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CITY OF BALTIMORE

BRANDON M. SCOTT  
Mayor



DEPARTMENT OF LAW  
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May 23, 2023

The Honorable President and Members  
of the Baltimore City Council  
Attn: Executive Secretary  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Re: City Council Bill 23-0378 – Unlawful Practices-Discrimination Based on  
Characteristics or Status

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 23-0378 for form and legal sufficiency. The bill seeks to extend certain protections to individuals regardless of the individual's HIV or AIDS status, or association with such individuals. It also seeks to prohibit the willful use of the incorrect name or pronouns of an individual and requires notices to be posted in certain facilities. As explained below, with a few amendments, the bill can be approved.

Since the enactment of Title VII in 1964, the Courts have been forced to expound upon the definition of sexual identity and what constitutes sexual discrimination. In *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), the United States Supreme Court considered whether an employer violates Title VII when it intentionally fires an individual employee based on their sexual orientation or transgender status. "In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin." *Id.* at 1737. The Court further opined that an individual's sexual orientation or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. *Id.* at 1741. While it may be argued that sexual orientation or transgender are terms that are not related to the word "sex" as was defined by Title VII in 1964, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1747.

The City is not preempted by Title VII from enacting local workplace discrimination laws because the clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). Similarly, the City is not preempted by Maryland law. *Broadcast Equities, Inc. v. Montgomery County*, 123 Md. App. 363, 394-95 (1998), *cert. granted*, 352 Md. 305 (1998), *vacated on procedural grounds*, 360 Md. 438, 461-62 (2000) (county human rights law not preempted by state anti-discrimination statute because "the 'fact that an ordinance enlarges upon the provisions of a [state] statute by requiring more than the statute requires creates

no conflict...”) (citations omitted). Section 20-101 of the State Government Article of the Maryland Code defines “Gender identity” as 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. Further, “Sexual orientation” means the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality. Md. Code, State Gov’t, § 20-101(i). Regarding employment, public accommodations and housing, it is the state’s policy to prohibit discrimination based upon a person’s race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity or disability. Md. Code, State Gov’t, § 20-304.

Montgomery County has passed a similar bill. Bill No. 28-20, enacted in Montgomery County on October 6, 2020, prohibits discriminatory practices against certain individuals in places of public accommodation, nursing homes and other facilities. The bill extends anti-discrimination protection regardless of a person’s gender expression or HIV status. Maryland’s Attorney General has opined that: “Refusal of service of any other type of discriminatory conduct based on race, creed, sex, age, color, national origin, marital status, or disability-including HIV status-is unlawful. 77 Opinions of the Attorney General 100 (1992).

Although the City is not preempted by Maryland’s anti-discrimination laws and can pass its own measures to protect against differential treatment based on gender identity, sexual orientation, and HIV status as it relates to discrimination in public accommodations, employment and housing, several amendments are needed in order to conform this bill to federal and state law.

First, the phrase “or associated with/association with an individual with a certain characteristic or status” throughout the bill is void because it is too vague. A statute must be “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,” otherwise, the enactment is void-for-vagueness. *McFarlin v. State*, 409 Md. 391, 410-11 (2009) (citations omitted). The Supreme Court has recognized that “the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all,” is not permitted. *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-240 (1925). An amendment to remove the language is attached.

Next, the City’s only power to enforce ordinances is through fines up to \$1,000, misdemeanors generally enforced by the State’s Attorney’s Office, or other enforcement powers specifically authorized by State law. City Charter, Art. II, § (48). While the City can make certain discrimination illegal, it can only impose those penalties the General Assembly permits; it cannot allow private parties to enforce the law in a private cause of action. *McCrary Corp. v. Fowler*, 319 Md. 12, 20 (1990). Enforcement, therefore, is accomplished as provided for in Art. 4, Community Relations Commission, Subtitle 4 of the City Code. The appropriate amendments are attached to this report.

It should be noted that laws across the country concerning gender and the use of restrooms available to other individuals of the same gender identity are varied and no clear path forward has emerged. *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67 (Ill. App. Ct. 2021)) (court held that as matter of first impression, employer’s conduct violated provisions of the Human Rights Act prohibiting discrimination based on gender identity in terms and conditions of employment and prohibiting such discrimination in provision of facilities in place of public accommodation);

*John Doe, et al. v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014) (court held that school violated the Maine Human Rights Act (MHRA) and discriminated against transgender student based on student's sexual orientation when it prohibited student from using the girls' communal bathroom and required her to use the unisex staff bathroom). Thus, while this language is not required to be removed to approve the bill for form and legal sufficiency, there is a risk that it could be challenged in court.

Similarly, with respect to the use of preferred pronouns, the U.S. Equal Employment Opportunity Commission's ("EEOC") technical assistance publication, *What You Should Know About EEOC and Enforcement Protections for LGBT Workers*, states that prohibited acts include "intentionally and persistently failing to use the name and gender pronoun that corresponds to the gender identity with which the employee identifies which the employee has communicated to management and employees." Thus, while this language is not required to be removed to approve the bill for form and legal sufficiency, there is a risk that it could be challenged in court.

Subject to the requisite amendments, the Law Department approves the bill for form and legal sufficiency.

Very truly yours,

*/s/ Teresa Cummings*

Teresa Epps Cummings  
Assistant Solicitor

cc: Ebony Thompson, Acting City Solicitor  
Nina Themelis, Mayor's Office of Government Relations  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Ashlea Brown, Chief Solicitor  
Jeffrey Hochstetler, Chief Solicitor  
Hilary B. Ruley, Chief Solicitor  
Michelle Toth, Assistant Solicitor

**AMENDMENTS TO COUNCIL BILL 23-0378  
(1<sup>st</sup> Reader Copy)**

By: Law Department

{To be offered to the Public Safety and Government Operations Committee}

**Amendment No. 1**

On page 1, in line 4, strike the first comma and substitute “or”; and, on that same page, strike beginning with the second comma in line 4 down through and including “status” in line 5; and, on that same page, in line 21, strike “OR ASSOCIATED WITH”.

**Amendment No. 2**

On page 2 in lines 11, 16, and 24, on page 3 in lines 22 and 26, on page 4 in line 24, on page 10 in lines 10 and 17, and on page 11 in lines 6 and 12, in each instance, before “HIV” insert “OR”; and, on page 2 in lines 11, 12, 17, and 18, on page 3 in lines 27 and 28, on page 10 in lines 10, 11, 17, and 18, and on page 11 in lines 7, 8, 12, and 13, in each instance, strike “, OR ASSOCIATION WITH AN INDIVIDUAL WITH A CERTAIN CHARACTERISTIC OR STATUS,”; and, on page 2 in lines 24 and 25, page 3 in lines 22 and 23, and page 4 in lines 24 and 25, in each instance, strike “, OR ASSOCIATION WITH AN INDIVIDUAL WITH A CERTAIN CHARACTERISTIC OR STATUS”.

**Amendment No. 3**

On page 6, strike “FILING A COMPLAINT WITH THE COMMUNITY RELATIONS COMMISSION” and substitute “ENFORCEMENT UNDER CITY CODE ARTICLE 4, SUBTITLE 4 {“ENFORCEMENT”}”.