

## Understanding Houston's New Equal Rights Ordinance

Authors William John Bux // 713-226-1275 // [bbux@lockelord.com](mailto:bbux@lockelord.com)  
 Sara C. Longtain // 713-226-1346 // [slongtain@lockelord.com](mailto:slongtain@lockelord.com)

On May 28, 2014, the Houston City Council passed, by a 11-6 vote, the Houston Equal Rights Ordinance (HERO), which generally prohibits discrimination within the city limits of Houston on the basis of certain protected characteristics in private employment, public accommodations, housing, and city employment, services and contracting practices. The term discriminate means "to intentionally distinguish, differentiate, separate, or segregate to the advantage or disadvantage of any person on the basis of a protected characteristic, except as required by federal or state law or court order," and applies equally to all portions of the HERO. Religious organizations, which generally include religious corporations, schools, social services or nonprofits operated by a religious corporation, are exempt from all provisions of the HERO.

While the HERO is mostly consistent with existing federal and state laws, significant variations include covering sexual orientation, gender identity, marital status, and familial status as protected characteristics, which may have a broad impact on affected businesses and employers. The HERO will become effective on June 27, 2014, as it provides covered entities a thirty day grace period to bring themselves into compliance. Below is a summary of the pertinent provisions of the HERO, as well as a discussion of the areas where the HERO varies from existing federal and state law.

### Private Employment

Article V of the HERO addresses discrimination in private employment. Coverage is defined on a graduated schedule, as follows:

Period of Coverage	# of Employees Required for Coverage
Effective Date until First Anniversary	50 or more employees
First Anniversary until Second Anniversary	25 or more employees
Upon Second Anniversary	15 or more employees

It is our understanding that the City Attorney considers the ordinance to cover an employer that has at least one employee within the City of Houston, if the employer otherwise employs in the aggregate the requisite number of employees outside of Houston. Importantly, only the Houston-based employee will be able to file a complaint.

Consistent with federal and state law, the HERO prohibits discrimination on the basis of a person's sex, race, color, ethnicity, national origin, age, military status, religion, disability, genetic information and pregnancy. The HERO, however, extends the prohibition against discrimination to the additional categories of familial status, marital status, gender identity and sexual orientation. The prohibition against discrimination covers only intentional discrimination, which should preclude disparate impact claims under the HERO.

It is both unlawful for an employer to retaliate against any person who files a complaint in good faith, and for any person to file a complaint in bad faith.

Employees have 180 days from the date of the alleged violation to file a verified complaint, in writing, with the office of inspector general (OIG). If the complaint is within the jurisdiction of a federal Equal Employment Opportunity Commission (EEOC) or state Texas Workforce Commission (TWC) agency, the OIG must refer the complaint to such agency and discontinue any investigation. For all other complaints, the OIG will investigate and may take statements and inspect relevant records. Voluntary cooperation will be expected of employers in any investigation. In the absence of voluntary cooperation, the OIG may compel cooperation by a request through the City Attorney to the City Council to issue a subpoena or subpoena duces tecum. Upon such a request, the otherwise confidential nature of the complaint and investigation will become a public record.

The OIG must complete the investigation within one year from the filing of the complaint. Employers may assert any affirmative defense to a complaint that would be available to them under existing federal or state discrimination laws. If a violation is found, the OIG must engage in conciliation of the complaint. If the conciliation process resolves the violation, confidentiality is maintained. If no resolution can be reached, the complaint will be referred to the City Attorney for appropriate action.

A violation of the HERO constitutes a Class C misdemeanor, which is punishable in municipal court by a fine of not less than \$250.00 or more than \$500.00 per day, with each day of violation treated as a separate offense. (The violation is a criminal act because the City can only enforce these fines in municipal court as a Class C misdemeanor, similar to traffic tickets.) In the aggregate, fines related to the same complaint are capped at \$5,000.00. Employers are entitled to a jury trial in municipal court. Any litigation in municipal court is a public record, so confidentiality cannot be maintained.

The HERO does not provide for a private right of action, nor does it detract from any existing civil remedies available to a complainant. No finding, conciliation or adjudication under the HERO will be admissible for purposes of the employer's licensing, permitting or regulatory matters within the city.

### Public Accommodations

Article IV of the HERO addresses discrimination in public accommodations. "[E]very business with a physical location in [the city limits of Houston], whether wholesale or retail, which is open to the general public and offers for compensation any product, services or facility," is covered by Article IV as a "place of public accommodation." For example, this means that if a business only offers its product or services to Houstonians through the internet, and does not have a physical location in Houston, the business will not be covered. The HERO specifically excludes from this definition "the leasing office, visitor parking area and model units of a multi-family housing facility."

The HERO also provides exemptions from coverage under Article IV for (1) facilities operated by a "bona fide private club" if the "accommodations, advantages, facilities and services" are restricted to members and their guests, (2) bona fide social, fraternal, educational, civic or religious organizations, or any private kindergarten, day care center or nursery school if profits above reasonable and necessary expenses are solely for the benefit of the organization, (3) any facility owned or operated by a federal, state, county or other local governmental entity, or (4) discounts on any product, services or facility based on age or military status.

Federal law prohibits discrimination in public accommodations on the basis of race, color, religion, national origin, or disability. Texas does not have its own directly correlative laws. However, the Texas Architectural Barriers Act (TABAA) establishes standards for accessibility in covered buildings and facilities, which, in large part, mirror the accessibility standards provided by the federal ADA Accessibility Guidelines. The HERO extends protection to the following protected categories, not otherwise covered under federal or state law: sex, ethnicity, age, military status, genetic information, pregnancy, familial status, marital status, gender identity and sexual orientation. As with private employment, the prohibition against discrimination is limited to intentional discrimination, but there is no specific provision prohibiting retaliation.

The enforcement and penalty provisions are generally the same as described above in private employment with only a couple of exceptions. First, if the complaint is within the jurisdiction of a federal (Department of Justice) or state (Texas Department of Licensing and Regulation) agency, the OIG may (but is not required to) refer the complaint to such agency and discontinue any investigation. Second, there are two defenses specific to this Article IV. For a claim of disability discrimination based on accessibility, a place of public accommodation may assert as a defense compliance with federal or state law related to accessibility and/or receipt of a variance from the city with respect to any specific condition or structural feature. Also, if multiple complaints allege a violation involving the same incident and same discrimination, it will be treated as one alleged violation.

### Fair Housing

Article VI of the HERO, which comprises two thirds of the HERO, addresses discrimination in housing, but in large part tracks the federal Fair Housing Act and the existing related city ordinance. There were very few changes to existing enforcement provisions. The Fair Housing Act only prohibits housing discrimination on the basis of race, color, national origin, religion, disability, sex and familial status (including pregnant women), but the HERO covers discrimination on the basis of pregnancy separate from familial status and the additional categories of ethnicity, military status, genetic information, marital status, gender identity and sexual orientation. Religious organizations and private clubs are exempted. Bringing a bad faith complaint can result in prosecution of the complainant in municipal court for a Class C misdemeanor.

Importantly, age is not a protected characteristic for the housing provisions. Similar to federal law, the HERO specifically exempts housing for elderly persons from coverage under Article VI with respect to the provisions relating to familial status, age and pregnancy. Accordingly, for example, retirement homes can restrict occupancy to older individuals without running afoul of the HERO.

The enforcement procedures follow federal law, and, therefore, vary from those outlined above for private employment and public accommodations. For instance, written complaints under oath must be filed within one year of the alleged discriminatory housing practice. Complaints are investigated by a fair housing administrator. An answer must be filed by a responding entity within 10 days of notice of the complaint. The matter must then be investigated within 30 days, or later upon notice of delay. If the complaint has merit and cause is found, conciliation will be attempted. If conciliation is unsuccessful, the City Attorney can prosecute the matter in municipal court as a Class C misdemeanor. The penalties for a violation of Article VI are the same as those provided for private employment and public accommodations, \$250 to \$500 per day with a \$5,000 cap.

### City Employment and Contracting

As mentioned at the outset, the HERO also covers discrimination in city employment, services and contracting practices. These provisions are mostly consistent with the city's existing practices, with the exception of the additional protected characteristics of gender identity, sexual orientation, marital status and familial status, so they are not covered in depth in this article.

### Compliance Considerations

From a business prospective, many of the requirements in the HERO for employment, public accommodations, and housing are already covered under existing federal and state laws or city ordinances, and businesses generally have compliance procedures in place for non-discrimination. However, employers covered by the HERO should review their equal opportunity, anti-harassment, and non-discrimination pronouncements in employee handbooks, policies, and notices and ensure they extend to the new protected categories or revise them accordingly. Employers should also train their employees on the requirements of the HERO, and be diligent in documenting, investigating, and promptly remedying complaints of discrimination.

Importantly, in the employment context, many claims will be covered by existing federal and state law, and, therefore, will be referred to either the Equal Employment Opportunity Commission or the Texas Workforce Commission. Thus, the only employment discrimination claims likely to be handled by the OIG or the City Attorney are those involving sexual orientation, gender identity, and marital status.

While the HERO does not specifically require employers and public accommodations to provide separate bathroom facilities for transgendered employees or customers, businesses cannot discriminate against covered individuals in the provision of such accommodations. The issue of access to restrooms, which engendered emotional debate before the City Council, may be a dominant complaint for employers and public accommodations. Restaurants, bars, clubs, and other places of amusement may see complaints filed by certain protected groups that may have been historically denied admission or service on the basis of some seemingly neutral admission criteria, like a dress code.

For housing, the addition of familial status, along with marital status, sexual orientation, and gender identity, may result in more housing becoming available to persons in these protected categories. Denial of such housing opportunities will likely be the focus of enforcement actions.

Finally, violations are enforced as a Class C misdemeanor. This means that if the City Attorney prosecutes an alleged violation, its occurrence and the required intent must be proven beyond a reasonable doubt. This is a higher burden of proof standard than the enforcement of civil penalties under state or federal law and may result in fewer convictions than would otherwise be expected. Likewise, the requirement that the discrimination be intentional may preclude any claim of disparate impact in enforcement of the HERO, which should be helpful to business.



### About the Authors

William J. Bux is a partner at Locke Lord. He is Board Certified in Labor and Employment Law. Mr. Bux focuses on all aspects of traditional management/union labor relations law, representing only management, as well as representing employers in the litigation of a variety of claims related to employment discrimination, occupational safety and health, wrongful termination, executive contracts, Sarbanes-Oxley whistleblower, and wages and hours. He has represented Harris County, Texas in an overtime wage dispute before the United States Supreme Court and numerous clients in litigation before state and federal district courts and the Fifth Circuit Court of Appeals.



Sara Longtain is an associate at Locke Lord. She concentrates her practice in labor and employment law. Ms. Longtain has litigated a wide variety of employment-related disputes, including, but not limited to, claims of discrimination, harassment, failure to accommodate (both religion and disability) and retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), wage and hour disputes under the Fair Labor Standards Act (FLSA), defense and enforcement of covenants not to compete and non-solicitation agreements, and workers' compensation retaliation claims. Ms. Longtain represents clients in both state and federal court and before various administrative bodies, including the Equal Employment Opportunity Commission (EEOC) and the Texas Workforce Commission (TWC).

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