

WORKSHOP SUMMARY

September 28, 2021

Submitted to City of Wichita.

Understanding Wichita's
Proposed Non-Discrimination
Ordinance, the Debate
Surrounding It, and Issues
that Could Be Clarified
or Discussed Further



KANSAS
LEADERSHIP
CENTER



Executive Summary

The proposed local non-discrimination ordinance set to come back before the Wichita City Council by Oct. 12 is among the most intensely debated issues to confront the governing body in recent years. Although the proposal names a number of protected classes, much of the discussion has centered around protections for LGBTQ residents and how a non-discrimination ordinance might affect the exercise of religious liberty in the community.

On Sept. 7 and 8, 2021, the Kansas Leadership Center facilitated two nights of discussion during a workshop focused on the proposed Non-Discrimination Ordinance as part of a \$17,800 contract with the City of Wichita. The meetings were organized by KLC staff to honor a concept called “the collaborative premise,” which posits that if you bring the right people together in a healthy process with good information, they make decisions that produce better results for the community. Due to a process that frequently became intense and heated, city officials reached out to the Kansas Leadership Center to bring key stakeholders together in a forum that would provide for deeper discussion.

Despite months of debate, aspects of what the NDO would do or not do had not been widely explored. The hope was that a more structured, designed and collaborative process would help organizations on various sides of the issue understand more about the content of the ordinance, what it would change and how it would relate to state and federal laws. To conduct the workshop, the Kansas Leadership Center would seek to leverage its professional knowledge and experience in leadership development education, leadership institution-building consultation, leadership coaching and civic engagement initiatives.

Nearly 40 stakeholders with an organizational interest in the proposed ordinance participated in the discussions, including members of the Diversity, Inclusion and Civil

Rights Advisory Board. As with other city workshops, the discussion was open to the public, but no official action was taken and there was not a public forum for comment. Several hours of public comment had taken place in the lead up to the meeting, and an additional opportunity for public comment was scheduled to occur in front of the Diversity, Inclusion and Civil Rights Advisory Board the week after this engagement.

The workshop opened with a legal review of the proposed ordinance by Teresa Shulda and Emily Matta from Foulston Siefkin LLP to clarify what it does – and doesn’t – do. For example, the ordinance can only add to and not supersede federal or state law. Like the Kansas Act Against Discrimination, the NDO applies to businesses with four or more employees. The second night focused on discussing the protections outlined in the proposed ordinance. A series of key points summarized by Kansas Leadership Center staff were discussed using a sequence of brief small group conversations each followed by more expansive discussions involving the large group.

Informed by presentations and dialogue on those two nights, this report attempts to capture what is known about the protections being offered in the proposed NDO as it relates to employment, housing and public accommodations and how they compare to existing state and federal interpretations of the law. It also seeks to identify areas of consensus and non-consensus



Executive Summary Cont.

and summarize the essence of the parties' concerns and arguments for and against the ordinance. Prior to the delivery of this final summary, a working version was submitted to the Diversity, Inclusion and Civil Rights Advisory Board to assist their deliberations.

The dialogue did not result in widespread consensus across stakeholder groups about what should be in the NDO or if one is needed. But one participant emphasized that something was gained in the course of the discussion.

"We found common ground...and the common ground is respect. We ask the council to respect each other and to respect the speakers that come forward. We are all worthy of respect and courtesy."

Potential Uses for this Report:

1. *To help the Diversity, Inclusion and Civil Rights Advisory Board, the City of Wichita and the Wichita City Council prioritize the aspects of the NDO that call for further research, clarification, or debate before Oct 12.*
2. *To prioritize specific issues and questions where additional public comment might influence the final version of the proposed NDO.*
3. *To assist City of Wichita staff in prioritizing questions on the interpretation of the NDO, both before and after the City Council's decision on Oct. 12. Should an ordinance be adopted, this report could inform outreach to the public on areas of potential confusion or concern.*
4. *To provide an example that the governing body, stakeholders and the public might draw from as the process continues. Should tensions flare up, the strategies outlined in this report – sharing*

expert guidance, structured facilitation, asking for discussions about specific points and not just the ordinance as a whole, allowing for opportunities for individuals with differing viewpoints to talk with each other – could be used again with profit for the process and the community. Interviews with participants suggest the KLC process did not eliminate disagreement, but it did make talking across disagreement feel more productive to stakeholders.

Prominent Issues:

At least five issues emerged that the Diversity, Inclusion and Civil Rights Advisory Board and the Wichita City Council might want to consider discussing further. They include:

1. *The significance of protections being offered through a local ordinance, especially to representatives of the LGTBQ community, who see existing protections under state and federal laws as fragile, insufficient or even nonexistent. The viewpoint that the ordinance amounted to using legislation to force people to treat others with respect was expressed, too. (Supporters of the NDO say laws have long been used to require equal treatment of particular groups.)*
2. *A lack of clarity around what religious organizations would be required to do when it comes to providing public accommodations should the ordinance be approved. Attorneys indicated that the impacts would depend heavily on how narrowly or broadly the city interprets what a public accommodation is. Similar scenarios were expressed about how employment provisions would affect religious organizations on the first night of discussions, but were not revisited on the second evening.*



Executive Summary Cont.

3. *What it means to prohibit discrimination against individuals based on both their actual and perceived gender identity and how that would affect access and use of public accommodations such as restrooms.*
4. *How the proposed ordinance should provide protection for religious liberty. There are differences in opinion over whether the NDO provides sufficient protection for religious liberty and even whether it should do it at all. Exemptions spelled out in the proposal ordinance were also criticized (by one participant) as a sign that the legislation is poorly written.*
5. *Several other details remained unclear or unresolved by the dialogue and may warrant further attention, including:*
 - a. *The definition of “retaliation” and how the city would interpret prohibitions against it.*
 - b. *Whether the ordinance allows for preferential treatment for veterans.*
 - c. *What protections are in place to prevent an abuse of the NDO process by claimants who have an ulterior motive to bring claims beyond seeking relief from discrimination.*

When asked to provide guidance to the Wichita City Council on how to proceed, participants in the discussion offered the following recommendations:

- Be cautious about how expansive the language in the ordinance is.
- Ensure the members of marginalized groups be included and centered in conversations and that intersections of discrimination (how people can be subject to discrimination based on multiple aspects of their identities) be taken into account.
- Don't move too swiftly through the decision-making process. Read the proposal and discuss it thoroughly before voting on it.
- Hear from more people in the broader community, not just select groups. But acknowledge there is no way to hear the views of every Wichitan on this topic.

The following sections explore in detail the discussion that occurred about the NDO at the event. This report quotes extensively from some of the participants, but identifies them only as representatives of stakeholder groups in hopes of putting the emphasis on what was said rather than who said it, which was a concern identified in follow-up interviews with participants.

Part 1. Employment *Summary*

As currently interpreted, federal and state law protects all but one category mentioned in the proposed non-discrimination ordinance. The NDO adds protection for familial status.

Federal law protects for sexual orientation and gender identity because the United States Supreme Court ruled in the 2020 case *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender. State law protects for sexual orientation and gender identity because the Kansas Human Rights Commission has interpreted Kansas law as consistent with the findings in the Supreme Court's *Bostock* ruling. Knowing that the commission's interpretation of Kansas law could change, Wichita's proposed NDO offers municipal-level protection for sexual orientation and gender identity.

Points of Discussion:

1. *Whether existing state and federal interpretations of employment law are sufficient to provide equal protections to Wichitans in the reality of daily life*
2. *Whether respect and trust can be legislated in the community*
3. *The importance of local non-discrimination ordinances in conjunction with state and federal laws*

Some participants at the workshop did not believe protections at the federal and state levels provided sufficient protections for Wichitans.

"I don't feel that LGBTQ people are currently protected by federal and state law," a participant attending on behalf of an LGBTQ advocacy organization said. "I strongly disagree with that statement. If you look at the work of LGBTQ activists, you kind of see some of the proof of that. I work with a lot of intelligent people. And I'd like to think we're not doing meaningless work. If there's a whole lot of people working towards it, then why are we doing it? And if it already exists, why are there different factions in the room fighting it?"

Another participant from a local church expressed concern that Kansas is an employment at will state, which means an employer can fire someone for any non-discriminatory and/or non-retaliatory reason.

"Living in a right-to-work state, all of these protections might theoretically be out there," they said. "Sure, you're protected, you're protected, we keep saying that they all exist. And the reality is, if I as the employer don't like something you're doing in your personal life, in this state, I can terminate your employment. That happens every day, whether it's legal, or illegal, or we want it to happen doesn't really matter. It happens. If you don't believe that, I can give you lots of examples.

"And the other thing is that (for) many of these, the federal law or the state law says (they) are due to court rulings. And those change. Hence the need for the NDO that interprets very clearly how we're going to love and care for each other."

Employment

PROTECTED CATEGORIES

	Federal	Kansas	Wichita Proposed NDO
Race	✓	✓	✓
Color	✓	✓	✓
National Origin	✓	✓	✓
Ancestry		✓	✓
Religion	✓	✓	✓
Familial status			✓
Sex	✓	✓	✓
Sexual Orientation	via USSC	via KHRC	✓ (actual or perceived)
Gender Identity	via USSC	via KHRC	✓ (actual or perceived)
Disability	✓	✓	✓
Age	40+	40+	40+
Genetic Information	✓		✓
Citizenship	✓		
Veterans	✓		✓
Military Members	✓	✓	✓

SOURCE: FOULSTON SIEFKIN LLP

That comment prompted a response from a representative attending on behalf of a community group who argued that trust and respect are not goals that can be accomplished through legislation.

A question was raised related to employment: “If this ordinance were enacted, what behaviors, what norms would be expected to change?”

The discussion continued, including a rebuttal to the statement that legislating people’s choices can’t be done.

“Legislating how we treat others - that has been shown to be necessary throughout our history as a nation,” a representative of an LGBTQ organization said. Without the 1954 Supreme Court ruling *Brown vs. the Board of Education* in Topeka, “we would not have desegregated schools.”

“And now we have similar discriminations taking place against other people, particularly LGBTQ people. And that is exactly why we need these legislative acts, especially in areas of housing, public accommodations, and the other things listed in the NDO.” That point was supported by the next speaker, who attended on behalf of an organization representing the blind and visually impaired community.

“I just wanted to expand upon the necessity of local legislation about this kind of thing.” The Americans with Disabilities Act became law in 1990. “To this day, there are employment issues being faced by people with disabilities. I can only speak for blind people. But as a blind person who has sought employment in the public sector, we do not have occupational freedom. And we need the ability to advocate for that at a local level, state level and federal level.”

Part 2. Housing *Summary*

As currently interpreted, existing federal and state laws protect most categories listed in the Wichita NDO: state law protects for sexual orientation and gender identity because the Kansas Human Rights commission has interpreted Kansas law in that manner.

Federal law protects sexual orientation and gender identity because of the Biden Executive Order in January 2021. Housing and Urban Development's memo a month later confirmed that it would enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity.

Wichita's proposed non-discrimination ordinance offers protection to the following categories not protected under federal or state law: age, genetic information and veterans. Recognizing that the Biden Executive Order could be changed at the federal level and the human rights commission's interpretation of Kansas law could also be changed, the NDO offers municipal level protection for sexual orientation and gender identity.

The proposed NDO allows for grievances to be filed within 60 days of the alleged violation.

Points of Discussion:

1. *How housing discrimination impacts LGBTQ adults*
2. *How an NDO would improve Wichita's ability to attract talent*
3. *Whether 60 days is sufficient or too much time to allow the filing of grievance*

As with the employment section, speakers voiced concerns over how much protection truly exists without the local ordinance.

A representative of an LGBTQ organization touched on housing issues during the employment discussion.

"... almost 1/3 of transgender people experience homelessness at some point in their lifetime because of discriminatory practices. 23% of all LGBTQ adults have reported being discriminated against in the area of housing alone. So, it has a very disparate impact on those communities, who are already making less money than the average population, and having lower rates of home ownership than the rest of the population as well, because of those discriminatory acts and employment, as well as public housing. It forms a double whammy. And the cumulative effect of the discriminatory acts that trans people face are why there are such high suicide rates among the transgender community. I wanted to make that point and make that very clear that legislating the treatment of others is nothing new and it's been proven necessary time and time again."

A representative of a local corporation saw an NDO as critical to making Wichita an attractive place for skilled workers.

"Specifically in the housing space, when I think of the impact on talent and what a great city Wichita is and how we want to grow that city and continue to have growth, housing does matter in attracting talent."

Speakers offered contrasting reactions to the 60-day timeframe for filing grievances for alleged violations.

Housing

PROTECTED CATEGORIES

	Federal	Kansas	Wichita Proposed NDO
Race	✓	✓	✓
Color	✓	✓	✓
National Origin	✓	✓	✓
Ancestry		✓	✓
Religion	✓	✓	✓
Familial status	✓	✓	✓
Sex	✓	✓	✓
Sexual Orientation	via Executive Order 13988	via KHRC	✓ (actual or perceived)
Gender Identity	via Executive Order 13988	via KHRC	✓ (actual or perceived)
Disability	✓	✓	✓
Age			✓
Genetic Information			✓
Citizenship			
Veterans			✓
Military Members		✓	✓

SOURCE: FOULSTON SIEFKIN LLP

“It has a grievance process that’s a lot quicker than the previous version and the processes that it currently exists at the state and federal level. When you think about housing, when people are looking for homes or an apartment or somewhere to stay, they’re not looking to wait 300 days. They need 60 days, 30 days...”

But a representative of an advocacy board said 60 days isn’t nearly long enough.

“Why is there only a 60-day period to file a grievance? I’ve had to file a sexual harassment case before and it takes quite a bit of courage to do that. If somebody’s needing to file a grievance about some pretty bad things, it’s going to take way longer than 60 days. I feel like if we really are truly trying to protect people who are suffering under these things and would have grievances to file, there needs to be 180 days minimum.”

Part 3. Public Accommodation *Summary*

Public accommodations are public and private facilities used by the public at large, such as restaurants, hotels and stores. This is the area where Wichita's proposed non-discrimination ordinance adds the most new protections. *The NDO offers protection beyond federal law for ancestry, familial status, sex, sexual orientation, gender identity, age, genetic information, military status and veteran status.*

The NDO offers added protection beyond state law for familial status, age, genetic information and veterans. State law protects for sex, sexual orientation and gender identity because of interpretations of Kansas law from the Kansas Human Rights Commission.

But there are no guarantees that the commission's interpretation of Kansas law is permanent. The NDO offers municipal level protection for sexual orientation and gender identity.

Points of Discussion:

1. *Why does the Wichita NDO not protect from discrimination on the basis of citizenship?*
2. *What requirements would a religiously affiliated organization offering services such as meals and shelter face in terms of providing accommodations?*
3. *Does a requirement to enter restrooms based on sex at birth subject transgender persons to intimidation and violence?*
4. *What are the implications of prohibiting discrimination against individuals based on their perceived as well as actual gender identity?*

This section drew multiple questions from the participants.

"We were wondering why the state level and the Wichita NDO for housing and public accommodations does not protect citizenship. We were a little bit confused on that aspect."

More questions: "The Lord's Diner opens up and hundreds of people come each day to eat there. There's a men's room and a women's room. If someone who is a biological male wants to enter the women's restroom, or vice versa, and they're stopped, does that constitute a violation of the NDO, if it passes in its current form?"

"Similar question: St. Anthony Family Shelter, a family of a same-sex couple comes in and they have children and they need a place to stay for the night. The rules of the St. Anthony Family Shelter are that people of the same sex do not sleep together. So, they are told, 'Sure, you can stay here, but we ask that you stay in separate quarters.' Is that a violation of the NDO as it's currently written?"

The answer to those questions, the Foulston attorneys later said, as the ordinance is currently drafted, depends on how broadly or narrowly the city would interpret aspects of the ordinance. "What is their intent in including this exception?" If the city chooses to define "places of public accommodation" strictly, then those actions could be seen as violations because anyone can go to the Lord's Diner for a free meal, regardless of economic status. St. Anthony Family Shelter is an emergency shelter for families with minor children.

The question raised about the bathrooms prompted a number of comments.

“In regard to the whole restroom issue, I think this is one of the large elephants in the room that nobody has really addressed or has really spoken to. I want to propose a question to everybody here: If I’m forced to go into a men’s room looking like this, what do you think is going to happen? Trans women are routinely killed in men’s restrooms, routinely raped in men’s restrooms. So that is making us a target. I just wanted to make that point known.”

In response, another person said, “I’m just going to throw something out because it is an elephant in the room. And I don’t know, but just consider this. On the gender identity thing, I think we need to just look at what it means. It’s the only place (in the NDO) that says ‘perceived.’...Would it be possible and would it be right - it doesn’t matter when a woman became a woman. She’s a woman. And if she’s a biological woman, she should go into the women’s restroom. I can’t imagine you going into a men’s restroom. I just can’t. If, because we’re talking about the laws and needing laws to govern things, because there are troubled individuals. If we say a perceived gender identity, there are going to be those - I don’t know that you’re going to get raped in a women’s restroom or not. I’m not saying that. But there are troubled individuals who would take advantage of that. They would go into the women’s restrooms, and whether it’s exposing themselves or just being there, it is going to happen. And you can’t say you don’t belong there, because they have every right to say ‘Today I perceive I’m a woman.’ But if we could say that if you are biologically a woman, then you need to go into the women’s restroom. If you only at this point perceive yourself to be a woman, but you are not, you’re a biological male, you would feel more comfortable going into a men’s restroom. If we could take that ‘actual or perceived’ and change it to the current anatomical gender identity, I think that that would help.”

Another person added their voice to the discussion: “What do you perceive me to be? Because I can tell you that about 60% of the time that I go into a public restroom, someone says to me, ‘You don’t belong in here.’ Who’s going to come check my genitals? When the soccer team (Wichita Wings) played out at the place in Park City (the Kansas Coliseum), they called security. They came and asked me to raise my shirt to make sure that I was a woman in the women’s bathroom. Yes, that was several years ago, and we are not better now than we were then. I can go into Sam’s Club doing shopping for my church at 7 a.m. and someone will invariably say ‘You’re in the wrong room.’ ‘No, I am not in the wrong room, mind your own business. Who’s checking your genitals before you come in here to go to the bathroom?’ As far as I know, most public restrooms I go to there are stalls. I was talking to somebody earlier, maybe there just needs to be rooms that say urinals in here and toilets in here and pick the room you want to go into. That would solve the problem.”

In response to the comment about “perceived,” a participant said, “The words ‘perceived’ in there refer to whether or not somebody perceives you as a transgender woman or a lesbian woman. It doesn’t mean how I perceived myself, necessarily, it’s how a person that owns a public accommodation may perceive you. If they claim you are trans and you are not, you would have recourse under this NDO to file a grievance.”

Public Accommodations

PROTECTED CATEGORIES

	Federal	Kansas	Wichita Proposed NDO
Race	✓	✓	✓
Color	✓	✓	✓
National Origin	✓	✓	✓
Ancestry		✓	✓
Religion	✓	✓	✓
Familial status			✓
Sex		✓	✓
Sexual Orientation		via KHRC	✓ (actual or perceived)
Gender Identity		via KHRC	✓ (actual or perceived)
Disability	✓	✓	✓
Age			✓
Genetic Information			✓
Citizenship			
Veterans			✓
Military Members		✓	✓

SOURCE: FOULSTON SIEFKIN LLP

Part 4. Religious Liberty *Summary*

The non-discrimination ordinance attempts to protect religious liberty in a number of ways. The ordinance will not be construed or applied in a manner that violates any law or unlawfully infringes on any rights under the First Amendment of the U.S. Constitution, Section 7 of the Kansas Constitution Bill of Rights, Kansas Adoption Protection Act or the Kansas Preservation of Religious Freedom Act.

According to city officials, the ordinance was not intended to affect existing religious freedoms, meaning that what is taking place under state and federal laws at present would be allowed to continue without violating the NDO. But religious organizations have expressed concern that the draft version of the NDO raises questions about whether that is truly the case.

The ordinance provides an exception or defense related to:

1. *The employment of individuals who perform work connected with carrying on the religious organization's religious teaching, ministry or other religious activities*
2. *Housing that is the same as the Fair Housing Act (for example, nonprofit and religious organizations)*
3. *Public accommodations for religious organizations that only provide goods, services or facilities to members, guests or persons who share their principles, and for religious organizations performing religious functions.*

The ordinance also provides built-in consideration of the impact any penalty would have on free speech, expression, association and exercise of religion during the enforcement process before the matter is referred for a hearing.

Points of Discussion:

1. *How a non-discrimination ordinance should address religious liberty*
2. *Whether the exemptions and exceptions included and a lack of clarity make the NDO unworkable as written.*
3. *Whether religious liberty is adequately protected under the NDO.*

The religious liberty protections prompted much discussion.

"The thing that I have to say about religious liberty in general is that religious liberty has no place under the heading of discrimination."

Others did not take that same stance. A local pastor said:

"Looking at different NDOs from different municipalities and a lot of other places, seeing the problems that are incurred from the way some of them are written, when you have a litany of exemptions, and exceptions, it seems to be that that would indicate that it's poorly written. So, it seems like this NDO could be written better. We've seen a lack of definitions, longer term to file, and those kinds of things. That seems pretty reasonable. But then, back to the elephant (in the room): You've got folks that have different worldviews entirely trying to figure out what's the best thing for the city. Obviously, discrimination is not acceptable. Period. And an NDO could really help the situation. It seems like this one creates more problems. But what about some provisions? We were talking about restrooms? What about some provisions, protecting minors or other private spaces? It's problematic no matter which way you go."

A representative of an LGBTQ advocacy organization said the drafters of the ordinance “tried to go out of their way to make sure that religious liberty was protected, considering how many provisions there are...and there are numerous protections at the federal level, at state level. So religious liberty is definitely covered under this NDO.”

But a representative of an LGBTQ advocacy organization said the NDO doesn't go far enough.

“I think we need to clarify what religious liberty means, because we know that...Christianity is a spectrum. And when we say ‘religious liberty,’ we really need to include all religions in there when we're talking about the NDO.”

A representative of a Christian lobbying organization questioned how much protection the NDO really offers for religious liberties.

“Religious liberties are our first right...this is what makes America different than other countries, not just today but in the history of the world. So, we have a lot of the people that I represent having a lot of concern over our religious liberties being under attack... I hope we all understand that these are not absolute protections for religious liberties. It is a defense, but there are many cases all across America right now that are underway where they are being attacked and they are being

questioned, and people are having to defend those beyond the local ordinances.”

One speaker posed a question to the pastor who said if an ordinance is filled with exceptions and exemptions, it's likely a sign that the ordinance is poorly written.

“You made mention about the complexity of trying to craft a document that's got all these definitions in it and how sometimes it can be overly burdensome and complex and nothing gets done. Do you think that this document is too wordy and needs more clarity, or if this document presents itself to create more questions than answers? Does it add to the solution or add to the problem?”

The pastor's response: “The document is very tight, especially because there's still so many questions and conversations about the fluidity, the nuance that is gender identity, sexual orientation, the spectrum of existence as it relates to those of us who are socioeconomically and sexually marginalized in our community. I think it would serve us to add some of those reference points, but in document drafting, if it gets too big, it's in the weeds anyway and it won't matter because it becomes burdensome. But we have to be able to at least agree on the language that helps. LGBTQIA people need protection beyond the state and federal level that will change from administration to administration.”

Part 5.

Interpretations to Consider

The meetings included discussion about whether a local ordinance is needed at all.

“I don’t want to be misunderstood. As a whole, looking at employment, housing, public accommodation when someone is discriminated against unfairly, that is wrong. I want to make that clear... What I wanted to state was something I heard in the Heal America video at the Wichita Prayer Breakfast ...Alice Marie Johnson said respect and trust cannot be demanded. It’s got to be a mutual thing. Elizabeth Koch said you can’t legislate reconciliation. It has to be a heart change. My basic premise is where there’s wrong in our world, (the answer is) treating people more fairly and justly with dignity and respect. I don’t see that the court system and the judicial system being the best alternatives to that.”

“Well, it’s not working this way.”

“Agreed. And ****, you said something that really made me think. You feel like the state and federal laws don’t protect your friends and people like you. If that’s true, would an NDO at the local level make any difference?”

“I agree with you. You cannot legislate what someone feels in their heart. I think I heard you say something like that. It wasn’t those words, but that’s what it sounded like to me. I agree. And as someone that has worked with people that have lost their jobs for being gay, that have lost their cars that have been burned for being gay, that have been kicked out of their apartments for being gay – yeah, I really, really think the NDO could matter...when this NDO had no teeth when it was first presented, my organization was the first to say no. The reason we said no, and it was printed in the paper, was because it’s dangerous to pass an NDO without any consequences because it

gives people a false sense of security. Do I think that everything is going to be hunky dory in the world if this is passed? No, unfortunately, it’s probably not. Do I think that these protections will matter to people? I absolutely do, with all my heart and soul. I really, truly do.”

A representative of a local church cautioned against the NDO attempting to put residents in a particular box.

“As we look at these pages...remember that people have intersecting identities that go across all these pages. And within those intersecting identities, if we focus only, like machine them down to just Point C, Page 2, Section A, you lose out on the ability to see the place where the systematic and systemic racism and oppression and sexism and homophobia, transphobia, all those things collide for us to need this. As I hear different comments, or as I see different things, I don’t want us to miss the totality of a person. I am black, I am lesbian, I am a veteran, I am a pastor. I have been on all these pages...”

The comments and discussions revealed a wide range of interpretations of the ordinance, the representative of a local employer noted:

“There are people who think that we need more specific language and people who think that more specific language has the problem of the potential of being exclusionary,” that if they’re not specifically mentioned, they’re excluded. “There are people who think that we need to speak more vaguely so that it can be interpreted more flexibly by our judicial system. Then you also have people who think that this piece of legislation is too expansive, and some people who think that it is not expansive enough.”

One speaker offered their perspective on what the ordinance is attempting to accomplish.

“My understanding of this NDO is that it’s not trying to legislate my conscience. It’s trying to put some boundaries around my behavior so that I am not discriminating against people that I want to be in relationship with in my same community. I can still have my conscience. I can believe that Jesus comes through the green leaves if that’s what I want to believe, whatever it is I want to believe. I have the right to believe that and nobody can take that away from me. What it does legislate is how I treat my fellow citizens when we interact with each other. That’s my understanding of this ordinance.”

One participant emphasized that something was gained in the course of the discussion.

“We found common ground...and the common ground is respect. We ask the council to respect each other and to respect the speakers that come forward. We are all worthy of respect and courtesy.”

Another participant addressed stakeholders and those interested in the ordinance:

“If you know a person that is a member of one of these protected classes, you need to reach out to them, because this has been traumatic to sit in a place where you know, many of the people that are sitting next to you do not appreciate you. ... We have young people that are losing their lives every day because somebody calls them something. And it is our responsibility as leaders and adults in this community to find ways to love each other not to kill each other.”

It was also suggested by another participant that the council carefully deliberate as they reach a final decision on the NDO.

“There are plenty of people on the City Council that I really respect, but I do feel sometimes like they move very quickly through decisions. My advice is that they read the NDO very thoroughly, that they put themselves in the shoes of those that the NDO is planning to protect, and that they do not move too swiftly through the decision process, unless there has been significant pre-discussion amongst themselves.”

Part 6. Questions from Participants and Answers from the City of Wichita

NOTE: An initial draft of this report was provided to the Diversity, Inclusion and Civil Rights Advisory Board on September 20, 2021. This content was subsequently provided by the City of Wichita Legal Department and included in this final report.

1. *What protections are there in the NDO to ensure that Christian business owners who have sincerely held religious beliefs that are inconsistent with the NDO will have their religious beliefs respected?*

ANSWER: Examples are needed of what “sincerely held Christian beliefs that are inconsistent with NDO,” and to which provisions of the NDO (employment, housing or public accommodations), that this questioner believes would conflict with the NDO. However, this ordinance has several exceptions related to religion (in employment, in public accommodations, and the statement that the ordinance shall not be construed or applied in a manner that violates “any law,” including the Kansas Preservation of Religious Freedom Act) Each situation would depend on all facts that likely exceed what are posited in these hypothetical questions. Any complaint would be reviewed completely on a case-by-case basis.

2. *Will the proposed NDO have the same impact on private business owners as the “Jack the Cake Baker” or “Ronelle the Florist” cases?*

ANSWER: While this calls for engaging in a hypothetical analysis, it should be noted that the “cake baker” case (“Masterpiece Cakeshop”) was not decided on the merits of Colorado’s NDO, and that the U.S. Supreme Court recently declined to hear the Washington state florist case, so there is

not clear guidance in this area. What is also relevant is that unlike the states of Colorado and Washington, Kansas has the Preservation of Religious Freedom Act, which would likely be asserted and applied in a case in which a business owner wished to challenge the constitutionality of the proposed NDO. Each situation would depend on all facts that likely exceed what are posited in these hypothetical questions. Any complaint would be reviewed completely on a case by-case basis.

3. *Are individual cases of alleged discriminations going to be publicly available? Are the names of alleged violators going to be published?*

ANSWER: KORA excludes from mandatory disclosure “Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.” The City may consider a policy governing records of adjudicated cases.

4. *What constitutes “reasonable educational requirements,” which is an alternative to monetary penalty?*

ANSWER: There is no definition in the ordinance. Courts apply common meaning to terms when there are no definitions. The Municipal Court Judge, as the Hearing Officer, has discretion in imposing this alternative penalty.

5. *Regarding public accommodation: A local catholic church is hosting a bazaar. A person attempts to enter a bathroom of their chosen gender versus their biological sex but they are turned away. Would that interaction constitute a violation of the NDO?*

ANSWER: The NDO's definition of "Place of Public Accommodation" excludes a religious organization which "restrict its products, facilities and services to the members of such ... organization, their guests or individuals who promote the principles for which the association/corporation or organization is established or maintained." If an event such as a bazaar is open to the public, this exemption may or may not apply during such events. Section 5 says that "nothing in this Chapter shall be interpreted to apply to a Religious Organization's performances of a religious function, including but not limited to the: Courts apply common meaning to terms when there

(1) provision of goods, services, facilities privileges advantages or accommodations related to the solemnization or celebration of a marriage, or

(2) Performance of its religious teachings, ministry, religious duties or practices, advancement of religion or other religious activities."

It is conceivable that the church could assert that the bazaar is operated for the purpose of "advancement of religion" by, for example, raising funds for the church. In addition, Section 6 says that "Nothing in this Chapter shall be construed or applied in a manner that violates any law or unlawfully infringes upon any rights under the First Amendment of the United States Constitution, Section 7 of the Kansas Constitution Bill of Rights, the Adoption Protection Act (K.S.A. 60-5322, and amendments thereto), or the Kansas Preservation of Religious Freedom Act (K.S.A. 60-5301 et seq., and amendments thereto). Each situation would depend on all facts that likely exceed what are posited in these hypothetical questions. Any complaint would be reviewed completely on a case by-case basis.

6. *The Lord's Diner has a men's restroom and a women's restroom. If someone who is a biological male wants to enter the women's restroom, or vice versa, and they're stopped, does that constitute a violation of the NDO, if it passes in its current form?*

ANSWER: The NDO's definition of "Place of Public Accommodation" excludes a religious organization which "restrict its products, facilities and services to the members of such ... organization, their guests or individuals who promote the principles for which the association/corporation or organization is established or maintained." If the Lord's Diner is generally open to the public, this exemption may not apply. However, Section 5 says that "nothing in this Chapter shall be interpreted to apply to a Religious Organization's performances of a religious function, including but not limited to the

(1) provision of goods, services, facilities privileges advantages or accommodations related to the solemnization or celebration of a marriage, or

(2) Performance of its religious teachings, ministry, religious duties or practices, advancement of religion or other religious activities."

It is conceivable that the Lord's Diner could assert that serving the homeless is the "advancement of religion" or a "ministry." In addition, Section 6 says that "Nothing in this Chapter shall be construed or applied in a manner that violates any law or unlawfully infringes upon any rights under the First Amendment of the United States Constitution, Section 7 of the Kansas Constitution Bill of Rights, the Adoption Protection Act (K.S.A. 60-5322, and amendments thereto), or the Kansas Preservation of Religious Freedom Act (K.S.A. 60-5301 et seq., and amendments thereto). Each situation would depend on all facts that likely exceed what are posited in these hypothetical questions. Any complaint would be reviewed completely on a case-by-case basis.

- 7.** *A family of a same-sex couple comes into the St. Anthony Family Shelter with their children and they need a place to stay for the night. The rules of the St. Anthony Family Shelter are that people of the same sex do not sleep together. They are told, 'Sure, you can stay here, but we ask that you stay in separate quarters.' Is that a violation of the NDO as it's currently written?*

ANSWER: The NDO's definition of "Place of Public Accommodation" applies to establishments that are "open to the general public." It is likely that the shelter has some type of screening or admission criteria and is therefore not open to the "general public." Also of note is the definition of "Place of Public Accommodation," which excludes a religious organization which "restrict its products, facilities and services to the members of such. . . organization, their guests or individuals who promote the principles for which the association/corporation or organization is established or maintained." In addition, Section 5 says that "nothing in this Chapter shall be interpreted to apply to a Religious Organization's performances of a religious function, including but not limited to the (1) provision of goods, services, facilities privileges advantages or accommodations related to the solemnization or celebration of a marriage, or (2) Performance of its religious teachings, ministry, religious duties or practices, advancement of religion or other religious activities." It is conceivable that the shelter could assert that serving the homeless is the "advancement of religion" or a "ministry." In addition, Section 6 says that "Nothing in this Chapter shall be construed or applied in a manner that violates any law or unlawfully infringes upon any rights under the First Amendment of the United States Constitution, Section 7 of the Kansas Constitution Bill of Rights, the Adoption Protection Act (K.S.A. 60-5322, and amendments thereto), or the Kansas Preservation of Religious Freedom Act (K.S.A. 60- 5301 et seq., and amendments thereto). Each situation would depend on all facts that likely exceed what are posited in these hypothetical questions. Any complaint would be reviewed completely on a case-by-case basis.

- 8.** *What do the terms "actual" and "perceived" mean in reference to the proposed ordinance? Does similar language exist on the federal or state level?*

ANSWER: This language mirrors the language from the Overland Park ordinance, and there have been no cases litigated resulting from its NDO. Courts apply common meanings to terms where no definition is provided.

These terms are not included in Title VII of the Civil Rights Act nor in the Kansas Acts Against Discrimination. The U.S. Supreme Court has held, however, that Title VII's protections based on sex are broader than gender alone.

- 9.** *Why is there no protection for citizenship under the NDO's public accommodations or housing sections?*

ANSWER: This was not included in the Overland Park language but could be considered by City Council.

- 10.** *Do fees for each occurrence mean someone can accuse someone for several "occurrences" in the same lawsuit?*

ANSWER: A complaint would likely treat multiple instances as one complaint, with one penalty.

- 11.** *Where does the fine money go?*

ANSWER: City's General Fund; it would defray costs of enforcement.

- 12.** *Does the ordinance allow for preferential treatment of veterans?*

ANSWER: Yes.

- 13.** *Is retaliation considered prohibited conduct under the NDO?*

ANSWER: Any complainant is filing and swearing to the veracity of the complaint. State law prohibits "Making false information," which is a felony.

- 14.** *What protections are in place to prevent an abuse of the NDO process by claimants who have an ulterior motive to bring claims beyond seeking relief from discrimination?*

ANSWER: City's General Fund; it would defray costs of enforcement. Any complainant is filing and swearing to the veracity of the complaint. State law prohibits "Making false information," which is a felony.

Participants in the Workshop

ALEJO CABRAL

*Wichita Regional Chamber
of Commerce*

BETH CARLSON

Cargill Protein North America

BEV BAUMGARTNER

West Heights UMC

DEBBIE BAKER

Family Research Council

DORIS FRY

West Heights UMC

CHARLES WILKS

Envision

CHUCK WEBER

Kansas Catholic Conference

CON HOWERTON

Temple Baptist Church

GENTRY THIESEN

*REALTORS of South
Central Kansas*

JACKIE CARTER

Table of Hope MCC

JEFF BENNETT

Kansas Family Voice

KENDALL HAWKINS

GLSEN Kansas

KERRY WILKS

Equality Kansas

MARK MCCORMICK

ACLU of Kansas

MAGDA BURCIAGA

*Wichita Hispanic
Chamber of Commerce*

NANCY TANTON

Culture Shield

ROBERT ROTOLA

Family Research Council

SHANA CHIVON STEPHENS

Community Activist and Pastor

STEVE DECKER

*Southeast Wichita
Community Impact*

TRACEE ADAMS

AARP

WALTER BERRY

Berry Cos.

DIOANE GATES

*Diversity, Inclusion and Civil
Rights Advisory Board member*

JENNIFER BREHON

*Diversity, Inclusion and Civil
Rights Advisory Board member*

KELLI GRANT

*Diversity, Inclusion and Civil
Rights Advisory Board member*

MACKENZIE BORLAND

*Diversity, Inclusion and Civil
Rights Advisory Board member*

PAMELA HUGHES MASON

*Diversity, Inclusion and Civil
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RENEE CARRION

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SHALA PEREZ

*Diversity, Inclusion and Civil
Rights Advisory Board member*

TABITHA LEHMAN

*Diversity, Inclusion and Civil
Rights Advisory Board member*

THY X PHAN

*Diversity, Inclusion and Civil
Rights Advisory Board member*

WILLIAM POLITE

*Diversity, Inclusion and Civil
Rights Advisory Board member*

Appendix 1:

Participant Views on Discussion

The discussion that unfolded about the NDO in September was a novel process for the city and the organizations involved, and included the expense of taxpayer dollars to fund the dialogue. This section attempts to summarize what participants thought went well with the discussion, what did not and what implications it might have for the city to deal with contentious issues in the future.

Following the two-night NDO facilitation meetings hosted by the Kansas Leadership Center, 11 participants were contacted to obtain feedback on how effective they thought the meetings were. They were asked if the meetings met their expectations, what worked well and any suggestions they might have to improve future facilitation meetings. The following is a summary of what they had to say.

Every person contacted said they were glad the Kansas Leadership Center conducted the meetings. The facilitation was professionally handled and kept the sessions from veering too far off track.

“The very first night, we had an opportunity to take something that was very polarized, given good facilitation to keep the emotions down. I always say, ‘Let the facts catch up with the feelings.’ And that was done really well... all in all, I really think it was done as well as possibly could have been done with the polarization we see on this topic.”

From another respondent: “I was impressed by how well the tone and the pace were managed. I believe it could have easily derailed because the room was filled with emotion and a variety of strong opposing views but it was well handled and productive. I would rate KLC highly on effectiveness.”

Similarly, all of those who responded welcomed a format that invited dialogue.

“When you go to City Hall, or you go to a district advisory board meeting, the number of people number one, makes constraints for dialogue. Number two, there is no real forum for dialogue in those meetings. You have your notes or your thoughts prepared ahead of time, you stand and wait in line until it’s your turn to speak. You got your two minutes or five minutes, and then pretty soon you see a repeat of people in long lines saying the same things that 10 other people said ahead of you. So that’s not a good dialogue format.”

One respondent said the most effective dialogue happened in the small group sessions rather than the larger open forum.

“I think more common ground occurred in the small group discussions” on the second night. As more and more of those discussions took place, “it dawned on me how much movement we could have in a common ground discussion, if we just did three simple things. That’s just treat each other with mutual respect; have open, two-way dialogue, don’t talk past each other, don’t interrupt people, move emotion out of it; and then just work from a foundation of trust. And that means you have to be vulnerable with people you don’t know. That was an ‘Aha!’ moment for me...”

A consistent theme emerged when participants were asked how the facilitation meetings could be improved: they all said more time was needed for discussion.

“It was awkward to devote time to meeting on topics for only 4 minutes (in small groups before a large group discussion). I feel like that did not allow enough time to gather around, hear both sides and include meaningful discussion. I would allow for more time on a larger segment instead of spending time on regrouping in shorter intervals.”

Appendix 1: *Participant Views on Discussion*

Another respondent viewpoint: “Four minutes per subject, when you’re talking about protected classes and the humanization of those protected classes is not enough. My fear is we have not gone deep enough in any of the conversations to really provide enough clarity as to why protected classes are fighting so hard for this ordinance, and why it’s important that (in addition to federal and state laws) something else is needed here in the city.... There has to be real time for discussion.

Meeting organizers sought to ensure diverse representation in the room by inviting stakeholders that reflected a wide array of backgrounds and viewpoints, an important component for ensuring that the “collaborative premise” gets fulfilled. But some participants still experienced a lack of diversity in the proceedings.

“And then the demographic of the room has got to center on the most vulnerable. The representation that we did have, I’m sure there were a lot of silent allies. But what’s the use of that” in such a setting? The invited group “was a lot of able-bodied, cis het white men. That has nothing to do with the NDO. Like, all of those opinions do not matter because none of them need to be protected. And when you can have someone sitting there saying ‘I don’t even understand why we need these policies,’ I was surprised to hear that more than once.”

Another respondent said more time was needed for discussions, though in this instance it may not have ultimately made any difference.

“I think we are at such a loggerhead of two worldviews, that I don’t know really how we come down any further.

A part of me has been thinking this whole thing still is being rushed so fast. Even the meeting was rushed. Everything in the city is rushed, rushed. But as someone shared with me at the end of the meeting, it’s very clear where everything lines up, there’s really nothing new under the sun. Everybody understands what the two sides are. It really just comes down to the city - you have to make a decision and someone will be hurt one way or the other, unfortunately.”

The facilitation meetings could have been a more effective forum, one respondent said, if it had been combined with an overview – whether via video or in-person – of the NDO prior to the meeting, with all participants required to attend or view. Clarifying questions could have been submitted in writing and answered prior to the meeting. The most prevalent questions could have been reviewed in the first hour of the initial meeting. This would then free up more time for dialogues.

“This would have made the meeting far more effective, particularly when there were many members of the meeting who had not looked at the NDO at all. It also would have provided the opportunity to streamline the hot-button issues so that moderators could predict with data (rather than gut feel) the nuances of those hot spots and provide clarifying statements or ways to direct the conversation back to the study of the language in the NDO draft.

“For instance, the issue of bathrooms was a long-discussed item. The issue was with the word ‘perceived.’ However, the conversation turned several times to whether transgender individuals should be allowed into bathrooms of the gender they identify with at all. It was a good discussion, but I felt it needed direction so that the issue focused on the wording in the NDO and a person’s legal ramifications and/or recourses if such an infraction were encountered, rather than the issue of simply being transgender.”

Another respondent said the meetings would be more effective if the decision makers were in the room with the conversation.

Note: This report was developed by a contract writer for the Kansas Leadership Center from discussions that occurred at the workshop sessions and through participant interviews. It was reviewed and edited by members of the Kansas Leadership Center’s staff.

For questions or more information contact Dennis Clary, Director of Custom Civic Engagement, Kansas Leadership Center: dclary@kansasleadershipcenter.org or 316-712-4960.

Appendix 2:

The State of the Law

The State of the Law

Comparing and Contrasting Anti-Discrimination Laws at the Federal, State, and Local Level

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Employment – Laws and Covered Employers

Jurisdiction		Number of Employees
Federal	Title VII	15+
	Section 1981	0+
	ADA	15+
	ADEA	20+
	USERRA	0+
	GINA	15+
	Equal Pay Act	0+
	Immigration Reform and Control Act	4+
Kansas	KAAD	4+
	KADEA	4+
	KS Discrimination Against Military Personnel Act	0+
Wichita Proposed NDO		4+

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Employment – Protected Categories

	Federal	Kansas	Wichita Proposed NDO
Race	✓	✓	✓
Color	✓	✓	✓
National Origin	✓	✓	✓
Ancestry		✓	✓
Religion	✓	✓	✓
Familial status			✓
Sex	✓	✓	✓
Sexual Orientation	via USSC	via KHRC	✓ (actual or perceived)
Gender Identity	via USSC	via KHRC	✓ (actual or perceived)
Disability	✓	✓	✓
Age	40+	40+	40+
Genetic Information	✓		✓
Citizenship	✓		
Veterans	✓		✓
Military Members	✓	✓	✓

Employment - Exceptions

Jurisdiction	Exception & Defenses (non-exhaustive)
Federal	<ul style="list-style-type: none">• BFOQ• Reasonable dress/grooming standards• Ministerial exception• Undue hardship (accommodation issues)• Direct threat (disability issues)• Bona fide seniority system (age and equal pay issues)
Kansas	<ul style="list-style-type: none">• Follow federal law
Wichita Proposed NDO	<ul style="list-style-type: none">• Follow federal law• NDO will not be construed or applied in a manner that violates any law or unlawfully infringes on any rights under<ul style="list-style-type: none">• US First Amendment,• Section 7 of the Kansas Constitution Bill of Rights,• Kansas Adoption Protection Act• Kansas Preservation of Religious Freedom Act.

Appendix 2: *The State of the Law*

Employment - Enforcement

Jurisdiction	Enforcing Agency	Administrative Statute of Limitations	Possible Penalties & Damages
Federal	EEOC IER VETS	300 days 180 days (IRCA) None (USERRA)	<ul style="list-style-type: none"> • Injunctive relief • Back pay • Front pay/reinstatement • Compensatory &/or Punitive damages (subject to caps based on size of employer) • Liquidated Damages (ADEA) • Attorney fees (prevailing employee)
Kansas	<u>KAAD:</u> KHRC <u>Military Personnel Act:</u> None	<u>KAAD:</u> 6 months <u>Military Personnel Act:</u> Not specified	<u>KAAD:</u> <ul style="list-style-type: none"> • Back pay • Front pay • Compensatory (\$2,000 cap) <u>Military Personnel Act:</u> <ul style="list-style-type: none"> • Actual damages or \$500, whichever more • Injunctive relief • Attorney fees (prevailing employee)
Wichita Proposed NDO	City	60 days	<ul style="list-style-type: none"> • Up to \$2,000 civil penalty per violation

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Housing – Laws and Covered Structures

Jurisdiction	Covered Housing
Federal	Fair Housing Act <ul style="list-style-type: none"> • Buildings used or intended for use as a home • Land offered for sale/lease for construction of a home
	Equal Credit Opportunity Act <ul style="list-style-type: none"> • Any housing where a creditor is involved (e.g., home loan)
Kansas	KAAD, Military Personnel Act <ul style="list-style-type: none"> • Buildings or portions of a building used or intended for use as a home • Vacant land without structures
Wichita Proposed NDO	<ul style="list-style-type: none"> • Real property within the City, including “Rental Housing”

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Housing – Protected Categories

	Federal	Kansas	Wichita Proposed NDO
Race	✓	✓	✓
Color	✓	✓	✓
National Origin	✓	✓	✓
Ancestry		✓	✓
Religion	✓	✓	✓
Familial status	✓	✓	✓
Sex	✓	✓	✓
Sexual Orientation	via Executive Order 13988	via KHRC	✓ (actual or perceived)
Gender Identity	via Executive Order 13988	via KHRC	✓ (actual or perceived)
Disability	✓	✓	✓
Age			✓
Genetic Information			✓
Citizenship			
Veterans			✓
Military Members		✓	✓

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Housing - Exceptions

Jurisdiction	Exception & Defenses (non-exhaustive)
Federal	<u>Fair Housing Act</u> <ul style="list-style-type: none"> • Small real-estate investors (single-family houses sold/rented by owner with 3 or fewer homes) • Owner-occupied small units (units in buildings with four or fewer families, including the owner) • May consider elderly applicant's age to benefit the applicant • Religious organizations <u>ECOA</u> <ul style="list-style-type: none"> • May consider elderly applicant's age to benefit the applicant
Kansas	<ul style="list-style-type: none"> • Similar to Fair Housing Act and the following: • Direct threat (disability-related issues) • Nonprofit private clubs • Applicant had 2+ prior drug manufacturing or distribution convictions
Wichita Proposed NDO	<ul style="list-style-type: none"> • Same as Fair Housing Act (e.g., religious organization; nonprofit) • NDO will not be construed or applied in a manner that violates any law or unlawfully infringes on any rights under <ul style="list-style-type: none"> • US First Amendment, • Section 7 of the Kansas Constitution Bill of Rights, • Kansas Adoption Protection Act • Kansas Preservation of Religious Freedom Act.

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Appendix 2: *The State of the Law*

Housing - Enforcement

Jurisdiction	Enforcing Agency	Administrative Statute of Limitations	Possible Penalties & Damages
Federal	<u>FHA</u> : HUD <u>ECOA</u> : FTC, CFPB, and several other agencies	<u>No administrative exhaustion requirement</u> FHA: may file complaint with HUD within 1 year or file lawsuit within 2 years ECOA: may file complaint with CFPB or file lawsuit within 5 years	<ul style="list-style-type: none"> • Injunctive relief • Actual damages • Punitive damages • Equitable relief • Attorney fees • Civil penalties of up to \$100,000+
Kansas	<u>KAAD</u> : KHRC <u>Military Personnel Act</u> : None	<u>KAAD</u> : 1 year <u>Military Personnel Act</u> : Not specified	<u>KAAD</u> : <ul style="list-style-type: none"> • Injunctive relief • Actual damages • Punitive damages • Equitable relief • Attorney fees • Civil penalties of up to \$50,000 <u>Military Personnel Act</u> : Injunctive relief, attorney fees, actual damages or \$500
Wichita Proposed NDO	City	60 days	<ul style="list-style-type: none"> • Up to \$2,000 civil penalty per violation

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Public Accommodations – Laws and “Public Accommodations”

Jurisdiction		Public Accommodations
Federal	Title II of Civil Rights Act	<ul style="list-style-type: none"> • Lodging • Eating establishments • Entertainment establishments • Entities located within and serving patrons of another covered establishment
	ADA	Same as Title II and the following (non-exhaustive): <ul style="list-style-type: none"> • Bakeries and grocery stores • Retail establishments • Public transportation • Private schools
Kansas	KAAD, Military Personnel Act	Individuals or businesses offering goods, services, and facilities to the public, including but not limited to: <ul style="list-style-type: none"> • Same as Title II • Barber shops, salons • Swimming pools, lakes, gyms • Mortuaries or cemeteries open to the public
Wichita Proposed NDO		Establishments in Wichita that are open to the public and offer products, services, or facilities, including but not limited to: <ul style="list-style-type: none"> • Same as Title II • Apartment hotels and apartment houses with one or more tenant units • All public conveyances

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Appendix 2: *The State of the Law*

Public Accommodations – Protected Categories

	Federal	Kansas	Wichita Proposed NDO
Race	✓	✓	✓
Color	✓	✓	✓
National Origin	✓	✓	✓
Ancestry		✓	✓
Religion	✓	✓	✓
Familial status			✓
Sex		✓	✓
Sexual Orientation		via KHRC	✓ (actual or perceived)
Gender Identity		via KHRC	✓ (actual or perceived)
Disability	✓	✓	✓
Age			✓
Genetic Information			✓
Citizenship			
Veterans			✓
Military Members		✓	✓

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Public Accommodations - Exceptions

Jurisdiction	Exception & Defenses (non-exhaustive)
Federal	<p><u>Title II</u>: Private clubs or other establishments not open to the public</p> <p><u>ADA</u>:</p> <ul style="list-style-type: none"> • Same as Title II • Religious organizations or entities controlled by religious organizations (including places of worship) • Direct threat • Undue burden
Kansas	<ul style="list-style-type: none"> • Religious or nonprofit fraternal or social associations/corporations • Sex (where necessary because of intrinsic nature of accommodation)
Wichita Proposed NDO	<ul style="list-style-type: none"> • Civic, political, or religious organizations that only provide products, services, and facilities to members, their guests, or individuals who promote their founding principles • Religious organizations performing religious functions • Nonprofit fraternal or social associations/corporations may limit membership • Don't have to make changes requiring building permit to an existing facility • NDO will not be construed or applied in a manner that violates any law or unlawfully infringes on any rights under <ul style="list-style-type: none"> • US First Amendment, • Section 7 of the Kansas Constitution Bill of Rights, • Kansas Adoption Protection Act • Kansas Preservation of Religious Freedom Act.

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Public Accommodations - Enforcement

Jurisdiction	Enforcing Agency	Administrative Statute of Limitations	Possible Penalties & Damages
Federal	<u>Title II</u> : None <u>ADA</u> : DOJ	<u>Title II</u> : 2 years to file lawsuit <u>ADA</u> : 2 years to file lawsuit	<ul style="list-style-type: none"> • Injunctive relief • Restraining order • Attorney fees (prevailing complainant) • Civil penalties of up to \$150,000 (ADA claims only)
Kansas	<u>KAAD</u> : KHRC <u>Military Personnel Act</u> : None	<u>KAAD</u> : 6 months <u>Military Personnel Act</u> : Not specified	<u>KAAD</u> : <ul style="list-style-type: none"> • Injunctive relief • Equitable relief (e.g., giving complainant full access to the denied goods, services, accommodations) • Compensatory damages up to \$2,000 <u>Military Personnel Act</u> : <ul style="list-style-type: none"> • Actual damages or \$500, whichever is more • Injunctive relief • Attorney fees
Wichita Proposed NDO	City	60 days	<ul style="list-style-type: none"> • Up to \$2,000 civil penalty per violation

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Wichita NDO Procedure

Phase I: Initiation

File complaint with the City (60 days)

60 days to mediate if parties choose

If no settlement after 60 days, or if parties choose not to mediate, case is referred to Investigator

Phase II: Investigation

Respondent has 30 days to file written answer (can request a 30-day extension)

Investigation period begins

Investigation must end within a "reasonable period of time" after information, documentation, or testimony is received

Phase III: Probable/No Probable Cause Determination

Investigator forwards information to Law Dept.

Law Dept. must decide whether there is probable cause

If **no probable cause**, parties are notified within "reasonable period of time" and no further action taken by City

If **probable cause**, Law Dept. requests conciliation and settlement

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Probable Cause Finding

Law Department must have “**Probable Cause**” to believe that an unlawful discriminatory act occurred **AND** either

- (1) A penalty would not be an unlawful burden on Respondent’s free speech, expression, association, or exercise of religion; **OR**
- (2) If a penalty would burden any of those rights, the burden furthers a compelling govt. interest and is the least restrictive means for furthering that interest

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Wichita NDO Procedure (con’t)

Phase IV: Conciliation and Settlement

60 days to execute settlement agreement (extensions available)

If no settlement executed within 60 days, or if parties refuse to participate in conciliation process, case is referred to a Hearing Officer

Phase V: Administrative Hearing

Hearing Officer schedules hearing; provides notice to parties at least 10 days in advance

Hearing occurs

Hearing Officer issues decision within 60 days

Hearing Officer may impose civil penalty (up to \$2,000 per violation) or reasonable educational requirements

Phase VI: Appeals

File notice of appeal with the City within 30 days of final order

File copies of all proceedings with the clerk of the 18th Judicial District Court

Court will review the Hearing Officer’s determination and issue a decision

Parties can appeal to Kansas Court of Appeals and then to Kansas Supreme Court

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Appendix 2: *The State of the Law*



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This information is not a legal opinion; it does not provide legal advice for any purpose; and it neither creates nor constitutes evidence of an attorney-client relationship. If you have questions or want more information, contact your legal counsel. If you do not have regular counsel for this type of legal assistance, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs.