

Amending Human Rights Commission Ordinances to include Fairness Protections

A Guide for City Attorneys

The Kentucky Commission on Human Rights (KCHR) has supported the inclusion of Sexual Orientation and Gender Identity as protected classes in the Kentucky Civil Rights Act (KCRA) since 2008. While bills have been proposed in recent legislative sessions, those changes have not been made at present.

A number of local Human Rights Commissions (LHRCs) have requested guidance in providing these protections to their own communities. Local Human Rights Commissions are established by City Ordinance. Given that those ordinances were drafted at different times by different individuals, there is no one single model to insert these changes.

(For the purposes of this document, we will be referring to both sexual orientation and gender identity protections as “Fairness” protections.)

Therefore, what follows is less a model, and more a guide to the procedure by which city attorneys can add these protections in their respective communities.

- Step 1 Obtain an **electronic, editable** copy of the current form of the LHRC establishment ordinance in question.

- Step 2 Assess the current ordinance to determine if the Essential Elements of an Enforceable Civil Rights Process are present, by using the attached check-list. Also assess to see if any previous language may conflict with current law.

- Step 3 Address those areas not covered in your existing ordinance, either by using the Sample Language Attachment, or by drafting new language to address those issues. Remove any language which no longer applies.

- Step 4 (Optional) Contact KCHR, and request an assessment of the new proposed amendment for an analysis and feedback.

- Step 5 Propose the Amended ordinance, and follow administrative procedure.

Checklist for Existing Ordinances

1. ___ Definitions

At a minimum, your ordinance should include definitions of:

- Discrimination
- Employer
- Housing
- Public Accommodation
- Sexual Orientation
- Gender Identity

KCHR strongly encourages cities to consider those definitions as set forth in KRS 344.010 and 344.030., as having equivalent jurisdictions places fairness protections on similar footing to race, sex, and religion. It also allows cities to refer non-fairness claims to KCHR, which can prevent the unnecessary expenditure of city resources.

2. ___ Intake

Your ordinance should describe how a complaint is filed- the title of the person taking complaints, and any specific requests including requiring the Complaint be in writing and notarized. Many intake portions specify that the complaint be filed within 180 days. KCHR strongly encourages communities to use a 180 day statute of limitations, consonant with KRS Ch. 344, for the reasons described above. (KCHR and HUD can file housing cases within one year, per KRS 344.600, and HUD is currently accepting sexual orientation and gender identity cases, which may be an appropriate place to refer complaints in some circumstances.)

3. ___ Conciliation and Settlement Provisions

Some provision should be made to allow/require the person conducting the process to engage in the settlement or conciliation process. (See KRS 344.200(4) for an example.)

4. ___ Investigation

Some provision should be made to assess the Complaint, to see that evidence exists to support the Complaint's allegations. (See KRS 344.200 for an example.)

5. ___ Discharge / Enforcement

After the investigation process, there should be a mechanism to discharge unsubstantiated complaints, while providing some enforceable way to address substantiated complaints. A complete administrative process should include some form of post-investigation determination of Probable Cause/ No Probable Cause, as illustrated in KRS 344.200.

6. ___ Retaliation

Absent some way to penalize retaliation against people for taking part in this process, the ordinance becomes unenforceable. (See KRS 344.280 as an example.)

7. *Referral to KCHR for non-Fairness Complaints

Some LHRCs can find themselves committed to investigating 10x more complaints than expected when they cover Race, sex, etc. A mandatory referral clause requiring race, sex, and other cases to be referred can control costs, and limit liability. These referrals are another reason KCHR strongly encourages local commissions to set their jurisdictions equal to that of KRS Ch. 344.

Notes on the Process

The Legislative Research Council of Kentucky suggests ordinance amendments be made by striking through the language to be replaced, and inserting the new language in bold, italicized, underlined form.

Originally, many Fairness Ordinances specified the City Manager take complaints- others allow the Mayor to designate a Fairness Officer. KCHR favors the appointment of a Fairness Officer as an intake and / or investigation mechanism. A city employee with a background in Human Resources, Legal Issues, or Compliance can perform intake and investigation functions, but not seeking election they can better avoid the appearance of impropriety. In those situations where City Manager is listed in the model language, "Fairness Officer" can generally be substituted.

KCHR believes that individuals using the restrooms corresponding to their gender of representation is the best practice, but recognizes that communities in the Commonwealth have come to different positions on the issue.

Model Language Suggestions Appendix

1. Definitions

From KRS CH. 344

"Discrimination" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter.

"Employer" means a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year and an agent of such a person, except for purposes of determining discrimination based on disability, employer means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of that person, except that, for two (2) years following July 14, 1992, an employer means a person engaged in an industry affecting commerce who has twenty-five (25) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding year, and any agent of that person. For the purposes of determining discrimination based on disability, employer shall not include:

- (a) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
- (b) A bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Service Code of 1986.

"Housing accommodations" includes improved and unimproved property and means any building, structure, lot or portion thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied as the home or residence of one (1) or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building or structure.

Definition of "place of public accommodation, resort, or amusement"
for chapter -- Exceptions.

As used in this chapter, unless the context requires otherwise, "place of public accommodation, resort, or amusement" includes any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds, except that:

- (1) A private club is not a "place of public accommodation, resort, or amusement"

if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;

- (2) "Place of public accommodation, resort, or amusement" does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence; and
- (3) "Place of public accommodation, resort, or amusement" does not include a religious organization and its activities and facilities if the application of KRS 344.120 would not be consistent with the religious tenets of the organization, subject to paragraphs (a), (b), and (c) of this subsection.
 - (a) Any organization that teaches or advocates hatred based on race, color, or national origin shall not be considered a religious organization for the purposes of this subsection.
 - (b) A religious organization that sponsors nonreligious activities that are operated and governed by the organization, and that are offered to the general public, shall not deny participation by an individual in those activities on the ground of disability, race, color, religion, or national origin.
 - (c) A religious organization shall not, under any circumstances, discriminate in its activities or use of its facilities on the ground of disability, race, color, or national origin.

From **KCHR's Model Fairness Ordinance With Commission**

SEXUAL ORIENTATION: An individual's actual or imputed heterosexuality, homosexuality, bisexuality or asexuality.

From **KCHR's Model Fairness Ordinance With Commission**

GENDER IDENTITY: means the actual or perceived appearance, expression or identity of a person with respect to masculinity and femininity.

2. Intake

From **KCHR's Model Fairness Ordinance With Commission**

FILING AND PROCESSING COMPLAINTS:

1. Any person claiming to be aggrieved by a violation of this ordinance may, within 180 days of the alleged Employment or Public Accommodation violations, or within one year of Housing violations, shall file a written complaint under oath with the City Manager containing the following information:
 - (a) The name and address (if known) of the alleged violator, ("Respondent") or facts sufficient to identify such person.
 - (b) An outline of the material facts upon which the complaint is based.
 - (c) The alleged violation.

(d) That any conduct of the complainant was for the purpose of obtaining the housing, employment, or public accommodation in question and not for the purpose of harassment or entrapment of the person against whom the complaint is made.

(e) That a complaint concerning this same matter has not been filed with another agency or that any complaint concerning this matter filed with another agency has been dismissed by such agency without a final judgment on the merits.

2. Upon receipt of the complaint, the City Manager shall first make the following determination, and take the following action:

If the complaint alleges discrimination based on race, color, national origin, religion, sex, age (over 40), familial status or disability, the complaint shall immediately be referred to the Kentucky Commission on Human Rights for further processing, investigation and administrative proceedings in accordance with the Kentucky Civil Rights Act, KRS Chapter 344, *et seq.*

If the complaint alleges discrimination based on sexual orientation or gender identity, a copy of the complaint shall be served on the respondent by certified mail. The respondent shall file a written response to the complaint within twenty (20) days from the receipt thereof.

3. Conciliation and Settlement Provisions

From **KCHR's Model Fairness Ordinance With Commission**

PRE-INVESTIGATION CONCILIATION EFFORTS:

- (#) Before conducting a full investigation of the complaint, the City Manager may attempt to negotiate a settlement of the dispute between the parties, if the City Manager deems that such an attempt is practicable.

4. Investigation

From **KCHR's Model Fairness Ordinance With Commission**

- (#) If the City Manager does not deem it practicable to attempt a pre-investigation settlement or if such settlement attempt is unsuccessful, the City Manager shall conduct an investigation to determine whether there is probable cause to believe the allegations of the complaint.

5. Discharge / Enforcement

From **KCHR's Model Fairness Ordinance With Commission**

INVESTIGATION – FINDINGS AND CONCILIATION:

1. If, after investigation, the City Manager determines that there is no probable cause to believe that a violation has occurred, the City Manager shall dismiss the complaint. Written notice of the dismissal shall be served upon the complainant and respondent by U.S. Mail postage prepaid. The notice shall state that complainant or his or her designee

may file a written request for reconsideration within ten (10) days in accordance with the provisions set out in KRS 344.200.

2. If, after investigation, the City Manager determines that there is probable cause to support the allegations contained in the complaint, the City Manager shall endeavor to eliminate the alleged violation by a conciliation agreement, signed by all parties and the City Manager, wherein the alleged violation is eliminated and the complainant is made whole to the greatest extent practicable.
3. If a settlement is achieved, the City Manager shall furnish a copy of a signed conciliation agreement to the complainant and the respondent. The terms of the conciliation agreement may be made public, but no other information relating to any complaint, its investigation, or its disposition may be disclosed without the consent of the complainant and the person charged. A conciliation agreement need not contain a declaration or finding that a violation has in fact occurred and it may provide for dismissal of the complaint without prejudice. The Commission shall have discretion to approve, modify, or reject the conciliation agreement.
4. If a conciliation is not achieved, the City Manager shall proceed with a hearing in accordance with the KCRA and KRS 13B.

PROCEDURES, HEARINGS, JUDICIAL REVIEW AND APPEALS:

1. The City Manager shall set a date, time and location for a hearing and notify the complainant and respondent in writing at least twenty (20) days in advance of that hearing date.
2. A hearing officer shall be appointed by the City Manager to preside over the conduct of an administrative hearing and to regulate the course of the proceedings in a manner that will promote the orderly and prompt conduct of the hearing. The hearing officer shall be an attorney, licensed to practice law in the Commonwealth of Kentucky, and shall be certified by the Attorney General's Office to serve as hearing officer in accordance with the requirements set forth in KRS 13B.
3. All pre-hearing proceedings, hearings, judicial review and appeals shall be conducted in accordance with all applicable provisions of the Kentucky Civil Rights Act, including KRS 344.240 and KRS 13B, the provisions of all of which are hereby adopted in full and incorporated herein by reference.
4. Any final adjudication and recommended order must be approved by the Commission.

§ DAMAGES, INJUNCTIVE/EQUITABLE RELIEF, PENALTIES:

All damages, injunctive/equitable relief and/or penalties which may be available to a complainant under applicable provisions of the Kentucky Civil Rights Act shall be available to the

complaint in proceedings under this ordinance, including actual damages for economic loss, embarrassment and humiliation, reinstatement of employment, lost wages, and/or reasonable modifications/accommodations.

§ _____ **ENFORCEMENT OF COMMISSION ORDERS:**

The proceeding for enforcement of a local commission order shall be in accordance with the applicable provisions of the Kentucky Civil Rights Act, and shall be initiated by filing a complaint in the Circuit Court. Copies of the complaint shall be served upon all parties of record. Within thirty (30) days after the filing of the complaint by the local commission, or within such further time as the court may allow, the local commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including a transcript of testimony, which need not be printed. By stipulation of all parties to the proceeding, the record may be shortened. The findings of fact of the local commission shall be conclusive unless clearly erroneous in view of the probative and substantial evidence on the whole record. The court shall have power to grant such temporary relief or restraining order as it deems just, and to enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the local commission, or remanding the case to the local commission for further proceedings.

6. Retaliation

From **KCHR's Model Fairness Ordinance with Commission**
OBSTRUCTION AND RETALIATION:

It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:

1. To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter; or
2. To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this chapter; or
3. To obstruct or prevent a person from complying with the provisions of this chapter or any order issued thereunder;
4. To resist, prevent, impede, or interfere with the commission, or any of its members or representatives, in the lawful performance of duty under this chapter; or
5. To coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this subsection and KRS 344.360, 344.367, 344.370, 344.380, or 344.680.

7. Referral of Non-Fairness Complaints

From KCHR's Model Fairness Ordinance with Commission

COMMISSION'S RELATIONSHIP WITH THE KENTUCKY COMMISSION ON HUMAN RIGHTS:

In order to effectuate and enforce the provisions of this subsection, the Commission shall enter into a cooperative working agreement with the Kentucky Commission on Human Rights whereby all claims filed with the Commission alleging discrimination in employment, public accommodations, housing, financial and credit transactions based on race, color, national origin, religion, age (over 40), familial status and disability, shall be referred to the Kentucky Commission on Human Rights for investigation and enforcement in accordance with the Kentucky Civil Rights Act, KRS Chapter 344 *et seq.* The Commission shall reserve to itself the resolution of all claims of discrimination based on sexual orientation or gender identity.

The Commission shall, when requested and with the advice and consent of the Mayor, act in an advisory capacity to and otherwise cooperate with the Kentucky Commission on Human Rights where ever possible to effectuate compliance with the Kentucky Civil Rights Act and this subchapter.

(From KCHR's Model Fairness Ordinance, "Filing and Processing Complaints")

Upon receipt of the complaint, the City Manager shall first make the following determination, and take the following action:

If the complaint alleges discrimination based on race, color, national origin, religion, sex, age (over 40), familial status or disability, the complaint shall immediately be referred to the Kentucky Commission on Human Rights for further processing, investigation an administrative proceedings in accordance with the Kentucky Civil Rights Act, KRS Chapter 344, *et seq.*