



MEMORANDUM

TO: Mayor and City Councilmembers

CC: Marcus Jones, City Manager
Lina James, Deputy City Attorney

FROM: Patrick W. Baker, City Attorney

DATE: July 26, 2021

SUBJECT: Proposed Charlotte Non Discrimination Ordinance

Attached, please find a draft proposed Charlotte Non-Discrimination Ordinance with revisions and expanded protections. The proposed ordinance revisions explicitly prohibit discrimination based on sexual orientation, gender identity/gender expression and natural hairstyle in the City's Commercial Nondiscrimination ordinance and ordinances regulating Public Accommodations, Passenger Vehicles for Hire and a *newly created* ordinance regulating Employment Discrimination. The protected class in these ordinances now includes race (including natural hairstyle), sex (including pregnancy, sexual orientation, gender identity and gender expression), gender, religion, national origin, ethnicity, age, familial status, veteran status, and disability.

The ordinances will continue to rely on the use of the Conciliation Division of the Community Relations Committee to receive, review and investigate discrimination complaints. The Conciliation Division will continue to offer conciliation services to the complaining and responding parties when it finds that there is reasonable cause to believe the respondent has engaged in prohibited discrimination against a protected class, as this new term is now defined. Should conciliation fail, the matter is referred to the City Attorney for further appropriate action and enforcement. Such enforcement actions could include fines and the pursuit of equitable and injunctive relief through the courts to stop the discriminatory practices. The ordinances do not create an independent private cause of action for an employee to sue their employer. No criminal penalty attaches to any of the proposed revisions.

I do want to bring your attention to the new ordinance related to employment discrimination. This may be one of the more controversial portions of the ordinance. In general, federal and North Carolina employment discrimination laws apply only to those employers with 15 or more employees. This leaves employees of smaller entities with little or no legal protection from employment discrimination. To address this gap in discrimination protection, the proposed ordinance is applicable only to those employers with 14 or fewer employees. The North Carolina communities that have recently enacted nondiscrimination ordinances have included employment discrimination ordinances that are applicable to all employers regardless of size (Durham, Asheville, Chapel Hill, Carrboro) or employers with 15 or more employees (Greensboro, Orange County). In my opinion, there is no need to include employers with 15 or more employees as those employees have well established remedies in federal and state law to pursue their discrimination claims. Additionally, from a legal perspective, there is no certainty or clarity that local governments have the legal authority to regulate private employment practices regardless of the size of the

employer and, to possibly, inadvertently create a private cause of action for an employee. This would be a new endeavor for the City of Charlotte and the other local governments that have recently enacted such ordinances. There is no applicable caselaw directly on point on this issue and there are good legal arguments both for and against the proposition. If the ordinance is challenged and a court ultimately determine that we do not have the legal authority to regulate private employment, the most likely outcome would be to be enjoined from further enforcement of the ordinance and an award of attorney's fees to the opposing side.

For Council, this will ultimately come down to your level of legal risk tolerance. The safest legal course of action would be to seek clear legal authority to enact such an ordinance from the General Assembly and either leave the employment discrimination ordinance out for the time being or pass a non-binding resolution against employment discrimination in general by all employers in Charlotte. Should you wish to proceed with the revised ordinance, we have included a provision that any legal defenses and exemptions recognized under federal and state law (such as first amendment and religious employer exemptions) would also be applicable to this ordinance.

In anticipation of litigation, we have included a severability clause. We also recommend an effective date of January 1, 2022 to provide time for community education and administrative preparation for all affected parties.

To assist you in reading the most important portions of the revisions, below is the location of key words and phrases:

- Definitions of Discrimination, Protected Class, Gender Identity, Gender Expression, Natural Hairstyle and Sexual Orientation:Pages 2-3 in Sec 2-153.
- Violation not punishable as a criminal offense: Page 4 Sec 12-31. (first paragraph)
- Preservation of first amendment and religious exemptions: Page 4 Sec 12-31(second paragraph)
- No private cause of action: Page 4 Sec 12-32.
- No applicability to multiple occupancy restrooms, showers, showers: Page 5 Sec 12-58(c).
- Employment Discrimination ordinance: Page 5-6 Sec 12-83.
- Severability Clause: Page 6 Sec 6
- Ordinance effective date January 1, 2022: Page 6 Sec 7.

There may be additional minor (technical and grammatical) edits to the draft revisions prior to the publication of the August 2 Council meeting agenda later this week. Please feel to reach out to me with any questions or comments prior to the meeting. I am in the process of updating the Q&A sheet I sent to you late last week that should answer a number of likely questions from the media and public.