

Employment Discrimination Based on Sexual Orientation and Gender Identity in South Dakota



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Executive Summary

More than 4% of the American workforce identifies as lesbian, gay, bisexual, or transgender (LGBT). Approximately 19,800 of these workers live in South Dakota. South Dakota does not have a statewide law that prohibits discrimination based on sexual orientation or gender identity in employment.

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

19,900	20%	70%	0.3%	9
Number of LGBT Workers	Income Disparity between Straight and Gay Male Workers	Public Support for LGBT Workplace Protections	Workforce Covered by LGBT Inclusive Local Non-Discrimination Laws or Policies	Estimated New Complaints if LGBT Protections are Added to State Laws

Key findings of this report include:

- In total, there are approximately 28,900 adults who identify as LGBT in South Dakota, including approximately 19,800 who are part of South Dakota's workforce.¹
- Media reports and lawsuits document incidents of sexual orientation and gender identity discrimination against employees in South Dakota. For example, in 2013, a transgender woman in South Dakota received a settlement after her employer fired her, stating that her transition was "making other employees uncomfortable."
- Survey data indicate that discrimination against LGBT workers is prevalent across the country. 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 because of their sexual orientation or gender identity.

- Disparities in wages are another way that discrimination has traditionally been measured. Census data show that in South Dakota, the median income of men in same-sex couples is 20% lower than the median income of men in different-sex marriages and the median income of women in same-sex couples is 66% lower than the median income of women in different-sex marriages.
- None of South Dakota's private sector workforce is expressly protected under state law from discrimination based on sexual orientation or gender identity. However, at least two South Dakota counties and at least two South Dakota municipalities have local ordinances or personnel policies that protect government employees from discrimination based on sexual orientation or gender identity.
- More than 99% of South Dakota's workforce is not covered by a local ordinance or policy that prohibits sexual orientation or gender identity discrimination in employment.²
- More than 40 leading companies in South Dakota have adopted internal policies prohibiting discrimination on the basis of sexual orientation or gender identity.
- Adding sexual orientation and gender identity to the state's current non-discrimination laws would result in approximately nine additional complaints being filed each year.
- The additional nine complaints per year would most likely have no noticeable impact on the state's budget and resources.

Evidence of Discrimination

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

The existence of widespread and continuing discrimination against LGBT workers in the U.S. is well documented. In response to national surveys, LGBT people consistently report experiences of discrimination in the workplace, and non-LGBT people often report witnessing discrimination against 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 because of their sexual orientation or gender identity.³ Similarly, on the 2008 General Social Survey, another nationally representative poll, 37% of gay men and lesbians reported experiences of workplace harassment in the last five years, and 12% reported losing a job because of their sexual orientation.⁴ In 2010, 78% of respondents to the most comprehensive survey of transgender people to date reported experiences of harassment or mistreatment at work, and 47% reported experiences of discrimination in hiring, promotion, or job retention because of their gender identity.⁵

Instances of employment discrimination against LGBT people in South Dakota have been documented in administrative cases and the media. For example, in 2013, a transgender grocery store clerk reached a

settlement with her employer after filing a complaint with the Equal Employment Opportunity Commission (EEOC) alleging discrimination based on gender identity.⁶ The employee, who had recently been promoted, stated that she was fired after she told her employer that she planned to transition.⁷ According to the employee, she was told that she was ““making other employees uncomfortable.””⁸ Through the EEOC’s settlement process, the employee was awarded \$50,000, and the employer was required to implement workplace non-discrimination policies and annual trainings.⁹ Additionally, in 2014, a gay, sixteen-year-old restaurant employee filed a discrimination complaint against his employer stating that the manager forced him to wear a nametag with an anti-gay slur on it during work.¹⁰ The employee said that he felt he had to wear the nametag or he would be fired.

Wage Inequity

Census data show that individuals in same-sex couples in South Dakota earn less than individuals married to different-sex partners. On average, men in same-sex couples in South Dakota earn \$24,551 each year, significantly less than the \$37,248 for men married to different-sex partners.¹¹ The median income of men in same-sex couples in South Dakota is \$24,000, 20% less than that of married men (\$30,000).¹²

Women in same-sex couples earn less than married men as well as men in same-sex couples. Women in same-sex couples in South Dakota earn an average of \$9,980 per year, significantly less than the \$20,015 for women married to different-sex partners.¹³ The median income of women in same-sex couples in South Dakota is \$6,000, 66% less than that of married women (\$17,600).¹⁴

Surveys of transgender people find that they have high rates of unemployment and very low earnings.¹⁵

These findings are not unique to South Dakota. Analyses of national data consistently find that men in same-sex couples and gay men earn 10-32% less than similarly qualified men who are married to different-sex partners, or men who identify as heterosexual.¹⁶ Additionally, surveys of transgender people find that they have high rates of unemployment and very low earnings.¹⁷

Although regression analyses were not done on the earnings data above, other studies that have analyzed earnings data using such methods have found that men in same-sex couples earn less than heterosexual men, even when they have the same productive characteristics. These studies have controlled for factors unrelated to sexual orientation that may contribute to higher earnings, such as education and work experience. The studies consistently find that men in same-sex couples and gay men earn 10-32% less than similarly qualified men who are married to different-sex partners, or men who identify as heterosexual.¹⁸

Current Protections from Discrimination

South Dakota does not have a statewide statute that prohibits discrimination based on sexual orientation or gender identity in employment.¹⁹ However, several local governments, all public

universities, and a number of private corporations in South Dakota have adopted internal policies that prohibit employment discrimination based on sexual orientation and gender identity.

South Dakota Human Relations Act

The South Dakota Human Relations Act prohibits employers from discriminating based on race, religion, sex, ancestry, disability, and national origin.²⁰ The Act does not prohibit discrimination based on sexual orientation or gender identity. The non-discrimination requirements apply to both public and private sector employers.²¹ The law does not prohibit religious organizations for making employment decisions based on religion.²²

The South Dakota State Commission of Human Rights, under the Division of Human Rights in the Department of Labor and Regulation, is responsible for administrative enforcement of the Human Relations Act.²³ The Commission has the power to investigate complaints, and attempt to remedy any violations of the law through informal measures, such as conferences and conciliations.²⁴ The Commission may also award remedies when discrimination is found, including hiring, reinstatement, and back pay.²⁵ An employee must file an administrative complaint with the Commission within 180 days of the alleged discriminatory practice.²⁶ The Human Relations Act also allows an employee who has experienced discrimination to file a civil action in court after he or she has exhausted administrative remedies.²⁷ A court may award the same remedies that are available through the Commission as well as compensatory damages.²⁸

Local-Level Protections from Discrimination

No localities in South Dakota have passed ordinances prohibiting discrimination on the basis of sexual orientation or gender identity in private sector employment.²⁹ However, four localities have adopted ordinances or personnel policies that prohibit discrimination in local government employment based on sexual orientation: Minnehaha County,³⁰ Shannon County,³¹ Brookings,³² and Sioux Falls.³³ Shannon County's personnel policy also prohibits discrimination based on gender identity.³⁴

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 improving recruitment and retention of talented employees, increasing employee productivity and customer satisfaction, and attracting a larger customer base.³⁵ 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.³⁶

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.³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ A number of states have similar laws that apply to state government contracts.⁴¹ Without such policies, companies would not be eligible to bid for contracts with these state and local governments.

Over 40 leading companies in South Dakota have adopted internal policies prohibiting discrimination on the basis of sexual orientation or gender identity,⁴² including three large employers headquartered in the state: IBP,⁴³ NorthWestern Energy,⁴⁴ and Sanford Health Adult Medicine.⁴⁵

Additionally, all six public universities in South Dakota have policies prohibiting employment discrimination based on sexual orientation. The public universities include South Dakota State University, Dakota State University, University of South Dakota, Northern State University, South Dakota School of Mines and Technology, and Black Hills State University.⁴⁶

Public Opinion

Public opinion in South Dakota supports the passage of non-discrimination protections for LGBT people. In response to a national poll conducted in 2011, 70% of those polled in South Dakota said that Congress should pass a federal law to prohibit employment discrimination based on sexual orientation and gender identity.⁴⁷

In addition, public opinion data indicate that South Dakota residents perceive the state as unfriendly to LGBT people. Aggregated data from two large public opinion polls found that 78% of South Dakota residents think that LGBT people experience a moderate amount to a lot of discrimination in the state.⁴⁸

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.⁴⁹ 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.⁵⁰

We estimate that approximately nine complaints of sexual orientation or gender identity discrimination would be filed in South Dakota each year. To reach this estimate, we drew on Gallup polling data and Census data from South Dakota 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 a number of other states.⁵¹

Results from a 2012 Gallup poll show that 4.4% of people in South Dakota identify as LGBT.⁵² Applying this percentage to the number of people in South Dakota's workforce (449,367⁵³) indicates that there are an estimated 19,772 LGBT employees in South Dakota.

Next, we applied the rate of complaints filed on the basis of sexual orientation or gender identity to the number of LGBT workers in South Dakota to estimate how many complaints would be filed annually if these characteristics were 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.⁵⁴ 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.⁵⁵ There is not sufficient data to make a similar calculation of the average rate of complaints filed on the basis of gender identity.⁵⁶ 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 South Dakota's workforce (19,772) suggests that, on average, approximately nine cases 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 suggests that an additional nine complaints would not be costly or burdensome to enforce. According to the Department of Labor and Regulation Division's seven most recent annual reports (FY2008-FY2014), the Commission of Human Rights handled an annual average of 96 discrimination complaints. The annual reports do not provide enough data to determine the cost of enforcement per complaint, so it is not possible to precisely estimate any added expense associated with the additional nine complaints.

However, the data suggest that the additional complaints would have minimal impact on the Commission. Annual fluctuations in the number of discrimination complaints filed with the Commission have varied from 88 to 113 complaints over the seven fiscal year periods from 2008 through 2014. From year to year, the number of complaints filed has varied by an average of nine complaints. This information suggests that an additional nine complaints, on average, per year would be within the range

of normal variation and could be absorbed by the Division of Human Rights/Commission of Human Rights with minimal impact on staff and resources.

Further, information from the South Dakota Bureau of Finance and Management suggest that the additional complaints would have a minimal impact on the Department of Labor and Regulation’s budget for enforcement of the Human Relations Act. Over the most recent seven fiscal years, the Department’s budget for enforcement of the Human Relations Act varied from \$1,337,432⁵⁷ to \$1,486,279.⁵⁸ Changes in the budget did not correspond to fluctuations in the number of complaints filed. For example, there were two fewer complaints handled in 2014 than in 2013,⁵⁹ yet the Commission’s enforcement budget in 2014 was \$115,654 more than its enforcement budget in 2013.⁶⁰ This information suggests that the cost of enforcement of the additional complaints could be absorbed into the existing budget with minimal impact on the Commission.

Fiscal Year	Caseload	Budget
2014	88 ⁶¹	\$1,496,279 ⁶²
2013	90 ⁶³	\$1,380,625 ⁶⁴
2012	91 ⁶⁵	\$1,337,432 ⁶⁶
2011	99 ⁶⁷	\$1,297,850 ⁶⁸
2010	104 ⁶⁹	\$1,339,269 ⁷⁰
2009	89 ⁷¹	\$1,257,702 ⁷²
2008	113 ⁷³	\$1,250,110 ⁷⁴

Conclusion

Documented evidence shows that LGBT people face employment discrimination across the country, including in South Dakota. There is currently no statewide law that prohibits discrimination based on sexual orientation or gender identity in public and private sector employment in South Dakota. Adding these characteristics to the state’s employment non-discrimination law would provide protection from discrimination to approximately 19,800 LGBT workers in the state. Based on data from other state administrative enforcement agencies, we estimate that approximately nine complaints of sexual orientation or gender identity employment discrimination would be filed in South Dakota annually if the law were amended. Enforcement of the additional complaints would most likely have a negligible impact on the state’s budget and resources.

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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

¹ These estimates were reached by applying the percentage of people in South Dakota that are LGBT (4.4 percent) to the population of South Dakota aged 16 years and older (656,877) and the number of people in the South Dakota civilian labor force (449,367), 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://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_DP03&prodType=table (last visited on Feb. 28, 2015).

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