

Arkansas Cities and Counties Provide Local LGBT Nondiscrimination Protections

By James R. Mulroy and Jennifer C. Kellett

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A new civil rights law affording nondiscrimination protections for most lesbian, gay, bisexual, and transgender residents of Fayetteville, Arkansas, will go into effect on November 7, 2015.

Passed by the City Council and ratified by a popular vote in a Special Election held on September 8, 2015, [the Uniform Civil Rights Protection ordinance](#) (Ordinance 5781) prohibits discrimination in employment, housing, and public accommodations, based upon sexual orientation or gender identity. Declaring that “[t]he right of an otherwise qualified person to be free from discrimination because of sexual orientation and gender identity is the same right of every citizen to be free from discrimination because of race, religion, national origin, gender and disability as recognized and protected by the Arkansas Civil Rights Act of 1993,” the Ordinance also protects anyone who opposes any act prohibited by the Ordinance or who participates in such an investigation.

Designed to overcome objections to a similar measure that was repealed in 2014, Ordinance 5781 exempts from its coverage any employer with fewer than nine employees, as well as any church, religious school or day school, and any other religious organization. It also includes an enforcement scheme that is conciliatory, rather than punitive, with civil fines imposed for violations.

Civil Rights Commission

Enforcement will be handled by a newly formed, seven-member Civil Rights Commission appointed by the City Council and comprised of representatives of the business community, owners or managers of rental property, and citizens at large (at least one of whom identifies as LGBT), as well as at least one person with experience in human resources or employment law.

Anyone claiming a violation of the ordinance must present that claim in writing to the Fayetteville City Attorney within 90 days of the alleged violation. The City Attorney must then forward the complaint to the Commission.

Resolution of any complaint will begin with informal and confidential mediation between the parties. If such attempts are unsuccessful, the claim will ultimately go to an evidentiary hearing before the Commission. Anyone found to have violated the Ordinance will be fined up to \$100 for the first offense, with subsequent violations carrying the City’s general penalty of fines up to \$500 and up to 30 days in jail if fines are not paid. However, there is no criminal classification or penalty associated with the Ordinance or its violation.

Opposition

The Fayetteville Chamber of Commerce, though a leading opponent of the measure repealed in 2014, is in full support of this one. The story may not end there, however.

Opponents of the law filed suit in August 2015, seeking to stop the Special Election and arguing that the measure infringes upon individuals’ and business owners’ freedom of religion, that sexual predators might use the law to prey upon women and children in public restrooms, and that the ballot had a misleading title that did not include any details about LGBT protections, among other things. Injunctive relief was denied, but the lawsuit is pending in Washington County Circuit Court. Further, Arkansas Attorney General Leslie Rutledge released an opinion on September 1, 2015, stating that Ordinance 5781, as well as any similar measure passed by other municipalities, conflicts with Arkansas state law, and therefore, should not survive legal challenge. She relies upon the state’s recently enacted

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Intrastate Commerce Improvement Act, which bans cities and counties from enacting or enforcing “an ordinance, resolution, rule or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.”

On the other hand, Fayetteville City Attorney Kit Williams has stated that he will defend the Ordinance. He said the Ordinance incorporates several existing state laws, including the Arkansas Anti-Bullying Act and the Fair Housing Act, which, by their very terms, provide LGBT protections. “The protected classifications are certainly there in state law, and, therefore, this is not a new protected classification,” said Williams. He also has questioned whether the Intrastate Commerce Improvement Act is constitutional under the equal protection clause of the U.S. Constitution’s 14th Amendment.

The new Ordinance is a part of a [growing national trend](#) to prevent employers, at the local level, from firing or declining to hire any person because of his or her sexual orientation or gender identity. Similar measures have been enacted by Pulaski County and five other cities in Arkansas: Little Rock, North Little Rock, Hot Springs, Eureka Springs, and Conway.

Employers should regularly review their policies and practices with employment counsel to ensure they address specific organizational needs effectively and comply with applicable law. Please contact a Jackson Lewis attorney if you have questions about this or other workplace developments.

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