

Department of Legislative Services
2014 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 212

(Senator Madaleno, *et al.*)

Judicial Proceedings

Health and Government Operations

Fairness for All Marylanders Act of 2014

This bill prohibits discrimination based on “gender identity” in public accommodations, labor and employment, and housing. Discrimination based on “gender identity” is also prohibited by persons licensed or regulated by a unit of the Department of Labor, Licensing, and Regulation. “The bill also prohibits discrimination based on gender identity and sexual orientation in State personnel actions and in the leasing of property for commercial use.

Fiscal Summary

State Effect: None. Although the bill may result in additional cases for the Judiciary, the Maryland Commission on Civil Rights, and the Office of Administrative Hearings, any increase in workload is expected to be minimal and absorbable within existing resources. In addition, the bill is not expected to have a significant operational or fiscal impact on the Department of Budget and Management; the Department of Labor, Licensing, and Regulation; or the State Personnel Management System.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: “Gender identity” means the gender-related identity, appearance, expression, or behavior of a person, regardless of the person’s assigned sex at birth, which may be demonstrated by (1) consistent and uniform assertion of the person’s gender identity or (2) any other evidence that the gender identity is sincerely held as part of the person’s core identity.

The bill exempts the rental of rooms or apartments in an owner's principal residence from provisions of the bill relating to housing discrimination. The exemption for apartments is limited to an owner-occupied dwelling with up to five rental units.

Religious corporations, associations, educational institutions, and societies are exempted from the employment discrimination provisions of the bill with respect to the employment of individuals of a particular gender identity to perform work connected with the activities of the religious entity.

The bill specifies that it is not unlawful for an employer to establish and require an employee to adhere to certain reasonable workplace appearance, grooming, and dress standards that are as long as an employee is allowed to appear, groom, and dress consistent with the employee's gender identity.

The bill does not apply to a private facility in a place of public accommodation, if the place of public accommodation makes available, for the use of persons whose gender identity is different from their assigned sex at birth, a space that is functionally equivalent to the space made available to users of the private facility. The bill defines "private facility" as a facility (1) that is designed to accommodate only a particular sex; (2) that is designed to be used simultaneously by more than one user of the same sex; and (3) in which it is customary to disrobe in view of other users of the facility.

Current Law/Background: Discrimination in public accommodations, labor and employment, and housing on the basis of race, sex, age, creed, color, religion, national origin, marital status, disability, and sexual orientation is prohibited.

Chapter 340 of 2001 added a prohibition against discrimination in public accommodations, labor and employment, and housing on the basis of sexual orientation to the prior list of prohibitions. The Act did not specifically prohibit discrimination in State personnel actions on the basis of sexual orientation.

Gender Identity Discrimination as Sex Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Transgender individuals have brought suit alleging "sex discrimination" under Title VII, often basing their claims on *Price Waterhouse v. Hopkins*, a Supreme Court case that held that harassment directed at a person because that person does not conform to traditional sex stereotypes is a form of sex discrimination prohibited by Title VII. 490 U.S. 228 (1989). In *Price Waterhouse*, however, the plaintiff was not a transgender individual, but a woman who was denied promotions because she lacked stereotypical femininity.

Few courts have accepted the claim that transgender discrimination is a form of sex discrimination. In 1977, the Ninth Circuit Court of Appeals held that Title VII did not extend protection to transsexuals, reasoning that Congress' purpose in enacting the statute was only to ensure that men and women are treated equally. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977). A few years later, the Seventh Circuit held that discrimination based on sex means only that "it is unlawful to discriminate against women because they are women and against men because they are men," and that Title VII was never intended to apply to anything other than the traditional concept of sex. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1981). More recently, the Tenth Circuit also held that because "sex" means nothing more than "male and female," the statute only extends protection to transsexual employees if they are discriminated against because they are male or because they are female. *Etsitty v. Utah Transit Authority*, 502 F.2d 1215, 1222 (10th Cir. 2005).

In 2008, the U.S. District Court for the District of Columbia heard a claim of employment discrimination by a transgender person. In response to the plaintiff's claim of sex stereotyping, the court agreed that "when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII." However, the court found in favor of the plaintiff on the sex discrimination claim because it held that the refusal to hire the plaintiff after being advised that she planned to change her anatomical sex was, in fact, discrimination because of sex. *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008).

Other State and Local Laws Prohibiting Gender Identity Discrimination

To date, at least 17 states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia have passed laws prohibiting discrimination based upon gender identity. In addition, over 140 local jurisdictions, including Atlanta, Boston, Dallas, New Orleans, New York City, and Philadelphia, prohibit gender identity discrimination.

Since 2002, Baltimore City has had laws prohibiting discrimination based upon gender identity and expression in employment, public accommodations, education, and housing. In November 2007, the Montgomery County Council amended the County Code to include gender identity as a covered basis under county law prohibiting discrimination in employment, housing, cable television services, and taxicab services. Howard County adopted a law in 2011 prohibiting discrimination based on gender identity and expression in housing, employment, law enforcement, public accommodations, and financing. Baltimore County voted in February 2012 to adopt a law prohibiting discrimination based on gender identity in housing, employment, finance, and public accommodations.

Governor O'Malley issued an executive order in August 2007 that included gender identity and expression as a proscribed basis for employment discrimination.

Additional Information

Prior Introductions: SB 449 of 2013, a substantially similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee. SB 212 of 2012, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. HB 235 of 2011, a similar bill, passed the House as amended, but was recommitted to the Senate Judicial Proceedings Committee. SB 583 of 2010, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 1022, received a hearing in the House Health and Government Operations Committee, but no further action was taken. Similar bills were also considered in the 2009, 2008, and 2007 sessions.

Cross File: HB 1265 (Delegate Clippinger, *et al.*) – Health and Government Operations.

Information Source(s): Department of Budget and Management; Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Office of Administrative Hearings; U.S. Government Accountability Office; Transgender Law and Policy Institute; Department of Legislative Services

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