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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Employment Non-Discrimination Act of 2011”.

SEC. 2. PURPOSES.

The purposes of this Act are—

(1) to address the history and widespread pattern of discrimination on the basis of sexual orienta-
tion or gender identity by private sector employers
and local, State, and Federal government employers;

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

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

SEC. 3. DEFINITIONS.

(a) IN GENERAL.—In this Act:

(1) COMMISSION.—The term “Commission”
means the Equal Employment Opportunity Commiss-

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

(3) EMPLOYEE.—

(A) IN GENERAL.—The term “employee”
means—
(i) an employee as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));


(iii) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) or section 411(c) of title 3, United States Code; or

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

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

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

(A) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has 15 or more employees (as
defined in subparagraphs (A)(i) and (B) of paragraph (3)) for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986;

(B) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 applies;

(C) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 or section 411(c) of title 3, United States Code; or

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

(5) EMPLOYMENT AGENCY.—The term “employment agency” has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(6) GENDER IDENTITY.—The term “gender identity” means the gender-related identity, appearance, or mannerisms or other gender-related charac-
characteristics of an individual, with or without regard to the individual’s designated sex at birth.

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

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

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

(10) **STATE.**—The term “State” has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

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

(1) to an employee or an employer shall be considered to refer to an employee (as defined in subsection (a)(3)) or an employer (as defined in subsection (a)(4)), respectively, except as provided in paragraph (2) of this subsection; and
(2) to an employer in subsection (f) of that section shall be considered to refer to an employer (as defined in subsection (a)(4)(A)).

SEC. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.

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

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity; or

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual’s actual or perceived sexual orientation or gender identity.

(b) EMPLOYMENT AGENCY PRACTICES.—It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual or to classify or refer for employment any
individual on the basis of the actual or perceived sexual orientation or gender identity of the individual.

(c) LABOR ORGANIZATION PRACTICES.—It shall be an unlawful employment practice for a labor organization—

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

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment, or would limit such employment or otherwise adversely affect the status of the individual as an employee or as an applicant for employment because of such individual's actual or perceived sexual orientation or gender identity; or

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

(d) TRAINING PROGRAMS.—It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-
job training programs, to discriminate against any indi-
vidual because of the actual or perceived sexual orientation
or gender identity of the individual in admission to, or em-
ployment in, any program established to provide appren-
ticeship or other training.

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

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

(1) any covered entity to grant preferential
treatment to any individual or to any group because
of the actual or perceived sexual orientation or gen-
der identity of such individual or group on account
of an imbalance which may exist with respect to the
total number or percentage of persons of any actual
or perceived sexual orientation or gender identity
employed by any employer, referred or classified for
employment by any employment agency or labor or-
ganization, admitted to membership or classified by
any labor organization, or admitted to, or employed
in, any apprenticeship or other training program, in
comparison with the total number or percentage of
persons of such actual or perceived sexual orienta-
tion or gender identity in any community, State, sec-
tion, or other area, or in the available work force in
any community, State, section, or other area; or
(2) the adoption or implementation by a cov-
ered entity of a quota on the basis of actual or per-
ceived sexual orientation or gender identity.
(g) Disparate Impact.—Only disparate treatment
claims may be brought under this Act.

SEC. 5. RETALIATION PROHIBITED.
It shall be an unlawful employment practice for a cov-
ered entity to discriminate against an individual because
such individual—
(1) opposed any practice made an unlawful em-
ployment practice by this Act; or
(2) made a charge, testified, assisted, or partici-
pated in any manner in an investigation, proceeding,
or hearing under this Act.

SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS.
This Act shall not apply to a corporation, association,
educational institution or institution of learning, or society
that is exempt from the religious discrimination provisions
of title VII of the Civil Rights Act of 1964 pursuant (42
SEC. 7. NONAPPLICATION TO MEMBERS OF THE ARMED FORCES; VETERANS’ PREFERENCES.

(a) Armed Forces.—

(1) Employment.—In this Act, the term “employment” does not apply to the relationship between the United States and members of the Armed Forces.

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

(b) Veterans’ Preferences.—This title does not repeal or modify any Federal, State, territorial, or local law creating a special right or preference concerning employment for a veteran.

SEC. 8. CONSTRUCTION.

(a) Employer Rules and Policies.—

(1) In general.—Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.
(2) **SEXUAL HARASSMENT.**—Nothing in this Act shall be construed to limit a covered entity from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.

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

(4) **ADDITIONAL FACILITIES NOT REQUIRED.**—Nothing in this Act shall be construed to require the construction of new or additional facilities.
(5) DRESS AND GROOMING STANDARDS.—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee’s hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.

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

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

SEC. 9. COLLECTION OF STATISTICS PROHIBITED.

The Commission shall not collect statistics on actual or perceived sexual orientation or gender identity from
covered entities, or compel the collection of such statistics by covered entities.

SEC. 10. ENFORCEMENT.

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

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

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


(2) the Librarian of Congress shall have the same powers as the Librarian of Congress has to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by such individual for a violation of such title;
(3) the Board (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall have the same powers as the Board has to administer and enforce the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by such individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1));

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

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

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

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

(5) the President, the Commission, and the Merit Systems Protection Board shall have the same powers as the President, the Commission, and the Board, respectively, have to administer and enforce chapter 5 of title 3, United States Code, in the case
of a claim alleged by such individual for a violation
of section 411 of such title; and

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

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

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

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

(D) chapter 5 of title 3, United States
Code, in the case of a claim alleged by such in-
dividual for a violation of section 411 of such
title.
(b) PROCEDURES AND REMEDIES.—The procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are—

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

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

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

(4) the procedures and remedies applicable for a violation of section 411 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of such section.

(e) OTHER APPLICABLE PROVISIONS.—With respect to a claim alleged by a covered employee (as defined in section 101 of the Congressional Accountability Act of
1995 (2 U.S.C. 1301)) for a violation of this Act, title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleged by such a covered employee for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

SEC. 11. STATE AND FEDERAL IMMUNITY.

(a) Abrogation of State Immunity.—A State shall not be immune under the 11th Amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act.

(b) Waiver of State Immunity.—

(1) In general.—

(A) Waiver.—A State’s receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th Amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity under this Act for a remedy authorized under subsection (d).

(B) Definition.—In this paragraph, the term “program or activity” has the meaning

(2) **Effective date.**—With respect to a particular program or activity, paragraph (1) applies to conduct occurring on or after the day, after the date of enactment of this Act, on which a State first receives or uses Federal financial assistance for that program or activity.

(e) **Remedies Against State Officials.**—An official of a State may be sued in the official capacity of the official by any employee or applicant for employment who has complied with the applicable procedures of section 10, for equitable relief that is authorized under this Act. In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes (42 U.S.C. 1988).

(d) **Remedies Against the United States and the States.**—Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States or a State for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for the violation to the same extent as the remedies are available for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) by a private entity, except that—
(1) punitive damages are not available; and
(2) compensatory damages are available to the extent specified in section 1977A(b) of the Revised Statutes (42 U.S.C. 1981a(b)).

SEC. 12. ATTORNEYS’ FEES.

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

SEC. 13. POSTING NOTICES.

A covered entity who is required to post notices described in section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–10) shall post notices for employees, applicants for employment, and members, to whom the provisions specified in section 10(b) apply, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964.
SEC. 14. REGULATIONS.

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

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

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

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

SEC. 15. RELATIONSHIP TO OTHER LAWS.

This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State.
SEC. 16. SEVERABILITY.

If any provision of this Act, or the application of the provision to any person or circumstance, is held to be invalid, the remainder of this Act and the application of the provision to any other person or circumstances shall not be affected by the invalidity.

SEC. 17. EFFECTIVE DATE.

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