



# ARIZONA

## EMPLOYMENT LAW LETTER

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### DISCRIMINATION

## Amid SB 1062 frenzy, Tempe becomes 4th AZ city to protect LGBT status

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*The last two weeks of February typically find Arizona getting national attention for our beautiful warm weather while most of the nation suffers through winter. In February 2014, however, Arizona was in the national—really, the world—spotlight for an entirely different and much less favorable reason. The Arizona Legislature's passage on February 20, 2014, of Senate Bill (SB) 1062, a bill ostensibly protecting the free exercise of religion, sparked global interest.*

*Only Republicans voted for the measure, and its opponents challenged SB 1062 as a license to discriminate against the lesbian, gay, bisexual, and transgender (LGBT) community. The furor that erupted over the next six days, until Governor Jan Brewer vetoed the bill on February 26, put our state at the center of the gay rights debate at a time of rapid social change.*

### **Tempe makes four**

Sandwiched around the SB 1062 hubbub was some much less publicized news from the city of Tempe. The day after Governor Brewer's veto of SB 1062, Tempe became the fourth city in the state to prohibit discrimination on the basis of sexual orientation and gender identity in employment and public accommodations. The Tempe City Council's vote was unanimous.

The Tempe ordinance sets up a charge-filing process and designates the city manager as the official to receive and investigate charges. Complainants have 45 days after the alleged violation to file the charge or be time-barred.

The city manager or his designate has 120 days to investigate the charge. The employer or business subject to the complaint has 20 days to file a written, verified

answer to the charge. A failure to answer the charge or participate in the process is deemed an admission of liability by the Tempe ordinance.

When there is a finding of reasonable cause, the city manager is tasked with attempting to conciliate the charge. A successful conciliation results in an order from the city manager stating the terms of the agreement. After an unsuccessful conciliation, the Tempe city manager must try to refer the charge to an appropriate federal or state agency. Of course, no state or federal agency currently is going to accept a referral of a charge alleging discrimination purely on the basis of sexual orientation or gender identity because those aren't protected characteristics under state or federal law.

When conciliation fails and no referral is available, the Tempe ordinance mandates a fine of \$1,500 per violation, capped at \$2,500 per infraction. The city manager also has the option of referring the charge to the city attorney's office for a determination of whether sufficient facts and evidence exist to bring a lawsuit against the violator to force compliance with the ordinance.

The Tempe ordinance sets out a series of appeal rights through an administrative hearing officer and ultimately to the city council. The ordinance also declares that all documents provided to the city in connection with the ordinance are public records, so there is no confidentiality, even in the investigative phase.

### **Bills target city laws**

Tempe's ordinance is similar to the ordinances of Phoenix and Flagstaff, adopted within weeks of each other in February and March 2013. We reported on the Phoenix and Flagstaff ordinances in the April 2013 issue of *Arizona Employment Law Letter* (see "Phoenix, Flagstaff extend employment protection to LGBT status" on



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pg. 1). Tucson has had an antidiscrimination ordinance protecting sexual orientation since 1999.

It was just shy of two weeks after Phoenix and Flagstaff passed their ordinances that Senator Steve Yarbrough (R-Chandler) introduced a bill similar to SB 1062 during the 2013 legislative session. Yarbrough's bill passed both houses of the legislature on party-line votes. The 2013 bill also was vetoed by Governor Brewer, but her stated reason for doing so was the "moratorium" she had imposed on signing any bills until the legislature passed the Medicaid expansion under the Affordable Care Act (ACA) she was then advocating.

Yarbrough was the sponsor of SB 1062 in the 2014 legislative session. His 2013 measure would have allowed individuals to sue if their free exercise of religion was infringed either by a government agency or a private individual or business. He stated publicly that he removed the provision authorizing lawsuits in hopes of avoiding a similar veto in 2014. While SB 1062 did not authorize affirmative claims, it would have provided a defense to an employer facing a claim of sexual orientation discrimination under an ordinance like Tempe's.

In a New Mexico case, a photographer was sued for declining to photograph a commitment ceremony between two women. The photographer ultimately lost her case in the New Mexico Supreme Court. While the national media focused on the New Mexico case, identified by proponents as demonstrating the need for SB 1062 in Arizona, the timing of Senator Yarbrough's introduction of the 2013 predecessor to SB 1062 points to a legislative intent to limit the effectiveness of the city ordinances prohibiting sexual orientation discrimination.

It appears that city ordinances banning LGBT discrimination are gaining steam in the state. Indeed,

Tempe City Councilman Kolby Granville threw out this challenge: "What I would say to the other cities, the other 100-plus something cities in the state of Arizona, let's see who's No. 5."

### ***Watershed moment?***

The way the Arizona business community responded to the passage of SB 1062 has been described as a decisive moment in the gay rights movement. Business giants such as AT&T, Intel, and Apple joined forces with airlines such as Delta and American and urged Governor Brewer to veto SB 1062. The NFL told the state it was monitoring developments, hinting that the 2015 Super Bowl, set for Glendale, might be in jeopardy.

Arizona's two U.S. senators, John McCain and Jeff Flake, both urged Governor Brewer to veto the law. So did the Republican presidential nominee for 2012, Mitt Romney. Many religious leaders in the state also spoke out against SB 1062.

For now, employment discrimination on the basis of sexual orientation and gender identity is lawful in Arizona except in four major cities. The way corporate America and supporters of LGBT rights came together to oppose SB 1062 signals that such discrimination is likely to lose its lawful status in a very short time. Wise Arizona employers will get ahead of the curve, if they haven't already adopted policies prohibiting discrimination on the basis of LGBT status.

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