

# Local Laws and Government Policies Prohibiting Discrimination Based on Gender Identity in Maryland



Christy Mallory and Sarah Liebowitz

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## Introduction

Maryland's civil rights law prohibits discrimination against individuals based on race, sex, age, creed, color, religion, national origin, marital status, disability, and sexual orientation in employment, housing, public accommodations.<sup>1</sup> Sexual orientation was added to the law as a protected characteristic in 2001.<sup>2</sup> The law does not explicitly prohibit discrimination based on gender identity.

Absent a statewide law, four local ordinances and a gubernatorial executive order that applies only to state employees provide the only explicit protections from gender identity discrimination in Maryland law. These laws and policies result in a patchwork of protections that vary in scope and provide different remedies. This report explains the current landscape of such protections, and compares the scope and remedies offered by these protections to the protections provided by Maryland's state non-discrimination law.

Approximately 53% of Maryland's population, including an estimated 9,200 transgender people,<sup>3</sup> lives in a locality which does not provide protection from discrimination based on gender identity.<sup>4</sup> If Maryland's statewide non-discrimination law were amended to include gender identity, these individuals would gain protection from discrimination. Additionally, a statewide law would offer stronger protections to those already covered by local ordinances. Moreover, adding gender identity to the statewide law would establish clear and uniform non-discrimination requirements, procedures, and remedies across the state. Businesses and citizens who currently face a patchwork of obligations and protections regarding gender identity discrimination in Maryland would benefit from the consistency of a statewide law.

## Local Ordinances Prohibiting Gender Identity Discrimination

One city and three counties in Maryland have enacted local legislation that prohibits discrimination on the basis of gender identity in certain areas, including employment, housing, and public accommodations. Fifty-three percent of Maryland's population lives outside of these jurisdictions.<sup>5</sup>

Baltimore City was the first municipality in Maryland to adopt a law prohibiting discrimination on the basis of gender identity, adding the protection in 2002.<sup>6</sup> Five years later, Montgomery County added gender identity protection to its non-discrimination laws.<sup>7</sup> Howard County followed in 2011, and Baltimore County added similar protections in 2012.<sup>8</sup>

## Scope of Coverage

Maryland state law prohibits discrimination on the basis of race, sex, age, creed, color, religion, national origin, marital status, disability, and sexual orientation in employment, housing, public accommodations.<sup>9</sup>

The four local laws that prohibit discrimination based on gender identity vary in scope, but all provide protection in the areas covered by state law, including employment, housing, and public accommodations. In addition, two localities expressly prohibit discrimination in at least some types of government services. Specifically, Baltimore City prohibits discrimination in public education, and prohibits discrimination by its health and welfare agencies, and Howard County prohibits its law enforcement officers from harassing and discriminating against citizens based on protected characteristics.

Locality	Discrimination prohibited in:					
	Employment	Housing	Public Accomm.	Government Services	Education	Credit
Baltimore City <sup>10</sup>	Yes	Yes	Yes	Yes, health and welfare agencies	Yes	Yes
Baltimore County <sup>11</sup>	Yes	Yes	Yes	No	No	Yes
Howard County <sup>12</sup>	Yes	Yes	Yes	Yes, law enforcement practices	No	Yes
Montgomery County <sup>13</sup>	Yes	Yes	Yes	No	No	Yes

## Enforcement

### Private Cause of Action

Maryland state laws allow individuals who have experienced employment or housing discrimination in violation of state law to file a private cause of action in court.<sup>14</sup> A private cause of action is not available to individuals who have experienced discrimination in public accommodations.<sup>15</sup>

Maryland state law also allows individuals who have experienced discrimination in violation of the local ordinances of Howard County, Montgomery County, or Baltimore County (in limited circumstances) to file a private cause of action in court.<sup>16</sup> This means that individuals who have been discriminated against based on their gender identity in these counties may file a private cause of action, whether or not the county codes explicitly provide for such enforcement. With respect to Howard County and Maryland County, the state law allows any individual who has been discriminated against in violation of the local ordinances to file a private cause of action.<sup>17</sup> With respect to Baltimore County, the state law only allows a private cause of action for employment discrimination against those individuals who work for employers with fewer than 15 employees.<sup>18</sup> A private cause of action is not available for a violation of Baltimore City's non-discrimination ordinance, either under the ordinance itself or under state law.<sup>19</sup>

### **Administrative Enforcement**

Maryland's state non-discrimination laws are enforced by the Maryland Commission on Human Relations.<sup>20</sup> All four Maryland localities that prohibit gender identity discrimination have commissions which serve a quasi-judicial function similar to the Maryland Commission on Human Relations.<sup>21</sup> Like the state commission, local commissions are generally empowered to accept complaints of discrimination; to investigate and hold hearings on discrimination complaints; and to award damages and other relief to remedy instances of discrimination.<sup>22</sup> The commissions can also enforce their decisions through the courts, if necessary.<sup>23</sup>

### **Statute of Limitations**

Maryland state laws provide a six-month statute of limitations period for filing an administrative complaint under the statewide non-discrimination laws,<sup>24</sup> and a two-year statute of limitations period for filing a private cause of action under the statewide non-discrimination laws.<sup>25</sup> Maryland state laws which allow individuals to file private causes of action for a violation of county ordinances, as described above, also provide two-year statute of limitations periods for such filings.<sup>26</sup>

All of the localities that prohibit gender identity discrimination in Maryland provide for the same, or longer, statute of limitations periods for filing administrative complaints. Baltimore City<sup>27</sup> and Baltimore County<sup>28</sup> provide the same statute of limitations periods for filing administrative complaints as the state law (six months or 180 days).<sup>29</sup> Howard County also provides a six-month statute of limitations period for complaints alleging most types of discrimination, including discrimination in employment and public accommodations, and a one-year statute of limitations period for complaints of housing discrimination.<sup>30</sup> Montgomery County provides a one-year statute of limitations period for filing administrative complaints.<sup>31</sup>

### **Remedies**

The remedies available under the local ordinances prohibiting discrimination based on gender identity are generally more limited than the remedies available under the Maryland state non-discrimination laws. The remedies available under the local ordinances differ most significantly from remedies available under the state law in terms of monetary relief that is available through an administrative proceeding. Additionally, case law in Maryland may further limit the remedies which can actually be awarded under a local ordinance, regardless of what the text of the ordinance provides.

Under Maryland state non-discrimination laws, the available remedies differ depending on whether the complainant proceeds through administrative enforcement or through court; and depending on the type of discrimination the individual experienced.

Under state non-discrimination laws, administrative remedies available to individuals in cases of employment discrimination include compensatory damages, affirmative relief (including reinstatement and back pay), and other equitable and injunctive relief.<sup>32</sup> Compensatory damages are capped at the following limits: \$50,000, if the employer has 15-100 employees; \$100,000 if the employer has 101-200 employees; \$200,000 if the employer has 201-500 employees; and \$300,000 if the employer has 501 or more employees.<sup>33</sup> Administrative remedies available to individuals in cases of housing discrimination include actual damages, injunctive or other equitable relief, and

attorneys' fees and costs.<sup>34</sup> In cases of public accommodations discrimination, only non-monetary remedies are available to individuals.<sup>35</sup> Civil penalties may also be imposed in cases of employment, housing, and public accommodations discrimination.<sup>36</sup>

Under state non-discrimination laws, in a private cause of action for employment discrimination, a court may award all available administrative remedies, as well as punitive damages and attorneys' fees and costs.<sup>37</sup> However, total compensatory and punitive damages cannot exceed the caps described above.<sup>38</sup> In a private cause of action for housing discrimination, a court may award all available administrative remedies as well as punitive damages.<sup>39</sup>

The Maryland state laws which allow individuals to file private causes of action based on violations of county ordinances provide remedies similar to those available for a violation of state non-discrimination laws. In cases filed under state law for a violation of Howard County's or Montgomery County's non-discrimination ordinances, courts may award damages, injunctive relief or other civil relief, and attorney's fees and costs.<sup>40</sup> The types of damages available are not specified in greater detail. In cases filed under state law for a violation of Baltimore County's non-discrimination ordinance, courts can award compensatory damages, including back pay, injunctive relief, and reasonable attorney's fees.<sup>41</sup> A court may not award punitive damages.<sup>42</sup>

Generally, the ordinances in the four localities that prohibit discrimination based on gender identity provide remedies that are more limited than those provided under the state's non-discrimination laws. None of the localities provides for punitive damages through administrative hearings.<sup>43</sup> One of the localities, Baltimore County, does not provide for compensatory damages at all,<sup>44</sup> and two localities, Howard County and Montgomery County, provide for capped compensatory damages through an administrative hearing.<sup>45</sup> Howard County<sup>46</sup> and Montgomery County<sup>47</sup> provide for attorney's fees and costs through an administrative hearing, but Baltimore City<sup>48</sup> and Baltimore County<sup>49</sup> do not. All of the localities provide for affirmative relief (such as reinstatement or admission of an individual to a public accommodation) and appropriate equitable relief.<sup>50</sup> The remedies that courts can award for violations of the three counties' non-discrimination ordinances are authorized by state law as discussed above.

Additionally, case law in Maryland further limits the remedies which can actually be awarded through administrative hearings under a local ordinance, regardless of what the text of the ordinance provides. Judicial decisions in Maryland establish that because of the state's Express Powers Act<sup>51</sup>, localities are authorized to provide only certain remedies for discrimination. The remedies provided by local ordinances must be limited to "damages [that are] reasonably quantifiable and relate to identifiable, actual losses," otherwise they reach beyond the scope of matters which local governments have the statutory authority to address through local rulemaking in Maryland.<sup>52</sup> On this principle, courts have invalidated local ordinance provisions authorizing damages for humiliation and embarrassment and other financial losses.<sup>53</sup>

Given such precedent, local ordinances providing for monetary relief (other than actual damages) in Maryland are vulnerable; and state law likely provides the only secure avenue for individuals to fully remedy discrimination. As explained above, state law provides protection to individuals who have been discriminated against based on gender identity in violation of local ordinances in Howard County and Montgomery County, and to a very limited extent, in Baltimore County. However, in

order to use these state laws to remedy discrimination, individuals must pursue a private cause of action. State law does not establish an administrative enforcement path for violations of local ordinances. Thus, options for remedying discrimination under these laws are more limited than under the Maryland's statewide non-discrimination law.

### **Executive Order Prohibiting Gender Identity Discrimination**

In 2007, Governor Martin O'Malley signed an Executive Order prohibiting discrimination on the basis of gender identity.<sup>54</sup> The order covers only state executive branch employees. Specifically, the order states that "personnel actions" regarding Maryland employees or applicants should be based on "merit and fitness," and cannot take gender identity into account.<sup>55</sup>

The executive order directed the Secretary of Budget and Management to recommend the appointment of a Statewide Equal Employment Opportunity Coordinator to oversee the non-discrimination policy. In addition, the order provides for the creation of an Equal Employment Opportunity Unit. The order directs the Secretary of Budget and Management to "take any action, not inconsistent with federal or State law, to resolve employee complaints of unfair employment practices," and directs the leader of each Executive Branch department or unit to appoint officers to implement the equal employment policy. The order does not, however, specify remedies available to employees or applicants who have experienced discrimination.

### **Conclusion**

An estimated 53% of Maryland residents live in jurisdictions without local ordinances prohibiting discrimination based on gender identity. Amending the Maryland's state non-discrimination laws to include gender identity would provide protection for these individuals in employment, housing, and public accommodations. Moreover, adding gender identity to the statewide non-discrimination law would establish clear and uniform non-discrimination requirements, procedures, and remedies across the state. Businesses and citizens who currently face a patchwork of protections regarding gender identity discrimination in Maryland would benefit from the consistency of a state law.

## Endnotes

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<sup>1</sup> MD. CODE ANN., STATE GOV'T §§ 20-304, 20-402, 20-501, 20-606, 20-607, 20-705, 20-707, 20-901 (LexisNexis 2013).

<sup>2</sup> Memorandum: Maryland – Sexual Orientation and Gender Identity Law and Documentation of Discrimination, WILLIAMS INST. (Sept. 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Maryland.pdf>.

<sup>3</sup> According to the U.S. Census Bureau's 2010 Decennial Census, the population of Maryland is 5,773,552. *Profile of General Population and Housing Characteristics: 2010, Table DP-1*, U.S. CENSUS, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_10\\_DP\\_DPDP1&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table) (last visited Sept. 9, 2013). A recent study suggests that 0.3% of the population identifies as transgender. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INSTITUTE (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. Applying 0.3% to Maryland's population suggests that, in total, approximately 17,320 adults in Maryland identify as transgender. Fifty-three percent of those people, or approximately 9,200 people, live in a locality without protection from discrimination based on gender identity.

<sup>4</sup> Calculated by authors using data from the American Community Survey, 2011 1-Year-Estimates, *available at* <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Aug. 30, 2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 9.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> Baltimore Cty., Md., Cty. Council Bill No. 3-12 (Jan. 17, 2012) (enacted).

<sup>9</sup> MD. CODE ANN., STATE GOV'T §§ 20-304, 20-402, 20-501, 20-606, 20-607, 20-705, 20-707, 20-901.

<sup>10</sup> BALTIMORE CITY, MD., CODE art. 4, §§ 3-1, 3-2, 3-3, 3-4, 3-5 (2013).

<sup>11</sup> BALTIMORE CITY, MD., CODE §§ 29-1-101, 29-2-101, 29-2-202, 29-2-302, 29-2-303, 29-2-402 (2003); Baltimore Cty., Md., Cty. Council Bill No. 3-12 (Jan. 17, 2012) (enacted).

<sup>12</sup> HOWARD CTY., MD., CODE §§ 12.200, 12.207, 12.208, 12.209, 12.210, 12.211 (2013).

<sup>13</sup> MONTGOMERY CTY., MD., CODE §§ 27-11, 27-12, 27-19, 27-23 (2013).

<sup>14</sup> MD. CODE ANN., STATE GOV'T §§ 20-1013, 20-1026.

<sup>15</sup> See *Id.* §§ 20-301 to 20-306, 19-106.

<sup>16</sup> *Id.* §§ 20-1202, 20-1203.

<sup>17</sup> *Id.* § 20-1202.

<sup>18</sup> *Id.* § 20-1203.

<sup>19</sup> See BALTIMORE CITY, MD., CODE art. 4, §§ 4-3, 4-4.

<sup>20</sup> MD. CODE ANN., STATE GOV'T §§ 20-201 to 2-207.

<sup>21</sup> BALTIMORE CITY, MD., CODE art. 4, §§ 4-1 to 4-4; BALTIMORE CTY., MD., CODE §§ 29-3-101 to 29-3-115; HOWARD CTY., MD., CODE § 12.202; MONTGOMERY CTY., MD., CODE §§ 27-1 to 27-2.

<sup>22</sup> E.g., BALTIMORE CITY, MD., CODE art. 4, §§ 4-1 to 4-3.

<sup>23</sup> BALTIMORE CITY, MD., CODE art. 4, § 4-6; BALTIMORE CTY., MD., CODE § 29-3-111(b); HOWARD CTY., MD., CODE § 12.212; MONTGOMERY CTY., MD., CODE §27-9(b).

<sup>24</sup> MD. CODE ANN., STATE GOV'T § 20-1004(c)(1).

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- <sup>25</sup> Id. § 20-1013.
- <sup>26</sup> Id. §§ 20-1202(c)(1), 20-1203(c)(1).
- <sup>27</sup> BALTIMORE CITY, MD., CODE art. 4, § 2-4(5).
- <sup>28</sup> BALTIMORE CTY., MD., CODE § 29-3-103.
- <sup>29</sup> BALTIMORE CITY, MD., CODE art. 4, § 2-4(5); BALTIMORE CTY., MD., CODE § 29-3-103(b).
- <sup>30</sup> HOWARD CTY., MD., CODE §§ 12.207B(l)(a), 12.212(l)(a).
- <sup>31</sup> MONTGOMERY CTY., MD., CODE §27-7(d).
- <sup>32</sup> MD. CODE ANN., STATE GOV'T § 20-1009(b).
- <sup>33</sup> Id. § 20-1009(b)(3).
- <sup>34</sup> Id. § 20-1028(b)(1); 20-1033.
- <sup>35</sup> See id. § 20-1009(c).
- <sup>36</sup> Id. §§ 20-1009, 20-1016, 20-1028(b)(2).
- <sup>37</sup> Id. §§ 20-1013(e)(1), 20-1015.
- <sup>38</sup> Id. § 20-1013(e)(2).
- <sup>39</sup> Id. § 20-1035(e).
- <sup>40</sup> Id. § 20-2012(b), (d).
- <sup>41</sup> Id. § 20-2013(d)(1), (3).
- <sup>42</sup> Id. § 20-2013(d)(2).
- <sup>43</sup> See BALTIMORE CITY, MD., CODE art. 4, § 4-3(e); BALTIMORE CTY., MD., CODE § 29-3-109(k)(2); HOWARD CTY., MD., CODE § 12.201(II); MONTGOMERY CTY., MD., CODE §27-8.
- <sup>44</sup> See BALTIMORE CTY., MD., CODE § 29-3-109(k)(2).
- <sup>45</sup> In Howard County, compensatory damages are capped at the following limits: actual damages plus \$5,000 for humiliation and mental anguish in cases of discrimination in employment or public accommodations, and actual damages plus \$1,000 for humiliation and mental anguish in all other discrimination cases. HOWARD CTY., MD., CODE §§ 12.216(b), 12.212(IV)(j)(1)(ii), 12.201(II), 12.207B(VIII). In Montgomery County, compensatory damages are capped at actual damages plus \$5,000 for humiliation and embarrassment. MONTGOMERY CTY., MD., CODE §27-8 (an annotation to the Code states that up to \$500,000 for humiliation and embarrassment are available, but the County Council bill that implemented provision was invalidated by the Montgomery County circuit court in *American Financial Services v. Montgomery County*. Case No. 269105 (Md. Cir. Ct. Montgomery County Nov. 30, 2006). Thus, the provision in place before the bill passed, which allowed \$5,000 in damages, is presumably reinstated.
- <sup>46</sup> HOWARD CTY., MD., CODE §§ 12.212(IV)(j)(1)(iii), 12.217(II).
- <sup>47</sup> MONTGOMERY CTY., MD., CODE §27-8(a)(1)(A).
- <sup>48</sup> See BALTIMORE CITY, MD., CODE art. 4, § 4-3(e).
- <sup>49</sup> See BALTIMORE CTY., MD., CODE § 29-3-109(k)(2).
- <sup>50</sup> BALTIMORE CITY, MD., CODE art. 4, § 4-3(e); BALTIMORE CTY., MD., CODE § 29-3-109(k)(2); HOWARD CTY., MD., CODE §12.212(IV)(j)(1); MONTGOMERY CTY., MD., CODE §27-8(a).
- <sup>51</sup> Md. Code Ann., art 25A, § 5.

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<sup>52</sup> Beretta USA Corp. v. Santos, 712 A.2d 69 (Md. 1998), vacated *sub nom*, 358 Md. 166 (2000).

<sup>53</sup> E.g., Beretta, *supra* note 52 at 85; Am. Fin. Svcs., *supra* note 45; McCrory Corp. v. Fowler, 570 A.2d 834, 838 (Md. 1988).

<sup>54</sup> Md. Exec. Order No. 01.01.2007.16 (Aug. 22, 2007).

<sup>55</sup> *Id.*