

City of Atlanta Adopts New Protections for Criminal History Status, Gender Expression

By Emily S. Borna

November 29, 2022

The Atlanta City Council has [amended](#) the City of Atlanta Anti-Discrimination Ordinance to extend protections to citizens on the basis of criminal history status and gender expression in employment, housing, and public accommodations. The City of Atlanta Anti-Discrimination Ordinance was initially enacted in December of 2000.

Criminal History Protection

The new criminal history protection makes it unlawful for Atlanta employers generally to disqualify applicants or single out employees based on their criminal conviction histories, without further individualized consideration.

The rationale for this protection is based on the theory that having a job can reduce an individual's likelihood for recidivism, allowing the individual to get on with living a productive life. It is unclear how many Atlanta citizens are formerly incarcerated, but Georgia has an incarceration rate higher than the national average and persons of color are overrepresented in prisons and jails, according to the [Prison Policy Initiative](#).

The new Atlanta ordinance provides, however, that employers may consider criminal conviction histories to the extent the criminal history is "related to the position's responsibilities," as determined by the evaluation of the following factors:

1. Whether the person committed the offense (*e.g.*, a dispositive conviction as opposed to simply an arrest or accusation);
2. The nature and gravity of the offense;
3. The amount of time since the offense; and
4. The nature of the job.

In addition, the Atlanta ordinance expressly provides that employers can follow state or federal mandates that, in effect, create automatic disqualifier for individuals with certain criminal convictions from holding certain positions, *e.g.*, law enforcement. For instance, [Georgia law disqualifies](#) persons convicted of a felony consisting of murder, child abuse or neglect, crime against children, spousal abuse, crime involving rape or sexual assault, kidnapping, arson, physical assault, or a drug-related offense in the preceding five years from serving children as child-care providers.

This new ordinance follows the [guidance the Equal Employment Opportunity Commission issued](#) a decade ago concerning consideration of criminal records in employment.

The amended Atlanta ordinance adds the new protections to existing provisions on publication of notices or ads indicating a prohibited employment preference, limitation, specification, or discrimination in employment. The only permissible exception is when such a preference, limitation, or specification is a *bona fide* occupational qualification for employment. This ordinance also expressly provides that employers may still follow state or federal laws that prohibit employment of persons with certain criminal convictions in particularly sensitive positions. Thus, an adverse employment decision based on criminal history status is not considered a *per se* violation of the law. Since there is no explicit direction, however, on how a job posting might be construed as potential evidence of a violation of the ordinance if it specifically addresses "criminal conviction history," employers should consult with counsel.

With fair chance initiatives like this growing around the country (*e.g.*, [Los Angeles](#) and [New York City](#)), multi-state employers need to consider the patchwork of progressive protection given to job postings.

Gender Expression Protection

The Atlanta ordinance protection based on gender expression is in line with recent national developments. In particular, it follows the U.S. Supreme Court holding in *Bostock v. Clayton County*, 590 U.S. ___, 140 S.Ct. 1731 (2020) (discrimination based on sexual orientation or gender identity constitutes discrimination

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“because of ... sex” in violation of Title VII of the Civil Rights Act), a case which originated in Clayton County, Georgia (considered part of the metro-Atlanta area).

This gender expression protection also shadow's the January 2021 Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, reaffirming and applying these protections. There is a distinction between sex, assigned at birth based on biological characteristics and documented on a person's birth certificate, and gender that the World Health Organization defines as “socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate” based on sex.

Implications for Employers

The City of Atlanta non-discrimination laws are in Atlanta's Charter and Code of Ordinances. Many of the protected classes identified are protected by federal law, but the latest City Council amendments offer broader protection and unlimited potential for recovery for aggrieved individuals. In Atlanta, discrimination is prohibited on the basis of sexual orientation, gender identity, race, color, creed, religion, sex, marital status, parental status, familial status, national origin, age (much broader than the federal protections for persons aged 40 and over), disability (including the use of a trained guide dog by a blind, deaf or otherwise physically disabled person), and, now, criminal history and gender expression.

These non-discrimination laws apply in the workplace to employment decisions made by private employers located in Atlanta with at least 10 employees, as well as contractors doing business with the City of Atlanta as to employment, subcontracting, and union membership decisions and actions. The ordinance does not specify whether application is limited only to employers with a physical presence in the City of Atlanta or whether it also applies to employers physically based outside of Atlanta but who do business within City limits.

There is no administrative prerequisite to filing an action at any time within two years of the occurrence of the alleged act of discrimination or unlawful practice. Private citizens can file a lawsuit in any court of competent jurisdiction to address perceived violations of these protections. Alternatively, an aggrieved citizen may file a complaint with the City's Human Relations Commission (HRC), which has broad investigative powers to address illegal discrimination in private employment, public accommodations, and housing, including subpoena powers. The HRC has the authority to order an employer to pay for the costs of an investigation, including payment of attorney's fees. The HRC also can revoke a company's city licenses.

Please contact a Jackson Lewis attorney with any questions related to policies, training, and other preventive practices.

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