

Why Not? Ian Ayres & Barry Nalebuff



Why would any employer take on this potential legal liability? Committing to equality is good business. Eighty-eight percent of the public opposes employment discrimination against gay and lesbian workers; using the mark is a way to appeal to those customers. Licensing the Fair Employment Mark could also be a recruiting tool.



Promises To Keep

IT IS POSSIBLE TO HOLD BUSINESSES TO HIGH STANDARDS without expanding the role of government regulators. Private enforcement can police conduct, too. If you want to be sure that your electrical appliance won't catch fire, look for the Underwriters Laboratories seal. If you want to know if your food is kosher, you can look for the Orthodox Union's OU symbol.



There is no reason we can't expand this idea to deal with the matter of employment discrimination. Consider: Some 50 large companies—among them, Coors, General Mills and Verizon—have endorsed legislation to prohibit employment discrimination on the basis of sexual orientation.

(Congress has not acted, but 16 states and the District of Columbia have their own legislation banning discrimination against gays.) Still more blue chips—four in five—have such nondiscrimination policies in place. With a nondiscrimination mark, these employers could make such policies into enforceable promises.



Law professors (and husband and wife) Ian Ayres and Jennifer Brown have created a contract that copies word-for-word the language of the proposed federal law banning employment discrimination on the basis of sexual orientation. It's a way for corporations to privately contract for federal civil rights legislation before the legislation passes.



In return for promising not to discriminate and for giving their employees and job applicants a right to sue for breaches of this promise, a business gains the right to use what Ayres and Brown call the Fair Employment Mark—something like the Good Housekeeping Seal for equal employment rights.

With a few mouse clicks at fairemploymentmark.org and without paying a licensing fee, any business can turn its nondiscrimination policy into a legally enforceable promise. The mark on the product provides the marketing value, while the legal contract gives teeth to the promise.

Against these benefits, there are the costs of allowing private suits. But these costs are lower than you might think. The Government Accountability Office studied 11 states and the District of Columbia that had already prohibited employment discrimination. Ayres and Brown calculate that in the average year only 17 out of 1 million employees brought claims of sexual orientation discrimination. Even if an average claim costs \$100,000, this would represent an extra cost per employee of only \$1.70 per year. This is for firms that had this policy imposed on them. We would expect that employers who voluntarily sign up will be much less likely to discriminate and thus less likely to face liability.

Most important, promising not to discriminate is the right thing to do. Licensing the mark doesn't mean that an employer can't defend lawsuits. It just means that the business can't tell the court, "We have a right to discriminate against gay and lesbian employees if we feel like it."

Many businesses say they oppose this kind of discrimination. They adopt policies and endorse legislation. Few employers, given the chance, would opt out of race discrimination laws. So now they have an opportunity to opt in with regard to sexual orientation nondiscrimination.

The type of certification proposed is different from Underwriters Laboratories' or the Orthodox Union's. The OU symbol says the product is kosher. The FE Mark does not certify the company does not discriminate. Rather, it certifies only that the company has legally promised not to discriminate. Ayres and Brown promise to play an entirely passive role. They will get involved only if a company uses the mark without having signed the contract.

Other certification marks (such as the Underwriters Laboratories seal) require the owners of the marks to police their licensees. This one doesn't. It lets employees and job applicants do the enforcing.

Regardless of whether you support the Fair Employment Mark, the idea of private legal promises has broad applicability. For example, before Congress passes a law, there is often doubt as to how the courts will interpret that law. By having some companies agree to the contract beforehand, a legal precedent can be established even before the law is passed. This idea of a private testing ground can greatly reduce the unintended consequences of legislation. If courts interpret the contract more broadly than Congress intended, then Congress can revise the terms before the law is ever passed. Companies do test markets all the time. Here's a chance for Congress (with help from companies) to do the same. **F**



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