired.

- A 2009 national survey found that many LGBT employees reported feeling depressed, distracted, and exhausted, and avoided people and work-related social events as a result of working in an environment that was not accepting. Some employees reported that the lack of acceptance in their workplace had caused them to look for other jobs or to stay home from work.

- Conversely, a 2008 study found that supervisor, coworker, and organizational support for LGB employees had a positive impact on employees in terms

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120. Id.


of job satisfaction, life satisfaction, and outness at work. 124

In sum, despite the variations in methodologies, contexts, and time periods of the studies reviewed here, the accumulated evidence demonstrates a compelling national picture consistent with the case law and other incident reports: sexual orientation- and gender identity-based discrimination remain indisputably common in many workplaces across the country and in both the public and private sectors. Further, an emerging body of research shows that this discrimination has negative effects upon LGBT employees in terms of physical and emotional health, wages and opportunities, job satisfaction, and productivity. In the next part we examine whether current federal, state, and local prohibitions are sufficient to address the ongoing discrimination that LGBT people face in the workplace.

III. THE LEGAL LANDSCAPE

While current federal, state, and local laws—and an increasing number of companies by their own policies—prohibit employment discrimination on the basis of sexual orientation and gender identity to some extent, these protections are incomplete at the federal level, inconsistent or nonexistent at the state and local levels, and often unenforced or unenforceable when they exist at the local level or simply as a matter of corporate policy. No federal statute explicitly prohibits employment discrimination based on sexual orientation or gender identity. The prohibition against sex discrimination in Title VII, 125 however, has been interpreted to protect all employees—including LGBT employees—against many forms of adverse treatment. These include harassment based on perceptions that an employee does not conform to gender stereotypes 126 and sexual harassment. 127 In addition, there appears to be a growing recognition

127. See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc); Equal Emp’t Opportunity Comm’n v.
that adverse action against an employee or prospective employee based on the individual undergoing gender reassignment is actionable sex discrimination.128

Only sixteen states and the District of Columbia include both sexual orientation and gender identity in their employment nondiscrimination laws.129 Five more states expressly ban employment bias based on sexual orientation but not based on gender identity.130 Some state laws against sex discrimination have been interpreted to prohibit gender identity discrimination as a form of sex discrimination, as Title VII has been held to do. In addition, as of 2009, more than two hundred cities and counties also covered one or both forms of discrimination.131

Public sector employees have more protection than those in the private sector. Under the U.S. Constitution, public sector employees may be protected against at least some forms of discrimination on the basis of sexual orientation and gender identity.132 A presidential executive order protects civil service employees of the federal government from discrimination based on sexual orientation,133 and a presidential directive protects them from discrimination based on gender identity.134 Some state constitutions have been interpreted to

131. See Executive Summary, in DOCUMENTING DISCRIMINATION, supra note 1, 11–12.
132. DOCUMENTING DISCRIMINATION, supra note 1, at 3-1 to 3-41.
134. The White House, Memorandum for the Heads of Executive Departments and Agencies (June 17, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-
protect LGBT state and municipal government employees. In eleven states, governors’ executive orders offer additional protections to LGBT state employees. However, only about 15 percent of the LGBT workforce is employed by federal, state, or local government agencies. The great majority of LGBT employees, who must look to federal, state, or local laws that apply to the private sector, find that current coverage is even less complete.

In the discussion that follows, the facts of the included cases illustrate recurring forms of workplace discrimination. We intentionally include only cases decided since 1989, in order to focus on the problems that remain, despite significantly improved public opinion toward LGBT people. The problems that we identify can help inform federal or state legislators considering additional statutory protections and employers considering new policies.

A. At the Federal Level—Title VII

Since the Supreme Court decided Hopkins v. Price Waterhouse, Title VII law has recognized that an employee who suffers job discrimination because of others’ judgments that the employee does not conform to gender stereotypes can assert a viable claim. There is much overlap between discrimination on the basis of sexual orientation and gender identity and discrimination on the basis of gender atypicality.

Professor Andrew Koppelman has noted that everyday experience teaches “that the stigmatization of the homosexual has something to do with the homosexual’s supposed deviance from
traditional sex roles." Koppelman reviewed extensive experiential, sociological, psychological, historical, and legal evidence on this question and concluded: “The two stigmas, sex inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other. There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles.”

Professor Francisco Valdes also has analyzed the relationships between gender norms and sexual orientation bias. Like Koppelman, Valdes devoted substantial attention to sociological and historical research and concluded that “social and sexual gender typicality was and is associated clinically and normatively with heterosexuality, while social or sexual gender atypicality was and is associated with homosexuality (and bisexuality).” Numerous other scholars have pointed to the same phenomenon. As Professor Valdes wrote, “discrimination putatively based on sexual orientation is in concept and practice tightly intertwined with gender discrimination.”

For transgender persons who have changed their gender identification from one sex to the other, the overlap between gender identity discrimination and sex discrimination is even more obvious than it is for lesbian, gay, and bisexual persons. As one author has

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141. Koppelman, supra note 140, at 235.


143. Id. at 135.


145. Valdes, supra note 142, at 335.
noted, “discrimination against transgender . . . employees is per se a form of sex-stereotyping discrimination . . . . The issue of discrimination against transgender employees cuts to the core of what a ‘gender stereotype’ is.” 

146 Discrimination against transgender individuals is rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities—i.e., stereotypes about how men and women are “supposed” to behave and about how male and female bodies are “supposed” to appear. For the most part, in other words, anti-transgender discrimination is not a new or unique form of bias, but rather falls squarely within the parameters of discrimination based on sex, sexual orientation and/or disability. 

In other words, when an employer discriminates based on gender stereotypes, sex-based discrimination is implicated. Title VII’s prohibition against different treatment “because of sex” should not cease to apply because an individual is or may be lesbian, gay, bisexual, or transgender, even though stereotypes about whether a male is masculine enough or a female is feminine enough frequently have motivated exclusions of LGBT people from employment.

Since the Supreme Court’s decision in *Price Waterhouse*, many lower federal courts have begun to recognize the overlap between either sexual orientation or gender identity discrimination and sex stereotype discrimination. Indeed, this sound principle now governs in at least five circuits. 148 In addition to recognition that Title VII’s

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148. Glenn v. Brumby, 663 F.3d 1312, 1316–20 (11th Cir. 2011) (deciding the case on equal protection grounds, but stating that Title VII’s sex-discrimination protections extend to transgender people under a sex-stereotyping theory); Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262–65 (3d Cir. 2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that a harasser was motivated by a belief that a victim did not conform to gender stereotypes, but finding that the plaintiff had been targeted based only on his sexual orientation); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (recognizing that a claim for sex discrimination could be grounded in comments that targeted a gay man for his “effeminate
prohibition against sex discrimination can cover adverse treatment based on sexual stereotypes and gender variance, and on a person’s change of gender presentation or identification, courts also have come to recognize that Title VII’s prohibition against sexual harassment includes same-sex sexual harassment149 and that lesbian, gay, and bisexual employees do not lose their protection against sexual harassment as a function of their sexual orientation.150 Despite this progress, however, courts have not uniformly adopted these understandings. The continuing resistance to them is sufficient to warrant more explicit federal protections.

1. Gender Identity Discrimination as a Form of Sexual Stereotyping

Among the first appellate decisions to extend Price Waterhouse to an adverse job action against a transgender plaintiff was Smith v. City of Salem,151 in which the Sixth Circuit found that a fire department employee was subjected to impermissible sex discrimination under Title VII when she was forced to resign because of nonconformity with gender stereotypes.152 The court held that “discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman.”153

A year later, the Sixth Circuit again recognized actionable sex-stereotype discrimination against a transgender public employee. In Barnes v. City of Cincinnati,154 Barnes filed suit against the City of Cincinnati after he was demoted from his position as a police officer.155 Barnes lived as a woman outside of work and sometimes

151. 378 F.3d 566 (6th Cir. 2004).
152. Id. at 575.
153. Id.
154. 401 F.3d 729 (6th Cir. 2005).
155. Id. at 735.
came to work with makeup, arched eyebrows, and a manicure. At the precinct, one of Barnes’s supervisors told him he was not sufficiently masculine, and another official informed Barnes that he “needed to stop wearing makeup and act more masculine.” After they placed him on probation, superiors told Barnes that he would fail probation for not acting masculine enough; in fact, Barnes became the only officer to fail probation over a three-year period. Explaining that Title VII protects against discrimination based on gender stereotypes regardless of the transgender status of the employee, the court held that Barnes had produced sufficient evidence at trial to establish a Title VII sex stereotype claim. The Eleventh Circuit also relied heavily on cases applying Title VII’s protections from sex stereotyping to transgender people when it found that terminating a transgender state employee violated the Equal Protection Clause of the U.S. Constitution. In Glenn v. Brumby, the court applied heightened scrutiny to the state’s decision to fire the employee because, like Title VII, “the Equal Protection Clause does not tolerate gender stereotypes.”

District courts outside these circuits also have applied Title VII to protect transgender employees. For example, in Schroer v. Billington, the court ruled after trial that the Library of Congress was liable under Title VII for its discrimination against a transgender woman, finding that the plaintiff prevailed on two legal theories: direct or disparate treatment sex discrimination and sex-stereotype discrimination. Testimony at trial had established that the negative reaction to the plaintiff resulted from her not fitting gender stereotypes because she had transitioned. The court also held that discrimination based on a gender transition is literally discrimination based on sex because gender identity is a component of sex, and therefore discrimination based on gender identity is sex

156. Id. at 734.
157. Id. at 735.
158. Id.
159. Id. at 738.
161. 663 F.3d 1312 (11th Cir. 2011).
162. Id. at 1316–20.
164. Id. at 303–08.
165. Id. at 304–08.
166. Id.
The court reasoned that, just as discrimination against converts from one to faith to another is discrimination based on religion, so too is discrimination against a person who undergoes gender transition sex discrimination. The U.S. Department of Justice defended the government in the district court but did not appeal the ruling.

Similarly, in *Kastl v. Maricopa County Community College District*, Estrella Mountain Community College (EMCC) required the plaintiff, who had been diagnosed with gender identity disorder and was transitioning from male to female, to use the men’s restroom until she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply. The court denied EMCC’s motion to dismiss, reasoning that “[t]he presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person’s sex) is a bona fide occupational qualification.”

Some courts, however, have continued the pre-*Price Waterhouse* rule that denies protection based on stereotyping to transgender employees. For example, in *Etsitty v. Utah Transit Authority*, a transgender employee of the Utah Transit Authority was fired after she began living openly as a woman as part of the sex reassignment process. The Transit Authority claimed that the termination stemmed from concerns that other employees would complain about the plaintiff’s restroom usage, despite the fact that no complaints had actually been made. The Tenth Circuit refused to apply Title VII’s prohibition on sex-stereotype discrimination to a

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167. Id.
168. Id.
171. Id. at *1.
172. Id. at *9–10.
173. Id. at *2; see also Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653, 660–61 (S.D. Tex. 2008) (“Lopez has pled, and developed facts in support of, a claim that River Oaks discriminated against her, not because she is transgendered, but because she failed to comport with certain River Oaks employees’ notions of how a male should look.”).
174. 502 F.3d 1215 (10th Cir. 2007).
175. Id. at 1219.
176. Id. at 1224.
transsexual plaintiff, holding that any discriminatory treatment was due to the plaintiff’s transsexual status rather than to gender stereotypes.177 Similarly, in Creed v. Family Express Corp.,178 the district court disregarded the transgender woman plaintiff’s evidence that her supervisors had made comments like, would it “kill [her] to appear masculine for eight hours a day,”179 and held that she had been fired for noncompliance with a valid gender-based appearance code.180

2. Sexual Orientation Discrimination and Sex Stereotyping

For lesbian, gay, and bisexual workers, courts have begun to use a sex stereotyping principle in situations involving harassment, but even here, the results are not uniform. Doe v. City of Belleville181 illustrates the emerging approach. There, two brothers who worked in a city public maintenance crew were taunted for what coworkers apparently perceived as feminine characteristics, including wearing an earring.182 Subjected to “a relentless campaign of harassment by their male co-workers,” they sued the city alleging intentional sex discrimination.183 The plaintiffs alleged that their harassment included being called degrading names like “queer” and “fag,” comments such as “[a]re you a boy or a girl?” and threats of “being taken ‘out to the woods’” for sexual purposes.184 The brother who wore the earring was subject to more ridicule and was once asked whether his brother had passed a case of poison ivy to him through intercourse.185 The verbal taunting turned physical when a coworker grabbed one of the boys’ genitals to determine if he was a girl or a boy.186 As a result, the plaintiffs left two days after giving their two

177. Id.
179. Id. at *9.
180. See id. at *10–11.
181. 119 F.3d 563 (7th Cir. 1997), vacated on other grounds, 523 U.S. 1001 (1998) (remanding to the Seventh Circuit for further consideration of the sexual harassment claim in light of Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), which held that same-sex sexual harassment is actionable under Title VII, but not critiquing the circuit court’s gender stereotyping analysis).
182. Id. at 566–67.
183. Id. at 566–68.
184. Id. at 566–67.
185. Id. at 567.
186. Id.
weeks’ notice due to continuing harassment.\textsuperscript{187} The Seventh Circuit noted that “a homophobic epithet like ‘fag[]’ . . . may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.”\textsuperscript{188} The court found that a “because of” nexus between the allegedly proscribed conduct and the victim’s gender could be inferred “from the harassers’ evident belief that in wearing an earring, [the brother] did not conform to male standards.”\textsuperscript{189}

Trial-level courts similarly have agreed that sex stereotyping claims by gay plaintiffs can be cognizable. For example, in \textit{Fischer v. City of Portland},\textsuperscript{190} the lesbian plaintiff was a city inspector who wore masculine attire.\textsuperscript{191} At work, she did not wear makeup, had short hair, and wore men’s clothing. Her supervisor subjected her to harassing comments based on both gender stereotypes and sexual orientation, including remarking that her shirt looked “like something her father would wear” and saying “are you tired of people treating you like a bull dyke[?]”\textsuperscript{192} Her coworkers also made multiple harassing comments based on both gender stereotypes and sexual orientation, including calling her a “bitch,” saying loudly that they were “surrounded by all these fags at work,” and asking her “would a woman wear a man’s shoes?”\textsuperscript{193} In holding that the employee could proceed with her Title VII claim, the court determined that the sex stereotype claim was not precluded by the fact that the harassers might also have been motivated by sexual orientation bias.\textsuperscript{194}

\textsuperscript{187}. \textit{Id.}
\textsuperscript{188}. \textit{Id.} at 593 n.27.
\textsuperscript{189}. \textit{Id.} at 575. Other appellate courts have rendered comparable decisions. \textit{E.g.}, \textit{Prowel v. Wise Bus. Forms, Inc.}, 579 F.3d 285 (3d Cir. 2009); \textit{Rene v. MGM Grand Hotel, Inc.}, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring); \textit{Nichols v. Azteca Rest. Enters., Inc.}, 256 F.3d 864 (9th Cir. 2001); \textit{Higgins v. New Balance Athletic Shoe, Inc.}, 194 F.3d 252 (1st Cir. 1999).
\textsuperscript{190}. No. CV 02-1728, 2004 WL 2203276 (D. Or. Sept. 27, 2004).
\textsuperscript{191}. \textit{Id.} at *7.
\textsuperscript{192}. \textit{Id.}
\textsuperscript{193}. \textit{Id.} at *8.
\textsuperscript{194}. \textit{See id. at *11–12. See also Ellsworth v. Pot Luck Enters., Inc.}, 624 F. Supp. 2d 868, 877 (M.D. Tenn. 2009) (“Although sexual orientation is not a basis for a Title VII claim, sexual orientation does not prevent a plaintiff from asserting an otherwise-valid sex discrimination claim when the harasser happens to be of the same sex.”); \textit{McMullen v. S. Cal. Edison, No. EDCV 08-9570VAP (PJWx)}, 2008 U.S. Dist. LEXIS 95635, at *21 (C.D. Cal. Nov. 17, 2008) (“[E]ven though sexual orientation does not appear in Title VII . . . harassment based on being effeminate and not conforming to male stereotypes . . . [i]s sufficient to state a claim under Title VII.”).
A number of other courts, however, have rejected stereotyping claims by LGB parties despite strong evidence. Several of these courts have dismissed Title VII claims after concluding that the actual motivation for the alleged discrimination or harassment was the plaintiff’s sexual orientation, and the courts have stressed that gender-based comments must be assessed in context. These courts often admonish against the improper “bootstrapping” of sexual orientation discrimination claims with sex discrimination claims, in effect finding that any workplace harassment based on sexual orientation precludes a claim based on sex, even if much of the harassment is in explicitly gendered terms or based on gender stereotypes.

For example, in *Anderson v. Napolitano*, the court explained away the evidence of gender bias by characterizing it as evidence of sexual orientation bias. Where the plaintiff asserted that his coworkers had mocked him in gendered terms by lisping, the court concluded any such conduct was not based on traits associated with the other sex. Rather, the court said, “the logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp. Lisping is not a stereotype associated with women.”

Other decisions illustrating this misunderstanding of stereotyping include *Trigg v. New York City Transit Authority*, in which a city employee was subjected to a number of comments by

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198. *Id.* at *6.
199. *Id.* at *17–18.
200. *Id.*
his supervisor implicating both sexual orientation and sex stereotypes.202 The supervisor used anti-gay slurs, but also told the employee to do tasks in a “more manly” way and “with more strength.”203 The court rejected the employee’s Title VII gender stereotyping claim because it found that sexual orientation, rather than sex stereotyping, was the sine qua non of the claim.204 The court thus allowed the sexual orientation discrimination to foreclose otherwise actionable sex stereotype discrimination.205 Similarly, in Cash v. Illinois Division of Mental Health,206 an employee of a state home for the developmentally disabled was subjected to hostile treatment based on both sex stereotypes and perceived sexual orientation.207 The employee was accused of being a closeted homosexual, was subjected to simulated sex acts, and was called a “he/she.”208 The federal district court rejected the employee’s Title VII claim, ignoring the gender-stereotyping dimensions of the treatment, and the Seventh Circuit affirmed.209

Other courts have noted the evidence of sex stereotyping, but have rejected the plaintiff’s claim after deeming the conduct insufficiently severe or pervasive to create a hostile environment cognizable under Title VII.210 Likewise, in same-sex sexual harassment cases, the same question always exists of whether the court will deem the plaintiff’s allegations or evidence adequate to satisfy Title VII’s requirement that the adverse conduct must have been severe or pervasive.211

Courts also have rejected same-sex sexual harassment cases on the ground that the harasser did not sexually desire the plaintiff,
although *Oncale* does not require proof of an accused harasser’s sexual desire for the complaining plaintiff.\footnote{212} Many of these cases are notable because they show rejection of sexual harassment claims despite evidence that the harassers had touched the plaintiffs in a sexual manner or had touched themselves in a sexual manner in the presence of the plaintiffs, and/or that the harassers’ comments to the plaintiffs indicated that they actually had been motivated by sexual desire.\footnote{213}

Lastly, courts dispense with Title VII claims if a plaintiff’s pleadings or testimony indicate that he or she believed that the discrimination was based on his or her sexual orientation or transgender status, regardless of what else the evidence might support.\footnote{214} Thus, even as recognition has grown that LGBT employees should have the same right as heterosexual employees have to protection from sexual harassment and discrimination based on sexual stereotyping and others’ hostility to their gender presentation, it appears that at least some judges remain hostile to applying Title VII in this manner. As a result, for LGBT workers facing sexual harassment or discrimination based on gender stereotypes, remedies under Title VII are uncertain at best. Passage of a federal law like ENDA would alleviate this problem by confirming that the range of sex- and gender-related adverse treatment is prohibited, whether the treatment is based on an individual’s gender-related appearance or mannerisms or on the sex of one’s partner.

\footnote{212} Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998) (explaining that a plaintiff can show improper sexual harassment in part with evidence that an alleged harasser’s conduct was motivated by sexual interest in the plaintiff, but suggesting other ways cognizable harassment may be demonstrated without a showing of sexual interest).


B. At the State Level—
State Laws and Executive Orders

1. State Laws

Currently, twenty-one states\(^{215}\) and the District of Columbia\(^{216}\) prohibit employment discrimination on the basis of sexual orientation and/or gender identity by statute.\(^{217}\) Of these twenty-two jurisdictions that prohibit discrimination in employment on the basis of actual sexual orientation, three do not prohibit discrimination on the basis of *perceived* sexual orientation,\(^{218}\) and five do not explicitly prohibit discrimination on the basis of gender identity by statute.\(^{219}\)

In other words, twenty-nine states do not have antidiscrimination statutes that prohibit sexual orientation discrimination, and thirty-four do not have statutes that explicitly

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218. These are Delaware, Vermont, and Washington. DEL. CODE ANN. tit. 19, § 710 (2009); VT. STAT. ANN. tit. 21, § 495 (2008); WASH. REV. CODE § 49.60.030 (2008).

prohibit gender identity discrimination.\footnote{Note that, as with Title VII, the sex discrimination prohibitions in every state’s employment law may be interpreted by each state’s courts as forbidding gender identity discrimination.} In terms of population, 56 percent of Americans live in states that do not offer protection from sexual-orientation discrimination in the workplace, and 77 percent live in states that do not explicitly prohibit employment discrimination based on gender identity.\footnote{E-mail from Dr. Gary Gates, Williams Distinguished Scholar, to Jennifer C. Pizer, Legal Dir. & Arnold D. Kassoy Senior Scholar of Law, the Williams Inst., UCLA Sch. of Law (March 19, 2012) (on file with the Williams Institute).}

2. Executive Orders


- None provides employees a private right of action;\footnote{For example, the Virginia Supreme Court ruled in June 2009 that there was “no reversible error” in a lower court decision holding that an executive order prohibiting discrimination based on sexual orientation created no right for the aggrieved employee to file suit in court. Va. Dep’t of Human Res. Mgmt., Office of Equal Emp’t Servs., Private Letter Ruling 0107–038 (Jan. 7, 2009); Final Order, Moore v. Va. Museum of Natural History, No. 690CL0900035–00 (Va. Cir. June 15, 2009).}
- Only seven confer any power to investigate complaints;\footnote{DOCUMENTING DISCRIMINATION, supra note 1, at 15-3; N.Y. Exec. Order 33 (Dec. 16, 2009).}
- The executive orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have been issued and then rescinded by successive governors during the last fifteen years.\footnote{DOCUMENTING DISCRIMINATION, supra note 1, at 15-3.
3. Local Laws

More than two hundred cities and counties have enacted local ordinances prohibiting employment discrimination on the basis of sexual orientation and/or gender identity. In 2008, the Williams Institute identified 203 such municipalities located in thirty-five states. More than two hundred cities and counties have enacted local ordinances prohibiting employment discrimination on the basis of sexual orientation and/or gender identity. In 2008, the Williams Institute identified 203 such municipalities located in thirty-five states.226 There is no state statutory protection or any identified municipality that explicitly prohibits employment discrimination on the basis of sexual orientation or gender identity in Alaska, Arkansas, Idaho, Mississippi, Montana, Nebraska, North Dakota, South Carolina, Tennessee, or Wyoming. Several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms, or willingness to accept and investigate sexual orientation and/or gender identity discrimination complaints.227

4. Limitations on Effectiveness of State and Local Laws

a. Resource and capacity impediments to agency enforcement

The Williams Institute’s recent research concerning the enforcement efforts and experiences of state agencies yielded results consistent with earlier studies. A 2009 Williams Institute study asked 20 state and 203 local government enforcement agencies to provide data on sexual orientation and gender identity discrimination complaints filed by public sector workers.228 Of the 20 state enforcement agencies contacted, only 6 made redacted complaints available for review.229 Moreover, only 122 of the 203 local agencies responded and only 23 provided documentation of specific examples of discrimination against public sector employees.230

Of the agencies that responded:

- Two had incorrectly referred such complainants to the U.S. Equal Employment Opportunity Commission

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226. Executive Summary, in DOCUMENTING DISCRIMINATION, supra note 1, at 11–12.
228. Executive Summary, in DOCUMENTING DISCRIMINATION, supra note 1, at 11.
229. DOCUMENTING DISCRIMINATION, supra note 1, at 11-5.
230. Id. at 11-12, 11-16 tbl.12-H, 11-17 tbl.12-I.
(EEOC), despite the lack of federal policy authorizing the EEOC to receive and investigate complaints of sexual orientation discrimination;

- One inaccurately reported that the city in question did not prohibit such discrimination;
- One incorrectly reported there was no administrative enforcement mechanism for such complaints;
- Five said they did not have the resources to investigate such claims and that they referred callers to their state administrative agency; and
- Three said they lacked the resources to provide the requested data.231

b. Threat of repeal

In addition to limitations in scope of coverage, enforcement mechanisms, remedies, and resources for implementation and enforcement, state and local laws prohibiting employment discrimination against LGBT people also have been vulnerable to repeal. From 1974 to 2009, over 120 ballot measures sought to repeal or prevent laws against sexual orientation or gender identity discrimination.232 Half of these measures passed.233 Twenty-two of the 120 measures were brought between 2000 and 2009.234 Ballot initiatives aimed at preventing the LGBT population from gaining legal protection from workplace discrimination began as attempts to repeal specific legislation or executive orders. Over time, an increasing number of these campaigns have aimed to block future laws against discrimination. In 1996, the U.S. Supreme Court in Romer v. Evans235 declared unconstitutional Colorado’s Amendment 2, which had conditioned passage of any such protections on amendment of the Colorado Constitution.236 Since the Romer decision, there have been nearly two dozen similar initiatives pressed across the country.237

231. Executive Summary, in DOCUMENTING DISCRIMINATION, supra note 1, at 12; DOCUMENTING DISCRIMINATION, supra note 1, at 11-17 tbl.12-J.
232. DOCUMENTING DISCRIMINATION, supra note 1, at 13-1.
233. Id. at 13-2.
234. Id. at 13-25 to 13-26, 13-51 to 13-54.
236. Id. at 632.
237. Executive Summary, in DOCUMENTING DISCRIMINATION, supra note 1, at 16.
Local ordinances also have been vulnerable to legislative repeal. In 2011, the Tennessee legislature passed a law prohibiting local governments from adopting broader antidiscrimination ordinances or policies than provided for by state law.238 Because Tennessee’s statutes do not prohibit discrimination based on sexual orientation or gender identity, the new law prevents municipalities in the state from enforcing local ordinances prohibiting discrimination on these bases.239 The Tennessee law was passed to overturn a Nashville ordinance that required its city contractors to not discriminate against their employees based on sexual orientation or gender identity.240

5. Corporate Policies

Over the past decade, there has been a surge in the number of corporations adopting workplace policies prohibiting discrimination based on sexual orientation and/or gender identity. In 1999, 72 percent of Fortune 500 companies included sexual orientation in their nondiscrimination policies and only a handful included gender identity.241 By 2009, 87 percent of such companies included sexual orientation and 41 percent included gender identity.242 While this trend is encouraging, these corporate policies do not provide the protections of a state or federal law with an external enforcement agency, a private right of action to seek redress in court, or remedies. While such policies may provide the basis for a breach of contract claim, many employment policies are designed to ensure that making such a claim is difficult if not completely precluded.243

239. See id.
242. Id.
This overview of federal, state, and local laws and corporate policies against discrimination shows that, while the protections against sexual orientation and gender identity discrimination are evolving, they are incomplete at the federal level, inconsistent and nonexistent at the state and local levels, and often unenforced or unenforceable when they exist at the local level or simply as a matter of corporate policy.

IV. ENDA AND THE DENIAL OF EQUAL ACCESS TO BENEFITS FOR EMPLOYEES WITH A SAME-SEX SPOUSE OR PARTNER

The insufficiency of current protections combined with the documentation of ongoing discrimination described above supports the continuing need for a federal law such as ENDA. However, ENDA in its current form does not go far enough because it would not require equal access to employee benefits. In this part, after examining the provisions in ENDA that limit its application to employee benefits, we present research documenting the inequality that LGBT employees face as a result of the denial of equal benefits to employees with a same-sex spouse or partner, and the harms stemming from this inequality. We then examine the growing legal support for the view that this inequality is an unlawful form of employment discrimination, and we consider the increasing practice of companies and state and local governments requiring equal benefits. This substantial body of experience with equal benefits policies for over two decades indicates that they result in minimal costs and have positive effects for employees, employers, and the economy.

A. ENDA and Its Exclusion of Equal Benefits for Same-Sex Spouses and Partners

As noted above, federal legislators have sought to enact explicit protections for lesbian and gay workers consistently since 1973, introducing bills in every Congress since 1994 but the
109th Congress. The 2011 version is pending currently in both the House of Representatives and the Senate.

In its current form, ENDA would prohibit employment discrimination on the basis of actual or perceived sexual orientation or gender identity. It would apply to private- and public-sector employers with fifteen or more employees but not to tax-exempt bona fide private-membership clubs or religious organizations. The remedies provided for generally track those available to an aggrieved employee who files a claim under Title VII. Public- and private-sector employees could recover economic damages. Non-equitable relief for all employees would be subject to graduated caps, and employees of a state or the United States would not be able to recover punitive damages. Equitable relief would be available to all public- and private-sector employees.

The current version of ENDA has several exclusions that may deserve reconsideration in light of developments in law, evolution of business practices, and shifts in public opinion during the years that similar bills have been pending. This Article considers one of them:

245. Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011). The House Education and Labor Committee held a hearing on ENDA during the 111th Congress, in September 2009; the Senate Committee on Health, Education, Labor, and Pensions also held a hearing during the 111th Congress, in November of 2009. Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009). The next steps in the enactment process likely would have been a markup in either the Senate committee or the House committee, followed by a floor vote in that chamber. As of this writing, no hearings or other such actions have been scheduled in either chamber since ENDA’s reintroduction into the 112th Congress.
246. H.R. 1397 § 4(a); S. 811 § 4(a).
252. When the United States is mentioned herein as an employer, it does not include the Armed Forces, to which the current version of ENDA does not apply. "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard. See H.R. 1397 § 7(a); S. 811 § 7(a).
the exclusion of employee benefits. Several provisions in ENDA limit its ability to address employment policies that do not provide the same benefits for employees’ same-sex spouses and partners that are provided to employees’ different-sex spouses.

First, ENDA explicitly provides that none of its protections are to be construed to require employers to treat unmarried couples the same as married couples for employee-benefits purposes. The bill then limits who may be recognized as married under the Act by referencing the federal DOMA, which restricts the terms “marriage” and “spouse” to different-sex partners for federal-law purposes.

Second, the current version of ENDA explicitly precludes disparate impact claims. Under Title VII, such claims commonly are premised on a showing that a facially neutral employer policy or practice has resulted in a group of employees defined by a covered trait, usually race or sex, that is smaller than would seem warranted by the relative sizes of the groups in the general population. A plaintiff may attempt to show that the representation of her or his group is suspiciously small with comparative statistics, which may create an inference of discrimination that shifts the burden to the employer to show a nondiscriminatory reason for the alleged imbalance.

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255. ENDA also excludes disparate impact claims, the data collection processes contained in Title VII with respect to race and sex of employees, and claims asserted by members of the U.S. Armed Forces. There has not been nearly as much study and public discussion about these exclusions from ENDA as there has been about the relative benefits, costs, and equities of family benefits for same-sex partners. As the fields of law, policy, and research concerning LGBT people continue to expand, however, there doubtless will be more attention paid to whether and how more data should be collected about LGBT people, whether disparate impact claims based on sexual orientation and/or gender identity should be allowed under federal law, and whether members of the U.S. Armed Forces should have greater protection.

256. H.R. 1397, § 8(b).

257. 1 U.S.C. § 7 (2006). However, President Obama has directed that federal agencies provide many benefits for same-sex domestic partners of employees to the same extent they are available for spouses of employees. See, e.g., Federal Long Term Care Insurance Program: Eligibility Changes, 75 Fed. Reg. 30267 (June 1, 2010) (to be codified at 5 C.F.R. pt. 875); Federal Travel Regulation (FTR), Terms and Definitions for “Dependent”, “Domestic Partner”, “Domestic Partnership” and “Immediate Family” Interim Rule, 75 Fed. Reg. 67629, 67631 (2010); U.S DEPT OF STATE, FOREIGN AFFAIRS MANUAL, 3 FAM 1611 (2009).

258. H.R. 1397 § 4(g); S. 811 § 4(g).

259. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that an employer violated Title VII by requiring a diploma or passing an intelligence test as a condition of employment because there was no showing that such requirements were related to successful performance of jobs for which they were used, but requirements did disproportionately screen out applicants by race).

260. Id. at 432.
In addition to precluding disparate impact claims explicitly, the current version of ENDA also limits challenges to sexual orientation or gender identity discrimination based on population data. The bill excludes claims based on “the total number or percentage of persons” with a particular sexual orientation or gender identity in a given community, and prohibits the collection of workforce data in the manner that Title VII requires with respect to race and sex. Whether there are common employer practices that LGBT employees should be allowed to challenge using a disparate impact theory, and what methods may be developed for collecting data concerning employee sexual orientation and gender identity without intruding inappropriately into workers’ privacy, are questions for a future day. For now, we focus solely on the fact that ENDA’s current exclusion of disparate impact claims limits the bill’s ability to address unequal employee-benefit policies. This is because employment benefits for family members most commonly have been based on the ostensibly neutral criteria of a recognized marriage and legal ties between parents and children. Marital status was not selected historically as the qualifying criterion in order to categorically exclude LGB people from eligibility for family benefits, but the routine practice nonetheless has had that effect. Consequently, employees claiming that such policies discriminate against them have met with difficulty when courts have required them to show an anti-gay motive for, or an explicit anti-gay rule in, the benefit plan, rather than recognize that it is a form of anti-gay discrimination to require a heterosexual marriage as a condition of receiving family benefits. Although earlier court decisions saw such a marriage requirement as marital status discrimination with

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262. H.R. 1397 § 9; S. 811 § 9.
264. See, e.g., Hinman v. Dep’t of Pers. Admin., 213 Cal. Rptr. 410 (Cal. App. 1985). Moreover, challenges to such policies based on a state nondiscrimination statute have met with difficulty when the statutes themselves precluded claims against a bona fide insurance benefit plan not adopted as a subterfuge to evade the law’s nondiscrimination mandate. See, e.g., Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 444 (Or. Ct. App. 1998). At the same time, as with religion, permitting disparate impact claims based on sexual orientation or gender identity is unlikely to inspire any substantial amount of litigation. Without population-based data about LGBT workers in particular settings, court cases based on statistics—as have been pursued with respect to worker population disparities based on race and sex—seem improbable.
only disparate impacts on lesbian and gay employees, more recent decisions recognize that these exclusions can be direct, intentional, categorical, and actionable.\footnote{265}{Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2001), aff’g Collins v. Brewer, 727 F. Supp. 2d 797 (D. Ariz. 2010); Alaska Civil Liberties Union v. State, 122 P.3d 781, 795 (Alaska 2005); Snetsinger v. Mont. Univ. Sys., 104 P.3d 445 (Mont. 2004); Tanner, 971 P.2d at 446–48.}

The exclusion of an equal-benefits requirement from a bill designed to ensure equal treatment, including equal terms and conditions of employment, may be recognized as a political compromise that was driven years ago by the concerns of some about the costs of domestic partner benefits. However, as discussed below, unequal benefits result in LGBT people having less access to health insurance and other benefits, imposing real harms; courts have increasingly held that such policies are unlawful discrimination;\footnote{266}{Diaz, 656 F.3d at 1008; Golinski v. U.S. Office of Pers. Mgmt., No. C 10-00257 JSW, 2012 U.S. Dist. LEXIS 22071 (N.D. Cal. Feb. 22, 2012); Dragovich v. U.S. Dep’t of Treasury, 764 F. Supp. 2d 1178, 1192 (N.D. Cal. 2011); Alaska Civil Liberties Union, 122 P.3d at 795; Snetsinger, 104 P.3d at 445; Tanner, 971 P.2d at 446–48.} and the rapid growth in corporate and governmental equal benefits policies has shown that the costs of these policies are minimal and they have positive effects for employees, employers, and economies.

\textbf{B. Denial of Equal Access to Employer-Provided Family Benefits Has Harmful Consequences for LGBT People}

LGBT people, and members of same-sex couples in particular, disproportionately lack access to health insurance and other employer-provided benefits.\footnote{267}{WILLIAM D. MOSHER ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002 at 16 (2005), \textit{available at} http://www.cdc.gov/nchs/data/ad/ad362.pdf (“While 19 percent of heterosexual men had no health insurance coverage, 27 percent of homosexual men and 35 percent of those who reported their sexual orientation as something else had no coverage.”).} This causes a range of significant harms. Some consequences of discrimination with respect to two high-value benefits—health insurance and retirement benefits—are considered briefly here.
1. Health Insurance

   a. LGBT people and their families are less likely to have access to health insurance

LGBT people are uninsured at higher rates than heterosexual people are.\textsuperscript{268} The 2002 National Survey of Family Growth, a nationwide probability sample of men and women between the ages of fifteen and forty-four, found that 27.2 percent of gay men and 15.2 percent of lesbians were not insured, compared to 18.9 percent of heterosexual men and 14.8 percent of heterosexual women.\textsuperscript{269} Gay men and bisexual women were 60 percent more likely to report no current health insurance coverage than their heterosexual counterparts were.\textsuperscript{270} Transgender people are even less likely to have health insurance through an employer than LGB people are.\textsuperscript{271} A 2009 survey of 6,450 transgender people from every state in the United States found that only 40 percent received employer-based health insurance coverage, compared to 62 percent of the population at large.\textsuperscript{272}

Multiple studies have attributed at least partial responsibility for the disparity in health insurance coverage to the lack of employer-based coverage to same-sex partners of employees.\textsuperscript{273} Roughly 80 percent of non-elderly people in the United States are insured through their jobs or through a family member’s job—typically a

\textsuperscript{268} Id.
\textsuperscript{269} Id. at 40 tbl.22; see Michael A. Ash & M.V. Lee Badgett, Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples, 24 CONTEMP. ECON. POL’Y 582 (2006) (“Because 80 percent of nonelderly insured people in the United States receive coverage through their own employment or through the employment-based health insurance of a family member, the exclusion of domestic partners makes unmarried couples and their children likely to lack insurance at a rate higher than the 14 percent U.S. average for the nonelderly.” (citations omitted)).
\textsuperscript{270} Mosher et al., supra note 267, at 40 tbl.22. See generally JEFF KREHELY, CTR. FOR AM. PROGRESS, HOW TO CLOSE THE LGBT HEALTH DISPARITIES GAP: DISPARITIES BY RACE AND ETHNICITY (2009) (providing a discussion of disparities in health insurance coverage for LGB people by race and ethnicity).
\textsuperscript{272} Id.
spouse’s job. However, it is still only a minority of employers that offer benefits to same-sex and/or different-sex unmarried partners. A 2009 Kaiser Family Foundation survey of a random sample of employers found that only 21 percent of firms that offered health benefits to cover employees’ spouses reported also covering same-sex domestic partners of employees, while 31 percent offered these benefits to different-sex unmarried partners.

Because a large majority of same-sex couples in the United States are unable to access workplace benefits available only to “spouses,” people in same-sex relationships and in different-sex unmarried relationships are less likely to be insured than those in a different-sex marriage are. In fact, the 2009 Kaiser study, analyzing data from the Current Population Survey (a large, nationally representative sample of households in the United States), found that people with a same-sex or different-sex unmarried partner are two-to-three times more likely to be uninsured than heterosexual married people are, even after controlling for factors influencing coverage. The Kaiser study estimated that provision of employment-related health insurance in a comprehensive manner to domestic partners would cut the number of uninsured people in unmarried couples by 30 percent to 43 percent.

A study analyzing data from the National Health Interview Survey similarly found that women in same-sex couples were less likely to have health insurance than women in different-sex relationships. In contrast, while men in same-sex relationships were less likely to have health insurance than men in different-sex relationships, the difference was not statistically significant.

274. Ash & Badgett, supra note 269, at 582.
275. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, supra note 273, at 37.
276. Id.; see N. Ponce et al., The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California, 29 HEALTH AFF. 1539, 1541 (2010) (noting that while there is some data to suggest that more California firms are offering coverage to same-sex and different-sex domestic partners, there is still a disparity between the financial value of the coverage benefits given to domestic partners and those given to spouses).
277. See KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, supra note 273, at 37.
278. Id.
279. Id.
281. Id.
These figures can be expected to change if the health insurance exchanges provided for in the Patient Protection and Affordable Care Act (PPACA)\textsuperscript{282} begin operation in 2014.\textsuperscript{283} However, serious problems may remain. For example, the PPACA does not address the unavailability to unmarried couples of coverage through an employed partner’s workplace plan.\textsuperscript{284} One can see the inequity if one assumes that a Partner A receives health insurance through employment and a Partner B does not. If Partner B is guaranteed access to a policy through an exchange, such coverage may cost more or cover less than the benefits offered to eligible spouses through Partner A’s employer-provided plan.

\textit{b. Health effects of unequal access to health insurance for LGBT people}

Many research studies have documented health disparities for LGBT people.\textsuperscript{285} For example, studies find that heterosexual adults are more likely than LGB adults are to report that they are in excellent or good overall health.\textsuperscript{286} LGB adults report higher rates of cancer than do heterosexual adults.\textsuperscript{287} Reasons for these health disparities are complicated, but lower rates of health insurance, as well as discrimination and minority stress, and lack of culturally competent medical care, likely combine to produce worse health outcomes for LGBT people.\textsuperscript{288} As a general matter, public health

\textsuperscript{284.} See 124 Stat. 119.
\textsuperscript{285.} INST. OF MED., \textit{supra} note 97.
\textsuperscript{287.} Analysis by Gary J. Gates using the California Health Interview Survey (2007) (on file with the Williams Institute); see Christopher Carpenter, \textit{Sexual Orientation and Body Weight: Evidence from Multiple Surveys}, 21 GENDER ISSUES 60 (2003) (reporting that lesbian and bisexual women are less likely to receive mammograms, and that lesbians, on average, have higher body mass index ratings, which are associated with obesity and other health problems). \textit{See generally Resources, NATIONAL COAL. FOR LGBT HEALTH, http://lgbthealth.webolutionary.com/content/resources} (last visited Feb. 18, 2012) (providing a list of resources with additional information on LGBT health).
\textsuperscript{288.} INST. OF MED., \textit{supra} note 97.
research has confirmed repeatedly that persons without health insurance have poorer health.  

2. Retirement and Pension Plans  

a. Unequal access to retirement and pension plans  

The percentage of the U.S. workforce eligible for a defined benefit pension upon retirement has diminished, as more employers have moved to tax-exempt employee savings plans instead. Under the Pension Protection Act of 2006 (PPA), same-sex partners can inherit a retiree’s tax-exempt retirement account with fewer adverse tax consequences, though the tax treatment for a same-sex partner is still not as preferred as the treatment of a federally recognized spouse. But some retirement plans still offer a defined-benefit pension for a surviving spouse, and comparable inclusion of unmarried partners can be an important element of compensation. Lack of recognition for same-sex partners of employees results in unequal treatment in employers’ retirement plans because many same-sex partners are not eligible for joint-and-survivor annuities or for beneficiary status within employer-provided plans. Women in same-sex couples are particularly disadvantaged in access to employer-sponsored pension plans, and this difference is exacerbated by differential access to survivor annuities for members of same-sex couples.

b. Harmful consequences of unequal access to retirement income  

The lack of a national rule requiring equality in employer-sponsored retirement plans may be a cause of the recent finding that members of same-sex couples have less income from retirement

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plans when they are elderly. Female same-sex couples were found to have almost 20 percent ($12,000) less income in retirement than married different-sex couples have.\textsuperscript{293} This differential results because female same-sex couples receive less income from all three of the primary sources of retirement income for most Americans: Social Security payments, retirement plan income, and income from interest, rentals, and dividends.\textsuperscript{294} Female same-sex couples rely most heavily on Social Security income as a percent of their overall income.\textsuperscript{295} For female couples in which both members are age sixty-five and older, Social Security income comprises 36 percent of their income as compared to 33 percent of married different-sex couples’ income, and 31 percent of male same-sex couples’ income.\textsuperscript{296} On average, female same-sex couples over sixty-five receive 15 percent less ($2,800) in Social Security benefits than do married different-sex couples.\textsuperscript{297}

Female couples also are 10 percent less likely than married different-sex couples over sixty-five to have income from retirement plans or accounts.\textsuperscript{298} On average, their income from these sources is almost 27 percent less ($3,575) than that for married different-sex couples over sixty-five.\textsuperscript{299} Further, they are 21 percent less likely than married different-sex couples over sixty-five to have income from interest, rentals, and dividends.\textsuperscript{300} As a result, elderly female same-sex couples rely more on public benefit programs and continue to work to maintain their household incomes.\textsuperscript{301} Lesbians who are sixty-five and over have a poverty rate twice as high as the poverty rate for married different-sex couples sixty-five and over.\textsuperscript{302} In contrast, as compared to married different-sex couples, male same-sex couples with at least one member age sixty-five or older have higher income during retirement. But they are 21 percent less likely to have income from retirement plans. Instead, they are likely to have

\begin{thebibliography}{99}
\bibitem{293} Id. at 6.
\bibitem{294} Id. at 6–7.
\bibitem{295} Executive Summary, in \textit{The Impact of Inequality}, supra note 292.
\bibitem{296} \textit{The Impact of Inequality}, supra note 292, at 8.
\bibitem{297} Executive Summary, in \textit{The Impact of Inequality}, supra note 292.
\bibitem{298} Id.
\bibitem{299} Id.
\bibitem{300} Id.
\bibitem{301} Id.
\bibitem{302} \textit{Randolph Alberda et al., Cal. Ctr. for Population Research, Poverty in the Lesbian, Gay, and Bisexual Community} 11 (2009).
\end{thebibliography}
more wage income and interest income. In fact, they are 60 percent more likely to have wage income than married different-sex couples are.  

C. Court Rulings Confirm That Denial of Equal Benefits Is Discrimination

A growing number of state and federal courts have concluded that policies excluding employees’ same-sex spouses and partners from coverage equivalent to the coverage offered for different-sex spouses are unlawful forms of employment discrimination. Specifically, these courts have held that public employers offering benefits according to criteria that categorically exclude same-sex partners are acting in violation of constitutional guarantees of equal protection.

1. State Court Rulings

Starting more than a decade ago, state courts began to be receptive to claims that a denial of equal benefits denies equal compensation as guaranteed by state equal protection provisions. In 1998, the Oregon Court of Appeals was the first to hold that a state employer’s decision to use marriage as the sole way employees could qualify an adult partner for benefits—at a time when same-sex couples as a class were barred from that status—violated the Oregon Constitution’s equal privileges and immunities clause.  

The Montana Supreme Court then considered a state-employee benefit plan that offered coverage for unmarried different-sex partners of employees but not for unmarried same-sex partners. That court held in 2004 that this denial of benefits for same-sex partners, who were similarly situated to their unmarried coworkers in different-sex relationships, was an unjustifiable sexual orientation classification.  

The following year, the Alaska Supreme Court echoed the Oregon court and held that a categorical denial of benefits to all employees with a same-sex partner violated the state constitution’s equal protection clause. As a result, the Oregon, Montana, and Alaska

303. Executive Summary, in THE IMPACT OF INEQUALITY, supra note 292.
306. Id. at 450–51.
state governments, as employers, must provide equal benefits, and those courts have charted a path for same-sex-partner recognition as a constitutional matter in contexts where a state’s marriage restriction is not being challenged but its employee-compensation policies are avoidably unequal.\textsuperscript{308}

2. Federal Court Rulings

The Ninth Circuit considered this same issue in \textit{Diaz v. Brewer}\textsuperscript{309} and upheld an injunction requiring the State of Arizona to offer domestic partner health insurance coverage for those of its employees with a same-sex life partner.\textsuperscript{310} The Ninth Circuit explained:

\begin{quote}
[B]arring the state of Arizona from discriminating against same-sex couples in its distribution of employee health benefits does not constitute the recognition of a new constitutional right to such benefits. Rather, it is consistent with long standing equal protection jurisprudence holding that “some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests.”\textsuperscript{311}
\end{quote}

Other pending cases consider similar equal benefits questions in the broader context of a challenge to DOMA.\textsuperscript{312} For example, in \textit{Golinski v. U.S. Office of Personnel Management},\textsuperscript{313} an employee of the Ninth Circuit sought equal access to health insurance for her same-sex spouse.\textsuperscript{314} The U.S. District Court for the Northern District of California assessed the reasons advanced in defense of the law distinguishing between same-sex spouses and different-sex spouses for federal benefits purposes and concluded “that DOMA, as applied to Ms. Golinski, violates her right to equal protection of the law . . . by, without substantial justification or rational basis, refusing to

\begin{footnotes}
308. The Oregon state government also has been required to provide equal benefits by statute since the state’s domestic partnership law went into effect in 2005. OR. REV. STAT. §§ 106.300–.340 (2009).
309. 656 F.3d 1008 (9th Cir. 2001), aff’g Collins v. Brewer, 727 F. Supp. 2d 797 (D. Ariz. 2010).
310. Id. at 1014–15.
314. Id. at *3–10.
\end{footnotes}
recognize her lawful marriage to prevent provision of health insurance coverage to her spouse.”

*Dragovich v. U.S. Department of Treasury*, pending in the U.S. District Court for the Northern District of California, considers the federal constitutional claim advanced by state employees of an equal right to enroll a same-sex spouse or domestic partner in the long-term-care insurance plan offered to state employees. At issue is California’s refusal to allow state workers with a life partner other than a different-sex spouse to enroll in the tax-qualified insurance plan offered by California according to federal tax rules and DOMA. The district court has held preliminarily that DOMA appears to be unconstitutional in this context and thus cannot require the discriminatory exclusion of those otherwise eligible to enroll.

**D. Providing Equal Benefits Has Minimal Costs and Positive Benefits for Employees, Employers, and Economies**

While the exclusion of benefits from ENDA might originally have been part of a political compromise, the growing practice of private companies and state and local governments in offering these benefits has shown that the politics around this issue have changed. Many private employers voluntarily offer equal benefits, recognizing such benefits as part of employee compensation and seeking to gain from the appeal of such benefits in their competition for skilled workers. Indeed, partner benefits have become the norm in many sectors of the economy. As a result, studies increasingly have shown that employers do not find equal family benefits to be burdensome but, instead, believe them to have positive business effects. For the same reasons, many state and local governments voluntarily provide equal benefits. Moreover, when state and local governments have required that their contractors offer partner benefits, these policies have greatly increased the number of employers that do so and have

315. Id. at *49, *64, *85 (holding that heightened scrutiny applies to the anti-gay classification drawn by DOMA, and that the statute fails both heightened scrutiny and on rational basis review).
317. Id. at 1186.
met with little to no resistance. This growing body of experience suggests that inclusion of equal benefits within ENDA would be beneficial not only for employees but for employers as well.

1. Corporate Equal Benefits Policies

The Human Rights Campaign (HRC) has been surveying large corporations for a decade, tracking which ones offer domestic-partner benefits along with other measures of LGBT-friendly policies. HRC’s reports show steady increases. As of 2008, 39 percent of the Fortune 1000, 57 percent of the Fortune 500, and 83 percent of the Fortune 100 companies offered benefits to cover their employees’ same-sex partners.320 As of early 2012, 60 percent of the Fortune 500 companies were offering such benefits.321 The figures for the decade during which HRC conducted its Corporate Equality Index surveys make clear that equal benefits now are a business norm; the rates at which responding companies have been offering benefits to cover their employees’ same-sex partners has risen from 69 percent in 2002 to 89 percent in 2012.322

It has become widely recognized that providing equal family benefits is not burdensome for businesses and, in fact, usually has positive effects for a company’s bottom line.323 Studies consistently suggest a 0.3 percent to 1 percent increase in enrollment when employers offer same-sex domestic partner benefits and a similar increase in costs,324 far less than may be assumed.

Providing benefits to cover same-sex partners does entail a small burden for employers because the benefits are taxed as imputed income to employees for federal tax purposes. Employers thus also must pay taxes on this additional income provided to their

322. Id. at 25; see N. Ponce et al., supra note 276, at 1541 (“The percentage of firms . . . offering . . . coverage to same-sex domestic partners grew from 34.4 percent in 2004 to 64 percent in 2006.”).
324. Ash & Badgett, supra note 269.
employees. In 2007, the Williams Institute estimated that the average amount of payroll tax paid by the employer per employee receiving partner benefits was $248. This taxation of domestic partnership benefits as imputed income requires companies to create a new administrative procedure to calculate the imputed income and corresponding taxes, resulting in an additional minimal burden upon them.

Offsetting these small additional burdens are positive effects for both employees and employers, such as increased employee productivity and improved employee recruitment and retention. Employer statements and research studies indicate that offering equal benefits helps employers attract, recruit, and retain employees. For example, in one public opinion survey, almost half of LGB employees indicated that partner benefits would be their most important consideration if offered another job. Such benefits tend to reduce gay, lesbian, and bisexual employee turnover and to increase their commitment to employers. By reducing turnover, partner benefits correspondingly reduce recruitment and training costs, which can be expensive. These effects have come to be well recognized, including by courts in cases considering whether public employers have business reasons for adopting domestic partner benefit plans for their employees.

326. Id. at 6.
331. See, e.g., Schaefer v. City & Cnty. of Denver, 973 P.2d 717, 719 (Colo. App. 1998) ("[E]mployee compensation, including benefits, is of particular importance to a local government because of its impact on a city’s ability ‘to both hire and retain qualified individuals.’") (quoting Colo. Springs Fire Fighters Ass’n v. Colo. Springs, 784 P.2d 766, 773 (Colo. 1989))); Crawford v. City of Chicago, 710 N.E.2d 91, 98 (Ill. App. Ct. 1999) (noting that cities must be able to offer good employment benefits in order to be able to hire and retain qualified individuals); Tyma v. Montgomery Cnty., 801 A.2d 148, 156 (Md. 2002) (upholding a county partner-benefits plan in part because “many private and public employers provide or plan to provide benefits for the domestic partners of their employees” and “providing domestic partner benefits [would]
Substantial confirming data has been compiled by the City and County of San Francisco, which has taken systematic steps to evaluate the effectiveness and impact of its Equal Benefits Ordinance (EBO) governing public contracts, publishing six reports between 1999 and 2004. The 2004 report showed that nearly all of the city’s contractors (94.6 percent) were complying with the EBO. The city estimated that approximately 66,492 people employed by a contractor had received family benefits by that time because of the EBO.

An external evaluation of the EBO conducted in 2003 inquired into the costs to jurisdictions and contractors of the policy, as well as its potential benefits. Concerning the cost to contractors of complying, the report found that, in general, the increases were small—between 0.02 percent and 0.12 percent. The report also noted that the number of applications for contracts had fallen slightly in the first year but recovered in the subsequent years. And while contractors did see small increases, the city’s costs did not increase to any measurable extent.

The report also determined that the city may have reduced public health spending because more residents had secured health insurance through an employer. The report reasoned that, if the estimated 26,000 city residents indeed were insured due to the EBO in the first five years after implementation, some of them probably had been uninsured previously. As a result, the city’s health system likely would have absorbed the cost of some of their

significantly enhance the County’s ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity.”); Heinsma v. Vancouver, 29 P.3d 709, 712 (Wash. 2001) (upholding city’s authority to offer partner benefits in service of its “strong interest in retaining qualified employees”).


333. Id. Rates of compliance increased from 91 percent six months after the implementation of the EBO to 94.6 percent after seven years. Id. In addition, the majority of contractors with more than one employee (62 percent) had complied with the EBO by providing equal benefits, as opposed to not providing benefits at all. Id.

334. Id.


336. Id. at 2.

337. Id.

338. Id. at 29.
uninsured health care. The 2003 report calculated that the city probably saved a minimum of approximately $10 million because of the increase in insured residents.\textsuperscript{339}

Other health policy studies similarly have shown that, in addition to the benefits for families of access to quality health care through private insurance, there are positive effects for the public fisc and public health programs. These positive effects include public cost savings and reduced demand on public health systems because more people are insured, receive wellness care, and do not need to rely on public systems as a last resort after health problems have become severe.\textsuperscript{340}

Respected scholar Richard Florida studies another potential positive effect businesses and others may experience after adopting a nondiscriminatory benefits plan. Florida notes that this issue arises during a time when businesspeople, policymakers, and scholars have been focusing intensely on the business value of diversity in the United States.\textsuperscript{341} He suggests that LGBT-friendly policies—like employment nondiscrimination, domestic partner benefits, and marriage equality—signal a welcoming and diversity-friendly climate that fosters entrepreneurship and innovation and attracts the creative class and the companies that employ them.\textsuperscript{342} Florida describes the creative class as an eclectic mix of individuals in occupations—including artists, teachers, financiers, software engineers, and scientists—who constitute a relatively young, highly educated, and mobile workforce that values innovation and diversity as essential elements for creating stimulating work environments.\textsuperscript{343} He argues that the creative class represents a key to regional economic development in today’s post-industrial and global economy.\textsuperscript{344}

Although many large national companies offer equal benefits, and those practices influence public views about what is appropriate

\textsuperscript{339.} \textit{Id.}
\textsuperscript{341.} Richard Florida, \textit{The Rise of the Creative Class} (Basic Books 2002).
\textsuperscript{342.} \textit{Id.}
\textsuperscript{343.} \textit{Id.}
\textsuperscript{344.} \textit{Id.}
and fair, there is a need for an equal benefits requirement in ENDA because approximately 70 percent to 80 percent of private employers do not offer domestic-partner benefits. In a 2009 survey of a random sample of employers, only 21 percent of firms that offered health benefits to employees also reported covering same-sex partners of employees. By comparison, 35 percent of firms surveyed said they did not offer such benefits to same-sex partners, and 44 percent reported that such benefits were “not applicable/not encountered,” a response that the authors interpreted as indicating the absence of a policy on partner benefits per se. The latter response was much more common for small employers (46 percent) than it was for large employers (6 percent).

2. Equal Benefits Policies of State and Local Governments

Many state and local governments now provide equal benefits to their own employees for the same reasons that private businesses do. As of 2009, twenty states and the District of Columbia offered benefits to cover the domestic partners of their employees. More than 250 cities, counties, and other local government entities did so as well. At least sixteen municipalities (and the State of California) have followed San Francisco’s lead and have passed an equal benefits law requiring businesses that wish to contract with the government to offer equal family benefits for the domestic partners of employees if they offer such benefits for employees’ different-sex

345. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, supra note 273.
346. Id.
347. Id. at 37, 43.
348. Id. at 43.
351. Id.
spouses,\textsuperscript{352} as an additional component of the contractors’ agreement not to discriminate in other ways. Despite this trend, a federal statutory requirement to end this form of employment discrimination would have substantial effect because thirty states and most localities do not yet have these requirements.

V. CONCLUSION

Is a federal law prohibiting employment discrimination on the basis of sexual orientation and gender identity still needed? Based on the current research and existing laws, the answer is clearly yes. A developing body of social science research confirms that discrimination is persistent, widespread, and harmful.

Current federal, state, and local laws, and voluntary corporate policies, are insufficient to address this pervasive discrimination. Since 1964, Title VII has offered American workers both a firm endorsement of the principle of equal employment opportunity based on race, sex, national origin, and religion, and an effective tool with which to pursue it. The prohibition against sex discrimination has come to be understood as forbidding a broader range of conduct, including types of sexualized and gender-based conduct that often feature prominently in the discrimination complaints of lesbian, gay, bisexual, and transgender workers. State and local laws provide important coverage as well, where they exist and include meaningful remedies.

But, despite some expansion of coverage under Title VII, LGBT workers on the whole are not protected effectively by the existing federal statute and by piecemeal state and local protections.

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While the research will continue, and more detailed legal and policy recommendations will emerge in time, the findings surveyed here should eliminate any doubt about the need for explicit federal statutory protections. ENDA offers those protections and has been ripe for passage for many years. During this period, courts, states, and the private sector have concluded ever more emphatically that ending unequal treatment based on sexual orientation or gender identity—with respect to terms, conditions, and benefits of employment—is warranted, feasible, and beneficial.
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