

Legislative Analysis



ADD SEXUAL ORIENTATION AND GENDER IDENTITY OR EXPRESSION TO ELLIOTT-LARSEN CIVIL RIGHTS ACT

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Senate Bill 4 as passed by the Senate

Sponsor: Sen. Jeremy Moss

House Committee: Judiciary

Senate Committee: Civil Rights, Judiciary, and Public Safety

Revised 5-24-23

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Senate Bill 4 would add sexual orientation and gender identity or expression to categories statutorily protected from discrimination under the Elliott-Larsen Civil Rights Act. The bill is identical to House Bill 4003 as introduced.

Generally speaking, the act prohibits discriminatory practices, policies, and customs based on religion, race, color, national origin, age, sex, height, weight, familial status [having children], or marital status. These are often called “protected categories” with reference to the act. The act is enforced by private lawsuits and by the Michigan Civil Rights Commission (MCRC), which through the Michigan Department of Civil Rights investigates and acts on discrimination complaints.

As described in greater detail below, the bill would add *sexual orientation* and *gender identity or expression* to the categories statutorily protected from discrimination under the act.

Sexual orientation would mean having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or of being identified with such an orientation.

Gender identity or expression would mean having or being perceived as having a gender-related self-identity or expression, whether or not associated with an individual’s assigned sex at birth.

Employment

An **employer** could not do any of the following based on an individual’s sexual orientation or gender identity or expression:

- Refuse or fail to hire or recruit an individual.
- Fire an individual.
- Otherwise discriminate against an individual regarding employment, compensation, or a term, condition, or privilege of employment.
- Limit, segregate, or classify an employee or applicant for employment in a way that deprives them of an employment opportunity.

An employer also could not print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to employment by the employer that indicates a preference, limitation, specification, or discrimination based on sexual orientation or gender identity or expression.

Except as allowed by rules of the MCRC or an applicable federal law, an **employer or employment agency** could not do any of the following:

- Make or use a written or oral inquiry eliciting or attempting to elicit information about a prospective employee's sexual orientation or gender identity or expression.
- Make, keep, or disclose a record of the information described above.
- Make or use a written or oral inquiry or form of application expressing a preference, limitation, specification, or discrimination based on a prospective employee's sexual orientation or gender identity or expression.

An **employment agency** could not do either of the following:

- Refuse or fail to procure, refer, recruit, or place for employment, or otherwise discriminate against, an individual based on their sexual orientation or gender identity or expression.
- Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to a classification or referral for employment by the employment agency that indicates a preference, limitation, specification or discrimination based on sexual orientation or gender identity or expression.

A **labor organization** could not do any of the following based on an individual's sexual orientation or gender identity or expression:

- Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership.
- Limit, segregate, or classify membership or applicants for membership.
- Classify or refuse or fail to refer for employment an individual in a way that deprives them of an employment opportunity.
- Classify or refuse or fail to refer for employment an individual in a way that would adversely affect wages, hours, or employment conditions.
- Fail to fairly and adequately represent a member in a grievance process.
- Otherwise adversely affect the status of an employee or applicant for employment.

A labor organization also could not print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to a membership in or a classification or referral for employment by the labor organization that indicates a preference, limitation, specification, or discrimination based on sexual orientation or gender identity or expression.

An **employer, labor organization, or joint labor-management committee** that controls an apprenticeship, on the job, or other training or retraining program could not discriminate against an individual regarding admission to, or employment or continuation in, the program on the basis of the individual's sexual orientation or gender identity or expression.

An **individual seeking employment** could not publish a notice or advertisement that does either of the following:

- Specifies or indicates the individual's sexual orientation or gender identity or expression.
- Expresses a preference, limitation, specification, or discrimination as to the sexual orientation or gender identity or expression of a prospective employer.

In addition, a contract to which the state, a political subdivision, or an agency of the state or a political subdivision was a party would have to contain a covenant by the **contractor and subcontractors** not to discriminate against an employee or applicant on the basis of sexual orientation or gender identity or expression with respect to hire, tenure, terms, conditions, or privileges of employment or a matter directly or indirectly related to employment.

Places of public accommodation

A **place of public accommodation** could not do any of the following based on an individual's sexual orientation or gender identity or expression:

- Deny an individual the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations.
- Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign indicating that its goods, services, facilities, privileges, advantages, or accommodations will be refused, withheld from, or denied to an individual based on the individual's sexual orientation or gender identity or expression or that the individual's patronage of or presence at the place of accommodation is objectionable, unwelcome, unacceptable, or undesirable.

Place of public accommodation means a business, an educational, refreshment, entertainment, recreation, health, or transportation facility, or an institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

The term also includes the facilities of the following private clubs:

- A country club or golf club.
- A boating or yachting club.
- A sports or athletic club.
- A dining club—except for a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color. (The bill would change the last phrase to “individuals of a particular *sex*, race, or color.”)

In addition, a **private club** that allows use of its facilities by one or more adults per membership would have to make use of those facilities equally available to all adults entitled to use them under the membership, and all classes of membership would have to be available without regard to sexual orientation or gender identity or expression.

Educational institutions

An **educational institution** could not do any of the following based on an individual's sexual orientation or gender identity or expression:

- Discriminate against an individual in the full use of or benefit from the institution or services, activities, or programs provided by it.
- Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or enrolled as a student in the terms, conditions, or privileges of the institution.
- For purposes of admission, make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning an individual's sexual

orientation or gender identity or expression, except as allowed by MCRC rule or as required under federal law or regulation or pursuant to an affirmative action program.

- Print or publish, or cause to be printed or published, a catalog, notice, or advertisement indicating a preference, limitation, specification, or discrimination based on the sexual orientation or gender identity or expression of an applicant for admission.
- Announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of sexual orientation or gender identity or expression.

Real estate transactions

A **person engaging in a real estate transaction** or a **real estate broker or salesperson** could not do any of the following based on the sexual orientation or gender identity or expression of an individual or of anyone residing with that individual:

- Refuse to engage in, or refuse to negotiate for, a real estate transaction.
- Refuse to receive or transmit a bona fide offer to engage in a real estate transaction.
- Falsely represent that property is not available for inspection, sale, rental, or lease.
- Knowingly fail to bring a property listing to a person's attention, refuse to allow a person to inspect a property, or otherwise make a property unavailable or deny it to a person.
- Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or the furnishing of facilities or services related to a real estate transaction.
- Discriminate against a person in brokering or appraising property.
- Make, print, circulate, post, mail, or otherwise cause to be made or published a statement, advertisement, notice, or sign, or use a form of application for a real estate transaction, that indicates, directly or indirectly, an intent to make a preference, limitation, specification, or discrimination with respect to the real estate transaction on the basis of sexual orientation or gender identity or expression.
- Offer, solicit, accept, use, or retain a property listing with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services related to a real estate transaction.
- Make a record of inquiry in connection with a prospective real estate transaction that indicates, directly or indirectly, an intent to make a preference, limitation, specification, or discrimination with respect to the real estate transaction on the basis of sexual orientation or gender identity or expression.

In addition, a person could not deny access to, membership in, or participation in a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to selling or renting real property. and also could not discriminate against a person in the terms or conditions of that access, membership, or participation, based on an individual's sexual orientation or gender identity or expression.

A person to whom application is made for financial assistance or **financing in connection with a real estate transaction** or building, rehabbing, repairing, maintaining, or improving real property, or the person's representative, could not do either of the following with respect to that application for financial assistance or financing:

- Discriminate against the applicant based on the sexual orientation or gender identity or expression of the applicant or anyone residing with the applicant.

- Use a form of application or make or keep a record or inquiry in connection with an application that indicates, directly or indirectly, a preference, limitation, specification, or discrimination regarding the sexual orientation or gender identity or expression of the applicant or anyone residing with the applicant.

Similarly, a person whose business includes engaging in real estate transactions could not discriminate against a person because of sexual orientation or gender identity or expression in purchasing loans for buying, building, improving, repairing, or maintaining a dwelling or in making or purchasing loans or providing other financial assistance secured by residential real estate.

A person who might benefit financially from a real estate transaction could not, in order to further or secure that transaction, represent that a change has occurred, will occur, or could occur in the composition of the owners or occupants of the block, neighborhood, or area where the real property is located, with respect to sexual orientation or gender identity or expression, or represent that this change will or could result in a reduction in property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools there.

Finally, a condition, restriction, or prohibition that directly or indirectly limits the use or occupancy of real property on the basis of sexual orientation or gender identity or expression would be void, except for a limitation of use on the basis of religion for property owned by a religious institution or organization and used for religious or charitable purposes.

Other provisions

The act contains some exceptions. For example, an employer can apply to the MCRC for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. There are also provisions dealing with single-sex educational institutions and religious educational institutions. The bill would not amend the sections with those exceptions.

The bill would take effect 90 days after its enactment.

MCL 37.2102 et seq.

BACKGROUND:

In 2018 the MCRC issued an interpretive statement finding that sexual orientation and gender identity fall within the protected category of sex,¹ after which the department began processing discrimination complaints based on sexual orientation and gender identity. In 2020 two Michigan businesses filed a lawsuit in the Court of Claims challenging the department's adherence to that interpretive statement. That court ruled that discrimination on the basis of gender identity is a form of discrimination on the basis of sex, but it was bound by earlier court decisions to find that this was not true of sexual orientation. Also in 2020, at the federal level, the U.S. Supreme Court found in *Bostock v Clayton County* that discrimination based on sexual orientation or gender identity is discrimination based on sex under the federal Civil Rights Act of 1964 as it applies to employment discrimination. In July 2022, in an appeal of the Court of Claims decision described above, the Michigan Supreme Court ruled that discrimination on the

¹ <https://www.michigan.gov/-/media/Project/Websites/mdcr/merc/interpretive-statements/2018/meaning-of-sex.pdf>

basis of sexual orientation is also a prohibited form of discrimination on the basis of sex under the Elliott-Larsen Civil Rights Act. The court based its decision in part on the reasoning in *Bostock*. The scope of its ruling faces pending challenges in federal court.

FISCAL IMPACT:

The bill would have an indeterminate fiscal impact on state government and no direct fiscal impact on local units of government. The bill may result in an increase in civil rights complaints and investigation caseload for the Michigan Department of Civil Rights, which is charged with investigating allegations of civil rights violations. The department would incur increased costs to the extent that its staffing for complaint investigations and enforcement was not able to meet the demand of a potentially increased caseload. While the department has already been investigating civil rights complaints based on sexual orientation and gender identity, it is not clear whether codification of protections based on sexual orientation and gender identity or expression would result in any increases in civil rights complaints or personnel needs.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.