

Non-Discrimination Ordinance

City Attorney's Office
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1

Non-discrimination Ordinance (NDO)

Major changes since 2016

Overview: areas and classes

History: federal, state and local law

Proposed ordinance amendments

Enabling authority

CROWN Act

Enforcement and Exemptions

2

NDO - Major Changes Since 2016

HB 142's Prohibition

- Bill prohibiting local governments from enacting non-discrimination ordinances expired December 1, 2020
- Since December 1, 2020, several municipalities have enacted local non-discrimination ordinances in the areas of public accommodations, housing and employment
 - *Durham, Asheville, Chapel Hill, Carrboro, Apex, and Hillsborough*
- Only restriction that still applies to local governments is regulation of bathrooms

NDO - Major Changes Since 2016 (cont.)

***Bostock v. Clayton County* (US Supreme Court Case Decided in June 2020)**

- In a 6-3 decision, the majority in an opinion written by Justice Neil Gorsuch determined that discrimination on the basis of sexual orientation or gender identity was necessarily discrimination on the basis of sex as prohibited under federal law
 - *"Employers discriminating against gay or transgender employees accept certain conduct in employees of one sex but not in employees of another sex"*
 - *"An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands. Only the written word is the law, and all persons are entitled to its benefit."*

NDO - Major Changes Since 2016 (cont.)

The *Bostock* case acknowledged its opinion would raise questions on its application in fact patterns that were not before the Court

- “They say sex-segregated bathrooms, locker rooms and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”

NDO – Overview

Areas previously regulated

- Public Accommodations (Code, Chp. 12, Art. III)
- Passenger Vehicles for Hire (Code, Chp. 22, Art. II)
- Commercial non-discrimination policy (Code, Chp. 2, Art. V)

Proposed new area

- Employment (<15 employees; Code, Chp. 12, Art. IV)

Classes previously covered (in above areas)

- Race, color, gender, religion, sex, national origin, ethnicity, age, disability

Proposed new classes

- Sexual orientation, gender identity, gender expression (included under sex), pregnancy, veteran status, familial status, natural hairstyle (also included under race and national origin)

NDO – Overview (cont.) Categories/Protected Characteristics

Race (including natural hairstyle)	
Color	Familial Status
Gender	Sex (including sexual orientation, gender identity and gender expression)
Religion	Veteran Status
National Origin (including natural hairstyle)	Pregnancy
Ethnicity	
Disability	Natural Hairstyle
Age	

7

NDO - History (federal law)

Civil Rights Act of 1964 & 1968

- Title II (public accommodations) – race, color, religion, national origin
- Title VII (employment) – race, color, religion, sex, national origin
- Added age (1967) and disability (1990)

No federal (or state) law specifically recognized protections for sexual orientation, gender identity, gender expression...until

Bostock v. Clayton County (U.S. Supreme Court, 2020)

- Court held that Title VII protects employees against prohibited discrimination on the basis of sexual orientation and gender identity as such would be discrimination on the basis of sex

8

NDO - History (state law)

Public Accommodations

- Persons with Disabilities Act (disability)

Passenger Vehicle for Hire

- Transportation Network Companies law (race, color, religion, national origin, disabilities, sex, age)

Procurement

- Statutory authority requires contracts be awarded to “lowest responsive, responsible bidder”
- Protects classes covered by federal & state law (race, gender, religion, national origin, ethnicity, age, disability)

Employment (≥ 15 employees)

- Federal law and several state acts protect employers with 15+ employees (race, color, religion, sex, national origin, pregnancy, disability, veterans status, age)

NDO – History (City Code) Public Accommodations

1968 ordinance adopted

- Protects race, color, religion, and national origin
- Code, Chp. 12, Art. III

1972 amendment

- Added sex

Unlawful to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations because of... protected class

Enforcement: through Community Relations Committee

NDO – History (City Code) Community Relations Committee (CRC)

In 1968, the Charlotte-Mecklenburg Community Relations Committee was established and members jointly appointed by City Council and County Commissioners

- Code, Chp. 12, Art. II

Duties: make recommendations for elimination or reduction of discrimination in housing* and public accommodations

Through conciliation process, CRC “approves or disapproves plans to eliminate or reduce discrimination...”

*Fair Housing ordinance and HUD guidance prohibit discrimination on basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability and familial status.

NDO – History (City Code) Passenger Vehicles for Hire

Currently prohibits companies and drivers from discriminating on basis of race, color, religion, sex or national origin

- Code, Chp. 22, Art. II

Enforcement:

- PVH board and CMPD
- Assess civil penalties and revocation of operating certificates and permits
- Equitable remedies (injunctive relief) available under ordinance

NDO – History (City Code) Commercial Non-discrimination Policy

In 2003, Council adopted ordinance (after City's minority and women-owned business development program was discontinued)

- Code, Chp. 2, Art. V

City contractors may not discriminate against vendors, suppliers, subcontractors or commercial customers on basis of race, gender, religion, national origin, ethnicity, age or disability

Enforcement:

- Rescission, suspension or termination of current contract
- Disqualification for up to two years

NDO -Proposed Amendments

Create **new definition of "Protected Class"**

- Means a person's race, color, gender, religion, national origin, ethnicity, age, **familial status, sex (including sexual orientation, gender identity and gender expression), veteran status, pregnancy, natural hairstyle** or disability
- Applies to all proposed areas

Add sexual orientation, gender identity and gender expression, familial status to...

- Passenger Vehicles for Hire and Commercial non-discrimination ordinances

Add new definition to...

- Public Accommodations ordinance
- Deletes separate, standalone section prohibiting sex discrimination

Add **employment discrimination as prohibited act for employers with less than 15 employees**

NDO - Enabling Authority

N.C.G.S. 160A-174 – General ordinance-making power (*i.e.*, the “police power”)

“A city may by ordinance ... regulate ... acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city...”

NDO - Enabling Authority (cont.)

N.C.G.S. 160A-194 – Regulating and licensing businesses, trades, etc. (*i.e.*, power to regulate businesses)

“A city may by ordinance, subject to the general law of the State, regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment...”

NDO – Enabling Authority (caselaw)

Williams v. Blue Cross and Blue Shield of North Carolina, 357 N.C. 170 (2003) – granted citizens subpoena power and the right to sue; court prohibited county's local act regulating employment but didn't address NDOs generally

Bostock v. Clayton County, 590 U.S. ____ (2020) – expanded definition of sex discrimination in workplace under Title VII to include sexual orientation and gender identity

- HUD now requires jurisdictions enforcing the Fair Housing Act (such as Charlotte) to use the same definition of sex
- Existing Fair Housing Ordinance should now cover sexual orientation and gender identity

NDO - CROWN Act and Natural Hair Discrimination

CROWN stands for Creating a Respectful and Open World for Natural Hair

CROWN Act legislation has been adopted in several cities and states around the country but has not been enacted in North Carolina or codified in federal law

Since the expiration of the December 1 moratorium, several municipalities have specifically identified natural hair discrimination race and/or origin discrimination in their ordinances

- Durham, Greensboro and Asheville

A successful race and/or national origin discrimination claim based on natural hair discrimination will depend on specific facts of the allegations

Caselaw continues to develop on this matter

NDO - Enforcement

Section 12-30 provides that an employee may file a complaint with the Conciliation Division of the Charlotte-Mecklenburg Community Relations Committee (CRC)

CRC will investigate claims and offer conciliation services if its investigation determines there is reasonable cause to believe the employer has engaged in prohibited employment discrimination

If alleged violation has not been voluntarily eliminated by conference and conciliation within a period of 90 days from filing of complaint, the complaint shall be referred to the City Attorney for appropriate action and the complainant and respondent shall be so notified.

NDO – Exemptions (religious freedom)

All legally recognized defenses afforded to religious organizations under federal and state law will apply to this ordinance

Not the intent of this ordinance to apply new requirements on religious organizations that are not required under federal and state law

NDO – Considerations

Small Businesses (<15 employees)

City Administration (CRC Enforcement)

Potential Litigation

General Assembly

Questions?