



May 17, 2023

To the Honorable City Council President, Nick Mosby
and Members of the Baltimore City Council
City Hall, 100 N. Holliday Street, Room 409
Baltimore, Maryland 21202

Re: CC Bill 23-0378 - Unlawful Practices - Discrimination Based on Characteristics or Status

The Department of Human Resources (“DHR”) has reviewed City Council Bill 23-0378 Informational Hearing – Unlawful Practices - Discrimination Based on Characteristics or Status. For the purpose of extending certain protections against discrimination to an individual regardless of the individual’s HIV or AIDS status, other characteristics or status, or association with individuals with a particular characteristic or status; prohibiting the willful use of the incorrect name or pronouns of an individual under certain circumstances; requiring a certain notice be posted in certain facilities; and generally relating to discrimination based on an individual’s protected status.

DHR has reviewed the above referenced bill and acknowledges that while we currently provide protections against discrimination, there are always opportunities to offer further protections against discrimination. Gender pronouns are important because they are used for everyday communication and to convey and affirm gender identity. This is especially true for those whose gender identity does not align with their sex assigned at birth (e.g., transgender individuals) or whose gender identity or expression does not fall within binary constructs of gender (e.g., genderqueer or gender nonbinary individuals). Sometimes, these individuals may use gender-neutral or gender-inclusive pronouns, such as "they," "them," and many others. In 2020, the U.S. Supreme Court ruled that Title VII’s prohibition against sex discrimination includes discrimination based on an employee’s gender identity or sexual orientation.

On June 15, 2021, The U.S. Equal Employment Opportunity Commission (“EEOC”) provided clarity to the public regarding existing requirements under the law on topics relating to Sex Discrimination, Sexual Orientation, Gender Identity, Sex Harassment, and Retaliation. It established legal positions on sexual orientation and gender identity-related workplace discrimination issues in a technical assistance publication, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* under Title VII.¹ The Title VII of

¹ (2021, June 15). *Protections against employment discrimination based on sexual orientation or gender identity*. US EEOC. <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>

the Civil Rights Act of 1964 expressly prohibits workplace discrimination based on race, color, religion, sex, and national origin. In the technical assistance publication, the EEOC referenced the *Lusardi v. Dep't of the Army* case and expressly concluded that intentionally referring to a transgender person by incorrect gender pronouns and prohibiting them from using the restroom consistent with their gender identity violated Title VII. The EEOC considers using pronouns or names inconsistent with an individual's gender identity as unlawful harassment. The EEOC guidance states, "*intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment*" and violates Title VII.

In Iowa, Maryland, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, and the District of Columbia, the nondiscrimination statutes explicitly include "gender identity" as a protected characteristic. In Colorado, Illinois, Minnesota, Maine, Oregon, and Washington, the nondiscrimination laws prohibit discrimination based on sexual orientation and include gender identity or expression within the statutory definition of sexual orientation. California protects transgender people by including gender identity or phrases within the statutory definition of sex for purposes of its nondiscrimination laws. Hawaii similarly prohibits discrimination based on sex, including gender identity or expression. Twelve states (California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia prohibit discrimination against transgender people in employment. These laws protect employees and job applicants from harassment, demotion, dismissal, or other unfair employment practices based on the person's transgender status or gender nonconformity.²

According to the State of Maryland's Commission on Civil Rights, under State Government Article, §20-602, Annotated Code of Maryland, every Marylander is guaranteed equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, disability, or genetic information.³

The New York City Human Rights Law ("NYCHRL") requires employers and covered entities to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.) with which a person self-identifies, regardless of the person's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person's identification. Gender discrimination under the NYCHRL includes discrimination based on gender identity (including being transgender, non-binary, or gender non-conforming) and gender expression. Under the NYCHRL, gender discrimination can be based on one's perceived or actual gender identity, which may or may not conform to one's sex assigned at birth, or to how one expresses gender, such as through appearance or communication style. Gender discrimination is prohibited in employment, housing, public

² National Center for Lesbian Rights. (2010, August 25). *State by State Guide to Laws that prohibit discrimination against transgender people*. LGBTAggingCenter.org. <https://www.lgbtaggingcenter.org/resources/resource.cfm?r=505>

³ *State of Maryland Commission on Civil Rights*. Maryland.gov Enterprise Agency Template. (n.d.). <https://mccr.maryland.gov/Pages/Employment-Discrimination.aspx>

accommodations, discriminatory harassment, and bias-based profiling by law enforcement. It exists when a person is treated "*less well than others because of their gender.*" The Commission can impose civil penalties of up to \$125,000 for violations and up to \$250,000 for violations resulting from willful, wanton, or malicious conduct.⁴

The EEOC also guides HIV/AIDS discrimination in the workplace in a technical assistance document, *What You Should Know: HIV/AIDS & Employment Discrimination*, published on December 21, 2015.⁵ It described a disability under the ADA as a physical or mental impairment substantially limiting one or more major life activities or a record of such an impairment. The EEOC further clarifies that a person qualifies as an individual with a disability if they are subject to a prohibited action due to an actual or perceived impairment. HIV-positive people will quickly meet this definition because HIV substantially limits major life activities, such as immune system functions. Someone subjected to a prohibited employment action, such as failure to hire or termination because of HIV or the suspicion of HIV, could also easily show that an action was taken against them because of an actual or perceived impairment.

The EEOC stipulates prohibitions during the application/interview stage, after an offer for employment, and during employment. It stipulates that:

- During the Application & Interview Stage, an employer may not ask a job applicant disability-related questions, including whether the applicant is HIV-positive, before making a job offer. However, an employer may ask applicants whether they can perform the job and how they would perform it, with or without accommodation.
- After an Offer of Employment, after a job offer, but before an individual starts work, an employer may ask disability-related questions and require medical exams if the same questions and exams are necessary for everyone in the same job category. An employer may only withdraw an offer from an applicant with a disability if it becomes clear that they cannot perform the job's essential functions or would pose a direct threat to health or safety in the workplace.
- During employment, an employer may only ask an employee medical question or require a medical exam if it is reasonably believed that the employee may be unable to perform a job successfully or safely because of a medical condition. The employer's reasonable belief must be based on objective evidence that it observed or learned from others who provided reliable information.

⁴ NYC Commission on Human Rights. (2019, February 15). *Gender Identity/Gender Expression: Legal Enforcement guidance*. Gender Identity/Gender Expression - CCHR. <https://www.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page#3.1>

⁵ (2015, December 21). *What you should know: HIV/AIDS & employment discrimination*. US EEOC. <https://www.eeoc.gov/laws/guidance/what-you-should-know-hiv-aids-employment-discrimination>

The New York City Commission on Human Rights provides legal enforcement guidance on discrimination based on disability. It stipulates that it is an unlawful job application if an employer's job application includes various questions related to applicants' medical history and disabilities, such as asking whether applicants would consent to a physical examination or an HIV test if they were hired and asking them to explain their physical/mental restrictions or impairments. This job application violates the New York City Human Rights Law by indirectly expressing a limitation, specification, or discrimination based on disability.⁶

The EEOC guides posting of Federal laws prohibiting job discrimination notices in facilities. According to the EEOC, the law requires an employer to post a message explaining the Federal laws prohibiting job discrimination based on the following: (1) race; (2) color; (3) sex (including pregnancy and related conditions, sexual orientation, or gender identity); (4) national origin; (5) religion; (6) age (40 and older); (7) equal pay; (8) disability or genetic information (including family medical history or genetic tests or services), and (9) retaliation for filing a charge reasonably opposing discrimination or participating in a discrimination lawsuit, investigation, or proceeding. Title VII of the Civil Rights Act of 1964 imposes a monetary penalty for covered employers who fail to post these notices. The fine, currently \$659, is adjusted annually for inflation as required by law. The “Know Your Rights: Workplace Discrimination is Illegal” poster, prepared by the U.S. Equal Employment Opportunity Commission (EEOC), summarizes these laws, and explains how employees or applicants can file a complaint if they believe they have experienced discrimination.⁷

EEOC stipulates that these posters should be placed in a conspicuous location in the workplace where notices to applicants and employees are customarily posted. In addition to physically posting, covered employees are encouraged to post the notice digitally on their websites in a conspicuous location. In most cases, electronic posting supplements the physical posting requirement. In some situations, employers without a physical location or for employees who telework or work remotely and do not visit the employer's workplace regularly, electronic posting may be the only posting required.

The Americans with Disabilities Act (ADA) requires that notices of Federal laws prohibiting job discrimination be made available in a location accessible to applicants and

⁶ NYC Commission on Human Rights. (2018, June). *NYC Commission on Human Rights Legal Enforcement Guidance on ...* - *nyc.gov*. NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability. https://www.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.2.pdf

⁷ U.S. Equal Employment Opportunity Commission. (n.d.). “*Know your rights: Workplace discrimination is illegal*” poster. US EEOC. <https://www.eeoc.gov/poster>

employees with disabilities that limit mobility. Printed statements should also be made available in an accessible format, as needed, to people with disabilities that limit their ability to see or read.

The Department of Human Resources supports best practices that attract and retain quality candidates for employment within the City of Baltimore. To that end, providing further protections against discrimination is crucial in building, attracting, and retaining a diverse workforce within city government and within the City of Baltimore as a whole.

The Department of Human Resources respectfully defers to the Law Department with respect to legal sufficiency regarding issues of public accommodations and legal requirements for signage posting for public accommodations, and statutory consequences for violating the proposed ordinance, and on whether the ordinance would be pre-empted by existing federal labor law.

For additional questions or concerns, contact me at Quinton.Herbert@baltimorecity.gov or by phone at (410) 396-1563.

Sincerely,

Quinton M. Herbert, JD