

## Measures to protect locally are weak

Ordinances ‘lack teeth,’ are almost unenforceable, experts across state say

### Stephanie Wang

[stephanie.wang@indystar.com](mailto:stephanie.wang@indystar.com)

In the absence of a state law banning discrimination against gays and lesbians — and in the explosive wake of Indiana’s Religious Freedom Restoration Act controversy — more cities are considering their own protections of LGBT rights at the local level.

Although Marion County and 10 other Hoosier communities already have local nondiscrimination ordinances that include sexual orientation, experts say such protections can be so weak that they are virtually unenforceable.

In Bloomington, Evansville, Fort Wayne and Michigan City, for example, civil rights agencies cannot pursue complaints of discrimination based on sexual orientation, unless the accused person or business agrees to an investigation.

Think about that. If people know they’re guilty of treating others unfairly because of their sexual orientation, why would they want to be investigated? And why would people file complaints in the first place if they might never be addressed?

“It offers the most meager statement possible,” said Robert Dion, an Evansville-Vanderburgh County human rights commissioner. “It’s weak sauce. It’s pretty damn thin.”

The lack of enforcement power for sexual orientation discrimination complaints becomes even more stark, he said, because those cities have a lot more authority to protect other groups of people.

For groups that also have state-level protections — such

## NON-DISCRIMINATION ORDINANCES

### Measures

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as race, religion, color, sex, disability or national origin — discrimination claims result in mandatory investigations. Local human rights commissions can often compel accused parties to participate through subpoenas and, if needed, go to court to enforce case resolutions.

But because the state statute does not include sexual orientation or gender identity, some local officials say, cities might not be legally able to enforce such protections with the same weight given to others.

“Any assessment that suggests that gay people are protected in a dozen cities in Indiana is an overstatement,” Dion said.

The battle over RFRA exposed the lack of a statewide law shielding rights of gay and lesbian Hoosiers — and a majority Republican reluctance to implement one. Lesbian, gay, bisexual and transgender advocates continue to push for statewide protections but failed to win them when the “religious freedom” law was clarified.

So without a statewide law, will municipalities actually be able to protect against sexual orientation or gender identity discrimination in a meaningful way?

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In Indianapolis and Marion County, the local ordinance bans discrimination based on sexual orientation and gender identity in employment, education, housing and public accommodations, which covers businesses open to the public.

If someone files a complaint, the equal opportunity office looks for probable cause through interviews and tries to settle the dispute and end any discriminatory practice. It can send the case to an administrative hearing, and both parties have the right to an appeals process.

Many complaints don't result in a reasonable finding of possible discrimination, said Maxine Russell, chief of equal opportunity. Of those that do, many of them can be settled in a conciliation agreement between the two parties.

But cases involving sexual orientation and gender identity are treated the same way as any other class protected by the ordinance, she said.

The situation is similar in West Lafayette, New Albany and South Bend, which have ordinances that include sexual orientation and gender identity at equal protection levels as other classes.

Terre Haute, Lafayette and Tippecanoe County protect sexual orientation at an equal level, but their ordinances do not include gender identity.

But in places such as Bloomington and Monroe County, the code includes an additional section:

“In complaints of discrimination on the basis of sexual orientation, gender identity, or both,” the human rights ordinance says, “the commission’s authority shall typically be limited to voluntary investigations and voluntary mediation.”

Indiana University law professor Carlton Waterhouse said voluntary compliance for sexual orientation or gender identity discrimination complaints essentially means the ordinance has no effect.

“It becomes more like a suggestion,” he said. “It becomes more like an aspiration, a hope.”

“It would only be meaningful if a person is claiming they did not discriminate, and they seek to show they did not discriminate by some voluntary process.”

In the cities with voluntary compliance for LGBT discrimination complaints, the complaint is dismissed if the accused party chooses not to participate.

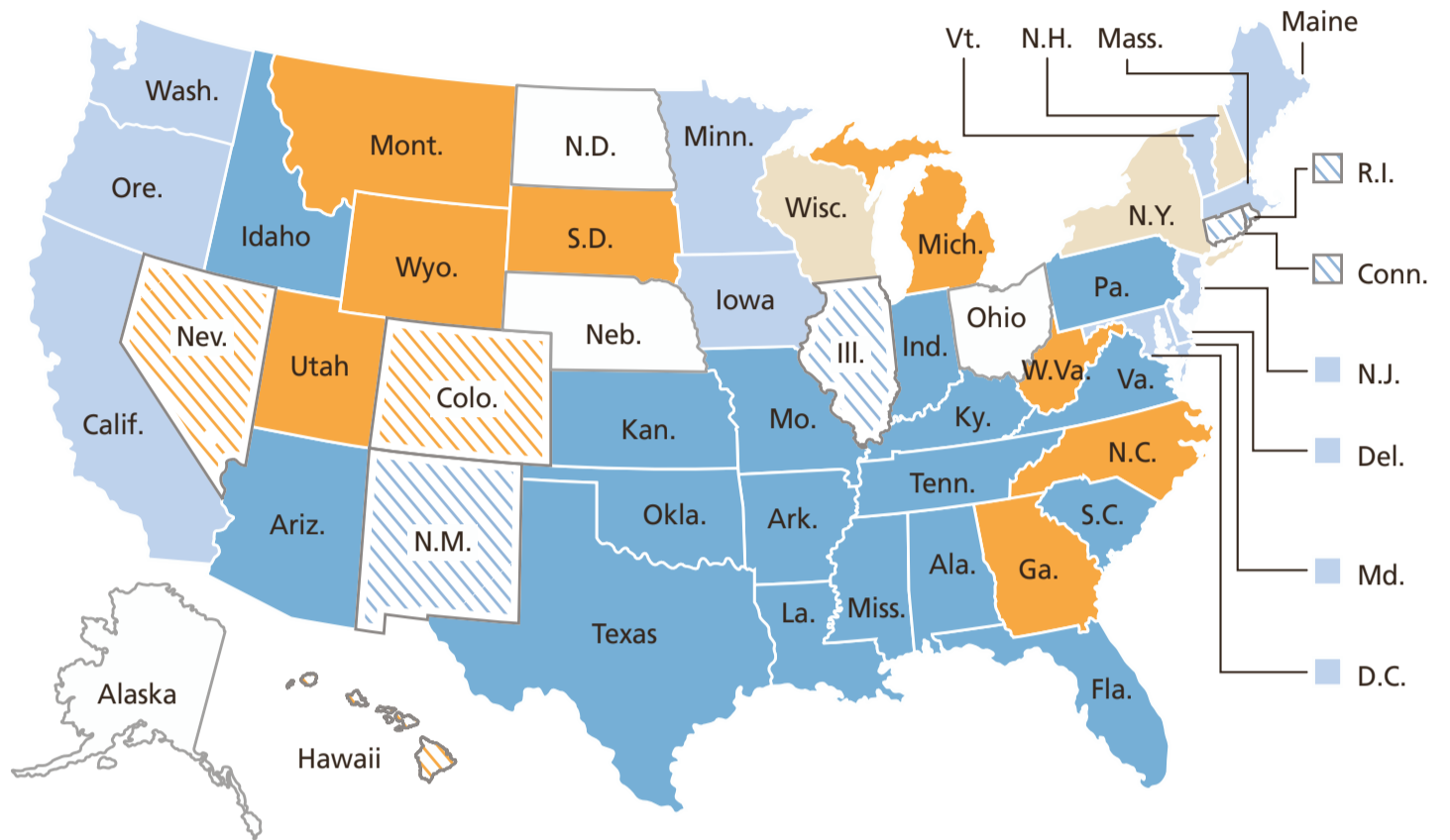
The reason Bloomington's ordinance doesn't go as far as the one in Marion County is in part because some officials disagree about what state law allows them to do.

Some disagree over whether adding sexual orientation and gender identity protections at equal protection levels would mean cities are legally enacting stricter laws than the state, or whether cities that do so could be unlawfully restricting what the state permits.

“It's my legal opinion that state home rule law prohibits local governments from enacting and enforcing ordinances prohibiting sexual orientation or gender identity discrimination with the same enforcement teeth” as other discrimination cases, Bloomington director of human rights Barbara McKinney said in an email.

The disagreement over how strong local ordinances can be is likely to continue unless the courts weigh in, said Dion, who is also the political science department chair at the University of Evansville.

- Has passed religious freedom laws\*
- Has introduced a religious freedom bill this year
- Has BOTH religious freedom laws and non-discrimination laws covering sexual orientation and gender identity
- Has employment non-discrimination laws covering sexual orientation and gender identity
- Has employment non-discrimination laws covering sexual orientation (not gender identity)
- Has introduced religious freedom legislation this year and has non-discrimination laws covering sexual orientation and gender identity



Note: Indiana differs from other states because its version of this law was adopted this year, set to become law July 1. Indiana Republicans said April 2 that they are presenting an addition to the controversial RFRA legislation that will make it clear that no one would be able to discriminate against anyone at any time.

Sources: National Conference of State Legislatures and American Civil Liberties Union

Michael Campbell, @campbell\_m; Kristine Guerra, @kristine\_guerra / IndyStar

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Demonstrators for and against RFRA on March 16. Some see the issue shifting now to local anti-discrimination measures and whether Indiana needs a state law to protect LGBT Hoosiers.

“That’s the gray area,” he said, adding that Evansville adopted its ordinance modeled after Bloomington’s on legal advice.

In Bloomington, McKinney said, people often cooperate in cases of possible discrimination, “but yes,” she wrote, “the lack of enforcement authority could undermine our ability to provide adequate protections to people who feel they have been discriminated against on the basis of sexual orientation or gender identity.”

To adequately protect against LGBT discrimination, McKinney said, sexual orientation and gender identity would need to be added to the state’s civil rights law.

Consider that in Fort Wayne, the human relations commission has never taken a sexual orientation discrimination complaint all the way to an administrative hearing to determine whether discrimination occurred, according to executive director Dawn Cummings.

But that’s not for a lack of cases. There have been a few cases, Cummings said, in which people initially agreed to the investigation. But once the commission found probable cause — evidence suggesting that discrimination might have occurred — the parties decided to stop participating.

So there were no resolutions. What, then, asks Indianapolis civil rights attorney Kevin Betz, do the local nondiscrimination ordinances actually achieve?

“They not only don’t have teeth,” he said, “but they don’t have gums. They’re really just policy statements.”

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Three years ago, in South Bend, a public meeting stretched late into the night as person after person commented on a proposal to add sexual orientation and gender identity to the city’s nondiscrimination ordinance.

It was a controversial proposal, and it had failed when it came up years before.

But for all the overblown claims about what would happen if it passed, or what would happen if it didn’t, the measure was approved.

Over the past week, Indiana’s new “religious freedom” law created a controversial perception that the state was unwelcoming toward the LGBT community, since some portrayed RFRA as a legal claim to refuse service to gays and lesbians on religious grounds.

“When such negative attention was coming to Indiana from the business community nationally, it was very helpful for me to be able to point to our own local law as a way to prove South Bend was open to everybody,” Mayor Pete Buttigieg said.

Violations of the city’s nondiscrimination ordinance carry the potential of a \$1,500 fine — a signal, Buttigieg said, that South Bend takes discrimination seriously.

The change to include sexual orienta-

- Cities that have enacted ordinances that prevent discrimination based upon sexual orientation.
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- Cities that have enacted ordinances that prevent discrimination based upon sexual orientation and gender identity.
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tion and gender identity in South Bend’s ordinance also carved out specific religious exemptions.

Protections for sexual orientation and gender identity do not apply to religious organizations when they would conflict with religious beliefs or practices.

“We are a community that prides itself on being open to everyone,” Buttigieg said. “We’re also a community of deeply held religious convictions. We wanted to make sure our ordinance was true to what South Bend is about. We believe — and I certainly believe — that there is room for religious protections and GLBT equality to coexist, and this was our way of trying to find that balance.”

“The idea that you have to pick one,” he added, “is a false choice.”

★ Call Star reporter Stephanie Wang at (317) 444-6184. Follow her on Twitter: @stephaniewang.

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## Alex Oh

akoh@callcarpenter.com

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