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Idaho Employers Maneuver Through Inconsistent and Confusing Discrimination Laws While Awaiting Formal Human Rights Expansion

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IDAHO EMPLOYERS MANEUVER THROUGH INCONSISTENT AND CONFUSING DISCRIMINATION LAWS WHILE AWAITING FORMAL HUMAN RIGHTS EXPANSION

PAM HOWLAND

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I. INTRODUCTION

The expansion of human rights' protections in the State of Idaho has never been easy or fast. Indeed, a brief survey of Idaho history reveals that since times that pre-date statehood, the process of adding legal protections for groups of Idaho citizens (and then implementing them) has traditionally been a slow one, marked with unforeseen hurdles and roadblocks.¹ Like it or not, Idaho is slow to accept changing social norms and conservative about expanding applicable state law protections.

The issue of discrimination on the basis of gender identity and sexual orientation is no different. This controversial issue is a law school professor's dream, as it intertwines numerous issues including preemption, constitutional rights, statutory construction and interpretation, agency interpretation of a statute, and changing social norms all into one. To complicate matters, the law is inconsistent throughout the country (as well as throughout the state) and is constantly evolving and morphing as new cases are decided, new laws are passed, and different agencies and special interest groups weigh in.

For Idahoans, the law seems clear at first blush. Neither Title VII nor the Idaho Human Rights Act specifically prohibit discrimination on the basis of gender identity and sexual orientation, which would suggest that gender identity and sexual orientation are not protected classes in

1. Katy Robinson & Ken Miller, *Idaho's Image: Where Myth Meets Reality*, IDAHO STATESMAN, Apr. 26, 1998; Charles Etlinger, *Black Roots Go Deep in Idaho*, IDAHO STATESMAN, Feb. 16, 1987, at 1A; IDAHO TRI-WEEKLY STATESMAN, Nov. 15, 1866, at 2; *Idaho Human Rights Timeline*, WASSMUTH CTR. FOR HUMAN RIGHTS (Feb. 17, 2015), <http://Idaho-humanrights.org/education/history-of-human-rights-in-idaho/timeline/> [<https://web.archive.org/web/20150217192534/http://idaho-humanrights.org/education/history-of-human-rights-in-idaho/timeline/>]; POCATELLO TRIBUNE, Jan 11, 1896; *Gem Civil Rights Official Claims 'Injustice' Exists in Housing, Employment*, IDAHO DAILY STATESMAN, Apr. 27, 1965; Dale Stewart, *Idaho Businessmen Hear Rights Law Talks*, IDAHO STATESMAN, Apr. 26, 1965; *Civil Rights Group Huddles With Samuelson Aid on Gem Program Report*, IDAHO STATESMAN, Dec. 27, 1968, at 15; John Corlett, *Member Says Idaho Rights Commission to Work 'Like Grand Jury'*, IDAHO STATESMAN, July 19, 1969, at 13; *Rights Panelist Contends Hubbard Incites Strife*, IDAHO STATESMAN, Oct. 18, 1969; *Rights Panel Challenges 'Ineffectiveness' Claims*, IDAHO STATESMAN, Oct. 18, 1969; Colette Wilde, *New Panel on Human Rights Hears Variety of Complaints*, IDAHO STATESMAN, Mar. 20, 1971; Jerry Gilliland, *Rights Panel Asks Canyon to Curb Bias at Plans Parley on Discrimination at Labor Camps*, IDAHO STATESMAN, June 19, 1971, at 15; *Advisory Panel on Civil Rights Probes Indian Discrimination*, IDAHO STATESMAN, Apr. 25, 1970; J. Schifferdecker, *Officials Face Action to Force Suit Under Anti-Discrimination Law*, IDAHO STATESMAN, Mar. 10, 1970.

Idaho.² However, the inquiry does not end there. Ninth Circuit case law, for example, has been interpreted to mean that the prohibition against discrimination based on sex found in Title VII makes discrimination on the basis of gender identity and sexual orientation unlawful.³ Recent guidance from the Equal Opportunity Employment Commission points to the same conclusion.⁴ The Idaho Human Rights Commission, charged with administering Idaho's anti-discrimination laws, must follow federal guidance interpreting Title VII when interpreting the Idaho Human Rights Act.⁵ Thus, it is likely that if or when they are called to upon to interpret the IHRA on this issue, they will likely conclude that discrimination is already prohibited. These considerations suggest that gender identity and sexual orientation may well already be protected under the Idaho Human Rights Act as written.

To muddle the issue even further, cities around the state have enacted ordinances making discrimination on the basis of gender identity and sexual orientation unlawful and provide criminal penalties for those who violate them.⁶ Although these ordinances lack civil remedies that would efficiently deter potential violators (and likewise lack a practical remedy for those who are discriminated against), they at least provide clear and concrete language to establish that discrimination on the basis of gender identity and sexual orientation is undisputedly illegal in more than a dozen Idaho cities regardless of how state and federal law is interpreted.⁷

Although Idaho's federal, state and local human rights laws apply to three primary areas – matters of employment, housing and public accommodation – this article will largely address the impact compliance has on employers, as conflicting authorities make compliance and the administration of related employment law policies and issues tricky, to say the least. This article will explore the current state of the law, where the law seems to be headed, how the legislature's treatment of this issue will, eventually, mark a milestone in the history of Idaho human rights, and why it matters for Idaho employers.

2. 42 U.S.C. § 2000e-2(41) (2012).

3. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Rene v. MGM Grand Hotel, Inc.* 305 F.3d 1061 (9th Cir. 2002).

4. See *Macy v. DOJ*, EEOC Appeal No. 0120120821 (April 20, 2012); EEOC, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Mar. 10, 2016)[hereinafter *What You Should Know*]; *Baldwin v. Dep't of Transp.*, EEOC Appeal No.0120133080 (July 2015).

5. IDAPA 45.01.01.012.; see also *Foster v. Shore Club Lodge, Inc.*, 908 P.2d 1228, 1232, 127 Idaho 921, 925 (1995).

6. *Foster v. Shore Club Lodge, Inc.*, 908 P.2d 1228, 1232, 127 Idaho 921, 925 (1995)

7. See, e.g., BOISE, ID, ORDINANCE § 6-02-01(D) (2012).

A. An Overview of Current Federal, State, and Local Laws Impacting
Whether Gender Identity and Sexual Orientation are Protected Classes
In Idaho

1. Title VII Provides Protections Against Discrimination on the Basis of
Gender Identity and Sexual Orientation

Title VII, the primary federal statute at issue here, prohibits discrimination on the basis of race, color, religion, sex and national origin.⁸ Ninth Circuit cases analyzing Title VII have been interpreted to mean that Title VII's prohibition of discrimination on the basis of sex encompasses discrimination on the basis of gender identity and sexual orientation.⁹ These decisions are largely premised on *Price Waterhouse v. Hopkins*,¹⁰ a United States Supreme Court case in which the Court held that a woman denied partnership in an accounting firm because she did not match a male stereotype had an actionable claim under Title VII.¹¹ The Court held "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."¹²

The Ninth Circuit has used *Price Waterhouse* as a spring board leading to the conclusion that gender identity and sexual orientation are protected classes under Title VII. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Ninth Circuit considered whether Sanchez, a former male employee who claimed he was harassed by male co-workers and a supervisor because he did not meet their views of a male stereotype, had an actionable claim under Title VII.¹³ The Ninth Circuit reversed a district court determination that Sanchez had not been harassed on the basis of his sex when his co-workers called him sexually derogatory names, referred to him with the female gender, and taunted him for behaving like a woman.¹⁴ The Court agreed with Sanchez who argued that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.¹⁵ The court concluded, "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes."¹⁶

8. 42 U.S.C. § 2000e-2(41) (2012).

9. See *Videckis v. Pepperdine Univ.*, 100 F.Supp.3d 927, 936 (C.D. Cal. 2015) ("Recent Ninth Circuit cases suggest that the distinction between sexual orientation discrimination and sexual discrimination is illusory.")

10. 490 U.S. 228 (1989).

11. *Id.*

12. *Id.* at 250 (Thus, under *Price Waterhouse*, gender stereotyping is actionable as sex discrimination under Title VII).

13. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

14. *Id.* at 874.

15. *Id.*

16. *Id.*

The Ninth Circuit reached a similar conclusion in *Rene v. MGM Grand Hotel, Inc.*¹⁷ In that case, a gay butler who served wealthy casino guests argued that he was subjected to a hostile work environment on the basis of his sexual orientation.¹⁸ The Ninth Circuit reversed the district court's grant of summary judgment in favor of the employer on the basis that Title VII prohibits physical conduct of a sexual nature when it is sufficiently severe or pervasive without regard to the sexual orientation of the victim.¹⁹

District courts within the Ninth Circuit have concluded the same, although the law is still in flux.²⁰

2. The EEOC Interprets Title VII as Prohibiting Discrimination on the Basis of Gender Identity and Sexual Orientation

The U.S. Equal Employment Opportunity Commission's interpretation of Title VII is in accord with the Ninth Circuit.²¹ The Equal Employment Opportunity Commission ("EEOC") is a federal administrative agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, national origin, age, disability or genetic information.²² Because the EEOC enforces Title VII, an individual who claims to have been the subject of workplace discrimination can file a charge with either the EEOC or the local enforcement agency.²³ Idaho employers, like other U.S. employers, are subject to EEOC enforcement.²⁴

In 2012, the EEOC held that discrimination against an individual on the basis of gender identity is discrimination because of sex and

17. 305 F.3d 1061 (9th Cir. 2002).

18. *Id.*

19. *Id.* at 1068.

20. *See, e.g., Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1225 (D. Ore 2002) (concluding protections of Title VII are not limited to heterosexual employees only); *see Videckis v. Pepperdine Univ.*, 100 F.Supp.3d 927, 936 (C.D. Cal. 2015) ("The law is rapidly developing and far from settled insofar as determining where sexual orientation discrimination lies within the framework of gender-based discrimination.").

21. Dana Beyer and Jillian T. Weiss, *New Title VII and EEOC Rulings Protect Transgender Employees*, TRANSGENDERLAWCENTER.ORG, <http://transgenderlawcenter.org/issues/employment/titlevii> (noting that the 9th Circuit has suggested that in the wake of *Price Waterhouse*, discrimination against transgender individuals is prohibited under Title VII).

22. *See Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. 355, 368 (1977); *see also E.E.O.C., About EEOC*, EEOC.GOV, (last visited Mar. 3, 2016) <http://www.eeoc.gov/eeoc/index.cfm>.

23. *Bryant v. City of Blackfoot*, 48 P.3d 636, 641, 137 Idaho 307, 312 (2002).

24. *Id.*

therefore is covered under Title VII of the Civil Rights Act of 1964.²⁵ More recently, in a July 2015 decision, the EEOC ruled that Title VII prohibits discrimination against employees on the basis of sexual orientation and gender identity in spite of the fact that its language does not explicitly denote them as protected classes. In *Baldwin v. Department of Transportation*, the EEOC found that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”²⁶

The EEOC’s FY 2013-2016 Strategic Enforcement Plan lists “coverage of lesbian, gay, bisexual and transgender (LGBT) individuals under Title VII’s sex discrimination provisions, as they may apply” as an enforcement priority.²⁷ This is consistent with positions the EEOC has taken in recent years on the intersection of LGBT-related discrimination and Title VII protections.²⁸ It has filed at least two lawsuits under Title VII alleging discrimination on the basis of gender identity and sexual orientation.²⁹

3. Executive Order 13672 Prohibits Discrimination on the Basis of Gender Identity and Sexual Orientation as to Federal Employees

Executive Order 13672 was signed into law on July 21, 2014 by President Obama.³⁰ This prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation and/or gender identity.³¹ Accordingly, federal workers are already afforded protections against discrimination on this basis regardless of where they reside.³²

4. Related Ninth Circuit Law Addressing Idaho’s Constitutional Ban on Gay Marriage Supports the Proposition that Discrimination on the Basis of Sexual Orientation is Unlawful

In 2014, the Ninth Circuit considered other significant issues intertwined with that of whether gender identity and sexual orientation should be protected classes immune from discrimination.³³ It considered whether constitutional amendments in Idaho and Nevada that banned same sex marriage (and refused to recognize same sex marriages validly performed elsewhere) were lawful.³⁴ After determining that “laws that

25. *What You Should Know*, *supra* note 4.

26. *Baldwin v. Dep’t of Transp.*, EEOC Appeal No.0120133080 (July 2015).

27. *What You Should Know*, *supra* note 4.

28. *Id.*

29. *Id.*

30. *Executive Order 13672*, GPO.GOV, (July 23, 2014) <https://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf>.

31. *Id.*

32. *Id.*

33. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

34. *Id.*

treat people differently based on sexual orientation are unconstitutional unless a ‘legitimate purpose . . . overcome[s]’ the injury inflicted by the law on lesbians and gays and their families,” the Court concluded that the Idaho and Nevada statutes unjustifiably discriminated on the basis of sexual orientation and were in violation of the Equal Protection Clause of the constitution.³⁵

Although *Latta* addressed a different issue and is limited to the constitutionality of gay marriage bans, the Ninth Circuit’s ultimate conclusion, that discrimination on the basis of sexual orientation is unlawful, is one more indicator that courts are moving toward a recognition of equal protection rights on the basis of gender identity and sexual orientation and that they are disinclined to tolerate discrimination on this basis.

5. The Idaho Human Rights Act Arguably Provides Protections Against Discrimination on the Basis of Gender Identity and Sexual Orientation

The next stopping point for a primer on the law of gender identity and sexual orientation is the Idaho Human Rights Act.³⁶ Its purpose plainly states that it is intended to provide for execution within the state of the same policies embedded within Title VII, the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADAAA”).³⁷ It prohibits discrimination on the basis of, race, color, religion, sex or national origin in matters of employment, public accommodation and housing.³⁸ The Idaho Human Rights Act (“IHRA”) largely mirrors the prohibitions against discrimination outlined within its federal counterparts and Idaho courts have determined that case law interpreting the federal statutes is instructive.³⁹

Although no Idaho courts appear to have analyzed whether gender identity and sexual orientation are protected classes under the IHRA, the rules that govern the Idaho Human Rights Commission (“IHRC”), the agency designated by Idaho law to oversee the administration of anti-discrimination laws within the state, suggest that if it was called upon to do so, it would answer in the affirmative.⁴⁰ IDAPA 45.01.01.012 provides, “In evaluating allegations of discrimination on the basis of race, color, religion, sex or national origin under the Act, the Commis-

35. *Id.* at 476.

36. IDAHO CODE §§ 67-5901–5912 (2014).

37. IDAHO CODE § 67-5901(1) (2014).

38. IDAHO CODE § 67-5909 (2014).

39. *See Foster v. Shore Club Lodge, Inc.*, 908 P.2d 1228, 1232, 127 Idaho 921, 925 (1995) (“The legislative intent reflected in I.C. § 67-5901 allows our state courts to look to federal law for guidance in the interpretation of the state provisions.”) (citing *O’Dell v. Basabe*, 810 P.2d 1082, 1097, 119 Idaho 796, 811 (1991)).

40. IDAPA 45.01.01.012.

sion will rely on the interpretations of Title VII of the Civil Rights Act, 42 USC 2000e et seq. and federal regulations at 29 CFR Parts 1604 through 1607.”⁴¹ This directive to follow federal law for guidance on how the IHRA should be interpreted, suggests that the IHRC would follow EEOC guidance and Ninth Circuit case law if presented with the issue of whether gender identity and sexual orientation are protected classes under the IHRA. Thus, although the IHRA does not specifically identify gender identity and sexual orientation as protected classes,⁴² for all practical purposes, they may well already be protected classes under Idaho law.

6. Cities Throughout Idaho Have Implemented Their Own Laws Prohibiting Discrimination on the Basis of Gender Identity and Sexual Orientation

In the absence of state law specifically prohibiting discrimination on the basis of gender identity and sexual orientation, cities around Idaho took matters into their own hands by passing local ordinances that ban discrimination on this basis.⁴³ Approximately 29% of Idahoans are protected from discrimination on the basis of gender identity and sexual orientation on the basis of these ordinances.⁴⁴

The genesis of Boise’s ordinance banning discrimination on the basis of gender identity and sexual orientation is telling as to how and why these local laws came into effect. According to Senator Maryanne Jordan, a former Boise City Council member and proponent of the Boise Ordinance banning discrimination on the basis of gender identity and sexual orientation, the Boise City Council began to seriously consider the need to enact protections on the basis of gender identity and sexual orientation in response to a council meeting that explored the issue.⁴⁵ During the meeting, numerous gay constituents reported that they were assaulted because of their gender identity and/or sexual orientation.⁴⁶ They reported that they were afraid to report their assault to the police out of fear that they would have to take time off work, that their employers would then discover their gender identity and/or sexual orientation, and that they would then lose their jobs.⁴⁷ There was a police presence at this same meeting and the police likewise voiced concerns about

41. *Id.*; see also *Foster*, 908 P.2d at 1232, 127 Idaho at 925.

42. See IDAPA 45.01.01.012.

43. *Local Employment Non-Discrimination Ordinance*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/profile_state/ID (last visited Mar. 21, 2015). These cities include, Bellevue, Boise, Coeur d’Alene, Driggs, Hailey, Idaho Falls, Ketchum, Lewiston, Moscow, Meridian, Pocatello, Sandpoint, and Victor. *Id.*

44. *Id.*

45. Telephone Interview with Senator Maryanne Jordan (February 17, 2016).

46. *Id.*

47. *Id.*

whether the current legal framework was adequate to protect members of the LGBT community from discrimination and hate crimes.⁴⁸

At the same time, the City Council recognized the need for more progressive policies in order to protect Boise's ability to recruit new businesses.⁴⁹ At one time, businesses chose their location based on factors such as a solid infrastructure, but as technology has advanced, the factors businesses prioritize have changed, as well.⁵⁰ Businesses now give precedence to other factors, such as quality of life and the ability to keep employees safe and valued.⁵¹ Without an ordinance protecting Boise residents from discrimination on the basis of gender identity and sexual orientation, Boise could not guarantee protection from discrimination for all of its citizens and, thus, stood to lose out from an economic perspective, as well.⁵²

The Council enacted Boise City Ordinance 6-02-01 et seq. on December 4, 2012, to counter these issues and concerns and to ensure that all Boise residents are treated fairly and equally.⁵³

Concerns that the ordinance would result in a barrage of complaints have never materialized and no one has been prosecuted for violating the ordinance. Instead, only a handful of complaints have been lodged under the Boise Ordinance.⁵⁴ This is largely due to the multi-tiered review process (along with various mediation provisions), that prevent a formal criminal complaint from being filed until a number of resolution avenues have been exhausted.⁵⁵ Several complaints have been brought alleging violations of the ordinance, however each has resolved short of a formal criminal complaint.⁵⁶ This is consistent with the City Council's goal—to provide equal protections for all citizens and a mechanism of enforcing those protections.⁵⁷

That being said, Idaho's city ordinances, including the Boise ordinance, are not without their limitations. For starters, they are drafted as criminal ordinances, as opposed to civil ordinances.⁵⁸ According to Senator Jordan, this was done out of privacy concerns to protect an alleged violation from public discovery until a formal criminal complaint

48. *Id.*

49. *Id.*

50. *Id.*

51. Telephone Interview with Senator Maryanne Jordan (February 17, 2016).

52. *Id.*; see BOISE, ID, ORDINANCE § 6-02-01(D) (2012) (noting that "denial of fair and equal treatment under the law due to sexual orientation or gender identity/expression . . . damages a city's economic well-being").

53. Telephone Interview with Senator Maryanne Jordan (February 17, 2016).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

is lodged.⁵⁹ However, this leads to a number of questions as to how effective the local city ordinances are when it comes to protecting from discrimination and providing a remedy for those who have been discriminated against.

For example, the Boise City Ordinance provides that a violation is a misdemeanor punishable by a fine not exceeding one thousand dollars and imprisonment in the county jail not to exceed six months or both.⁶⁰ It further provides that a prosecutor may reduce the violation to an infraction, payable by a \$100 fine, if the defendant engages in corrective actions, such as sensitivity training, an agreement to adopt and pursue a policy of nondiscrimination in its practices, and the defendant's agreement not to engage in discriminatory practices in the future.⁶¹ The ordinance explicitly states that it does not give rise to a private right of action.⁶²

This obviously differs from the private civil cause of action authorized by the Idaho Human Rights Act and the various civil remedies outlined within it, including:

- (a) An order to cease and desist from the unlawful practice specified in the order;
- (b) An order to employ, reinstate, promote or grant other employment benefits to a victim of unlawful employment discrimination;
- (c) An order for actual damages including lost wages and benefits, provided that such back pay liability shall not accrue from a date more than two (2) years prior to the filing of the complaint with the commission or the district court, whichever occurs first;
- (d) An order to accept or reinstate such a person in a union;
- [and] (e) An order for punitive damages, not to exceed one thousand dollars (\$1,000) for each willful violation of this chapter.⁶³

In fact, an analysis of Idaho's city ordinances prohibiting discrimination on the basis of gender identity and sexual orientation leads to the conclusion that their lack of a civil remedy and the absence of the threat of money damages (or the other civil remedies provided for in the IHRA) renders them largely ineffective. For example, an Idaho employee could be terminated on the basis of their gender identity or sexual orientation at the hands of their Idaho employer, could bring a complaint under their local ordinance, and yet would be unable to seek reinstatement or to recover any monetary compensation based on the discrimination. Their employer, on the other hand, could escape with as little as a \$100

59. Telephone Interview with Senator Maryanne Jordan (February 17, 2016).

60. BOISE, ID, ORDINANCE § 6-02-05(A) (2012).

61. BOISE, ID, ORDINANCE § 6-02-05(B) (2012).

62. BOISE, ID, ORDINANCE § 6-02-07 (2012).

63. IDAHO CODE § 67-5908 (2015).

fine if they provide sensitivity training, agree to adopt a non-discrimination policy and agree not to discriminate in the future.

To complicate matters, many employers are entities, not individuals, which would further impede the enforcement of a criminal violation against them. For example, an Idaho employer that discriminates against an employee on the basis of gender identity and sexual orientation, could be prosecuted for its violation of a local ordinance banning such discrimination, and assessed the maximum fine of six months imprisonment and a one thousand dollar fine. But what happens if the employer is an entity that refuses to comply? Could the entity be imprisoned for six months? Could it be held in contempt? Although none of these issues appear to have been addressed, they would undoubtedly pose challenges and obstacles to anyone seeking protection under the statute.

The local ordinances throughout Idaho banning discrimination on the basis of gender identity and sexual orientation appear to remain unchallenged at this point. Whether such a challenge would be successful remains to be seen, however, under Idaho's test for challenging the constitutionality of local ordinances. In *Hobbs v. Abrams*, the Court discussed the three general restrictions that apply to ordinances enacted under the authority conferred by this constitutional provision: "(1) the ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) it must not be in conflict with other general laws of the state, and (3) it must not be an unreasonable or arbitrary enactment."⁶⁴

Boise's ordinance specifically states that it is intended to supplement state and federal civil right laws; Boise, ID, Ordinance 6.02.01(F), thus suggesting that it is not in conflict with any other laws of the state.⁶⁵ In addition, because the local ordinances at issue here are largely drafted as criminal provisions without any right to civil damages, they do not necessarily conflict with the civil remedies set forth in the IHRA, nor do the other general restrictions that apply to ordinances appear to be satisfied.⁶⁶

Although Idaho Courts do not appear to have addressed the issue, courts from other jurisdictions have rejected the argument that cities lack authority to enact ordinances that ban discrimination on the basis of gender identity and/or sexual orientation.⁶⁷ In *Heller*, the court relied

64. *Hobbs v. Abrams*, 657 P.2d 1073, 1075, 104 Idaho 205, 207 (1983) (quoting *State v. Clark*, 399 P.2d 955, 960, 88 Idaho 365, 374 (1965)).

65. Boise, ID, Ordinance § 6-02-01(F) (2012).

66. IDAHO CODE §§ 67-5901–5912 (2014).

67. See *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1221 (D. Or. 2002).

on an Oregon Court of Appeals case rejecting the same argument.⁶⁸ The *Sims* court concluded that “Portland did not exceed its authority by prohibiting discrimination by Portland employers on the basis of sexual orientation and by giving people who are harmed by the prohibited conduct a claim for relief for that harm”⁶⁹ Portland’s ordinance differs from those passed by Idaho cities in that it appears to give rise to a civil cause of action – a right that Idaho’s local ordinances specifically prohibit – and, thus, can be distinguished.⁷⁰ Nevertheless, the Oregon cases are instructive and demonstrate a willingness by state and federal courts to uphold a city’s right to expand human right’s protections.

A case from the United States Supreme Court provides further insight and support for the conclusion that the local Idaho ordinances would likely be upheld if challenged.⁷¹ In *Romer v. Evans*, the Supreme Court considered the lawfulness of an amendment to the Colorado constitution that prohibited legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons from discrimination.⁷² The amendment was targeted at local ordinances passed by cities throughout Colorado aimed at banning discrimination on the basis of sexual orientation.⁷³

The Court rejected the State’s primary argument in favor of the Amendment, that the Amendment was passed to respect “other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,” and concluded the Amendment violated the Equal Protection Clause of the United States Constitution.⁷⁴ *Romer* provides one more example of the Supreme Court’s willingness to recognize equal protection rights on the basis of sexual orientation.⁷⁵

7. Laws Throughout the Rest of the Country Are Inconsistent and Rapidly Evolving

Idaho is not unique in that it has been reluctant to expand human rights protections on the basis of gender identity and sexual orientation and is now left with inconsistent and confusing local, state, and federal laws.⁷⁶ Instead, a fairly even split exists across the country between states that have amended their state laws to make gender identity and sexual orientation protected classes and states that have resisted efforts

68. *Heller*, 195 F. Supp. 2d at 1221; *see Sims v. Besaw’s Café*, 997 P.2d 201 (Or. Ct. App. 2000);

69. *Sims*, 997 P.2d at 210.

70. *See, e.g.*, BOISE, ID, ORDINANCE § 6-02-07 (2012).

71. *See Romer v. Evans*, 517 U.S. 620 (1996).

72. *Romer*, 517 U.S. at 623–24.

73. *Id.*

74. *Id.* at 635.

75. *See also Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

76. *See* 42 U.S.C. § 2000e-2(41) (2012); IDAHO CODE §§ 67-5901-5912 (2014); Boise, ID, Ordinance 6.02.01-08.

to do so.⁷⁷ As of early 2016, twenty states, the District of Columbia, Guam, and Puerto Rico have statutes that protect against both sexual orientation and gender identity discrimination in employment in the public and private sector.⁷⁸

Additionally, Michigan, Nebraska, Ohio, Florida, Arizona, Indiana, and Pennsylvania, have campaigns at the state level seeking to expand state law anti-discrimination protections.⁷⁹

Just like in Idaho, in states that have failed to adopt state-wide protections on the basis of gender identity and sexual orientation, nearly two hundred cities across the nation have pressed forward with their own protections, enacting ordinances to ban discrimination on the basis of gender identity and sexual orientation.⁸⁰

Meanwhile, other laws throughout the country continue to evolve in such a manner as to establish that social norms are indeed changing

77. The states of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wyoming have not adopted LGBT anti-discrimination laws, while the states of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Nevada, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Utah, Washington, Wisconsin and Washington, D.C., have adopted protections. Some states, including Alaska, Kentucky, Louisiana, Michigan, Montana, Ohio, Pennsylvania, and Virginia have adopted LGBT protections that extend only to limited groups, such as state employees.

78. Arizona Exec. Order No. 2003-22: Confirming Equal Employment Opportunities; Assembly Bill 1001 (Ca. 1999); COLO. REV. STAT. 24-34-402 (2015); CONN. GEN. STAT. § 46a - 81c (2016); D.C. CODE § 2-1401.01, §2-1402.11; Exec. Order S.B. 121 (Del. 2009); HAW. REV. STAT. §378-2 (2016); 775 ILL. COMP. STAT. 5/1-102 (2016); IOWA CODE § 216.6 (2016); ME. REV. STAT. ANN. tit. 5, § 4571-76 (employment), § 4581-83 (housing), § 4591-94F (public accommodations), §4595-98 (credit), § 4601-04 (education opportunity); MASS. GEN. LAWS ANN. ch. 151B, §4 (2016); MINN. STAT. §363A.01 to §363A.41; NEV. REV. STAT. 233.010(2); 613.330; N.H. REV. STAT. ANN. §§ 21-I:42 (2002); 354-A:2 (2002); 354-A:6 (2002); N.J. STAT. ANN. § 10:2-1; 10:5-1-49; N.M. STAT. ANN. §§ 28-1-2, 7, 9 (April 8, 2003); N.M. STAT. ANN. § 28-1-7 (2001); N.Y. EXEC. LAW § 296, 296-a; 2007 Oregon SB 2; R.I. GEN. LAWS § 28-5-3 (2001), R.I. GEN. LAWS § 28-5-7 (2001), R.I. GEN. LAWS § 34-37-4 (2001), R.I. GEN. LAWS § 34-37-4.3 (2001), R.I. GEN. LAWS § 11-24-2 (2001); VT. STAT. ANN. tit. 3, § 963, 21, § 495, 9, § 4503, 8, § 10403, 8, § 4724 (2016); UTAH CODE ANN. 34A-5-106 (2015); WASH. REV. CODE. §§ 49.60.175, 176, 178, 180, 190, 200, 215, 222-225, 300 (2007); WASH. ADMIN. CODE § 356-09-020 (2005); WIS. STAT. §§ 36.12, 106.50, 106.52, 111.31, 230.18, 224.77 (2015). States providing protections for limited groups such as state employees by executive order include: Alaska Admin. Order No. 195 (signed March 5, 2002); Kentucky Exec. Order No. 2008-473 (signed June 2, 2008); Louisiana Exec. Order No. JBE 2016-11 (signed Apr. 13, 2016); Michigan Exec. Order No. 2003-24 (signed Dec. 24, 2004) (reinstated on Nov. 23, 2007); Montana Exec. Order No. 04-2016 (signed Jan. 18, 2016); Ohio Exec. Order No. 2011-05K (signed Jan. 21, 2011); Pennsylvania Exec. Order No. 2016-04 (signed Apr. 7, 2016); Virginia Exec. Order No. 1 (signed Jan. 13, 2014).

79. *Id.*

80. *Local Employment Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies (last visited Mar. 10, 2016).

and that it is only a matter of time before Idaho follows suit by affording protections from discrimination on the basis of gender identity and sexual orientation.

In June 2015, the United States Supreme Court decided the landmark case *Obergefell v. Hodges*, concluding that same-sex couples have access to the same marriage rights as their opposite-sex counterparts throughout the country.⁸¹ This decision overruled state laws in Michigan, Kentucky, Ohio, and Tennessee, banning same sex marriage.⁸² Much of the Court's opinion explores the evolution of gay rights in the United States, highlighting the changing times, progressing social norms, and eventual court decisions analyzing and upholding rights for members of the LGBT community.⁸³

Obergefell is largely premised on the protections afforded by the Equal Protection and Due Process Clauses of the Fourteenth Amendment, providing, among other things, that no State shall "deprive any person of life, liberty, or property without due process of law."⁸⁴ These liberties include "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."⁸⁵ The Court noted that in interpreting the Equal Protection Clause, it has "recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."⁸⁶

The Court recognized that some may advocate against same sex marriage on the basis of their religious beliefs, and that the First Amendment ensures that they will have protections to do so.⁸⁷ Nevertheless, the Constitution does not permit the State to bar same-sex couples from marriage on the same terms afforded to couples of opposite sex.⁸⁸

B. The Evolution of Human Rights in Idaho Demonstrates that While Human Rights Are Slow to Evolve, Gender Identity and Sexual Orientation Will Eventually Be Recognized as Protected Classes

1. The History of Human Rights Recognition and Protection in Idaho

Although many people think of Idaho as lacking in diversity, its past is replete with contributions made by numerous minority groups, including Native Americans, Japanese, African Americans, Basques, Chinese, and Hawaiian Islanders.⁸⁹ A brief look at discrimination these

81. *Obergefell*, 135 S. Ct. at 2608.

82. *Id.* at 2608.

83. *Id.* at 2595–96.

84. *Id.* at 2597–98.

85. *Id.*

86. *Id.* at 2603.

87. *Obergefell*, 135 S. Ct. at 2607.

88. *Id.*

89. Katy Robinson & Ken Miller, *Idaho's Image: Where Myth Meets Reality*, IDAHO STATESMAN, Apr. 26, 1998.

groups have overcome in Idaho, together with measures implemented by the State over the past one hundred fifty years to assist these efforts, establishes that human rights protections are slow, but sure, to evolve.

For example, in territorial times, non-whites were prohibited from serving as witnesses for or against whites.⁹⁰ The Idaho Tri-Weekly Statesman reported in 1866 that a trial of men who robbed “Chinamen” resulted in the assailants, who were undoubtedly guilty, being released due to a lack of evidence based on Idaho law that prohibited testimony from non-whites.⁹¹ The author queries, “This case naturally enough suggests the question whether a change is not desirable in the territorial statute concerning the admissibility of testimony. There is a growing tendency among the States to admit all persons to testify in courts of law without regard to race or color.”⁹²

When Idaho became a state in 1890, various groups of Idahoans were denied the right to vote, including Asians of Chinese and Japanese descent, Native Americans, Mormons, and women.⁹³ A newspaper article from 1896 proudly advertises a restaurant using strictly white help.⁹⁴ Another describes the visit to Boise in 1924 by an African American performing artist who was allowed to stay in the Owyhee Plaza Hotel, but only upon reassurances that she would remain in her room.⁹⁵ Additional instances of discrimination ranging from Japanese internment camps to persecution against Native Americans leads to the inescapable conclusion that there is no shortage of examples of discrimination and other human rights violations throughout Idaho history.

The history and formation of Idaho’s civil rights laws throughout the 1960’s and 1970’s were aimed at remedying these injustices. In 1961, Idaho passed its first civil rights legislation aimed at curbing discrimination in public accommodations on the basis of race, creed, color, or national origin.⁹⁶ Notable omissions from Idaho’s first civil rights act include a lack of any provisions to ban discrimination as to housing and employment and a lack of a definitive enforcement mechanism. As explained by a civil rights official shortly following its passage, discrimination in housing and employment still remained a problem throughout the state and “when non-whites inquire about buying a home, often is it

90. Charles Etlinger, *Black Roots Go Deep in Idaho*, IDAHO STATESMAN, Feb. 16, 1987, at 1A.

91. IDAHO TRI-WEEKLY STATESMAN, Nov. 15, 1866, at 2 (on file with author).

92. *Id.*

93. *Idaho Human Rights Timeline*, WASSMUTH CTR. FOR HUMAN RIGHTS (Feb. 17, 2015), <https://web.archive.org/web/20150217192534/http://idaho-humanrights.org/education/history-of-human-rights-in-idaho/timeline/>.

94. POCATELLO TRIBUNE, Jan 11, 1896.

95. Etlinger, *supra* note 90.

96. See Jill Gill, *The Civil Rights Movement in Idaho*, THE BLUE REVIEW (Oct. 6, 2014), <https://thebluereview.org/civil-rights-movement-idaho/>.

priced out of their market."⁹⁷ The article further notes that the initial legislation lacked provisions for enforcing violations and that enforcement was left to the commission which lacked the power to order compliance.⁹⁸

Title VII of the Civil Rights Act of 1964 marked a giant leap forward with human rights' protections. However, it was met with resistance by many. Recognizing the fear and hesitation that often accompanies change, Idahoans were advised not to fear the Civil Rights Act because it "is an act devoted to trying to cure discriminatory methods by the most moderate means possible."⁹⁹

In August 1968, the Governor appointed the Human Rights Advisory Council to address the implementation of a civil rights program in Idaho.¹⁰⁰ This led to the creation of the Idaho Commission on Human Rights by the 1969 legislature.¹⁰¹ Although the passage of these civil rights laws was a step in the right direction, it hardly solved the problem and, in many ways, led to others. One article reports tensions between whites, African Americans, Mexicans, and Native Americans as to how the human rights commission was to be organized.¹⁰² Another article alleged that complaints were being "buried" by the commission, thus suggesting corruption among the commission members.¹⁰³ According to one report, disunity prevailed throughout meetings about the human rights commission, with some suggesting the commission be dissolved, while others recommended that minority groups start from scratch to form their own committees to handle complaints.¹⁰⁴

In spite of these early challenges, the commission progressed into the 1970's, hearing cases on racial discrimination as to Mexicans, Africans, and Native Americans, "discrimination because of long hair," and sex discrimination.¹⁰⁵ The commission found ways to counter the missing enforcement provisions in the early legislation and addressed dis-

97. Gem Civil Rights Official Claims 'Injustice' Exists in Housing, Employment, IDAHO DAILY STATESMAN, Apr. 27, 1965.

98. *Id.*

99. Dale Stewart, *Idaho Businessmen Hear Rights Law Talks*, IDAHO STATESMAN, Apr. 26, 1965.

100. Civil Rights Group Huddles With Samuelson Aid on Gem Program Report, IDAHO STATESMAN, Dec. 27, 1968, at 15.

101. John Corlett, Member Says Idaho Rights Commission to Work 'Like Grand Jury', IDAHO STATESMAN, July 19, 1969, at 13.

102. Rights Panelist Contends Hubbard Incites Strife, IDAHO STATESMAN, Oct. 18, 1969.

103. Rights Panel Challenges 'Ineffectiveness' Claims, IDAHO STATESMAN, Oct. 18, 1969.

104. *Id.*

105. Colette Wilde, New Panel on Human Rights Hears Variety of Complaints, IDAHO STATESMAN, Mar. 20, 1971; Jerry Gilliland, Rights Panel Asks Canyon to Curb Bias at Plans Parley on Discrimination at Labor Camps, IDAHO STATESMAN, June 19, 1971, at 15; Advisory Panel on Civil Rights Probes Indian Discrimination, IDAHO STATESMAN, Apr. 25, 1970; J. Schifferdecker, Officials Face Action to Force Suit Under Anti-Discrimination Law, IDAHO STATESMAN, Mar. 10, 1970.

crimination through the filing of criminal complaints.¹⁰⁶ Those charged with administering Idaho's anti-discrimination laws overcame huge obstacles, such as an initial operating budget of \$13,000.¹⁰⁷ One Statesman article reports that in 1972, a human rights commission investigator – determined to perform his job but lacking a budget to pay for travel expenses – hitchhiked from Boise to Eastern Idaho for a week of investigations with his sleeping bag and a sign that read “Pocatello or Bust.”¹⁰⁸

Fast-forward over a hundred years, well after the IHRA and other civil rights laws were enacted, and concerns over discrimination against many of these same protected classes persisted. An Idaho Statesman article reported in 1998 that two-thirds of the State's voters were worried about Idaho's racist reputation, attributed largely to the fact that ninety one percent of Idaho's population was white.¹⁰⁹ Another article from that same year highlights Idaho's racist image around the country, largely due to an Idaho presence of several highly-publicized hate groups, including the Aryan Nations.¹¹⁰ While Idaho undoubtedly made progress during the twentieth century in the area of discrimination, the concerns voiced in the 1998 Statesman article highlight that discrimination issues are rarely addressed immediately, are not entirely alleviated by the passage of anti-discrimination laws, and that social norms can, in some cases, take decades to evolve.

Contrast the 1998 Statesman article with the story of the hitchhiking human right's investigator and the IHRA as currently enacted. Idaho now has additional protections within the IHRA for disability and age, a human rights commission that receives over four hundred complaints a year, and a statute that provides for a civil cause of action, along with numerous civil remedies and damages. Idaho's human rights laws have morphed, changed, and expanded over the past fifty years. However, its history demonstrates that the issue of expanding human rights protections is a multi-faceted, complex one with many phases and components, spanning many years.

106. J. Schifferdecker, *Officials Face Action to Force Suit Under Anti-Discrimination Law*, IDAHO STATESMAN, Mar. 10, 1970.

107. Jay Shelledy, *'Thumb Power' To Transport Rights Official*, IDAHO STATESMAN, Apr. 15, 1972, at 17.

108. *Id.*

109. Ken Miller, *State's Reputation Is A Worry, Poll Finds*, IDAHO STATESMAN, 1998, at 1A.

110. Robinson & Miller, *supra* note 1.

2. The Idaho Legislature Has Repeatedly Considered and Rejected an Amendment to the IHRA to Add Protected Classes on the Basis of Gender Identity and Sexual Orientation

Perhaps this backdrop explains the Idaho legislature's failure to amend the IHRA to designate gender identity and sexual orientation protected classes. Nearly a decade ago, the Just Add the Words campaign, seeking to add gender identity and sexual orientation as protected classes to the Idaho Human Rights Act, first sought an amendment to the IHRA. Although their efforts have continued throughout the past ten years, in recent years, their campaign has become more aggressive and has accomplished milestones suggesting that its goal – the passage of amended legislation – will eventually be obtained.

For example, in 2014, proponents of the Just Add the Words campaign engaged in a series of protests throughout the 2014 legislative session.¹¹¹ As reported by one source, “By the end of February 2014, 122 arrests had been made and negotiations between LGBT-rights advocates and religiously conservative legislators had tentatively begun.”¹¹²

In 2015, the Just Add the Words campaign gained additional momentum. After nine years of seeking a hearing on the issue, the issue made it to committee and afforded supporters from around the State an opportunity to testify in favor of House Bill 2 (HB 002).¹¹³ The committee heard three days, and twenty-one hours, of emotionally-charged testimony from 190 people: 134 people spoke in favor of the bill, 54 were opposed, and two were neutral.¹¹⁴

Proponents of the bill gave personal accounts of being discriminated against on the basis of gender identity and sexual orientation. Many expressed a concern over a culture of hate and discrimination that is promoted in a state that does not provide legal protections to prohibit such conduct. Others discussed how the absence of legal protections made them feel less valued as a human being and judged because of sexual orientation. They further described a perception of unequal treatment as citizens.

Opponents, on the other hand, argued that passage of the bill would impose regulatory burdens on businesses, that the bill was unneeded because the free market would allegedly punish bad businesses, that the bill would result in costly litigation that would shut businesses

111. ‘Add the Words’ Protesters Arrested, IDAHO STATESMAN, <http://www.idahostatesman.com/news/local/military/article40639461.html> (last visited Apr. 27, 2016).

112. John Miller, *Idaho’s arrested ‘Add the Words’ activists added lawyers*, THE GAYLY (Feb. 5, 2014), <http://www.gayly.com/idahos-arrested-add-words-activists-added-lawyers> (last visited Apr. 27, 2016).

113. Bill Dentzer, *Add the Words Activists to Press On*, IDAHO STATESMAN, Jan. 30, 2015, at A1.

114. *Id.*

down, that freedom of speech would be obstructed, and argued that the state cannot legislate kindness.

On January 29, 2015, the Idaho House State Affairs Committee ultimately voted 13-4 to keep the bill in committee, effectively killing it for the legislative session.¹¹⁵

Although the Idaho legislature refused to recognize additional rights on the basis of gender identity and sexual orientation in 2015, neighboring Utah did exactly that. On March 6, 2015, the Utah Senate passed, in a 23-5 vote, statewide legislation to ban discrimination based on sexual orientation and gender identity in employment and housing (public accommodation was not included) with exemptions for religious organizations and their affiliates such as schools and hospitals, as well as Boy Scouts.¹¹⁶ The measure was backed by the Church of Jesus Christ of Latter-day Saints.¹¹⁷ It was approved by the state House on March 11, in a 65-10 vote and signed into law on March 12, 2015.¹¹⁸

For many Idahoans, Utah's legislation offered hope as to what could lie ahead for the Idaho 2016 legislative session. After all, a statute signed into law by a neighboring conservative state with potentially similar religious concerns, could only be seen as fodder for the argument that legislation creating protected classes on the basis of gender identity and sexual orientation was feasible and that it would not conflict with religious freedoms and concerns.

Although the 2016 legislative session was seen optimistically by many as holding the potential for an amendment to the IHRA, progress to date has been disappointing. According to Senator Cherie Buckner-Webb, one of two Senators proposing legislation to amend the IHRA to add four words – gender identity and sexual orientation—the proposed legislation is unlikely to pass during this legislative session.¹¹⁹

The amendment to the IHRA reached a stalemate primarily due to conflict among the legislators as to whether gender identity and sexual orientation should simply be adopted as protected classes to the current

115. Dentzer, *supra* note 113.

116. S.B. 296, 61st Leg., Gen. Sess. (Utah 2015); *see also* LGBT Rights in Utah, WIKIPEDIA, https://en.wikipedia.org/wiki/LGBT_rights_in_Utah (last updated Mar. 2, 2016); Lindsey Bever, *Utah – yes, Utah – Passes Landmark LGBT Rights Law*, WASH. POST (Mar. 12, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/>.

117. *LGBT Rights in Utah*, WIKIPEDIA, https://en.wikipedia.org/wiki/LGBT_rights_in_Utah (last updated Mar. 2, 2016); *see also* Lindsey Bever, *Utah – yes, Utah – Passes Landmark LGBT Rights Law*, WASH. POST (Mar. 12, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/>.

118. *Id.*

119. Telephone interview with Cherie Buckner-Webb, Sen., Idaho Senate (Feb. 17, 2016).

IHRA or whether an extensive overhaul of the IHRA is warranted in order to limit the scope of protections for those facing discrimination on the basis of gender identity and sexual orientation.¹²⁰ Those seeking major revisions to the IHRA express concerns about the impact the amendment would have on religious freedoms.¹²¹ Notably, these same concerns over religious freedoms have been considered and rejected by the United States Supreme Court in similar contexts.¹²²

According to Senator Buckner-Webb, an extensive revision to the IHRA aimed at singling out the two LGBT protected classes is inconsistent with the goal of protecting Idahoans equally and would not further the goal of expanding human rights' protections.¹²³ Senator Buckner-Webb reported that the working group aimed at pushing the amendment to the IHRA to add gender identity and sexual orientation as protected classes is no closer to an agreement now than they were one year ago.¹²⁴ The bipartisan working group was organized in summer 2015 to bring legislators with different viewpoints together to discuss a path forward with LGBT rights in Idaho.¹²⁵

Although the 2016 legislative session might be seen by many as a failure, when viewed in conjunction with Idaho's human rights history, it is unsurprising and reflects yet one more example of Idaho's reluctance to expand human rights protections. In fact, the passage of local ordinances around the state, the numerous proposed amendments to the IHRA, expanded media coverage of the issue, testimony and committee hearings by impacted Idahoans, favorable Supreme Court pronouncements on related issues, and a growing overall public distaste of discrimination on the basis of gender identity and sexual orientation all suggest that change is imminent. Idaho is following the trajectory that marks human rights recognition and expansion, it is likely the IHRA will eventually be amended to make gender identity and sexual orientation protected classes, and Idaho history will be favorably altered as a result.

C. Until the Conflicting Legal Authorities are Reconciled, Idaho Employers Are Left to Maneuver Through A Minefield of Confusing Laws

For Idaho employers seeking to ensure compliance with all relevant employment laws, understanding the scope and requirements of federal,

120. *Id.*

121. *Id.*

122. *See* *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2606 (2015).

123. Telephone interview with Cherie Buckner-Webb, Sen., Idaho Senate (Feb. 17, 2016).

124. *Id.*

125. Harrison Berry, *Idaho Senate Democrats Introduce Add the Words Legislation*, BOISE WEEKLY (Jan. 20, 2016), <http://www.boiseweekly.com/boise/idaho-senate-democrats-introduce-add-the-words-legislation/Content?oid=3698409>.

state, and local laws is difficult, to say the least. An Idaho employer with operations across the state could theoretically be governed on this one issue by nearly a dozen different local criminal ordinances, the Idaho Human Rights Act, and Title VII. Nevertheless, with an estimated 31,565 members of the LGBT population in Idaho, the issue is real and will undoubtedly result in liability and expense for employers who fail to do so.¹²⁶

Unsurprisingly, many Idaho employers support an amendment to the Idaho Human Rights Act. In addition to the fact that an amendment would promote diversity and further equality as to all Idahoans, it would also bring the laws that govern the playing field into uniformity. The Human Resource Association of the Treasure Valley, for example, signed a resolution in early 2016, supporting an amendment of the Idaho Human Rights Act to add gender identity and sexual orientation as protected classes.¹²⁷

Until such a measure is passed, employers are left to seek compliance and to adopt tools aimed at minimizing risk. The criminal ordinances that have been enacted throughout the State present their own host of problems.¹²⁸ The risk of jail time under these ordinances seems remote and the threat of a fine that can easily be reduced through the adoption of remedial measures poses a negligible threat when compared to the civil remedies provided for in Title VII and the IHRA. However, businesses should consider the risk of bad publicity and the media blitz that could ensue if a business is found to be in violation.

The bigger issue is whether the IHRA or Title VII prohibits discrimination on the basis of gender identity and/or sexual orientation. This remains a pivotal one in light of the increasing number of civil claims brought against employers alleging discrimination on the basis of gender identity and sexual orientation.

The EEOC first began tracking the number of charges filed alleging discrimination related to gender identity and/or sexual orientation in 2013.¹²⁹ During the first reporting period (January through September of 2013), it received 790 charges of discrimination related to gender

126. *State Profile Policy: Idaho*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality_maps/profile_state/14 (last visited Apr. 27, 2016).

127. HUM. RES. ASS'N OF THE TREASURE VALLEY, RESOL. OF THE BOARD OF DIRECTORS (2014), <http://hratv.shrm.org/sites/hratv.shrm.org/files/Add%20Words%20Resolution.pdf>.

128. *See, e.g.*, Boise, Idaho, Ordinance O-36-12 (Nov. 7, 2012), http://www.cityofboise.org/city_clerk/111312/o-36-12.pdf.

129. *What You Should Know: EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Apr. 27, 2016).

identity and/or sexual orientation.¹³⁰ In 2014, the number increased to 918 charges. For the first two quarters of 2015, the EEOC received 617 charges alleging discrimination on the basis of gender identity and/or sexual orientation.¹³¹ Obviously, complaints are on the rise, with some attorneys reportedly specializing in transgender law.¹³² One such attorney reported maintaining twenty active cases throughout the country related to transgender rights in late 2015.¹³³

Idaho employers seeking to avoid liability must both understand the law and implement policies and procedures that will enable them to comply with it. One thing is clear: in light of EEOC guidance, *see infra* Section I.A.2, and the Idaho Human Rights Commission's directive to follow federal interpretations of Title VII when analyzing the Idaho Human Rights Act, the administrative agencies charged with making the first-tier review of a discrimination claim will undoubtedly conclude that discrimination on the basis of gender identity and sexual orientation is unlawful under either state or federal law. The danger here for an employer is the threat of a probable cause determination at the administrative level.

While it remains to be seen whether Idaho state and federal courts would follow suit should an aggrieved employee take the claim to the next level, a substantial amount of damage is already done once an administrative agency concludes there is reasonable cause to believe discrimination occurred. Such an administrative finding can be admissible in subsequent legal proceedings, depending on the court and the applicable rules of evidence, creating a risk that a judge or jury would find in favor of the claimant. Undoubtedly, a probable cause determination legitimizes a complaint, highlights increased risk of liability for the employer, and escalates settlement considerations.

In order to avoid claims, employers should adopt policies and procedures prohibiting discrimination on the basis of gender identity and sexual orientation. Many employers appear to be doing just that. According to one source, 325 *Fortune* 500 companies now prohibit discrimination based on gender identification, compared to just three in 2000.¹³⁴ Many Idaho employers have done the same.¹³⁵ Employers must also train their workforce on the existence of these policies and strive for a workplace culture that promotes diversity and an intolerance for discrimination of any type.

130. *Id.*

131. *Id.*

132. Susan Mulligan, *A Remarkable Transformation*, HR MAG. Vol. 60, no. 7 (Sept. 2015), <https://www.shrm.org/Publications/hrmagazine/EditorialContent/2015/0915/Pages/0915-transgender-employees.aspx>.

133. *Id.*

134. *Id.*

135. Bill Dentzer, *Add the Words Activists to Press On*, IDAHO STATESMAN, Jan. 30, 2015, at A1.

Finally, employers should consider action plans for dealing with related issues – such as gender transition – before the situation arises.¹³⁶ These plans should include points of contact, questions to be discussed, and how co-workers will be informed.¹³⁷

II. CONCLUSION

Although Title VII and the IHRA do not designate gender identity and sexual orientation as protected classes, recent Supreme Court guidance, Ninth Circuit case law, EEOC interpretations, and changing social norms all support the conclusion that gender identity and sexual orientation are already protected under federal and state law. Nevertheless, that provides little certainty for Idaho employers (and other Idahoans pursuing equal protection under the law), seeking to know and apply the law.

It is unlikely that such certainty will come this year, as the 2016 legislature appears to have reached an impasse on the passage of an amendment to the IHRA. However, this year's failure, as well as the legislature's failure to pass an amendment in previous years, could well provide the foundation for the passage of human right's legislation in coming years. Idaho history teaches us that the business of recognizing and protecting human rights in Idaho is a slow one, but the logical result will eventually be an amendment to the IHRA that reconciles inconsistent local, state and federal laws and that promotes equality and diversity.

In the meantime, employers should develop policies and procedures aimed at prohibiting discrimination in the workplace on the basis of gender identity and sexual orientation, should promote a culture of diversity and inclusion, and should implement plans and protocols anticipating related workplace issues.

136. Mulligan, *supra* note 132.

137. *Id.*