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Prohibiting Discrimination based on Sexual Orientation and Gender Identity and Expression

Background

- **Twenty states** and the District of Columbia, in addition to **over 180 localities**, have passed laws prohibiting discrimination on the basis of sexual orientation in various areas. Hundred of businesses across the United States, including 90% of Fortune 500 companies, have voluntarily adopted policies that prohibit discrimination based on sexual orientation.
- Beginning with an ordinance passed in Minneapolis in 1975, **12 states**¹, the District of Columbia, and **more than 100 cities and counties** have enacted laws prohibiting discrimination based on gender identity or gender expression. More than 500 private businesses across the United States, including more than a third of Fortune 500 companies, have voluntarily adopted policies that prohibit discrimination based on gender identity or expression.
- State Representative Pete Schwartkopf plans to introduce House Bill 5 into the state legislature this session. This bill prohibits discrimination for sexual orientation, defined as “heterosexuality, homosexuality, bisexuality, or gender identity or expression, whether real or perceived,” in housing, employment, public works contracting, public accommodations, and insurance. The bill grants Superior Court exclusive criminal jurisdiction over violations of equal accommodations, fair housing, and employment discrimination. Delawareans may be more familiar with this bill as referred to by “House Bill 99,” the name it had when it passed the State of Delaware’s House of Representatives in 2001. This is the first year the nondiscrimination bill includes gender identity and expression.
- The City of Wilmington prohibits discrimination on the basis of sexual orientation in contracts, housing, public accommodations such as restaurants, and city government employees. The City of Wilmington does not currently prohibit discrimination based on gender identity or expression.²
- Rehoboth Beach prohibits discrimination on the basis of sexual orientation for housing, employment, public works contracting, and public accommodations.
- The City of Newark’s personnel practices policy currently states, “The City shall not discriminate in any manner against any person on the basis of age, race, color, creed, religion, sex, national origin, marital status, disability, political affiliation, sexual orientation, parental status or active military or veterans status except where such factors constitute a *bona fide* occupational qualification with regard to selection or employment with the City.”

¹ Note that a thirteenth state, Hawaii, prohibits discrimination based on gender identity in public accommodations in housing, but not in employment. The other 12 states referred to all prohibit discrimination based on gender identity in employment, as well as other areas.

² <http://www.municode.com/resources/gateway.asp?pid=11715&sid=8>

Why prohibit discrimination based on sexual orientation, gender identity, and gender expression?

- The motivation behind these protections is simple, but powerful: **the goal is to protect people from arbitrary discrimination** in employment, housing, public accommodations, and other areas. A person's sexual orientation and a person's gender identity has nothing to do with their job performance, or their qualifications as a good renter. Polling shows that Americans agree people should be judged on their merits -- on their qualifications to do a job or pay for an apartment -- not on who they are or how people perceive them³. Though no state or federal laws provide Delawareans with protections based on sexual orientation, polling in 2002 showed that 74% of New Castle County voters and 69% of Delawarean voters favor such nondiscrimination legislation.⁴ Like provisions addressing discrimination based on, for example, national origin, race, or gender, prohibitions against discrimination based on sexual orientation or gender identity or gender expression help ensure that people will, indeed, be judged on their merits.
- **In the 38 states** (including Delaware) **without protections against employment discrimination and other discrimination based on gender identity or expression, transgender people** (please see definition below) **simply have no legal protection against even the most outrageous forms of discrimination**, unless they live in a city or county with applicable anti-discrimination protections. **In the 30 states** (including Delaware) **without protections against employment discrimination and other discrimination based on sexual orientation, gay and lesbian people simply have no legal protection against even the most outrageous forms of discrimination**, unless they live in a city or county with applicable anti-discrimination protections. It is worth noting that prohibiting discrimination based on sexual orientation also provides protections for straight people who may experience discrimination based on their sexual orientation, though that occurs far less frequently.
- The State of Delaware's Employment Practices Act prohibits employment practices based on discriminations against "race, marital status, genetic information, color, age, religion, sex or national origin." 19 Del. C. Sec. 711. The State of Delaware's Fair Housing Act prohibits discrimination in housing on the basis of "race, color, national origin, religion, creed, sex, marital status, familial status, age or disability." 6 Del. C. Sec. 4601. Neither of these protect against sexual orientation, gender identity, or gender expression.
- It is important to note that **laws against discrimination do not prevent employers from firing incompetent employees and do not prevent landlords from turning down unqualified renters**. These laws simply make sure that all employees get a fair chance at working hard to get ahead without discrimination or bias and that no one is singled out for arbitrary discrimination when it comes to renting an apartment.
- One reason why it is particularly urgent to prohibit discrimination based on gender identity or gender expression is the reality that **transgender people experience unusually high rates of discrimination: at least one in five transgender people surveyed reports experiencing employment discrimination**⁵. Transgender people report having difficulty making ends meet because, although they possess valuable skills and experience, they often cannot find work because they face discrimination from employers.
- It is also important to note that, while prohibiting discrimination based on gender identity is especially necessary to provide transgender people with desperately needed protections against discrimination, **prohibiting discrimination based on gender identity or expression can protect a wide range of people who do not fit traditional gender stereotypes**, for instance, a woman who is perceived by others as "masculine" because of her manner of speech or her way of interacting socially.

³ A 2007 survey conducted by Peter Hart & Associates found that 72% of Americans agree "fairness is a basic value and employment decisions should be based on qualifications and job performance, including for transgender people".

⁴ Hickman-Brown Public Relations Research, May 2002

⁵ M.V. Lee Badgett *et al.*, "Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination", June 2007.

Definitions

- **Sexual orientation** is the preferred term used when referring to an individual's physical and/or emotional attraction to the same and/or opposite gender. "Heterosexual," "bisexual," and "homosexual" are all sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.
- **Gender identity** is distinct from sexual orientation and refers to a person's innate, deeply felt psychological sense of gender, which may or may not correspond to the person's body or designated sex at birth (the sex originally listed on a person's birth certificate).
- **Gender expression** refers to all of a person's external characteristics and behaviors, including dress, mannerisms, grooming, speech patterns, and social interactions, that are socially identified with a particular gender.
- **Transgender** or "**trans**" is an umbrella term that refers to people who experience and/or express their gender differently from conventional or cultural expectations—either in terms of expressing a gender that does not match the sex listed on their original birth certificate or by physically altering their sex.

Responses to Some Arguments Against Prohibiting Discrimination Based on Gender Identity or Expression

- **If private employers are already enacting policies to prohibit discrimination, why not leave it to them?** It is a positive step that private employers are enacting these policies, but we can't count on private businesses to guarantee equal rights. For one thing, not every employee works for an employer with these policies. In addition, government-enacted laws can provide specific protections that voluntary employer policies cannot provide. Finally, employers are free to change their voluntary policies at any time. Many of Delaware's largest employers voluntarily protect their works from sexual orientation discrimination but cannot assure the same treatment for their partner in looking for a job or when they are seeking a place to live. This limits a company's ability to attract top people.
- **Are nondiscrimination laws really necessary?** Nondiscrimination laws are necessary. "Studies conducted from the mid-1980s to mid-1990s revealed that 16% to 68% of LGB respondents reported experiencing employment discrimination at some point in their lives. Since the mid-1990s, an additional fifteen studies found that 15% to 43% of lesbian, gay, and bisexual respondents experienced discrimination in the workplace."⁶ In a 2002 GAO study of states with similar legislation, the number of complaints of sexual orientation discrimination was relatively few.⁷
- **Why prohibit discrimination based on gender identity when the estimated population of transgender people is so small?** Even though transgender people are a distinct minority, they deserve equal rights and protection against discrimination. The fact that a group is in the minority, no matter how small, is not a reason to deny them equal rights.

⁶ M.V. Lee Badgett *et al.*, "Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination", June 2007.

⁷ GAO 02-878R, *Sexual Orientation-Based Employment Discrimination*