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## **LEGAL MEMORANDUM**

**To:** The Honorable Mayor Alvin Brown  
**From:** Office of General Counsel  
**Re:** Review of Anti-Discrimination Laws  
**Date:** June 30, 2015

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### **I. INTRODUCTION**

At your request, the Office of General Counsel has reviewed federal, state, and local anti-discrimination laws, policies and practices for the purpose of determining which measures (if any) apply to the City of Jacksonville (“the City”) and to the extent desired, issues to consider in determining whether the City should adopt further measures.

### **II. SUMMARY**

Title XI, comprised of Chapters 400, 402, 404, 406, and 408 of the Jacksonville Ordinance Code, prohibit discrimination in the areas of employment (public and private), public accommodations, and housing. Furthermore, the City is subject to several federal and state anti-discrimination statutes that protect various categories of individuals against discrimination in employment, housing, public accommodations, education, voting, etc. These statutes take precedence over any local measure. Therefore, the City may adopt measures that offer greater protection, but it may not adopt measures that conflict with federal and state laws.

A review of existing federal and state laws reveals extensive anti-discrimination measures that are likewise applicable to local governments such as the City of Jacksonville. In recent years, however, certain interest groups, business interests and various citizens throughout the country have advocated for further measures that would provide for the inclusion of sexual orientation and/or gender identity/expression as protected categories in anti-discrimination provisions at the federal, state, and local levels. These specific categories affect lesbian, gay, bisexual, and transgender (“LGBT”) individuals.

At the federal level, the United States Congress has considered and declined to expressly recognize LGBT as a protected group. However, the United States Supreme Court has ruled that discrimination based on sex, which is explicitly protected under federal anti-discrimination laws, may include discrimination against persons who do not conform to gender-based norms or sex-related stereotypes. The Supreme Court has also held that sexual harassment includes same-sex sexual harassment. Based on those decisions, LGBT persons who are able to show that they suffered discrimination based on their failure to conform to sex stereotypes, rather than solely based on their sexual orientation, have prevailed in discrimination claims. Also at the federal level, the President has issued Executive Orders, and various federal agencies have issued administrative rules and guidance, prohibiting or discouraging LGBT discrimination with regard to the statutes these agencies administer.

At the state level, Florida (along with 17 other states) has not adopted LGBT-specific anti-discrimination laws. The remaining thirty-two states have either recognized LGBT persons as a protected group in their anti-discrimination statutes, or promulgated executive measures that address discrimination against LGBT public employees.

In the eighteen states that do not have an LGBT-specific statute, some counties and cities have passed ordinances adding LGBT as a protected group in anti-discrimination ordinances. In Florida, a total of approximately 30 counties and municipalities have passed measures that prohibit discrimination based on LGBT status. Jacksonville is not one of those municipalities. A proposed LGBT anti-discrimination ordinance adding as protected classes “sexual orientation, gender identity, and gender expression,” was considered but did not pass City Council in 2012. Because it is likely that the same or similar legislation will again be introduced, this review discusses legal issues that Council will likely encounter and consider.<sup>1</sup>

### **III. FEDERAL LAW**

#### **A. Overview of Federal Anti-Discrimination Laws**

The anti-discrimination laws of the United States at the federal level primarily derive from three sources: (1) the U.S. Constitution; (2) federal statutes enacted by Congress; and (3) regulations promulgated by federal agencies to which Congress has delegated the responsibility to administer an anti-discriminatory statute.<sup>2</sup> Most federal anti-discrimination statutes are based on constitutional rights specifically enumerated in the U.S. Constitution or the U.S. Supreme Court's interpretation of specific constitutional provisions, the most important of which are<sup>3</sup>:

- The First Amendment, guaranteeing freedom of speech, religion and assembly.

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<sup>1</sup>To the extent that studies, surveys and reports are referenced throughout this memorandum, they are being so referenced for purposes of understanding the various aspects of this particular subject matter, and are not being relied upon for proven fact, as such documents have not been independently verified.

<sup>2</sup>*Chevron U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

<sup>3</sup>U.S.C. Const. Amend I, V, XIII, XIV, XV and XIX.

- The Due Process Clause of the Fifth Amendment, which states that no person shall be deprived of life, liberty or property without due process of law.
- The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, which prohibits states from depriving a person of the equal protection of the law and due process of law.
- The Thirteenth Amendment prohibiting slavery and involuntary servitude.
- The Fifteenth Amendment, which prohibits denying persons the right to vote on the basis of race or color.
- The Nineteenth Amendment, which prohibits denying persons the right to vote on the basis of gender.

While a comprehensive discussion of each anti-discrimination law is beyond the scope of this memorandum, federal anti-discrimination laws may be categorized into the broad spheres of rights each law was designed to protect. In the area of employment, Title VII of the 1964 Civil Rights Act<sup>4</sup> (Title VII) prohibits employment discrimination based on race, color, sex, religion and national origin.<sup>5</sup> In response to a series of U.S. Supreme Court decisions limiting the right of employees who had sued their employers, Congress enacted the Civil Rights Act of 1991<sup>6</sup>, which modified some of the basic procedural and substantive rights provided by federal law in employment discrimination cases. The 1866 Civil Rights Act and its amendments (§§ 1981, 1983 and 1985)<sup>7</sup> prohibit discrimination based on race, color or national origin in such areas as the right to make and enforce contracts, to sue, and employment. The Pregnancy Discrimination Act<sup>8</sup> (PDA), an amendment to Title VII, protects against pregnancy discrimination. The Age Discrimination in Employment Act<sup>9</sup> (ADEA) forbids discrimination on the basis of age (40 years of age and over). Title I of the Americans with Disabilities Act<sup>10</sup> (ADA) and the ADA Amendments Act (ADAAA) prohibit discrimination in employment on the basis of disability or an employee's association or relationship with a disabled person. The Genetic Information Non-discrimination Act<sup>11</sup> (GINA) protects employees from discrimination based on their genetic information. The Equal Pay Act<sup>12</sup> (EPA) prohibits wage discrimination on the basis of sex. The

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<sup>4</sup>42 U.S.C. § 2000e, *et seq.*

<sup>5</sup>Title VII also prohibits "harassment" based on protected categories and retaliation if an employee engages in "protected activity" by filing a discrimination complaint or participating in the investigation of a discrimination complaint. *See* 42 U.S.C. § 2000e-3(a).

<sup>6</sup>42 U.S.C. § 2000e-2(k) and (m).

<sup>7</sup>42 U.S.C. §§ 1981, 1983 and 1985.

<sup>8</sup>42 U.S.C. § 2000e-(k).

<sup>9</sup>29 U.S.C. §§ 621 – 634.

<sup>10</sup>Titles I, II, III and IV of the ADA are codified at 42 U.S.C. §§ 12101 – 12213.

<sup>11</sup>42 U.S.C. § 2000ff.

<sup>12</sup>29 U.S.C. § 206(d).

Fair Labor Standards Act<sup>13</sup> (FLSA) requires employers to pay minimum wage for all hours worked and overtime, if applicable. The Family and Medical Leave Act<sup>14</sup> (FMLA) permits eligible employees to take unpaid medical leave up to 12 weeks (26 weeks for active-duty military personnel) per year to care for the employee's or a close family member's serious health condition and prohibits discrimination or retaliation against employees who take FMLA leave. The Employee Retirement Income Security Act<sup>15</sup> (ERISA) regulates the health and welfare plans of private employers (e.g., pension, health and disability plans) and provides remedies for employees wrongfully denied benefits.

In the area of disabilities, Title II of the ADA forbids discrimination by all public entities at the local level (e.g., municipality, county or school district) and requires that such entities make facilities, programs and services accessible to disabled persons. Title III of the ADA prohibits discrimination against disabled persons in public accommodations, and the Air Carrier Access Act precludes such discrimination by air carriers.<sup>16</sup> Title III of the ADA and the Telecommunications Act require telecommunication companies to provide functionally equivalent services for consumers with disabilities.<sup>17</sup> The Rehabilitation Act<sup>18</sup> prohibits disability discrimination by the federal government and federal contractors. The Architectural Barriers Act<sup>19</sup> (ABA) mandates that facilities and buildings designed, built, altered or leased with federal funds must provide access to disabled persons. The Individuals with Disabilities Education Act<sup>20</sup> (IDEA) requires public schools to provide a free appropriate education to students with disabilities.

Among the federal laws prohibiting discrimination in housing and public accommodations are the Fair Housing Act<sup>21</sup> (FHA), which protects people from discrimination on the basis of race, color, national origin, religion, sex, disability and the presence of children when they are renting, buying, or securing financing for any type of housing. Title II of the 1964 Civil Rights Act<sup>22</sup> protects against discrimination in places of public accommodations (e.g., motels, hotels, restaurants, theaters and stores) on the basis of race, color, age, disability, national origin, gender and religion.

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<sup>13</sup>29 U.S.C. §§ 201 - 219.

<sup>14</sup>29 U.S.C. § 2601.

<sup>15</sup>29 U.S.C. §§ 1021- 1191c.

<sup>16</sup>42 U.S.C. § 12184 and 49 U.S.C. § 41705.

<sup>17</sup>47 U.S.C. § 255, 251 (a)(2).

<sup>18</sup>29 U.S.C. §§ 791 *et seq.*

<sup>19</sup>42 U.S.C. §§ 4151 *et seq.*

<sup>20</sup>20 U.S.C. §§ 1400 *et seq.*

<sup>21</sup>42 U.S.C. § 3601 *et seq.*

<sup>22</sup>42 U.S.C. § 2000a.

Regarding public education, besides the IDEA discussed above, Title IV of the 1964 Civil Rights Act mandated the desegregation of schools.<sup>23</sup> Title VI<sup>24</sup> of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, sex, religion or national origin by public elementary and secondary schools and public colleges and universities receiving federal financial assistance. Title VI applies to all programs and activities receiving federal funds, not just in the field of education. Title IX of the Education Amendments of 1972<sup>25</sup> protects female athletes from discrimination based on sex in education programs and activities that receive federal financial assistance, and prohibits sexual harassment and discrimination based on pregnancy. The Equal Educational Opportunity Act<sup>26</sup> (EEOA) protects faculty, staff, and students from discrimination, including racial segregation of students, and requires school districts to take action to overcome barriers to students' equal participation.

In the category of voting rights, the Voting Rights Act<sup>27</sup> (VRA) effectuates the Fifteenth Amendment's guarantee that no person shall be denied the right to vote on account of race or color. The National Voter Registration Act<sup>28</sup> (the NVRA) made voter registration easier, more accessible, and uniform from state to state. The Help America Vote Act<sup>29</sup> (HAVA) reformed the nation's voting process and improved voting systems and voter access to correct problems identified after the 2000 Election. The Voting Accessibility for the Elderly and Handicapped Act<sup>30</sup> (VAEHA) improved the access of handicapped and elderly individuals to registration facilities and polling places. The Uniformed and Overseas Citizens Absentee Voting Act<sup>31</sup> (UOCAVA) provides voting rights and protection for U.S. citizens living overseas.

In the area of credit and other financial services, the Fair Credit Reporting Act<sup>32</sup> (FCRA) protects the integrity and privacy of consumer credit information. The Equal Credit Opportunity Act<sup>33</sup> (ECOA) prohibits discrimination against applicants for credit on the basis of race, color, religion, national origin, sex, marital status and age, or because the applicant's income derives

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<sup>23</sup>42 U.S.C. § 2000c.

<sup>24</sup>42 U.S.C. § 2000d.

<sup>25</sup>20 U.S.C. §§ 1681 - 1688.

<sup>26</sup>20 U.S.C. §§ 1701- 1758.

<sup>27</sup>52 U.S.C. §§ 10301 – 10314; 10501-10508; and 10701 – 10702.

<sup>28</sup>52 U.S.C. §§ 20501 - 20511.

<sup>29</sup>52 U.S.C. §§ 20901 - 20906.

<sup>30</sup>52 U.S.C. §§ 20101 - 20107.

<sup>31</sup>52 U.S.C. §§ 20301 - 20311.

<sup>32</sup>15 U.S.C. § 1681.

<sup>33</sup>15 U.S.C. § 1691.

from public assistance. The Consumer Credit Protection Act<sup>34</sup> (CCPA) protects employees from discharge by their employers because their wages have been garnished.

Persons who serve in the military are protected by the Uniformed Services Employment and Reemployment Rights Act<sup>35</sup> (USERRA), which provides veterans with reemployment rights and prohibits discrimination and retaliation against employees who leave work to perform military service. The Servicemembers Civil Relief Act<sup>36</sup> (SCRA) protects military members as they enter active duty with regard to such issues as rental agreements, security deposits, prepaid rent, eviction, mortgage foreclosure, health insurance and income tax payments.

Federal statutes governing religion include the Religious Freedom Restoration Act<sup>37</sup> (RFRA), which states that the government may not substantially burden a person's exercise of religion even if the burden results from a neutral rule of general applicability.<sup>38</sup> The Religious Land Use and Institutionalized Persons Act<sup>39</sup> (RLUIPA) protects individuals, houses of worship and other religious institutions from discrimination due to zoning laws and similar restrictions on property. The Freedom of Access to Clinic Entrances Act<sup>40</sup> (FACEA) forbids the physical obstruction or the threat or use of force to injure, intimidate, or interfere with a person's right to seek or obtain reproductive health services or to exercise the First Amendment right of religious freedom at a place of religious worship.

In the category of prisoners' rights and criminal and immigration laws, the Civil Rights of Institutionalized Persons Act<sup>41</sup> (CRIPA) protects individuals in correctional facilities, nursing homes, mental health facilities, and institutions for people with intellectual and developmental disabilities from abuse. The Violent Crime Control and Law Enforcement Act<sup>42</sup> prohibits law enforcement officers from engaging in a pattern or practice that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

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<sup>34</sup>15 U.S.C. §§ 1671 - 1677.

<sup>35</sup>38 U.S.C. §§ 4301 - 4335.

<sup>36</sup>50 App. U.S.C. §§ 501 *et seq.*

<sup>37</sup>42 U.S.C. § 2000bb - 2000bb-4.

<sup>38</sup>In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the U.S. Supreme Court held that the RFRA was unconstitutional as applied to the states, but it continues to be constitutional as applied to the federal government. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), the U.S. Supreme Court held that requiring a closely-held corporation to provide contraceptives as part of its employees' group health insurance coverage substantially burdened the exercise of religion under the RFRA.

<sup>39</sup>42 U.S.C. §§ 2000cc – 2000cc-5.

<sup>40</sup>18 U.S.C. § 248.

<sup>41</sup>42 U.S.C. § 1997a.

<sup>42</sup>42 U.S.C. §§ 14141 – 14142.

As part of the Violence Against Women Act<sup>43</sup>, Congress enacted the Gender Motivated Violence Act (GMVA), which provides a federal civil rights cause of action for victims of gender motivated violence. The Immigration Reform and Control Act<sup>44</sup> (IRCA) prohibits discrimination on the basis of citizenship or immigration status.

## **B. Other Categories Which Are Not Currently Protected at the Federal Level**

While the President has issued an Executive Order<sup>45</sup> and some federal agencies have promulgated rules prohibiting discrimination on the basis of sexual orientation, gender identity and familial status (e.g., a person's status as a parent), they only apply to the federal government and federal contractors. To date, Congress has not amended Title VII to explicitly recognize sexual orientation or familial status as protected categories.<sup>46</sup> However, in 1989, in a seminal case, *Price Waterhouse v. Hopkins*<sup>47</sup>, the U.S. Supreme Court held that Title VII's prohibition on discrimination "on the basis of sex" or "because of sex" also includes discrimination on the basis of sex stereotypes. Since that time, LGBT persons have brought workplace discrimination claims under Title VII and/or the Equal Protection Clause, alleging that their failure to conform to gender-based norms, expectations, or stereotypes was a form of sex discrimination.<sup>48</sup> The courts in various jurisdictions have produced inconsistent rulings on this issue. Generally, employees claiming sexual orientation discrimination on the basis that they are gay or lesbian have not been successful in using Title VII's prohibition on sex discrimination.<sup>49</sup> In contrast, transgender persons, transsexuals and persons transitioning from one sex to another sex have had more success in prevailing under Title VII by arguing that the discrimination they suffered as a result of their gender-nonconforming behavior was due to impermissible sex stereotypes.<sup>50</sup> The

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<sup>43</sup>42 U.S.C. § 13981.

<sup>44</sup>8 U.S.C. § 1324(b).

<sup>45</sup>Executive Order 11478, as amended by Executive Orders 12106 and 13087.

<sup>46</sup>Since Title IX has been interpreted as consistent with Title VII, sexual orientation is also not a protected category under Title IX. *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601 (E.D.N.Y. 2011).

<sup>47</sup>490 U.S. 228, 235, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

<sup>48</sup>The U.S. Equal Employment Opportunity Commission (EEOC), the federal agency responsible for investigating and remediating Title VII discrimination claims, accepts LGBT discrimination complaints, which are prosecuted as sex discrimination complaints. See [http://www.eeoc.gov/federal/directives/lgbt\\_complaint\\_processing.cfm](http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm).

<sup>49</sup>*Kalich v. AT&T Mobility, LLC*, 679 F.3d 464 (6th Cir. 2012); *Pagan v. Gonzalez*, 430 Fed. Appx. 170 (3d Cir. 2011); *DiPetto v. U.S. Postal Service*, 383 Fed.Appx. 102 (2d Cir. 2010); *Kiley v. Am. Soc. for the Prevention of Cruelty to Animals*, 296 Fed. Appx. 107 (2d Cir. 2008); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Simonton v. Runyon*, 225 F.3d 122 (2d Cir. 2000).

<sup>50</sup>*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (under ECOA, interpreting discrimination against transsexual in same manner as Title VII sex discrimination based on gender non-conformity); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (under GMVA, interpreting gender-motivated attack against transsexual in same manner as Title VII sex discrimination based on gender non-conformity); *E.E.O.C. v. R.G. & G.R. Harris Funeral Home, Inc.*, 2015 WL 1808308 (E.D. Mich. April 21, 2015).

U.S. Supreme Court has held that Title VII's prohibition against sexual harassment includes harassment by members of the same sex, not only heterosexual sexual harassment.<sup>51</sup>

LGBT plaintiffs alleging harassment or discrimination based on non-conforming gender norms and sex stereotypes have had some recent successes. This is perhaps due to a more favorable political climate and/or recent court success at both the federal and state level in the area of same-sex marriage. These cases demonstrate the financial risks an employer may face if it loses or settles a LGBT discrimination claim. In a 2013 case from the Fifth Circuit, a jury awarded \$450,000 to the plaintiff, a construction worker who claimed he was subject to same-sex sexual harassment by his supervisor, the superintendent of an all-male crew on a worksite operated by defendant.<sup>52</sup> In a 2014 case against a car dealership in New Mexico, the EEOC settled a class action with over 50 male plaintiffs for over \$2 million dollars.<sup>53</sup> In that case, the plaintiffs claimed egregious sexual harassment by a former lot manager under the direction of the dealership's then general manager. In federal court in the Middle District of Florida, which includes Duval County,<sup>54</sup> a transgender employee who was transitioning from male to female claimed her employer, an eye clinic, discriminated against her because she did not conform to sex stereotypes. Although the employee's job performance had always been satisfactory, after she began presenting as a woman and informed the clinic she was a transgender person, her employer fired her. During the discovery stage of the litigation, the parties settled the case for \$150,000. In addition, the employer will have to revise its policies, undergo managerial and employee training, and be subject to EEOC monitoring for two years.

Although certain transgender persons and transsexuals have attempted to bring discrimination claims under the ADA, the ADA does not recognize these claims as disabilities for which employers must provide reasonable accommodations (e.g., by providing a gender neutral restroom).<sup>55</sup> Likewise, transgender, transsexual and transitioning employees claiming that the employer's refusal to permit them to use the restroom of the sex they identify with was sex discrimination have generally failed to establish a sex discrimination claim where the employer has set forth a legitimate, non-discriminatory reason for the refusal (e.g., safety concerns) or the employee has been unable to show that the employer's asserted reason was a pretext for sex discrimination.<sup>56</sup> Employees have also brought claims of sexual orientation

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<sup>51</sup>*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

<sup>52</sup>*EEOC v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013) (en banc).

<sup>53</sup>*EEOC v. Pitre Buick* (D.N.M. Civ. No. 11-00875).

<sup>54</sup>*EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla. Civ. No. 8:14-cv-2421).

<sup>55</sup>42 U.S.C.A. § 12211(b)(1); 29 U.S.C. § 705(20)(E); *Diamond v. Allen*, 2014 WL 6461730, \*4 (M.D. Ga. Nov. 17, 2014). However, at the state level, some courts and human rights commissions have ruled in favor of transgender and transsexual students at elementary and secondary schools on this issue, finding that denying them the right to use the restroom of the sex they identify with violates state human rights laws prohibiting sexual orientation discrimination.

<sup>56</sup>*Kastl v. Maricopa County Cmty. Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).



discrimination as religious discrimination claims under Title VII, but for the most part, the courts have rejected these claims as an attempt to circumvent Title VII's exclusion of sexual orientation as a protected category.<sup>57</sup>

Employment protection is also offered through internal policies established by private (e.g., Walt Disney and Florida Blue) and public employers, including the majority of Florida's public universities, which prohibit such discrimination. While these policies do not enjoy the force of the law, their mere existence may deter discrimination as they are express statements of the employer's attitude toward LGBT and/or gender identity discrimination.

Under the Equal Protection Clause, courts have recognized the right of same-sex couples to receive the same benefits as heterosexual married couples.<sup>58</sup> Even where the state denied same-sex couples the right to marry, some courts held that denying same-sex partners the same benefits as married heterosexual couples violates the Equal Protection Clause. In 2013, the U.S. Supreme Court overturned a section of the Defense of Marriage Act (DOMA), a federal statute that defines marriage as between a man and a woman and does not require states to recognize the marriages of same-sex couples from other states.<sup>59</sup> The Supreme Court found that under federal law, DOMA's definition of "marriage" and "spouse" as only applying to opposite sex persons for the purposes of federal benefits was unconstitutional. On June 26, 2015, the U.S. Supreme Court issued a landmark decision holding that the Fourteenth Amendment requires states to marry two people of the same sex and to recognize such marriages lawfully performed and licensed in other states.<sup>60</sup> Similarly, while discrimination based on familial status is not recognized under Title VII, discrimination against caregivers may be a form of sex discrimination under Title VII or disability discrimination (based on relationship or association) under the ADA.<sup>61</sup>

In the area of public accommodations, the Supreme Court has generally upheld the right of private clubs to exclude persons on the basis of sexual orientation under the First Amendment's freedom of association clause<sup>62</sup>, but courts have held that places of public accommodation may not exclude persons on the basis of sexual orientation.<sup>63</sup> With regard to the housing industry, the FHA does not contain any anti-discrimination language applicable to the

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<sup>57</sup>*Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009); *Fiore v. Fairfield Bd. of Educ.*, 2009 WL 2869523 (D. Conn. Sept. 1, 2009).

<sup>58</sup>*In re Fonberg*, 736 F.3d 901 (9th Cir. 2013); *Basset v. Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013).

<sup>59</sup>*U.S. v. Windsor*, 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013).

<sup>60</sup>*Obergefell v. Hodges, Director, Ohio Dep't of Health*, No. 14-556 (U.S. Supreme Court, June 26, 2015).

<sup>61</sup>*Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004); *EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, at <http://www.eeoc.gov/policy/docs/caregiving.html>.

<sup>62</sup>*Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

<sup>63</sup>*Apilado v. N. Am. Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011).

LGBT community. However, in February 2012, the Department of Housing and Urban Development (HUD), which administers the FHA, issued rules prohibiting owners of HUD-assisted housing and individuals whose financing is insured by HUD from discriminating on the basis of sexual orientation or gender identity.<sup>64</sup> The rules apply to HUD's rental assistance program, Federal Housing Administration mortgage insurance, community development, and public assisted housing programs.

In the category of public education, the U.S. Department of Education (DOE) has issued guidance on sexual harassment and sexual violence in schools, and has made it clear that protection applies to LGBT students.<sup>65</sup> Most recently, the DOE issued a letter stating that each school is required to have a Title IX coordinator handling allegations of sexual harassment, and that employees serving as coordinators are protected from retaliation by the administration for performing their job duties.<sup>66</sup>

Congress has also enacted the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act<sup>67</sup>, which makes it a federal crime to commit a physical assault or cause property damage based on a bias against someone due to their sexual orientation or gender identity, as well as other classifications.

#### **IV. STATES**

##### **A. Florida's Anti-discrimination Laws**

Florida has passed anti-discrimination laws in employment, public accommodations, and housing. Under the Florida Civil Rights Act of 1992 ("FCRA"), it is against the law to discriminate in employment on the basis of race, color, religion, sex, national origin, age, handicap or marital status.<sup>68</sup> The FCRA also prohibits discrimination or segregation in public accommodations on the ground of race, color, national origin, sex, handicap, familial status, or religion.<sup>69</sup> Persons with HIV/AIDS receive "every protection made available to handicapped persons."<sup>70</sup>

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<sup>64</sup>See HUD website, at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination).

<sup>65</sup>See <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>;  
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>66</sup> See <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

<sup>67</sup>18 U.S.C. § 249.

<sup>68</sup>§§ 760.01 et seq., Fla. Stat.

<sup>69</sup> § 760.08, Fla. Stat.

<sup>70</sup> § 760.50, Fla. Stat.

Florida's Fair Housing Act<sup>71</sup> prohibits discrimination in the sale, rental, financing, appraisal, or insuring of housing, in the provision of real estate brokerage service, or in the advertising of a dwelling on the basis of race, color, religion, sex, national origin, handicap or familial status.<sup>72</sup> Steering<sup>73</sup> and blockbusting<sup>74</sup> are also illegal.

**B. Florida Laws/Rules Pertaining to Protection of LGBT Community**

In the criminal law context, Florida has legislated for the protection of individuals targeted due to their sexual orientation. Crimes that show a prejudice based on sexual orientation have been reclassified as hate crimes, and therefore receive harsher penalties.<sup>75</sup> Similarly, Florida's Criminal Gang Prevention Act identifies hate groups as criminal gangs, and defines hate groups as organizations whose primary purpose is to promote animosity, hostility, and malice based on various criteria, including sexual orientation.<sup>76</sup>

Some Florida professional organizations have internal anti-discrimination rules in the provision of professional services, and some of these rules recognize sexual orientation and/or gender identity as protected categories. For example, the Florida Bar prohibits discrimination by lawyers against litigants, jurors, witnesses, court personnel, and other lawyers "on any basis including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic."<sup>77</sup>

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<sup>71</sup> §§ 760.20 et seq., Fla. Stat.

<sup>72</sup> The Fair Housing Act provides the following definition for "familial status":

"Familial status" is established when an individual who has not attained the age of 18 years is domiciled with:

- (a) A parent or other person having legal custody of such individual; or
- (b) A designee of a parent or other person having legal custody, with the written permission of such parent or other person. § 760.22, Fla. Stat.

The applicable federal law provides the following definition for "familial status":

"Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with:

- (1) a parent or another person having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years. 42 U.S.C. § 3602.

<sup>73</sup> Steering is defined as the practice of nudging buyers away or toward a specific area based on the presence or absence of protected class members in the area relative to the buyers.

<sup>74</sup> Blockbusting is defined as the practice of encouraging homeowners to sell because of an influx or expected influx of minorities into the area.

<sup>75</sup> § 775.085, Fla. Stat.

<sup>76</sup> § 874.03, Fla. Stat.

<sup>77</sup> § 4-8.4, Fla. Bar Rules.

### **C. States Without LGBT Statutes**

Seventeen other states do not have any provision specifically addressing sexual orientation or gender identity in the context of anti-discrimination laws: Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Mississippi, Nebraska, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia and Wyoming. In most of these states, some counties and cities have passed ordinances banning discrimination in employment (public and/or private), public accommodations and/or housing on the basis of sexual orientation and/or gender identity.

Arkansas<sup>78</sup> and Tennessee<sup>79</sup> recently passed statutes prohibiting counties and cities from passing ordinances that give private individuals greater anti-discrimination protection than that given by state law. Under these statutes, local government entities may not pass ordinances, regulations, etc., creating additional protection for their employees. The declared purpose of both statutes is to ensure that employers, businesses, and organizations are subject to uniform anti-discrimination laws throughout the state. The statutes have created a conflict between state law and city ordinances.

### **D. States with LGBT Anti-Discrimination Statutes**

Twenty-two states have statutes that prohibit discrimination based on sexual orientation or gender identity in public employment, private employment, housing, and/or public accommodations: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin.<sup>80 81</sup> If the state statute

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<sup>78</sup> A.C.A. § 14-1-401 et seq. (Intrastate Commerce Improvement Act).

<sup>79</sup> T. C. A. § 7-51-1801 et seq. (Equal Access to Intrastate Commerce).

<sup>80</sup> Below is a list of relevant statutes addressing sexual orientation and/or gender identity discrimination in employment, housing and/or public accommodations.

**California** – Cal. Govt. Code T. 2, D. 3, Pt. 2.8; Cal. Civ. Code § 51;

**Colorado** – C.R.S. T. 24, Art. 34;

**Connecticut** – C.G.S. T. 46a, Ch. 814c;

**Delaware** – 25 Del.C. § 5101 et seq. (housing); 19 Del.C. § 710 et seq. (employment); 6 Del.C. § 4500 et seq. (equal accommodations); 6 Del.C. § 4600 et seq. (Fair Housing Act); 29 Del.C. 29 § 5953 (public employment);

**Hawaii** – HRS § 515-1 et seq. (housing); HRS § 489-1 et seq. (public accommodations); HRS § 378-1 et seq. (employment);

**Illinois** –ILCS Ch. 775;

**Iowa** – I.C. § 216.1 et seq. (Iowa Civil Rights Act of 1965);

**Maine** – 5 M.R.S. § 4551 et seq. (Maine Human Rights Act);

**Maryland** – MD Code, State Government, T 20;

**Massachusetts** – M.G.L. Ch. 151B;

**Minnesota** – M.S. Ch. 363A;

**Nevada** – N.R.S. 613.310 et seq. (employment); N.R.S. 118.010 et seq. (Nevada Fair Housing Law); N.R.S. 233.010 et seq. (Nevada Equal Rights Commission); N.R.S. 651.050 et seq. (public accommodations);

**New Hampshire** – N.H. Rev. Stat. § 354-A:1 et seq. (New Hampshire Law Against Discrimination);

addresses only sexual orientation, some counties and cities have passed ordinances extending the protection to gender identity, *e.g.*, New York City, Albany (NY), and Madison (WI).<sup>82</sup>

### **E. States with Executive Orders, Policy Statements, or Personnel Rules**

Ten states have executive orders, executive directives, policy statements, or personnel rules that prohibit discrimination based on sexual orientation and/or gender identity in public employment: Alaska, Arizona, Indiana, Kentucky, Michigan, Missouri, Montana, Ohio, Pennsylvania, and Virginia.<sup>83</sup> It is not clear whether, at the time of this review, some of these orders/directives/statements/rules are still in effect.

In some of these states, large numbers of counties and cities have passed ordinances banning discrimination in employment (public and/or private), public accommodations and/or housing on the basis of sexual orientation or gender identity. For example, currently more than 30 cities in Michigan have such ordinances.<sup>84</sup>

### **F. States with Religious Freedom Statutes**

Twenty-one states also have religious freedom statutes, many of which mirror the federal Religious Freedom Restoration Act: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma,

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**New Jersey** – N.J.S. 10:5-1 et seq. (New Jersey Law Against Discrimination);

**New Mexico** – N.M.S. 1978, § 28-1-1 et seq. (New Mexico Human Rights Act);

**New York** – McKinney's Executive Law § 290 et seq. (New York Human Rights Law);

**Oregon** – O.R.S. § 659A.001 et seq.;

**Rhode Island** – Gen.Laws 1956, § 28-5-1 et seq. (employment); Gen.Laws 1956, § 34-37-1 (housing); Gen.Laws 1956, § 11-24-1 et seq. (public accommodation);

**Utah** – SB 296 (2015);

**Vermont** – 21 V.S. § 495 et seq. (employment); 9 V.S. § 4500 et seq. (housing and public accommodation);

**Washington** – West's RCW 49.60.010 et seq. (Washington Law Against Discrimination);

**Wisconsin** – W.S. 106.50 et seq. (Equal Rights Programs); W.S. 111.31 et seq. (employment); W.S. 66.1011 (housing).

<sup>81</sup> See also Eric Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, New York Times, June 27, 2015, [http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?emc=etal&\\_r=0](http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?emc=etal&_r=0) (see chart within article entitled “Where Discrimination is Banned”; sources of chart data are Human Rights Campaign and Movement Advancement Project).

<sup>82</sup> NYC Admin. Code, Title 8 (The New York City Human Rights Law); Code of the City of Albany, NY, Ch. 48 (Equal Opportunity Protections); City of Madison, WI, Code of Ordinances, Ch. 39 (Department of Civil Rights).

<sup>83</sup> See also Eric Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, New York Times, June 27, 2015, [http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?emc=etal&\\_r=0](http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?emc=etal&_r=0) (see chart within article entitled “Where Discrimination is Banned”; sources of chart data are Human Rights Campaign and Movement Advancement Project).

<sup>84</sup> In June 2015, the Michigan legislature passed a bill (HB 4052) that prohibits local government entities from giving protection that goes beyond that afforded by federal or state law in private-sector employment. At the same time, the bill specifies that it does not apply to anti-discrimination provisions adopted by local governments.

Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Many of these statutes were passed throughout the 1990s and 2000s without any objection from special interest groups. More recent attempts to adopt religious freedom statutes have met with opposition from LGBT groups. This year, Arkansas<sup>85</sup> and Indiana<sup>86</sup> passed religious freedom statutes in the midst of a heated debate over whether their purpose was to target LGBT individuals. In response, the Indiana statute was revised to specify that it: (1) did not authorize refusal of services, goods, accommodations, employment, or housing, (2) did not establish a defense to accusations of refusal to provide services, goods, accommodations, employment, or housing, and (3) did not negate other rights available under the state constitution.

Florida's Religious Freedom Restoration Act of 1998, codified in Chapter 761, Florida Statutes, provides greater protections to a person's religious freedom rights than is afforded by the U.S. Supreme Court's interpretations of the Free Exercise Clause of the United States Constitution. *See, e.g., Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). This act requires a court to apply a strict scrutiny analysis, which limits a state's ability to substantially burden a person's exercise of religion unless the government establishes that the imposition of such burden is: 1) in furtherance of a compelling governmental interest; and 2) the least restrictive means of furthering the compelling governmental interest.

At least in theory, the right against discrimination has not been elevated above that of religious freedom, and vice versa. However, it remains to be seen how courts will balance a "substantial burden" on one's religious rights against a "compelling governmental interest" justifying such burden. This type of balancing test typically results in varied outcomes based on the individual circumstances of each case.

## V. LOCAL LAW

While the U.S. Congress and the Florida Legislature have passed laws prohibiting discrimination in areas such as employment, education, housing, and public accommodations on the basis of certain specified classifications such as race, national origin, sex, age, disability, familial status and others, LGBT has not been expressly designated as a protected group. This does not mean, however, that Florida has collectively remained silent on the issue. 10 out of Florida's 67 counties (Alachua, Broward, Hillsborough, Leon, Miami-Dade, Monroe, Orange, Palm Beach, Pinellas and Volusia Counties), as well as approximately 20 of its municipalities (the number is in constant flux), have passed local laws prohibiting discrimination based on sexual orientation and/or gender identity and/or gender expression.<sup>87</sup>

According to Gallup polling, Jacksonville is the Florida metro area with the highest percentage of residents who identify themselves as lesbian, gay, bisexual, or transgender

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<sup>85</sup> A.C. § 16-123-401 et seq. (Religious Freedom Restoration Act).

<sup>86</sup> Indiana Senate Enrolled Acts 101 and 50, effective July 1, 2015.

<sup>87</sup> For a listing of Florida counties and municipalities that have passed LGBT-related anti-discrimination laws, see <http://www.eqfl.org/discrimination>.

(“LGBT”) (4.3%), followed closely by the Miami, Orlando, and Tampa metropolitan areas.<sup>88</sup> Unlike the Miami, Orlando, and Tampa metropolitan areas, however, Jacksonville currently has no local laws explicitly prohibiting discrimination against the LGBT community.

In 2007-2008, the Jacksonville Community Council, Inc. (“JCCI”) and the Jacksonville Human Rights Commission (“JHRC”) reported on the makeup of the LGBT community and specific issues they faced, Jacksonville residents’ attitudes toward the LGBT community, and the level of discrimination toward LGBT residents in the areas of employment, housing, and public accommodations in Jacksonville.<sup>89</sup> Findings of the JHRC survey of 512 Jacksonville residents (95% of which were reportedly heterosexual), included, in part, the following:

- 86% of respondents strongly agreed that individuals should receive equal treatment at work regardless of their sexual orientation;
- 73.5% of respondents reported they would be equally comfortable having a single lesbian or a single heterosexual woman as a neighbor;
- 86.2% of respondents reported that prejudice against lesbian and gays is either “non-existent” or “low;”
- 23.4% agreed with the statement that a heterosexual person is more moral than a homosexual person.<sup>90</sup>

The JCCI study of 211 self-identified LGBT residents included the following conclusions: First, with regard to employment, housing, and public accommodations, a “recurrent thread of fear” runs through the LGBT study participants that discrimination, loss, or violence may occur if people become aware of their true identity. Second, local institutions, such as the Duval County Public Schools<sup>91</sup>, as well as many large employers in Jacksonville, have added policies protecting LGBT individuals. Third, JCCI found substantive LGBT

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<sup>88</sup> Frank Newport and Gary J. Gates, San Francisco Metro Area Ranks Highest In LGBT Percentage (March 2015), Gallup Poll; <http://www.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx>. Gallup Inc., is an American research-based global performance consulting company founded in 1935. Gallup Poll is the division of Gallup that is well-known for tracking the public’s attitudes concerning political, social, and economic issues, including sensitive or controversial subjects.

While it is unclear what source Gallup polling used to determine Jacksonville’s population, the U.S Census Bureau lists Jacksonville’s population estimate as 821,784 (as of April 1, 2010), with a projected population estimate as of July 1, 2014 of 853,382. *Annual estimates of the Resident Population: April 1, 2010 to July 1, 2014*; <https://www.census.gov/popest/data/cities/totals/2013/SUB-EST2013-3.html>; *United States Census Bureau, Population Division: Release Date: December 2014*. According to data collected from 2012-2014, 4.3% of 853,382 (Jacksonville’s 2014 population estimate) is 36,695, which could mean that approximately 36,695 Jacksonville residents are lesbian, gay, bisexual, or transgender.

<sup>89</sup> JCCI Forward Issues Forum- *Out in Jacksonville: the Status and Impact of our GLBT Community*; Spring 2007; JCCI, Inc. Study- *Community Engagement: Understand the GLBT Community Experience with Discrimination*; Fall 2008; JHRC LGBT Attitudinal Awareness Survey conducted by Public Opinion Research Laboratory at the University of North Florida; October 2008.

<sup>90</sup> See Tables, 1, 4, 9, 14; JHRC LGBT Attitudinal Awareness Survey conducted by Public Opinion Research Laboratory at the University of North Florida- October 2008.

<sup>91</sup> See Chapter 10.0 - Anti-Discrimination and Harassment, Duval County School Board Policy Manual.

discrimination exists in employment, housing, and public accommodations, but that Jacksonville lacked any laws to protect LGBT residents from discrimination.

LGBT discrimination was brought to the forefront of the Jacksonville political landscape in 2012 by the introduction of proposed ordinance 2012-296. The bill proposed to add sexual orientation, gender identify, and gender expression to the list of protected classes already existing in Jacksonville’s anti-discrimination ordinances covering the areas of employment, housing, and public accommodations.<sup>92</sup> Proposed ordinance 2012-296 was under consideration by City Council from approximately May 2012 to August 2012. The bill, as introduced, included sexual orientation, gender identity, and gender expression as classes that would be protected from discrimination. A substitute bill was introduced calling for, among other changes, protection to be extended only to the category of “sexual orientation,” but was defeated by a City Council vote of 10 (opposed) to 9 (in favor). Because the substitute bill failed, the bill returned to providing all three categories—sexual orientation, gender identity, or gender expression—with protection from discrimination. City Council defeated the bill by a vote of 17-2 in August 2012. Though the bill was defeated, the issue of LGBT discrimination has been an ongoing source of discussion in the community. Because a bill similar to the one introduced in 2012 may once again be considered by the City Council, the following summarizes some issues that could very well surface and be considered when determining the value of such legislation (in no particular order of priority).

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<sup>92</sup>See Chapters 400 (Equal Opportunity/Equal Access), 402 (Equal Employment Opportunity), 406 (Public Accommodations), and 408 (Fair Housing), Jacksonville Ordinance Code. Of note is language in sections 400.101(a) and (d), which state:

400.101(a):

*Employment.* The Council hereby declares it to be the policy of the City that personnel shall be employed, compensated, promoted, transferred, or disciplined without regard to race, color, religion, political affiliation, gender, national origin, disability, age, marital status, **or any circumstances other than merit and qualification.** (*emphasis added*).

400.101(d):

*Harassment.* It is the policy of the City to provide a professional and businesslike work environment free from all forms of employee discrimination, including incidents of harassment.

.....

(2) *Other forms of harassment.* No employee or applicant for employment shall be subjected to any other form of workplace harassment, whether based upon a state or federally protected status, a physical characteristic or **a personal orientation or belief**, which might detract from an employee's or candidate's capacity to successfully perform in the workplace. This policy of non-harassment is not intended to limit management's authority to supervise the workforce and to engage in instruction, direction, counseling, training, personal supervision, or discipline. (*emphasis added*).

Arguably, it appears that the City itself already has prohibited discrimination against LGBT individuals with regard to City employment (the language found in section 400.101(d) not included within Chapters 402, 406, and 408 of the Jacksonville Ordinance Code, the chapters setting forth the classes protected from public or private discrimination in the areas of employment, public accommodations, and fair housing). The language in section 400.101(d), however, has never been cited as the basis for a complaint in Jacksonville per the Jacksonville Human Rights Commission.



One issue of consideration is whether and how LGBT anti-discrimination legislation would impact the investigation of complaints (to be borne by the City's Jacksonville Human Rights Commission)<sup>93</sup>, as well as the costs associated with liability exposure for those governed by the LGBT anti-discrimination laws (private and public entities alike). The EEOC began tracking information on charges filed alleging discrimination related to sexual orientation and/or gender identity in 2013. A review of the data for fiscal year 2014 (the only full fiscal year data has been collected), reveals that nationwide in 2014, the EEOC received 918 charges that included allegations of sex discrimination related to sexual orientation and 202 charges that included allegations of sex discrimination based on gender identity/transgender status.<sup>94</sup>

In 2015, the Williams Institute<sup>95</sup> reported findings that adding sexual orientation and gender identity to Florida's current anti-discrimination law would result in approximately 154 additional complaints, which would likely require no additional funding to the Florida Commission on Human Rights<sup>96</sup>, as their current staff and budget could absorb the costs associated with that number of complaints.<sup>97</sup> Considering Jacksonville's LGBT population is approximately five percent of Florida's LGBT population,<sup>88 98</sup> one could posit that the prospect of increased costs associated with investigation of such complaints would be relatively minimal.

A second issue of consideration is that even if LGBT anti-discrimination legislation results in a modest number of complaints, whether enactment of an ordinance could serve other more symbolic purposes, if that is the desire of the elected body charged with promulgating rules for its community:

The critical change created by law is realized from symbolic rather than purely instrumental effects. That is, symbolic effects come into play even without "any possibility of tangible punishment, legislation may reduce a given act (discrimination) simply by designating it as illegal, criminal, or deviant." The law works not

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<sup>93</sup> See Chapter 60, Jacksonville Ordinance Code.

<sup>94</sup> See [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

<sup>95</sup> The Williams Institute is a national thinktank at UCLA Law, whose stated mission is dedication to conducting rigorous, independent research on sexual orientation and gender identity law and public policy.

<sup>96</sup> The Florida Human Rights Commission is a state agency charged with enforcing the state's civil rights laws and also serves as a resource on human relations for the people of Florida.

<sup>97</sup> Mallory, C. & Sears, B. (2015). *Employment Discrimination Based on Sexual Orientation and Gender-Identity in Florida*; p. 3; The Williams Institute; <http://williamsinstitute.law.ucla.edu/>.

<sup>98</sup> The U.S. Census Bureau lists Florida's population estimate as 18,801,310 (as of April 1, 2010 ) with a projected July 1, 2014 population estimate of 19,893,297. *Annual estimates of the Resident Population: April 1, 2010 to July 1, 2014*; <https://www.census.gov/popest/data/cities/totals/2013/SUB-EST2013-3.html>); *United States Census Bureau, Population Division: Release Date: December 2014*. According to a report by the Williams Institute in 2013 using figures from Gallup Poll gathered in 2012, Florida's LGBT population constitutes 3.5% of Florida's total population. Gates, Gary J. & Newport, Frank (2013). *LGBT Percentage Highest in D.C., Lowest in North Dakota*; the Williams Institute; <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-noth-dakota.aspx>. Assuming this percentage has not changed since 2012, 3.5% of Florida's 2014 population estimate of 19,893,297 is 696,265 (LGBT Floridians).

simply as a result of the fear of punishment; rather, people fear violating the law because it authoritatively describes moral rules of conduct. As such, antidiscrimination legislation may create a clear social norm that discrimination is societally unacceptable.<sup>99</sup>

There is some legal scholarship to suggest that cases brought subsequent to the enactment of local anti-discrimination laws have demonstrated that employers and others, who would discriminate, whether consciously or not, will often act differently once their actions are revealed as potentially unlawful.<sup>100</sup> Under this theory, the law's mere existence forces the potential discriminator to consider the point of view of the LGBT individual against whom he or she intends to discriminate and the consequences, such as publicity and liability, should they decide to discriminate.<sup>101</sup>

A third issue of consideration is determining the scope of any legislation a local government can pass concerning rights that are not already protected by federal or state law. A local government may provide more extensive protection that is already available under federal or state law, but such local measures must not conflict with any applicable federal or state law. Some have speculated whether it would be preferable if uniform rules were to be promulgated by the federal government due to its resources, enforcement power and ability to provide a consistent system of regulation from state to state, and locality to locality. However, since both the federal and state legislatures have not done so to date, it remains to the discretion of Jacksonville lawmakers whether LGBT anti-discrimination laws are appropriate. It also remains to be seen whether the recent U.S. Supreme Court decision affecting same-sex marriages will impact whether such legislation will finally be issued at the federal or state level. While the State of Florida or United States governments could pass legislation pre-empting any locally enacted laws, any such pre-emption would be limited to the extent it seeks to impact fundamental rights.<sup>102</sup>

A fourth issue for consideration is the interplay between anti-discrimination legislation and religious freedom legislation. Religious freedom proponents argue that anti-discrimination laws force the government to take sides in a moral debate, and that government should not regulate issues of morality. They argue that residents acting consistently with their religious beliefs should not be viewed as acting in a discriminatory manner. Because the federal

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<sup>99</sup> *The Link Between Economic Competitiveness and Workplace Equal Opportunity in Florida*; p. 22; March 2015; Equality Means Business; [http://www.eqfl.org/emb/economic\\_impact\\_study](http://www.eqfl.org/emb/economic_impact_study).

Equality Means Business, formed to spotlight major employers in Florida that have adopted comprehensive discrimination policies, commissioned ThinkSpot, Inc., to conduct research addressing the economic impact of discrimination against LGBT people in Florida. The study consists of published research and findings from interviews with C-level business leaders from organizations such as Florida Blue, Wells Fargo, UNF, and numerous other entities.

<sup>100</sup> Cornell Journal of Law and Public Policy, Vol. 10, Iss. 2; Spring 2001 (citing Zimring, F., & Hawkins, G. (1973). *Deterrence: The legal threat in crime control*. Chicago: University of Chicago Press).

<sup>101</sup> Cornell Journal of Law and Public Policy, Vol. 10, Iss. 2; Spring 2001 (citing Robinson, P. H., & Darley, J.M. (1995). *Justice, liability and blame: Community views and the criminal law*. Boulder, CO: Westview.

<sup>102</sup> *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996).

government and Florida Legislature have spoken on the issue of the importance of religious freedom<sup>103</sup>, local legislation in this area must take that federal and state action into account. Thus, local anti-discrimination laws are usually required to provide certain religious exemptions to account for constitutionally and statutorily protected religious freedom rights. For example, Section 402.209 of the previously proposed ordinance 2012-296 contained a religious exemption that states that Part 2 of Chapter 402, Jacksonville Ordinance Code (the chapter addressing discrimination in employment), does not apply to “a religious corporation, association or society with respect to the employment of individuals with a particular religion, sexual orientation, or gender identity or expression to perform work connected with the carrying on by the corporation, association, or society of its religious activities.” However, religious exemptions are not absolute.

## **VI. CONCLUSION**

The purpose of this memorandum is to provide a general overview of federal, state, and local anti-discrimination laws with a particular consideration of where such laws stand in relation to sexual orientation or gender identity and expression. The contents of this memorandum are not in any way intended to express an opinion of policy which is a prerogative of rule-making rightly reserved to elected officials when contemplating what is in the best interests of the community they serve.

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<sup>103</sup> U.S.C. Amend. I; Fla. Const. art. 1, § 3; Fla. Stat. ch. 761.