

112TH CONGRESS
1ST SESSION

S. 811

To prohibit employment discrimination on the basis of sexual orientation
or gender identity.

IN THE SENATE OF THE UNITED STATES

APRIL 13, 2011

Mr. MERKLEY (for himself, Mr. KIRK, Mr. HARKIN, and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To prohibit employment discrimination on the basis of sexual
orientation or gender identity.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employment Non-Dis-
5 crimination Act of 2011”.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

8 (1) to address the history and widespread pat-
9 tern of discrimination on the basis of sexual orienta-

1 tion or gender identity by private sector employers
2 and local, State, and Federal government employers;

3 (2) to provide a comprehensive Federal prohibi-
4 tion of employment discrimination on the basis of
5 sexual orientation or gender identity, including
6 meaningful and effective remedies for any such dis-
7 crimination; and

8 (3) to invoke congressional powers, including
9 the powers to enforce the 14th Amendment to the
10 Constitution, and to regulate interstate commerce
11 and provide for the general welfare pursuant to sec-
12 tion 8 of article I of the Constitution, in order to
13 prohibit employment discrimination on the basis of
14 sexual orientation or gender identity.

15 **SEC. 3. DEFINITIONS.**

16 (a) IN GENERAL.—In this Act:

17 (1) COMMISSION.—The term “Commission”
18 means the Equal Employment Opportunity Commis-
19 sion.

20 (2) COVERED ENTITY.—The term “covered en-
21 tity” means an employer, employment agency, labor
22 organization, or joint labor-management committee.

23 (3) EMPLOYEE.—

24 (A) IN GENERAL.—The term “employee”
25 means—

1 (i) an employee as defined in section
2 701(f) of the Civil Rights Act of 1964 (42
3 U.S.C. 2000e(f));

4 (ii) a State employee to which section
5 302(a)(1) of the Government Employee
6 Rights Act of 1991 (42 U.S.C. 2000e-
7 16b(a)(1)) applies;

8 (iii) a covered employee, as defined in
9 section 101 of the Congressional Account-
10 ability Act of 1995 (2 U.S.C. 1301) or sec-
11 tion 411(c) of title 3, United States Code;
12 or

13 (iv) an employee or applicant to which
14 section 717(a) of the Civil Rights Act of
15 1964 (42 U.S.C. 2000e-16(a)) applies.

16 (B) EXCEPTION.—The provisions of this
17 Act that apply to an employee or individual
18 shall not apply to a volunteer who receives no
19 compensation.

20 (4) EMPLOYER.—The term “employer”
21 means—

22 (A) a person engaged in an industry affect-
23 ing commerce (as defined in section 701(h) of
24 the Civil Rights Act of 1964 (42 U.S.C.
25 2000e(h)) who has 15 or more employees (as

1 defined in subparagraphs (A)(i) and (B) of
2 paragraph (3)) for each working day in each of
3 20 or more calendar weeks in the current or
4 preceding calendar year, and any agent of such
5 a person, but does not include a bona fide pri-
6 vate membership club (other than a labor orga-
7 nization) that is exempt from taxation under
8 section 501(c) of the Internal Revenue Code of
9 1986;

10 (B) an employing authority to which sec-
11 tion 302(a)(1) of the Government Employee
12 Rights Act of 1991 applies;

13 (C) an employing office, as defined in sec-
14 tion 101 of the Congressional Accountability
15 Act of 1995 or section 411(c) of title 3, United
16 States Code; or

17 (D) an entity to which section 717(a) of
18 the Civil Rights Act of 1964 applies.

19 (5) EMPLOYMENT AGENCY.—The term “em-
20 ployment agency” has the meaning given the term in
21 section 701(c) of the Civil Rights Act of 1964 (42
22 U.S.C. 2000e(c)).

23 (6) GENDER IDENTITY.—The term “gender
24 identity” means the gender-related identity, appear-
25 ance, or mannerisms or other gender-related charac-

1 teristics of an individual, with or without regard to
2 the individual’s designated sex at birth.

3 (7) LABOR ORGANIZATION.—The term “labor
4 organization” has the meaning given the term in
5 section 701(d) of the Civil Rights Act of 1964 (42
6 U.S.C. 2000e(d)).

7 (8) PERSON.—The term “person” has the
8 meaning given the term in section 701(a) of the
9 Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

10 (9) SEXUAL ORIENTATION.—The term “sexual
11 orientation” means homosexuality, heterosexuality,
12 or bisexuality.

13 (10) STATE.—The term “State” has the mean-
14 ing given the term in section 701(i) of the Civil
15 Rights Act of 1964 (42 U.S.C. 2000e(i)).

16 (b) APPLICATION OF DEFINITIONS.—For purposes of
17 this section, a reference in section 701 of the Civil Rights
18 Act of 1964—

19 (1) to an employee or an employer shall be con-
20 sidered to refer to an employee (as defined in sub-
21 section (a)(3)) or an employer (as defined in sub-
22 section (a)(4)), respectively, except as provided in
23 paragraph (2) of this subsection; and

1 (2) to an employer in subsection (f) of that sec-
2 tion shall be considered to refer to an employer (as
3 defined in subsection (a)(4)(A)).

4 **SEC. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.**

5 (a) EMPLOYER PRACTICES.—It shall be an unlawful
6 employment practice for an employer—

7 (1) to fail or refuse to hire or to discharge any
8 individual, or otherwise discriminate against any in-
9 dividual with respect to the compensation, terms,
10 conditions, or privileges of employment of the indi-
11 vidual, because of such individual’s actual or per-
12 ceived sexual orientation or gender identity; or

13 (2) to limit, segregate, or classify the employees
14 or applicants for employment of the employer in any
15 way that would deprive or tend to deprive any indi-
16 vidual of employment or otherwise adversely affect
17 the status of the individual as an employee, because
18 of such individual’s actual or perceived sexual ori-
19 entation or gender identity.

20 (b) EMPLOYMENT AGENCY PRACTICES.—It shall be
21 an unlawful employment practice for an employment agen-
22 cy to fail or refuse to refer for employment, or otherwise
23 to discriminate against, any individual because of the ac-
24 tual or perceived sexual orientation or gender identity of
25 the individual or to classify or refer for employment any

1 individual on the basis of the actual or perceived sexual
2 orientation or gender identity of the individual.

3 (c) LABOR ORGANIZATION PRACTICES.—It shall be
4 an unlawful employment practice for a labor organiza-
5 tion—

6 (1) to exclude or to expel from its membership,
7 or otherwise to discriminate against, any individual
8 because of the actual or perceived sexual orientation
9 or gender identity of the individual;

10 (2) to limit, segregate, or classify its member-
11 ship or applicants for membership, or to classify or
12 fail or refuse to refer for employment any individual,
13 in any way that would deprive or tend to deprive any
14 individual of employment, or would limit such em-
15 ployment or otherwise adversely affect the status of
16 the individual as an employee or as an applicant for
17 employment because of such individual's actual or
18 perceived sexual orientation or gender identity; or

19 (3) to cause or attempt to cause an employer to
20 discriminate against an individual in violation of this
21 section.

22 (d) TRAINING PROGRAMS.—It shall be an unlawful
23 employment practice for any employer, labor organization,
24 or joint labor-management committee controlling appren-
25 ticeship or other training or retraining, including on-the-

1 job training programs, to discriminate against any indi-
2 vidual because of the actual or perceived sexual orientation
3 or gender identity of the individual in admission to, or em-
4 ployment in, any program established to provide appren-
5 ticeship or other training.

6 (e) ASSOCIATION.—An unlawful employment practice
7 described in any of subsections (a) through (d) shall be
8 considered to include an action described in that sub-
9 section, taken against an individual based on the actual
10 or perceived sexual orientation or gender identity of a per-
11 son with whom the individual associates or has associated.

12 (f) NO PREFERENTIAL TREATMENT OR QUOTAS.—
13 Nothing in this Act shall be construed or interpreted to
14 require or permit—

15 (1) any covered entity to grant preferential
16 treatment to any individual or to any group because
17 of the actual or perceived sexual orientation or gen-
18 der identity of such individual or group on account
19 of an imbalance which may exist with respect to the
20 total number or percentage of persons of any actual
21 or perceived sexual orientation or gender identity
22 employed by any employer, referred or classified for
23 employment by any employment agency or labor or-
24 ganization, admitted to membership or classified by
25 any labor organization, or admitted to, or employed

1 in, any apprenticeship or other training program, in
2 comparison with the total number or percentage of
3 persons of such actual or perceived sexual orienta-
4 tion or gender identity in any community, State, sec-
5 tion, or other area, or in the available work force in
6 any community, State, section, or other area; or

7 (2) the adoption or implementation by a cov-
8 ered entity of a quota on the basis of actual or per-
9 ceived sexual orientation or gender identity.

10 (g) DISPARATE IMPACT.—Only disparate treatment
11 claims may be brought under this Act.

12 **SEC. 5. RETALIATION PROHIBITED.**

13 It shall be an unlawful employment practice for a cov-
14 ered entity to discriminate against an individual because
15 such individual—

16 (1) opposed any practice made an unlawful em-
17 ployment practice by this Act; or

18 (2) made a charge, testified, assisted, or partici-
19 pated in any manner in an investigation, proceeding,
20 or hearing under this Act.

21 **SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS.**

22 This Act shall not apply to a corporation, association,
23 educational institution or institution of learning, or society
24 that is exempt from the religious discrimination provisions
25 of title VII of the Civil Rights Act of 1964 pursuant (42

1 U.S.C. 2000e et seq.) to section 702(a) or 703(e)(2) of
2 such Act (42 U.S.C. 2000e–1(a), 2000e–2(e)(2)).

3 **SEC. 7. NONAPPLICATION TO MEMBERS OF THE ARMED**
4 **FORCES; VETERANS' PREFERENCES.**

5 (a) ARMED FORCES.—

6 (1) EMPLOYMENT.—In this Act, the term “em-
7 ployment” does not apply to the relationship be-
8 tween the United States and members of the Armed
9 Forces.

10 (2) ARMED FORCES.—In paragraph (1) the
11 term “Armed Forces” means the Army, Navy, Air
12 Force, Marine Corps, and Coast Guard.

13 (b) VETERANS' PREFERENCES.—This title does not
14 repeal or modify any Federal, State, territorial, or local
15 law creating a special right or preference concerning em-
16 ployment for a veteran.

17 **SEC. 8. CONSTRUCTION.**

18 (a) EMPLOYER RULES AND POLICIES.—

19 (1) IN GENERAL.—Nothing in this Act shall be
20 construed to prohibit a covered entity from enforcing
21 rules and policies that do not intentionally cir-
22 cumvent the purposes of this Act, if the rules or
23 policies are designed for, and uniformly applied to,
24 all individuals regardless of actual or perceived sex-
25 ual orientation or gender identity.

1 (2) SEXUAL HARASSMENT.—Nothing in this
2 Act shall be construed to limit a covered entity from
3 taking adverse action against an individual because
4 of a charge of sexual harassment against that indi-
5 vidual, provided that rules and policies on sexual
6 harassment, including when adverse action is taken,
7 are designed for, and uniformly applied to, all indi-
8 viduals regardless of actual or perceived sexual ori-
9 entation or gender identity.

10 (3) CERTAIN SHARED FACILITIES.—Nothing in
11 this Act shall be construed to establish an unlawful
12 employment practice based on actual or perceived
13 gender identity due to the denial of access to shared
14 shower or dressing facilities in which being seen
15 unclothed is unavoidable, provided that the employer
16 provides reasonable access to adequate facilities that
17 are not inconsistent with the employee’s gender iden-
18 tity as established with the employer at the time of
19 employment or upon notification to the employer
20 that the employee has undergone or is undergoing
21 gender transition, whichever is later.

22 (4) ADDITIONAL FACILITIES NOT REQUIRED.—
23 Nothing in this Act shall be construed to require the
24 construction of new or additional facilities.

1 (5) DRESS AND GROOMING STANDARDS.—Noth-
2 ing in this Act shall prohibit an employer from re-
3 quiring an employee, during the employee’s hours at
4 work, to adhere to reasonable dress or grooming
5 standards not prohibited by other provisions of Fed-
6 eral, State, or local law, provided that the employer
7 permits any employee who has undergone gender
8 transition prior to the time of employment, and any
9 employee who has notified the employer that the em-
10 ployee has undergone or is undergoing gender tran-
11 sition after the time of employment, to adhere to the
12 same dress or grooming standards as apply for the
13 gender to which the employee has transitioned or is
14 transitioning.

15 (b) EMPLOYEE BENEFITS.—Nothing in this Act shall
16 be construed to require a covered entity to treat an unmar-
17 ried couple in the same manner as the covered entity
18 treats a married couple for purposes of employee benefits.

19 (c) DEFINITION OF MARRIAGE.—In this Act, the
20 term “married” refers to marriage as such term is defined
21 in section 7 of title 1, United States Code (commonly
22 known as the “Defense of Marriage Act”).

23 **SEC. 9. COLLECTION OF STATISTICS PROHIBITED.**

24 The Commission shall not collect statistics on actual
25 or perceived sexual orientation or gender identity from

1 covered entities, or compel the collection of such statistics
2 by covered entities.

3 **SEC. 10. ENFORCEMENT.**

4 (a) **ENFORCEMENT POWERS.**—With respect to the
5 administration and enforcement of this Act in the case of
6 a claim alleged by an individual for a violation of this
7 Act—

8 (1) the Commission shall have the same powers
9 as the Commission has to administer and enforce—

10 (A) title VII of the Civil Rights Act of
11 1964 (42 U.S.C. 2000e et seq.); or

12 (B) sections 302 and 304 of the Govern-
13 ment Employee Rights Act of 1991 (42 U.S.C.
14 2000e–16b and 2000e–16c),

15 in the case of a claim alleged by such individual for
16 a violation of such title, or of section 302(a)(1) of
17 the Government Employee Rights Act of 1991 (42
18 U.S.C. 2000e–16b(a)(1)), respectively;

19 (2) the Librarian of Congress shall have the
20 same powers as the Librarian of Congress has to ad-
21 minister and enforce title VII of the Civil Rights Act
22 of 1964 (42 U.S.C. 2000e et seq.) in the case of a
23 claim alleged by such individual for a violation of
24 such title;

1 (3) the Board (as defined in section 101 of the
2 Congressional Accountability Act of 1995 (2 U.S.C.
3 1301)) shall have the same powers as the Board has
4 to administer and enforce the Congressional Ac-
5 countability Act of 1995 (2 U.S.C. 1301 et seq.) in
6 the case of a claim alleged by such individual for a
7 violation of section 201(a)(1) of such Act (2 U.S.C.
8 1311(a)(1));

9 (4) the Attorney General shall have the same
10 powers as the Attorney General has to administer
11 and enforce—

12 (A) title VII of the Civil Rights Act of
13 1964 (42 U.S.C. 2000e et seq.); or

14 (B) sections 302 and 304 of the Govern-
15 ment Employee Rights Act of 1991 (42 U.S.C.
16 2000e–16b and 2000e–16c);

17 in the case of a claim alleged by such individual for
18 a violation of such title, or of section 302(a)(1) of
19 the Government Employee Rights Act of 1991 (42
20 U.S.C. 2000e–16b(a)(1)), respectively;

21 (5) the President, the Commission, and the
22 Merit Systems Protection Board shall have the same
23 powers as the President, the Commission, and the
24 Board, respectively, have to administer and enforce
25 chapter 5 of title 3, United States Code, in the case

1 of a claim alleged by such individual for a violation
2 of section 411 of such title; and

3 (6) a court of the United States shall have the
4 same jurisdiction and powers as the court has to en-
5 force—

6 (A) title VII of the Civil Rights Act of
7 1964 (42 U.S.C. 2000e et seq.) in the case of
8 a claim alleged by such individual for a viola-
9 tion of such title;

10 (B) sections 302 and 304 of the Govern-
11 ment Employee Rights Act of 1991 (42 U.S.C.
12 2000e–16b and 2000e–16c) in the case of a
13 claim alleged by such individual for a violation
14 of section 302(a)(1) of such Act (42 U.S.C.
15 2000e–16b(a)(1));

16 (C) the Congressional Accountability Act
17 of 1995 (2 U.S.C. 1301 et seq.) in the case of
18 a claim alleged by such individual for a viola-
19 tion of section 201(a)(1) of such Act (2 U.S.C.
20 1311(a)(1)); and

21 (D) chapter 5 of title 3, United States
22 Code, in the case of a claim alleged by such in-
23 dividual for a violation of section 411 of such
24 title.

1 (b) PROCEDURES AND REMEDIES.—The procedures
2 and remedies applicable to a claim alleged by an individual
3 for a violation of this Act are—

4 (1) the procedures and remedies applicable for
5 a violation of title VII of the Civil Rights Act of
6 1964 (42 U.S.C. 2000e et seq.) in the case of a
7 claim alleged by such individual for a violation of
8 such title;

9 (2) the procedures and remedies applicable for
10 a violation of section 302(a)(1) of the Government
11 Employee Rights Act of 1991 (42 U.S.C. 2000e–
12 16b(a)(1)) in the case of a claim alleged by such in-
13 dividual for a violation of such section;

14 (3) the procedures and remedies applicable for
15 a violation of section 201(a)(1) of the Congressional
16 Accountability Act of 1995 (2 U.S.C. 1311(a)(1)) in
17 the case of a claim alleged by such individual for a
18 violation of such section; and

19 (4) the procedures and remedies applicable for
20 a violation of section 411 of title 3, United States
21 Code, in the case of a claim alleged by such indi-
22 vidual for a violation of such section.

23 (c) OTHER APPLICABLE PROVISIONS.—With respect
24 to a claim alleged by a covered employee (as defined in
25 section 101 of the Congressional Accountability Act of

1 1995 (2 U.S.C. 1301)) for a violation of this Act, title
2 III of the Congressional Accountability Act of 1995 (2
3 U.S.C. 1381 et seq.) shall apply in the same manner as
4 such title applies with respect to a claim alleged by such
5 a covered employee for a violation of section 201(a)(1) of
6 such Act (2 U.S.C. 1311(a)(1)).

7 **SEC. 11. STATE AND FEDERAL IMMUNITY.**

8 (a) **ABROGATION OF STATE IMMUNITY.**—A State
9 shall not be immune under the 11th Amendment to the
10 Constitution from a suit brought in a Federal court of
11 competent jurisdiction for a violation of this Act.

12 (b) **WAIVER OF STATE IMMUNITY.**—

13 (1) **IN GENERAL.**—

14 (A) **WAIVER.**—A State’s receipt or use of
15 Federal financial assistance for any program or
16 activity of a State shall constitute a waiver of
17 sovereign immunity, under the 11th Amend-
18 ment to the Constitution or otherwise, to a suit
19 brought by an employee or applicant for em-
20 ployment of that program or activity under this
21 Act for a remedy authorized under subsection
22 (d).

23 (B) **DEFINITION.**—In this paragraph, the
24 term “program or activity” has the meaning

1 given the term in section 606 of the Civil
2 Rights Act of 1964 (42 U.S.C. 2000d–4a).

3 (2) EFFECTIVE DATE.—With respect to a par-
4 ticular program or activity, paragraph (1) applies to
5 conduct occurring on or after the day, after the date
6 of enactment of this Act, on which a State first re-
7 ceives or uses Federal financial assistance for that
8 program or activity.

9 (c) REMEDIES AGAINST STATE OFFICIALS.—An offi-
10 cial of a State may be sued in the official capacity of the
11 official by any employee or applicant for employment who
12 has complied with the applicable procedures of section 10,
13 for equitable relief that is authorized under this Act. In
14 such a suit the court may award to the prevailing party
15 those costs authorized by section 722 of the Revised Stat-
16 utes (42 U.S.C. 1988).

17 (d) REMEDIES AGAINST THE UNITED STATES AND
18 THE STATES.—Notwithstanding any other provision of
19 this Act, in an action or administrative proceeding against
20 the United States or a State for a violation of this Act,
21 remedies (including remedies at law and in equity, and
22 interest) are available for the violation to the same extent
23 as the remedies are available for a violation of title VII
24 of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)
25 by a private entity, except that—

- 1 (1) punitive damages are not available; and
- 2 (2) compensatory damages are available to the
- 3 extent specified in section 1977A(b) of the Revised
- 4 Statutes (42 U.S.C. 1981a(b)).

5 **SEC. 12. ATTORNEYS' FEES.**

6 Notwithstanding any other provision of this Act, in
7 an action or administrative proceeding for a violation of
8 this Act, an entity described in section 10(a) (other than
9 paragraph (4) of such section), in the discretion of the
10 entity, may allow the prevailing party, other than the
11 Commission or the United States, a reasonable attorney's
12 fee (including expert fees) as part of the costs. The Com-
13 mission and the United States shall be liable for the costs
14 to the same extent as a private person.

15 **SEC. 13. POSTING NOTICES.**

16 A covered entity who is required to post notices de-
17 scribed in section 711 of the Civil Rights Act of 1964 (42
18 U.S.C. 2000e-10) shall post notices for employees, appli-
19 cants for employment, and members, to whom the provi-
20 sions specified in section 10(b) apply, that describe the
21 applicable provisions of this Act in the manner prescribed
22 by, and subject to the penalty provided under, section 711
23 of the Civil Rights Act of 1964.

1 **SEC. 14. REGULATIONS.**

2 (a) IN GENERAL.—Except as provided in subsections
3 (b), (c), and (d), the Commission shall have authority to
4 issue regulations to carry out this Act.

5 (b) LIBRARIAN OF CONGRESS.—The Librarian of
6 Congress shall have authority to issue regulations to carry
7 out this Act with respect to employees and applicants for
8 employment of the Library of Congress.

9 (c) BOARD.—The Board referred to in section
10 10(a)(3) shall have authority to issue regulations to carry
11 out this Act, in accordance with section 304 of the Con-
12 gressional Accountability Act of 1995 (2 U.S.C. 1384),
13 with respect to covered employees, as defined in section
14 101 of such Act (2 U.S.C. 1301).

15 (d) PRESIDENT.—The President shall have authority
16 to issue regulations to carry out this Act with respect to
17 covered employees, as defined in section 411(c) of title 3,
18 United States Code, and applicants for employment as
19 such employees.

20 **SEC. 15. RELATIONSHIP TO OTHER LAWS.**

21 This Act shall not invalidate or limit the rights, rem-
22 edies, or procedures available to an individual claiming
23 discrimination prohibited under any other Federal law or
24 regulation or any law or regulation of a State or political
25 subdivision of a State.

1 **SEC. 16. SEVERABILITY.**

2 If any provision of this Act, or the application of the
3 provision to any person or circumstance, is held to be in-
4 valid, the remainder of this Act and the application of the
5 provision to any other person or circumstances shall not
6 be affected by the invalidity.

7 **SEC. 17. EFFECTIVE DATE.**

8 This Act shall take effect on the date that is 6
9 months after the date of enactment of this Act and shall
10 not apply to conduct occurring before the effective date.

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