

# HOW THE CITY OF SEATTLE ANTIDISCRIMINATION ORDINANCE CAN AFFECT YOUR WORKPLACE

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## **I.** **BACKGROUND**

The purpose of this presentation is:

- To outline the differences between federal, state and local antidiscrimination laws
- To analyze the impact of recent amendments to the City of Seattle antidiscrimination ordinance
- To offer strategies that will reduce the likelihood of a discrimination suit under the recent amendment to the City of Seattle antidiscrimination ordinance

## **II.** **OUTLINE OF THE DIFFERENCES BETWEEN** **FEDERAL, STATE AND LOCAL LAW**

### **A. Liability for Discrimination Generally**

There are three levels of antidiscrimination laws, each a little different:

- Federal
- State
- Local (City or County)

Each level adds more requirements for the employer (*i.e.*, local law is more onerous than state law; state law is more onerous than federal law)

**B. Discrimination in Employment under Federal Law.**

Classes protected under the federal antidiscrimination law, 42 U.S.C. § 2000e-2(a) (also known as "Title VII") are as follows:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Other federal statutes provide protection against discrimination based on factors such as age (being over 40), veteran's status and disability, and provide for family and medical leave.

The federal statute quoted above applies to employers who employ 15 or more people.

**C. Discrimination in Employment under State Law.**

Classes protected under the Washington Law Against Discrimination ("WLAD"), RCW Ch. 49.60.180 are as follows:

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling

in a particular instance has found the employment practice to be appropriate for the practical realization of equality or opportunity between the sexes.

(4) [Prohibiting discrimination in advertising or employment applications].

The underlined in the above quote illustrates classes protected under state law that are not expressly protected under federal law. For example, state law includes "creed" in place of "religion." "Creed" is a broader term:

**creed, n.** **1.** a system of religious belief. **2.** any system of belief or of opinion.

The Random House Dictionary (1980 paperback ed.) at p. 207.

RCW Ch. 49.60 applies to employers who employ 8 or more people.

Other Washington state laws prohibit discrimination against pregnant women and provide for parental and family leave and military leave.

**D. Discrimination in Employment under the City of Seattle Ordinance.**

Classes protected under the Seattle Municipal Code ordinance prohibiting discrimination in employment are as follows:

F. "Discrimination," "discriminate," and/or "discriminatory act" means any act, by itself or as part of a practice, which is intended to or results in different treatment or differentiates between or among individuals or groups of individuals by reason of race, color, age, sex, marital status, sexual orientation, political ideology, creed, religion, ancestry, national origin, or the presence of any sensory, mental or physical handicap.

SMC 14.04.030.F. The underlined in the above quote illustrates classes protected under the Seattle ordinance that are not expressly protected under state or federal law. Some of the underlined terms are defined in the ordinance:

N. "Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function, or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with job performance.

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P. "Sexual orientation" means actual or perceived male or female heterosexuality, bisexuality, homosexuality, transsexuality, or transvestism and includes a person's attitudes, preferences, beliefs and practices pertaining thereto.

SMC 14.04.030.N and SMC 14.04.030.P.

SMC 14.04.030 applies to employers who employ 4 or more people.

### **III.**

#### **A BRIEF HISTORY OF LOCAL, STATE AND FEDERAL LAW REGARDING SEXUAL ORIENTATION**

##### **A. Legislative and Court Attempts to Include Sexual Orientation as A Protected Class.**

There have been legislative and judicial expressions against expanding the discrimination laws to include discrimination based upon sexual orientation. In De Santis v. Pacific Telephone and Telegraph Co., 608 F.2d 327 (9th Cir. 1979) the court held that the prohibition on discrimination on the basis of sex should not be judicially extended to cover sexual orientation. See also Williamson v. A.G. Edwards and Sons, 876 F.2d 69 (8th Cir. 1989), cert. denied, 493 U.S. 1089, 107 L.Ed. 2d 1061, 110 S. Ct. 1158 (1990).

On the legislative front, the Washington State Senate refused to enact SB 5600 in the 1995 regular session, which would have added sexual orientation to RCW 49.60 as a protected class. Similar bills failed in the 1997 regular session. See HB 1044 and SB 5716. Moreover, an initiative was circulated last year that would prohibit claims of discrimination based on sexual orientation in the State of Washington. It was not enacted into law.

Last year, an initiative, I-200, was put before Washington State voters that would repeal "preferential treatment" based on race, color, ethnicity, or national origin in many contexts, including public employment. This initiative was passed, and has had some limiting effect on the WLAD. Though not precisely on point, Initiative 200 can be seen as evidence that Washington State, as a whole, has been more interested in limiting, rather than expanding, civil rights laws.

##### **B. Local Ordinances Like Seattle's "Fill in the Gaps" Left by State and Federal Law.**

Despite the state and federal government's unwillingness to include sexual orientation as a protected class, several local jurisdictions have included it in their own antidiscrimination ordinances. For example, the City of Seattle ordinance quoted earlier in this outline has been in place since 1973.

The difference between SMC 14.04 Fair Employment Practices and state and federal law historically has been in enforcement. Unlike the state and federal laws, which allow an individual enforce his or her rights in court, SMC 14.04 has not included an express "private right of

action." Attempts to have a private right of action implied by the courts have failed. E.g., Webb v. Puget Sound Broadcasting Co.

As a result, up until the recent amendments to SMC 14.04 went into effect in March 1999, the only remedy for a violation of the ordinance was to file a complaint with the City of Seattle Human Rights Commission. With the passage of the amendment, people now have a private right of action, enforceable in court, for discrimination in employment based on sexual orientation and political ideology.

### **C. Possible Effects of the Amendment to SMC 14.04.**

The private right of action under the amendment to SMC 14.04 is so new that there are many practical areas of its enforcement that are unresolved. For example, it is unknown at this time as to whether the superior courts or municipal courts have jurisdiction over violations of the ordinance. The ordinance states that actions can be filed in "Superior Court or any other court of competent jurisdiction," but there is an issue as to whether the superior court (which is a state body) will accept jurisdiction over a cause of action created by a city government.

The nexus required with the City for jurisdiction to attach is also unclear. The ordinance applies to "both private employers and the City," but does not indicate what is meant by a private employer. Several interpretations are possible. Some examples include the following:

- Any employer with an office or facility or mail drop in the City of Seattle
- Any employer whose employees work in the City of Seattle, even though the employer's facilities are located elsewhere (but only if the complaining employee has done work in Seattle)
- Any employer whose employees work in the City of Seattle, even though the employer's facilities are located elsewhere (even if the complaining employee has not done work in Seattle)
- Any employer who advertises for employees in Seattle
- Any employer whose employees or applicants live in Seattle

Until the nexus between the employer and the City of Seattle has been established by the courts or by further amendment to the ordinance, employers should take a conservative approach in deciding whether the ordinance may apply to them.

The other area that will need additional guidance from the courts is the type of conduct that is protected under the "political ideology" portion of the ordinance because there are no identical provisions in state or federal law to look to for guidance. This guidance will probably occur on a case-by-case basis and be highly fact-specific.

**IV.**  
**WHAT EMPLOYERS CAN DO TO PROTECT THEMSELVES**  
**FROM LAWSUITS UNDER SMC 14.04**

There are a number of steps that employers can take to protect themselves from lawsuits under the newly-amended SMC 14.04:

- Stop doing business that has any possible nexus with the City of Seattle
- Avoid treating employees differently based on sexual orientation, political beliefs, or other protected status
- Avoid discussing, verbally or in writing, opinions on sexual orientation, political beliefs, or other opinions regarding protected classes
- Train managers and other employees about discrimination and harassment
- Caution employees and managers not to discuss or otherwise bring information regarding protected classes into the workplace
- Update your sexual harassment and/or discrimination policies to cover the Seattle ordinance
- Promptly investigate any complaints or inappropriate conduct
- Apply discipline in established instances of discrimination that is designed to keep the conduct from reoccurring
- Call me if you have any questions; an ounce of prevention is definitely worth a pound of cure here
- Keep an eye out for court interpretations of the amendments that expand or limit the scope of the ordinance

**V.**  
**APPENDIX**

**A. Discrimination Cases.**

Aripa v. DSHS, 91 Wn.2d 135, 588 P.2d 185 (1978)

Brewer v. Copeland, 86 Wn.2d 58, 542 P.2d 445 (1975)

Cutler v. Phillips Petroleum Co., 124 Wn. 2d 749, 881 P.2d 216 (1994), cert. denied, 515 U.S. 1169, 132 L. Ed. 2d 873, 115 S. Ct. 2634 (1995)

De Santis v. Pacific Telephone and Telegraph Co., 608 F.2d 327 (9th Cir. 1979)

Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989)

Food Servs. of America v. Royal Heights, Inc., 123 Wn.2d 779, 871 P.2d 590 (1994)

Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996)

Graham Thrift Group v. Pierce County, 75 Wn. App. 263, 877 P.2d 228 (1994)

Griffen v. Elder, 130 Wn.2d 58, 922 P.2d 788 (1996)

Guild v. St. Martin's College, 64 Wn. App. 491, 827 P.2d 286 (1992)

Havens v. C&D Plastics, 124 Wn.2d 158, 876 P.2d 435 (1984)

High Tech Gays v. Defense Ind. Sec. Clr. Office, 895 F.2d 563 (9th Cir. 1990)

MacDonald v. Korum Ford, 80 Wn. App. 877, 912 P.2d 1052 (1996)

Marquis v. Spokane, 130 Wn.2d 97, 922 P.2d 43 (1996)

Maxwell v. Dept. of Soc. & Health Servs., 30 Wn. App. 591, 636 P.2d 1102 (1981)

O'Hartigan v. Dept. of Personnel, 118 Wn.2d 111, 821 P.2d 44 (1991)

Omega Nat'l Ins. Co. v. Marquardt, 115 Wn.2d 416, 799 P.2d 235 (1990)

Roe v. Quality Transportation, 67 Wn. App. 604, 838 P.2d 128 (1992)

Schonauer v. DCR Entertainment, 79 Wn. App. 808, 905 P.2d 392 (1995)

Singer v. Hara, 11 Wn. App. 247, 522 P.2d 1187 (1974)

State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 247 P.2d 787 (1952)

Williamson v. A.G. Edwards and Sons, 876 F.2d 69 (8th Cir. 1989), cert. denied, 493 U.S. 1089, 107 L. Ed. 2d 1061, 110 S. Ct. 1158 (1990)

Williamson v. Lee Optical, 348 U.S. 483, 99 L. Ed. 2d 563, 75 S. Ct. 461 (1955)

**B. Discrimination Statutes.**

Laws of 1949, ch. 183, sec. 1

Laws of 1957, ch. 37, sec. 1

Laws of 1973, ch. 141, Sec. 3

Laws of 1993, ch. 510, sec. 1

Laws of 1995, ch. 259 Sec. 1

RCW 34.04.130(6)(a)

RCW Ch. 49.60

Title VII of the Federal Civil Rights Act

SMC 14.04, as amended (copy attached)

**C. Constitutional Provisions.**

Fourteenth Amendment to the United States Constitution

Washington Constitution, Article I, Sec. 12