



Senate Fiscal Agency  
P.O. Box 30036  
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383  
Fax: (517) 373-1986

Senate Bill 4 (as enacted)  
Sponsor: Senator Jeremy Moss  
Senate Committee: Civil Rights, Judiciary, and Public Safety  
House Committee: Judiciary

**PUBLIC ACT 6 of 2023**

Date Completed: 3-25-24

**RATIONALE**

In 2018, the Michigan Civil Rights Commission issued an interpretative statement declaring that sexual orientation and gender identity fall under the definition of "discrimination because of . . . sex" under the Eliot-Larsen Civil Rights Act (ELCRA). On this basis, the Michigan Department of Civil Rights (MDCR) began accepting and investigating claims of discrimination based on sexual orientation and gender identity. In 2022, the Court of Claims ruled that discrimination against an individual who identifies with a gender different than that assigned at birth counted as "discrimination because of . . . sex" but discrimination based on sexual orientation did not. The Michigan Supreme Court reversed the latter decision, affirming sexual orientation and gender identity as "discrimination because of . . . sex" and therefore protected under the ELCRA. Some believe that discrimination on the basis of sexual orientation or gender identity or expression has risen in the past few years. Accordingly, it was suggested that current practices governing the prohibition against discrimination based on sexual orientation and gender identity or expression be codified in the ELCRA.

**CONTENT**

**The bill amended the ELCRA to prohibit discrimination based on sexual orientation and/or gender identity or expression.**

Generally, the ELCRA prohibits discrimination in employment, public accommodations and public services, educational facilities, and housing and real estate based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.

Under the bill, the ELCRA also prohibits discrimination based on sexual orientation and gender identity or expression. "Sexual orientation" means having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation. "Gender identity or expression" means having or being perceived as having a gender-related self-identity or expression whether associated with an individual's assigned sex at birth or not.

The bill took effect February 13, 2024.

MCL 37.2102 et al.

**PREVIOUS LEGISLATION**

*(Please note: This section does not provide a comprehensive account of all previous legislative efforts on the relevant subject matter.)*

The bill is a reintroduction of Senate Bill 208 from the 2021-2022 Legislative Session. The bill was referred to the Senate Committee on Government Operations but received no further action.

## **BACKGROUND**

In May 2018, the Michigan Civil Rights Commission issued Interpretative Statement 2018-1 declaring that discrimination based on sexual orientation and gender identity falls under the definition of "discrimination because of . . . sex" under the ELCRA. Based on this statement, MDCR determined it had the authority to accept complaints of discrimination based on sexual orientation and gender identity.

In 2022, Rouch World, LLC and Uprooted Electrolysis brought an action in the Court of Claims against the MDCR seeking, among other things, a declaratory judgment that the prohibition of sex discrimination in places of public accommodation under the ELCRA did not bar discrimination based on sexual orientation or gender identity. The owners of Rouch World denied a request to host a same-sex wedding, claiming that doing so would violate their religious beliefs. The owner of Uprooted Electrolysis denied providing hair-removal services to a transgender woman on the same basis. The affected individuals filed complaints with the MDCR. The MDCR opened investigations into both incidents, but the investigations were stayed when the plaintiffs brought their lawsuit. Relying on *Barbour v Dept. of Social Services*, 198 Mich App 183 (1993), the Court of Claims concluded that the ELCRA's discrimination prohibition did not encompass sexual orientation. (In *Barbour*, the Court of Appeals held that Congress's intent in prohibiting discrimination because of sex was to place women on an equal footing with men rather than to regulate discrimination based on sexual orientation and, therefore, the ELCRA did not encompass discrimination based on sexual orientation.)

However, because *Barbour* did not address gender identity discrimination, the Court of Claims ruled that when a person discriminates against someone who identifies with a gender different than that assigned at birth, then that conduct is disparate treatment on the basis of sex and prohibited under the ELCRA. In coming to its conclusion regarding discrimination based on gender identity, the Court of Claims relied on the United States Supreme Court's decision in *Bostock v Clayton Co*, 590 US \_\_\_ (2020), in which the Court held that an employer violates Title VII when it intentionally fires a person on the basis of that person's homosexuality or transgender identity because doing so necessarily involves discrimination based on sex.

The Court of Claims granted the defendants' motion for summary disposition as to Uprooted Electrolysis but denied the defendant's motion for summary disposition as to Rouch World. Defendants filed an appeal challenging the rejection of summary disposition as to Rouch World and filed a bypass application in the Michigan Supreme Court. The Court overruled *Barbour* and reversed the Court of Claims' decision with respect to Rouch World, ruling that the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" on the basis of sexual orientation constitutes discrimination "because of . . . sex", which constituted a violation of the ELCRA.<sup>1</sup>

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Including sexual orientation and gender identity or expression as protected classes under the ELCRA was necessary to prevent discrimination against Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Michiganders, protections enjoyed by members of other protected classes. According to the MDCR, LGBTQ individuals may be more likely than their heterosexual and/or cisgender counterparts to experience discrimination, particularly in employment and

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<sup>1</sup> *Rouch World, LLC and Uprooted Electrolysis v Department of Civil Rights*, Case No. 162482 (2022).

housing. Testimony before the Senate Committee on Civil Rights, Judiciary, and Public Safety indicates that LGBTQ Michiganders may be refused services or employment and may be more likely to experience workplace harassment and wage disparities. Census data from 2000 shows that men in same-sex relationships in Michigan earned an average of \$35,107 a year, whereas men in heterosexual marriages earned \$53,887, despite higher levels of education on average for men in same-sex relationships.<sup>2</sup> Transgender individuals may be at greater risk for unemployment, lower wages, and housing discrimination. Granting LGBTQ individuals protection from discrimination based on sexual orientation and gender identity or expression upheld the United States and Michigan values of equal rights for all.

### **Supporting Argument**

Protecting Michiganders from discrimination based on sexual orientation and gender identity or expression will economically benefit the State. According to testimony, Michigan needs young, educated talent to support the economy; however, discrimination may influence LGBTQ Michiganders to leave the State and discourage people from moving to it. Of voters surveyed by the Detroit Regional Chamber, 56.9% stated that, if they were offered an attractive job in another State, that State's social policies, including those related to LGBTQ rights, would play an important position in deciding whether to accept it. Nearly half of voters under the age of 40 said a State's social policies would be "very important" in deciding whether they would consider such an opportunity.<sup>3</sup> Protecting LGBTQ Michiganders improves the State's reputation, helping to retain and attract talent.

### **Supporting Argument**

Codifying protections based on sexual orientation and gender identity or expression into law was necessary to prevent them from being overturned in the future. Though the *Rouch World, LLC and Uprooted Electrolysis v Department of Civil Rights* verdict set a precedent for protecting sexual orientation or gender identity under the class of sex, another court case could have overruled it, as happened in *Barbour*. Additionally, it was this determination that led the MDCR to begin accepting and investigating complaints of discrimination based on sexual orientation and gender identity. The bill effectively enshrined current practice into law, while preventing it from being overturned in the future.

### **Opposing Argument**

Amending the ELCRA to include sexual orientation and gender identity or expression may lead to an increase in litigation. In general, some people hold religious beliefs that may compel them to deny services to LGBTQ people. Under the law, LGBTQ individuals may seek legal action against businesses, service providers, or religious institutions that discriminate against them based on the expansion of the ELCRA, litigating religious individuals for following their beliefs. Requiring religious individuals to serve LGBTQ individuals may infringe on their rights, which also are protected under the ELCRA. Additionally, according to testimony, disaffected religious individuals may challenge the expansion of the ELCRA in court, leading to lengthy and expensive trials and the waste of tax-payer money.

### **Opposing Argument**

Certain individuals may take advantage of the expansion of the ELCRA for exploitative ends, putting others at risk. The ELCRA prohibits discrimination in employment, public accommodations and public services, educational facilities, and housing and real estate. According to testimony, an individual may self-attest that he or she is transgender and use the ELCRA to enter private spaces, such as restrooms, or activities, such as sports. For some,

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<sup>2</sup> Michigan Department of Civil Rights, *MDCR Report on LGBT Inclusion under Michigan Law With Recommendations for Action*, p. 45., Jan. 2013.

<sup>3</sup> Detroit Regional Survey, *Michigan Statewide Voter Survey 600 sample--Registered Voters*, p. 16, Dec. 2022.

the ELCRA could serve as a pretext to enter these areas to assault or victimize other individuals. Additionally, LGBTQ individuals acting in good faith may still discomfit individuals sharing those spaces or activities or put them at a disadvantage. The expansion of the ELCRA was too broad and could lead to abuse.

**Response:** Allowing discrimination of any kind contradicts Michigan values. Lesbian, Gay, Bisexual, Transgender, and Queer individuals should not have to sacrifice their comfort for that of others. Additionally, requiring LGBTQ individuals to conform to methods of identification that the State prescribed, instead of allowing them to self-attest, would constitute discrimination, as members protected under other classifications, such as religious individuals, do not have to do the same.

Legislative Analyst: Tyler P. VanHuyse

### **FISCAL IMPACT**

The bill will have an indeterminate but likely negative fiscal impact on State government and an indeterminate fiscal impact on local units of government.

The inclusion of sexual orientation and gender identity or expression as protected classes will allow for individuals or groups to file formal complaints related to those categories with State entities, namely the MDCR. Increased caseloads likely will result in additional costs to the MDCR due to increased workloads. In addition, the MDCR will need to alter its website, data collection processes, and public outreach materials in order to reflect the expanded protections. It is possible that the MDCR will need additional ongoing appropriations as a result of the bill. In addition, other State offices could see minor increases in costs pertaining to sharing information or updating processes.

Fiscal Analyst: Elizabeth Raczkowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.