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Administrative Impact of Adding Sexual Orientation and Gender Identity to Texas's Employment Non-Discrimination Law



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INTRODUCTION

In the American workforce, more than eight million people (or 4 percent of the U.S. workforce) identify as lesbian, gay, bisexual, or transgender (LGBT). Approximately 431,095 of these workers live in Texas. Texas law does not prohibit discrimination based on sexual orientation or gender identity.¹ This report estimates the impact of adding sexual orientation and gender identity to the state's employment non-discrimination law.

Research shows the existence of widespread and continuing discrimination against LGBT workers. In response to surveys, LGBT workers consistently report having experienced discrimination, and non-LGBT people often report having witnessed discrimination against their LGBT co-workers. For example, the nationally representative 2008 General Social Survey found that 37% of gay men and lesbians had experienced workplace harassment in the last five years, and 12% had lost a job because of their sexual orientation.² As recently as 2010, 78% of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, and 47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.³

Employment discrimination against LGBT people has also been documented in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers, books, and other media. Additionally, a number of federal, state, and local administrative agencies and legislative bodies have acknowledged that LGBT people have faced widespread discrimination in employment.⁴

Despite the persistence and pervasiveness of employment discrimination against LGBT people, studies show that enforcing sexual orientation and gender identity provisions in non-discrimination laws has only a minimal burden on state agencies. Complaints of sexual orientation are filed by LGBT people at approximately the same rate as complaints of race and sex discrimination are filed by people of color and women.⁵ However, because the LGBT population is so small, the absolute number of sexual orientation and gender identity complaints filed under state non-discrimination laws is very low.⁶

We find that adding sexual orientation and gender identity to Texas's employment non-discrimination law would result in an additional 203 complaints filed with the Texas Workforce Commission each year. We estimate that handling the additional 203

complaints would cost the state approximately \$1.3 million – \$1.6 million over five years.

COMPLAINT ESTIMATE

We estimate that approximately 203 complaints of sexual orientation or gender identity employment discrimination would be filed with the Texas Workforce Commission (TWC) each year. To reach this estimate, we draw on Census data from Texas to estimate the size of the LGBT population in the state, and apply a national sexual orientation and gender identity complaint rate to that population. We have previously used this methodology to estimate the number of complaints that would be filed on the basis of sexual orientation and gender identity in other states, including Utah⁷ and South Dakota.⁸

Census data show that same-sex couples are not evenly distributed throughout the United States.⁹ Instead, some states have more same-sex couples per capita than other states. For our analysis, we assume that LGBT people in the workforce distribute across the U.S. similarly to same-sex couples. We estimate how many LGBT workers live in Texas by applying the percentage of U.S. same-sex couples that live in Texas to the number of LGBT people in the U.S. workforce.

According to 2010 Census data, 46,401 same-sex couples live in Texas.¹⁰ This number represents 7.2% of the 646,464 same-sex couples in the U.S.¹¹ Averaging data from five population-based surveys, a recent study found that 3.8%¹² of adults in the U.S. identify as LGBT.¹³ Applying this percentage to the number of people in the U.S. workforce (157,564,231)¹⁴ indicates that there are 5,987,441 LGBT people in the U.S. workforce. We then multiply the number of LGBT people in the U.S. workforce by 7.2% (the percent of same-sex couples that live in Texas) to determine the size of the LGBT workforce in Texas: 431,095.

Next, we apply the rate of complaints filed on the basis of sexual orientation or gender identity to the number of LGBT workers in Texas to determine how many complaints will be filed annually if these characteristics are added to the employment non-discrimination law. We use the national average complaint rate from a 2008 study that analyzed administrative complaint data from 17 states that prohibited sexual orientation discrimination at that time.¹⁵ The study found that across these states, the average rate of complaints filed on the basis of sexual orientation was 4.7 per 10,000 LGB workers.

The data gathered for the 2008 study included all employment discrimination complaints filed on the basis of sexual orientation; it was not limited to complaints filed by LGB employees. Heterosexual employees may also file complaints under sexual orientation non-discrimination laws if they were discriminated against because of their heterosexuality or because they were perceived to be LGB. However, we use the LGB workforce as the underlying population for purposes of our analysis because LGB employees likely file the vast majority of sexual orientation discrimination complaints.¹⁶

There is not sufficient data to make a similar calculation of the average rate of complaints filed on the basis of gender identity.¹⁷ Therefore, we assume that this rate is also 4.7 per 10,000 transgender workers.

Applying the national complaint rate (4.7 per 10,000 LGBT workers) to the number of LGBT workers in Texas suggests that 203 complaints of sexual orientation and gender identity discrimination would be filed annually if these characteristics were added to the state's employment non-discrimination law.

COMPARISON WITH ESTIMATE PREPARED BY THE TEXAS LEGISLATIVE BUDGET BOARD

In March, 2011, the Texas Legislative Budget Board (LBB) estimated the fiscal impact of adding sexual orientation and gender identity to the state's employment non-discrimination law. The LBB estimated that 474 complaints of sexual orientation or gender identity discrimination would be filed each year under the new law.

LBB's analysis assumed that complaints would be filed by the entire Texas workforce at a similar rate as the entire California workforce. To estimate the number of complaints based on this assumption, the LBB divided the population of Texas by the population of California, and then multiplied by sexual orientation and gender identity complaints filed annually in California ($(23,904,380/36,553,215) \times 724.33 = 473.68$).

Our methodology differs from the LBB methodology slightly, which has resulted in a lower estimate. First, we have taken into account that a smaller percentage of the workforce in Texas is LGBT than in California. The LBB analysis assumes that the percentage is the same in both states. In effect, our analysis is based on a smaller underlying LGBT population than the LBB analysis.

Second, to determine how many complaints LGBT workers in Texas would file annually, we used the national average rate of complaints filed based on sexual orientation.¹⁸ The LBB used California's complaint rate. We have used the average complaint rate rather than any one state's complaint rate because it reduces the risk that the rate applied represents an extreme in either direction.

COST ESTIMATE

Using information provided in the LBB report, we can roughly estimate the cost associated with handling the additional 203 complaints we expect would be filed if Texas added sexual orientation and gender identity to its employment non-discrimination law. We emphasize that this is only a rough estimate, as we have only limited information about the costs of enforcing complaints of employment discrimination in Texas. It would be possible to provide a more accurate estimate if we had more detailed information about these costs.

In its analysis, the LBB determined the increase in staff and operating costs that the TWC would incur in order to enforce the additional 474 complaints. Using expense data from the TWC, the LBB estimated that TWC would have to hire seven new full-time employees to handle the additional 474 complaints per year. This would result in a total increase in TWC salaries of \$411,000 and benefits of \$114,505. The LBB further estimated that TWC would spend an additional \$82,200 in indirect costs, an additional \$12,110 in other operating costs per year, and an additional \$1,800 in travel per year. Finally, the LBB estimated the TWC would incur \$47,117 in nonrecurring costs in the first year, which accounts for the difference estimates in Year 1 and in Year 2 – Year 5.

It will cost the state less to enforce the law if fewer complaints are filed. From the information provided in the LBB report, it is not possible to determine exactly how much less it would cost the state to handle 203 additional complaints as opposed to 474 additional complaints. The nature of some of the expenses described in the LBB report suggests that there might not be a *pro rata* reduction in costs for each fewer complaint filed. For example, the LBB stated that TWC would have to one new supervisor to manage five new investigators. Even if it is possible to estimate how many fewer investigators would be needed if only 203 additional complaints were filed each year, it is not clear how many new investigators trigger the need for a new supervisor.

Nevertheless, 203 complaints is less than half of the complaints estimated by the LBB (43% of the LBB estimate) and the bulk of the costs of enforcement (investigator salaries and benefits) would logically increase or decrease with the number of complaints on a near *pro rata* basis. Thus, it is reasonable to assume that the costs associated with enforcing these complaints would be close to 43% of the LBB cost estimate. Here, we assume a 10% range, figuring that the costs would likely be between 40% and 50% of what the LBB estimated. This would amount to a cost of approximately \$1.3 million – \$1.6 million over five years; approximately \$270,000 – \$330,000 in the first year and \$250,000 - \$310,000 each subsequent year.

Additionally, it will cost the state less to enforce the law if the EEOC shares the costs of enforcement of some complaints, as described below.

IMPACT OF RECENT LEGAL DEVELOPMENTS UNDER TITLE VII

The Equal Employment Opportunity Commission (EEOC) has held that discrimination based on gender identity or expression violates Title VII's requirement that employers not discriminate based on sex.¹⁹ The decision means that all 53 EEOC field offices throughout the United States will accept and investigate complaints filed by employees who believe that they were discriminated against based on their gender identity.²⁰

The EEOC's decision most likely changes how costs associated with gender identity complaints would be covered in Texas. In light of the decision, the EEOC should be responsible for sharing the costs of enforcing gender identity complaints with the Texas General Revenue Fund pursuant to their fixed price cooperative agreement. Essentially this is because both the Texas state non-discrimination law and Title VII would prohibit

discrimination based on gender identity. The EEOC decision does not change how the agency handles complaints of sexual orientation discrimination, so the Texas General Revenue fund would still be responsible for the costs associated with these complaints as explained by LBB.

However, there is a possibility that the fixed price cooperative agreement requires the TWC to accept any sex discrimination complaints that are enforceable *either* under Texas law, or under federal law. If this is the case, the TWC is already required to accept complaints of gender identity discrimination because the EEOC has decided that this type of discrimination is prohibited sex discrimination under Title VII. As such, adding gender identity to the state's non-discrimination law would not result in higher costs than the state is already incurring.

In short, we are unable to determine how gender identity complaints are being handled by the TWC in light of the EEOC's decision without more information about the fixed price cooperative agreement. For purposes of our analysis in this memo, we have assumed that the TWC is *not* currently required to accept complaints of gender identity discrimination. This assumption results in a higher cost estimate than we would reach if we were to assume that the complaints are already being accepted by the TWC.

CONCLUSION

This report estimates the impact of adding sexual orientation and gender identity to Texas's employment non-discrimination law. We conclude that if Texas added these characteristics to its law, an additional 203 complaints would be filed each year. Based on the information provided in the LBB analysis, we roughly estimate that handling these additional complaints would cost the state \$1.3 million – \$1.6 million over five years; \$270,500 – \$330,000 in the first year and \$250,000 - \$310,000 each subsequent year.

ENDNOTES

¹ TEX. LAB. CODE ANN. § 21.051 (2012).

² Brad Sears & Christy Mallory, The Williams Instit., Documented Evidence of Employment Discrimination & Its Effects on LGBT People 2 (2011), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>.

³ Jamie M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, & Mara Keisling, Injustice at Every Turn: A report of the National Transgender Discrimination Survey 51 (2011), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

⁴ Sears & Mallory, *supra* note 2.

⁵ M.V. Lee Badgett, Christopher Ramos & Brad Sears, The Williams Instit., Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity: Complaints Filed with State Enforcement Agencies 1999-2007 (2008), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Ramos-Emply-Discrim-1999-2007-Nov-08.pdf>; William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 66, 79-81 (2001).

⁶ Badgett, Ramos, & Sears, *supra* note 5.

⁷ Clifford Rosky, Christy Mallory, Jenni Smith, & M.V. Lee Badgett, The Williams Instit., Employment Discrimination against LGBT Utahns (2011), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Rosky-Mallory-Smith-Badgett-Utah-Emp-Discrim-Jan-11.pdf>.

⁸ Naomi G. Goldberg, M.V. Lee Badgett, & Christopher Ramos, The Williams Instit., The Impact of Employment Non-Discrimination Legislation in South Dakota (2010), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Badgett-Ramos-SouthDakota-ENDA-Jan-2010.pdf>.

⁹ See Williams Institute, United States Census Snapshot: 2010, *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf> (last visited Oct. 24, 2012).

¹⁰ Williams Institute, Texas Census Snapshot: 2010, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Texas_v2.pdf (last visited Oct. 24, 2012).

¹¹ For the number of same-sex couples in the U.S., see Williams Institute, United States Census Snapshot: 2010, *supra* note 9.

¹² Gary J. Gates, The Williams Instit., How Many People are Lesbian, Gay, Bisexual, and Transgender? 1 (2011), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

¹³ Similarly, findings from the 2012 Gallup Daily Tracking Survey—the largest single study of the distribution of LGBT people to date—found that 3.4% of adults in the U.S. identify as LGBT. Sharon Jayson, *New Survey: 3.4% of U.S. Adults are LGBT*, USATODAY, Oct. 19, 2012.

We use the figure from the review (3.8%, Gates, *supra* note 12) rather than the figure from the Gallup poll because the review takes into account some of the variation across surveys by averaging. In contrast, the 3.4% figure is based on one survey question on one survey instrument gathered through phone interviews. Research suggests that respondents may be more willing to identify as LGBT in more anonymous survey methods (e.g., internet or computer-assisted interviews), which may bias the Gallup estimate slightly downward.

¹⁴ American Community Survey, American FactFinder, 2011 ACS Table S2301: Employment Status, 1-year estimates, available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml#none> (search “topic or table name” for S2301; then select “2011 American Community Survey 1-Year Estimates”). The workforce number is calculated by multiplying the population age 16 and over (246,194,111) by the percent in the labor force (64%).

¹⁵ “National average” refers to the average of the complaint rates in 17 states across the country that prohibited sexual orientation discrimination in 2008. Badgett, Ramos & Sears, *supra* note 5.

¹⁶ See Rubenstein, *supra* note 5.

¹⁷ Badgett, Ramos & Sears, *supra* note 5 at 5.

¹⁹ *Id.*

²⁰ Jeff Krehely & Crosby Burns, A Watershed Moment for Workplace Equality: Equal Employment Opportunity Commission Ruling Protects Transgender Workers (Apr. 4, 2012), http://www.americanprogress.org/issues/2012/04/eec_decision.html.

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