

## New Houston Ordinance Bans Sexual Orientation, Gender Identity, Familial Status, and Marital Status Discrimination in Employment

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A new Houston ordinance prohibits private employers from discriminating against employees on the basis of sexual orientation, gender identity, familial status, and marital status. The Houston Equal Rights Ordinance (“HERO”), which takes effect on June 27, 2014, expands the types of “protected characteristics” beyond those which are covered currently by federal and state anti-discrimination laws.

### Who is Covered?

As with most state and federal anti-discrimination statutes, HERO applies only to employers with at least a certain number of employees. During the first year, employers with at least 50 employees are covered. The coverage threshold is lowered to 25 employees after the Ordinance’s first year and lowered again to 15 employees after the second year. Religious organizations and bona fide private clubs are exempted from HERO.

### Prohibitions

HERO prohibits discrimination against employees on the basis of sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy. HERO broadly defines “discrimination” to include:

Any intentional act or demonstration of preference or antipathy in making decisions regarding employment that adversely affect an employee’s pay, status, position, or assignment, including opportunities for overtime pay and advancement, and includes decisions regarding recruitment, job application procedures, referrals for employment, selection and hiring, appointment, compensation, promotions, demotions, transfer, retention, layoffs, recalls, training, educational opportunities, and all forms of discipline, including terminations.

HERO’s list of covered employment decisions arguably is more extensive than the types of decisions an employee can challenge under federal or state anti-discrimination statutes. Additionally, HERO’s prohibition against “antipathy” (i.e., a negative feeling about a person rather than an intentional act against the person) also appears to expand the circumstances under which an employer may be found to have discriminated against an employee beyond those recognized by federal or state anti-discrimination statutes.

HERO also prohibits employers from retaliating against employees for filing a complaint in good faith. HERO’s retaliation provision appears to protect only employees who have made a formal complaint to the City and not those who have made an internal complaint to their employer. HERO’s anti-retaliation provision, however, is less than clear and may be interpreted to cover internal complaints.

### Investigation Procedures

An aggrieved employee must file a complaint with the City Attorney’s Office of the Inspector General within 180 days of the asserted unlawful employment act. If the complaint is subject to the jurisdiction of a federal or state agency (such as the Equal Employment Opportunity Commission), the inspector general must refer it to the

appropriate agency. If the complaint is not subject to the jurisdiction of a federal or state agency, the inspector general must investigate the complaint. Essentially, this means the inspector general will investigate only complaints involving discrimination on the basis of sexual orientation, gender identity, familial status, and marital status, as those claims are generally not subject to the jurisdiction of a federal or state agency.

If the inspector general determines the employer violated HERO, the inspector general must engage in conciliation of the complaint. If no resolution is achieved, the inspector general must refer the complaint to the city attorney for possible prosecution against the employer in municipal court.

## Penalties

Significantly, the Ordinance does not create a private right of action for employees to sue employers. Instead, it provides only for criminal penalties. A violation of the Ordinance is a Class C misdemeanor, punishable by a maximum \$5,000 fine per complaint. “Agents” of employers can be held liable under the Ordinance, thus raising the possibility that managers can be prosecuted in their individual capacities.

## Next Steps

Employers doing business in Houston should update their anti-discrimination and anti-harassment policies to address the expanded “protected characteristics” covered by HERO. Employers also should ensure that supervisors and human resources professionals are trained on the unique issues that arise in the workplace related to these new protected categories.

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Jackson Lewis attorneys are available to answer questions about this and other developments that affect employers. Please contact Jeff Barnes, at [BarnesJ@jacksonlewis.com](mailto:BarnesJ@jacksonlewis.com), in our Houston office, (713) 650-0404, or the Jackson Lewis attorney with whom you regularly work.

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