

Employment Discrimination Based on Sexual Orientation and Gender Identity in Montana



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March 2015

Executive Summary

More than 4% of the American workforce identifies as lesbian, gay, bisexual, or transgender (LGBT). Approximately 13,400 of these workers live in Montana. Montana does not have a statewide law that prohibits discrimination based on sexual orientation or gender identity in public and private sector employment.

This report summarizes evidence of sexual orientation and gender identity employment discrimination, explains the limited current protections from sexual orientation and gender identity employment discrimination in Montana, and estimates the administrative impact of passing a law prohibiting employment discrimination based on these characteristics in the state.

13,400	61%	67%	19%	6
Number of LGBT Workers	Income Disparity between Straight and Gay Male Workers	Public Support for LGBT Workplace Protections	Workforce Covered by Local Non-Discrimination Laws	Estimated New Complaints if LGBT Protections are Added to State Law

Key findings of this report include:

- In total, there are approximately 21,200 LGBT adults in Montana, including 13,400 who are part of Montana's workforce.²
- Employment discrimination against LGBT people has been documented in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers, books, and other media.
- Surveys also show that discrimination against LGBT workers is persistent and prevalent. Most recently, a 2013 Pew Research Center survey found that 21% of LGBT respondents had been treated unfairly by an employer in hiring, pay, or promotions.
- When transgender people are surveyed separately, they report similar or higher levels of discrimination. For example, 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.

- Census data show that in Montana, the median income of men in same-sex couples is 61% lower than the median income of men in different sex marriages.
- A gubernatorial executive order in Montana provides protection from sexual orientation discrimination for state government employees.
- Four localities in Montana, Bozeman, Butte, Helena, and Missoula, prohibit employment discrimination based on sexual orientation and gender identity by local ordinance. Approximately 81% of Montana's workforce is not covered by one of these four ordinances.³
- Several large private sector employers in Montana have adopted corporate policies that prohibit discrimination based on gender identity including Billings Clinic, HK Contractors, and Walmart. In addition, both the University of Montana and the Montana State University systems have policies prohibiting employment discrimination based on sexual orientation and gender identity.
- Public opinion in Montana supports the passage of non-discrimination protections for LGBT people. In response to a poll of Montana residents conducted in 2008, 67% of respondents said that they strongly or somewhat supported a legislative proposal to extend the state's current equal protection laws for housing, employment, and benefits to gay and lesbian Montanans. In addition, other polls have found that 79% of Montana residents think that LGBT people experience a moderate amount to a lot of discrimination in the state
- Adding sexual orientation and gender identity to the state's current non-discrimination law would result in approximately six additional complaints being filed with the Montana Human Rights Bureau each year.
- Because the number of discrimination complaints filed with the Montana Human Rights Bureau varies, on average, by more than six complaints annually, the anticipated new complaints based on sexual orientation and gender identity could likely be absorbed into the existing system with no need for additional staff and negligible costs.

Evidence of Discrimination

Survey Data and Specific Examples of Sexual Orientation and Gender Identity Discrimination in Wyoming

Research shows the existence of widespread and continuing discrimination against LGBT workers in the U.S. 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, a national survey conducted by Pew Research Center in 2013 found that 21% of LGBT respondents had been treated unfairly by an employer in hiring, pay, or promotions.⁴ Additionally, 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.⁵ 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.⁶

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.⁷

Examples of employment discrimination and fear of discrimination against LGBT people Montana have been documented in testimony before the state legislature. In a 2013 hearing before the House Judiciary Committee on a bill that would have added sexual orientation and gender identity to the state's non-discrimination law, a transgender resident of Helena testified that she had experienced employment discrimination in the state.⁸ Additionally, in legislative hearings on the 2013 bill and a similar bill introduced in 2011, Montana residents testified that they hid their sexual orientation at work out of fear of discrimination.⁹

Wage Inequity

Census data show that individuals in same-sex couples in Montana earn less than individuals married to different-sex partners. On average, men in same-sex couples in Montana earn \$17,141 each year, significantly less than the \$35,993 for men married to different-sex partners.¹⁰ The median income of men in same-sex couples in Montana is \$11,740, 61% less than that of married men (\$30,000).¹¹ Women in same-sex couples in Montana earn an average of \$22,666 (with a median of \$18,000); more than married women, whose earnings average \$17,795 (with a median of \$15,000).¹²

These findings are not unique to Montana. Analyses of national data consistently find that men in same-sex couples and gay men earn less than similarly qualified men who are married to different-sex partners, or men who identify as heterosexual.¹³ Additionally, surveys of transgender people find that they have high rates of unemployment and very low earnings.¹⁴

A 2009 study indicated that the wage gap for gay men is smaller in states that implement non-discrimination laws, suggesting that such laws reduce discrimination against LGBT people.¹⁵

Current Protections from Discrimination

Montana does not have a statewide law that prohibits employment discrimination based on sexual orientation or gender identity.¹⁶ Efforts have been made to add sexual orientation and/or gender identity to the state's non-discrimination law in seven of the most recent eight legislative sessions.¹⁷ In each session, the proposed legislation died in committee.¹⁸

A gubernatorial executive order in Montana provides protection from sexual orientation discrimination for state government employees. Additionally, several state universities and private corporations in Montana have adopted internal policies that prohibit discrimination based on sexual orientation and gender identity in employment.

Statewide Non-Discrimination Laws in Montana

State statutes in Montana prohibit discrimination based on race, religion, national origin, age, disability, marital status, and sex.¹⁹ The non-discrimination requirements apply to public and private sector employers of any size.²⁰ Religious organizations are exempt from the non-discrimination laws unless they are “organized for private profit or to provide accommodations or services that are available on a nonmembership basis.”²¹

The Montana Department of Labor and Industry administratively enforces the state’s employment non-discrimination law.²² The Human Rights Bureau, within the Department of Labor and Industry, is authorized to accept and investigate complaints of discrimination.²³ The Department may hold administrative hearings on complaints filed, and may award remedies (with the exception of punitive damages) to complainants if discrimination is found.²⁴ An employee who has filed a complaint with the Bureau may initiate a civil action in court for relief only if the administrative complaint is dismissed.²⁵ Courts may award the same remedies that are available through an administrative hearing with the Department, in addition to attorney fees and costs.²⁶

Executive Order Prohibiting Discrimination against State Government Employees

In 2008, former governor Brian Schweitzer issued an executive order banning employment discrimination based on sexual orientation against state government employees.²⁷ The order provides for an internal complaint procedure, but does not permit employees to file suit in court based on a violation of the non-discrimination requirements.²⁸ Though former governor Schweitzer is no longer in office, the executive order remains in effect.²⁹ The executive order protects over 33,000 state employees from discrimination based on sexual orientation.³⁰

Local-Level Protections from Discrimination

Four Montana localities, Bozeman,³¹ Butte,³² Helena,³³ and Missoula,³⁴ prohibit employment discrimination based on sexual orientation and gender identity by local ordinance. In all four of the localities, the ordinances apply to both public and private sector employers.³⁵ All of the ordinances provide for a private right of action, which allows employees to file a case in court if they have experienced discrimination.³⁶ Under the ordinances, courts may award a variety of remedies to successful plaintiffs, including civil and equitable relief (which generally includes back pay and damages), and attorney fees and costs. Approximately 81% of Montana’s workforce is not covered by a local ordinance that prohibits discrimination based on sexual orientation and gender identity.³⁷

Private Company and University Non-Discrimination Policies

Private companies adopt internal policies prohibiting discrimination based on sexual orientation and gender identity for a variety of reasons including improved recruitment and retention of talented employees, increasing employee productivity and customer satisfaction, and attracting a larger customer base.³⁸ One study of corporate motivations behind adopting workplace non-discrimination policies found that 53% of the top companies in the U.S. with LGBT-supportive policies had adopted the policies for economic reasons.³⁹

Academic research has found that LGBT-supportive corporate policies are linked to positive business-related outcomes, including greater job commitment, improved workplace relationships, increased job satisfaction, and improved health outcomes among LGBT employees.⁴⁰ For example, a 2006 national poll found that 89% of LGBT respondents and 72% of non-LGBT respondents reported that when deciding where to work, it was important that an employer have a written non-discrimination policy that includes race, ethnicity, sex, religion, age, sexual orientation and disability.⁴¹ Research also suggests that employers limit their available talent pool by screening out applicants based on their sexual orientation. One study found that the rate of screening out gay male applicants was twice as high in regions without sexual orientation non-discrimination laws.⁴²

Additionally, LGBT-supportive workplace policies can expand opportunities to secure potentially lucrative government contracts for corporate employers. A 2011 study found that 68 local governments had laws requiring contractors to have LGBT-inclusive non-discrimination policies.⁴³ A number of states have similar laws that apply to state government contracts.⁴⁴ Without such policies, companies would not be eligible to bid for contracts with these state and local governments.

Several large private sector employers in Montana have adopted internal policies that prohibit sexual orientation and gender identity discrimination, including Billings Clinic,⁴⁵ HK Contractors,⁴⁶ and Walmart.⁴⁷

Additionally, both public university systems in Montana, the Montana State University system⁴⁸ and the University of Montana system,⁴⁹ have internal policies prohibiting employment discrimination based on sexual orientation and gender identity.

Public Opinion

Public opinion in Montana supports the passage of non-discrimination protections for LGBT people. In response to a 2008 poll of 600 likely voters in Montana, 87% of respondents said that they strongly or somewhat agreed that no one should be discriminated against in the workplace because they are gay or lesbian.⁵⁰ Further, 67% of respondents said that they strongly or somewhat supported a legislative proposal to extend the state's current equal protection laws for housing, employment, and benefits to gay and lesbian Montanans.⁵¹ Similarly, 76% of Montana respondents to a 2011 national poll said that

Congress should pass a federal law to prohibit employment discrimination based on sexual orientation and gender identity.⁵²

In addition, public opinion data indicate that Montana residents perceive the state as unfriendly to LGBT people. Aggregated data from two large public opinion polls found that 79% of Montana residents think that LGBT people experience a moderate amount to a lot of discrimination in the state.⁵³

Administrative Impact

Complaint Estimate

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 discrimination 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, respectively.⁵⁴ 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.⁵⁵

We estimate that approximately six complaints of sexual orientation or gender identity discrimination would be filed with the Montana Human Rights Bureau each year. To reach this estimate, we drew on Gallup polling data and Census data from Montana to estimate the size of the LGBT workforce in the state, and applied 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 South Carolina, Missouri, Ohio, Pennsylvania, South Dakota, Texas, Utah, and West Virginia.⁵⁶

Results from a 2012 Gallup poll show that 2.6% of people in Montana identify as LGBT.⁵⁷ Applying this percentage to the number of people in Montana's workforce (516,204⁵⁸) indicates that there are an estimated 13,421 LGBT workers in Montana.

Next, we applied the rate of complaints filed on the basis of sexual orientation or gender identity to the number of LGBT workers in Montana to determine how many complaints will be filed annually if these characteristics are added to the employment non-discrimination law. We used 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.⁵⁹ 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.⁶⁰ There is not sufficient data to make a similar calculation of the average rate of complaints file on the basis of gender identity.⁶¹ 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 Montana (13,421) suggests that six 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.

Cost of Enforcement

Available data suggest that the additional six complaints could be absorbed into the Human Rights Bureau’s existing structure and budget. Over the most recent five-year period, the number of employment discrimination complaints filed annually has varied from 391 (in 2011) to 607 (in 2013). From year to year, the number of complaints filed has varied by an average of 95 complaints—significantly more than the additional six complaints we would expect if the law were amended to include sexual orientation and gender identity. This information suggests that a small number of additional complaints would have no noticeable impact on the Bureau’s existing staff and resources.

Fiscal Year	Number of Employment Discrimination Complaints Filed
2014	530 ⁶²
2013	607 ⁶³
2012	439 ⁶⁴
2011	391 ⁶⁵
2010	478 ⁶⁶

Conclusion

Documented evidence shows that LGBT people face employment discrimination across the country, including in Montana. There is currently no statewide law that prohibits employment discrimination based on sexual orientation or gender identity in Montana. Adding these characteristics to Montana’s employment non-discrimination laws would provide protection from discrimination to approximately 13,400 LGBT workers in the state. Based on data from other state administrative enforcement agencies, we estimate that approximately six complaints of sexual orientation or gender identity employment discrimination would be filed in Montana annually if the law were amended. Given fluctuations in number of complaints filed with the Montana Human Rights Bureau annually, it is likely that the additional six complaints could be absorbed with little impact on the staff and negligible costs.

About the Williams Institute

The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public. These studies can be accessed at the Williams Institute website.

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Endnotes

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² These estimates were reached by applying the percentage of people in Montana that are LGBT (2.6 percent) to the population of Montana aged 16 years and older (815,994) and the number of people in the Montana labor force (516,204), respectively. Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP, Feb. 15, 2013, <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>; American Community Survey, U.S. Census Bureau, American FactFinder, 2013 ACS Table DP03: Selected Economic Characteristics, 1-Year Estimates, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_DP03&prodType=table.

³ Calculated by authors using data from the American Community Survey, 2010-2012 3-Year-Estimates & 2013 1-Year-Estimates, Select Economic Characteristics tables (civilian labor force numbers) available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Dec. 14, 2014).

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¹⁶ MONT. CODE ANN. § 49-2-303 (2014).

¹⁷ H.B. 481, 62nd Leg., Reg. Sess.(Mont. 2013) (sexual orientation and gender identity); H.B. 514, 63rd Leg., Reg. Sess. (Mont. 2011) (sexual orientation and gender identity); H.B. 252, 61st Leg., Reg. Sess. (Mont. 2009) (sexual orientation and gender identity); S. 371, 60th Leg., Reg. Sess. (Mont. 2007) (sexual orientation and gender identity); S. 199, 59th Leg., Reg. Sess. (Mont. 2005) (sexual orientation); H.B. 438, 58th Leg., Reg. Sess. (Mont. 2001) (sexual orientation); S. 329, 57th Leg., Reg. Sess. (Mont. 1999) (sexual orientation).

¹⁸ Legislative history and bill status for all proposed and enacted legislation in Montana is available at http://search.leg.mt.gov/search?q=%22sexual+orientation%22&site=2013-Bills&btnG=Search&client=default_frontend&output=xml_no_dtd&proxystylesheet=default_frontend&getfields=*&sort=date%3AD%3AL%3Ad1&entsp=a&wc=200&wc_mc=1&oe=UTF-8&ie=UTF-8&ud=1&exclude_apps=1 (select session from drop down menu, click relevant bill, click “status of this bill”).

¹⁹ MONT. CODE ANN. § 49-2-303.

²⁰ *Id.* § 49-2-101(11).

²¹ *Id.*

²² *Id.* § 49-2-101(8); Mont. Dep’t of Labor & Ind., Discrimination, <http://dev2.erd.dli.mt.gov/human-rights> (last visited Dec. 17, 2014).

²³ MONT. CODE ANN. § 49-2-501.

²⁴ *Id.* § 49-2-506.

²⁵ *Id.* § 49-2-512(3).

²⁶ *Id.* § 49-2-512.

²⁷ Mont. Exec. Order No. 41-2008 (2008), available at <http://www.dphhs.mt.gov/Portals/85/amdd/documents/MMHNCC/policymanual/100/119-1.pdf>.

²⁸ *See id.*

²⁹ By its own terms, EO 41-2008 does not is to “remain in effect until amended or rescinded by further executive order.” *Id.* No order issued since Governor Schweitzer left office has amended or rescinded EO 41-2008. *See* State of Mont., Office of Gov. Steve Bullock, Executive Orders, <http://governor.mt.gov/Home/Governor/eo.aspx> (last visited Dec. 18, 2014).

³⁰ Calculated by authors using data from the American Community Survey, 2013 1-Year-Estimates, Sex by Class of Worker for the Civilian Population Aged 16 Years and Over (Montana) available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_B24080&prodTy pe=table (last visited Dec. 19, 2014).

³¹ BOZEMAN, MONT., CODE §§ 24.10.030; 24.10.040.

³² BUTTE, MONT., CODE §§ 5.68.020; 5.68.030.

³³ HELENA, MONT., CODE §§ 1-8-1; 1-8-3.

³⁴ MISSOULA, MONT., CODE §§ 9.64.010; 9.64.030.

³⁵ BOZEMAN, MONT., CODE § 24.10.030; BUTTE, MONT., CODE § 5.68.020; HELENA, MONT., CODE § 1-8-2; MISSOULA, MONT., CODE § 9.64.030.

³⁶ BOZEMAN, MONT., CODE § 24.10.080; BUTTE, MONT., CODE § 5.68.090; HELENA, MONT., CODE § 1-8-7; MISSOULA, MONT., CODE § 9.64.090.

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- ⁴⁷ *Walmart Adds Gender Identity, Expression to Non-Discrimination Policy*, LGBTQNATION.COM, Sept. 28, 2011, <http://www.lgbtqnation.com/2011/09/walmart-adds-gender-identity-expression-to-non-discrimination-policy/>.
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⁶⁰ 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. See Rubenstein, *supra* note 54.

⁶¹ BADGETT, RAMOS & SEARS, *supra* note 54, at 5.

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