

Gender Identity Guidelines Bring New Compliance Issues

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On Dec. 21, 2015, the New York City Human Rights Commission (the Commission) issued one of the most powerful sets of guidelines¹ in the nation prohibiting gender identity discrimination in employment.²

Gender identity is already a protected class under the New York City Human Rights Law, (NYCHRL), the City's law prohibiting employment discrimination, but the new guidelines provide explicit examples of what kind of workplace behavior leads to liability.³ Penalties for violation of the NYCHRL range from \$125,000 to \$250,000, and the statute does not provide a limit for the amount of compensatory damages that a discrimination victim can recover.⁴ Given the potential for damages and the fact that there are an estimated 25,200 transgender and gender non-conforming individuals in New York City⁵ (three-quarters of whom have reported harassment in the workplace⁶), New York City employers must be especially careful to observe and comply with the new guidelines going forward.

While the Commission's guidelines are new, they are generally articulated clearly, and include helpful examples of discriminatory behavior that could give rise to liability under the NYCHRL. The guidelines spell out eight explicit potential actions that could constitute employment discrimination based on gender identity: (1) failing to use an individual's preferred name or pronoun; (2) refusing to allow individuals to utilize single-sex facilities and programs consistent with their gender; (3) sex stereotyping; (4) imposing different uniforms or grooming standards based on sex and gender; (5) providing employee benefits that discriminate based on gender; (6) considering gender when evaluating requests for accommodations; (7) engaging in discriminatory harassment; and (8) engaging in retaliation.⁷ This article recommends steps New York City employers should take—as well as policies they should consider adopting—in order to fully comply with the recently issued guidelines and avoid workplace gender identity discrimination.

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Relevant Definitions.

There are several important definitions associated with the new guidelines that may be unfamiliar, and are especially important for employers to understand when formulating and communicating policies to comply with the NYCHRL. "Gender identity" is defined under the NYCHRL as "actual or perceived sex [including] a person's gender identity, self-image, appearance, behavior or expression, whether

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or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."⁸ Individuals whose biological sex and gender identity match (for instance, a man who self-identifies as male) are defined as "cisgender." Alternatively, "transgender" individuals are those whose gender identity or expression is not typically associated with the sex that person was born with (a man who self-identifies as female). An

individual may also be "gender non-conforming," an adjective which describes "someone whose gender expression differs from traditional gender-based stereotypes" (a man who prefers to wear women's clothes). Not every gender non-conforming person is transgender, and not all transgender people are gender non-conforming.⁹ Further, "androgynous" individuals may reject outward expressions of gender identity altogether.¹⁰ When implementing the new guidelines, employers should be aware of the multiple sensitive and fact-specific definitions provided in the guidelines, and make sure to understand which might apply to their workforce.

Identify Employees the Way They Identify Themselves.

The Commission's guidelines set forth several ways in which an employer can be liable for discrimination for failing to treat employees as the gender that they identify with. As a general rule, New York City employers should carefully assess how their employees self-identify, and ensure that management and co-workers alike treat them accordingly. For instance, City employers may survey workers who are already employed, or ask potential employees during the application process, to ascertain their preferred gender identity and ensure that they know an employee's preferred name, pronoun, and title. Additionally, employers should communicate these preferences to other employees in order to ensure that co-workers also observe individual preferences in the workplace. However, employers should be sure to obtain employee consent before communicating any information to co-workers regarding that employee's gender.¹¹ Appropriate pronouns may include he/him/his, she/her/hers, they/them/theirs, or ze/hir, regardless of the employee's sex assigned at birth, anatomical gender, medical history, appearance, or sex indicated on legally identifying materials.¹² Additionally, handbooks and employment policies should be thoroughly reviewed to eliminate any uniform or grooming standards that may impose distinctions based on sex or gender. In the new guidelines, the Commission states that policies that require different uniforms for different genders, mandate that female employees wear makeup, only allow women to wear makeup or jewelry, prohibit male employees from having long hair, or require all men to wear ties may provide a basis for gender identity discrimination.¹³

As the Commission notes, New York City employers should also ensure that their facilities and programs are friendly to individuals of all gender

identities, and permit employees to use the resources that they identify as appropriate for their own gender identities. It is particularly important for employers to observe this recommendation in the provision of private facilities, such as bathrooms or dressing rooms. The NYCHRL mandates that all individuals must be allowed to use single-sex facilities or access single-sex programs consistent with their gender, regardless of their sex assigned at birth or otherwise.¹⁴ While employers are not required to make existing bathrooms or locker rooms all-gender or to install new facilities, they should note that the guidelines explicitly prioritize the individual employee's desire to use facilities conforming with their gender identity over the comfort of others. For instance, the Commission clearly notes that objections from customers or co-workers do not provide lawful grounds to deny facility or program access to transgender or gender non-conforming individuals.¹⁵ Further, employers may not lawfully require an individual to use a single-occupancy restroom in the workplace because of transgender or gender non-conforming status.¹⁶ The safest way to comply with the NYCHRL and the Commission's guidelines in this instance is, to the extent possible, provide single-occupancy restrooms, and/or private space within multi-user facilities to accommodate privacy concerns for cisgender, transgender, and gender non-conforming employees alike. As the Commission recommends, employers should post a sign in all single-sex facilities that states, "Under New York City Law, all individuals have the right to use the single-sex facility consistent with their gender identity or expression."¹⁷

Review Benefit and Leave Policies.

New York City employers should carefully review and change as needed all employee benefit and leave policies to ensure compliance with the NYCHRL and the newly issued guidelines. From a benefits perspective, the most important policies to review (and those most likely to require adjustment) are those describing health benefits. It is unlawful under the NYCHRL to provide health benefit plans that deny or exclude services on the basis of gender, and such plans must include transgender care¹⁸ (also known also as "transition-related" or "gender-affirming") care.¹⁹ Transgender care is not limited to gender reassignment surgery, and may include hormone replacement therapy, counseling sessions, or voice training.²⁰ To avoid liability, employers should provide a health benefits option that includes comprehensive coverage for transgender individuals; the World Professional Association for Transgender Health provides standards of care that the benefits option should match.²¹ Additionally, if they have not done so already, employers should ensure that they offer health benefits equally to same-sex and opposite-sex spouses of employees.

It is equally important for New York City employers to review leave policies in order to comply with the Commission's new guidelines. Specifically, leave policies should treat employee leave requests to address health or medical needs relevant to the individual's gender identity in the same way they treat leave requests for all other medical conditions.²² Further, reasonable accommodations for medical issues should be made in the same way to employees undergoing gender transitions (including leave for medical and counseling appointments and recovery time) as made to employees with any other medical issue.²³

Examine Handbooks and Educate the Workforce.

As discriminatory harassment and retaliation in the workplace based on protected classifications such as race or age are prohibited under the NYCHRL, so is harassment and retaliation based on gender identity.²⁴ Employers should review existing anti-harassment and anti-retaliation provisions enumerated in current employee handbooks to ensure that gender identity is specifically listed along with other classes such as race, age, national origin, and sexual orientation. Additionally, relevant handbook provisions should include definitions of potentially unfamiliar terms (such as "cisgender" and "gender non-conforming") to ensure that all employees are apprised of what type of conduct is potentially problematic and prohibited. Recruitment teams should also be apprised of the Commission's guidelines to avoid gender identity discrimination in the hiring process.²⁵

Management training is of particular importance in ensuring compliance with the newly issued guidelines. Gender and transgender status is an emerging classification that may not be well-understood or immediately accepted by co-workers.²⁶ Moreover, a vast quantity of information (and possibly misinformation) passes to the public through the media, friends, family, and personal experience. Managers and supervisors are uniquely situated to communicate an employer's policies, practices, and expectations, and thus are key for employers seeking to avoid gender identity discrimination in the workplace.²⁷ Accordingly, employers should conduct management training regarding gender identity issues and sensitivity as soon as possible to ensure that the message of equality prescribed by New York City is transmitted to employees from the top down. City employers should also strongly consider conducting periodic company-wide training sessions to update their workforces and remind employees of what the NYCHRL requires and the employer's expectations for treatment of co-workers regardless of their individual characteristics. Where a transitioning or transgender individual is a member of the workforce, employers may consider holding small group meetings with employees who will have regular contact with the employee to review company policy, expected behavior, and any concerns or questions that may arise.²⁸

Further, as the Commission recommends, employers should educate employees at all levels to avoid discriminatory sex stereotyping at work.²⁹ Discrimination based on a person's failure to conform to sex stereotypes, defined as "expectations of how an individual represents or communicates gender to others," is prohibited under the NYCHRL and explicitly addressed in the new guidelines on gender identity discrimination.³⁰ Common sex stereotypes may relate to behavior, clothing, hairstyle, activities, voice, mannerisms, or other characteristics connected to masculinity or femininity.³¹ As the Commission notes, sex stereotyping may manifest itself implicitly, such as through the use of anti-gay epithets or overlooking employees for advancement opportunities because they do not conform to traditional gender norms.³² Because sex stereotyping may be difficult to identify and address, it is particularly important for employers to inform employees of what may constitute sex stereotyping and how to avoid it.

Although the Commission's guidelines set forth new information for New York City employers to internalize, they also set forth clear expectations, easing the burden of compliance. Many of the actions employers can take to adhere to the guidelines are similar to measures they may already have taken to avoid discrimination against other protected classes. The most important steps employers can take to follow the guidelines include treating employees according to the gender identity they use for themselves and communicating expectations to other employees regarding how to respect their co-workers' identities as well. Employers should also be aware of the novel issues and stereotype-based biases that may be implicated, and take prompt and thorough steps to avoid liability under the NYCHRL.



1. New York City Commission on Human Rights, "Legal Enforcement Guidance on the Discrimination on the Basis of Gender Identity or Expression" (Dec. 21, 2015), http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf (Guidance).
2. Associated Press, "New York City Unveils Rules on Gender Discrimination," Wall St. J. (Dec. 21, 2015), <http://www.wsj.com/articles/new-york-city-unveils-rules-on-gender-discrimination-1450742331>.
3. NBC New York, "NYC Announces Stronger Protections for Transgender New Yorkers," (Dec. 21, 2015), <http://www.printthis.clickability.com/pt/cpt?expire=&title=NYC+Announces+Stronger+Protections+for+Transgender+New+Yorkers+%7C+NBC+New+York&urlID=543572372&action=cpt&partnerID=525222&cid=363150741&fb=Y&url=http%3A%2F%2Fwww.nbcnewyork.com%2Fnews%2Flocal%2FNYC-Announces-Stronger-Protections-For-Transgender-People-363150741.html>.
4. The New York City Human Rights Law, N.Y.C. Admin. Code §8 (2016).
5. Michael Balsamo & Jennifer Peltz, "New York City Officials Unveil New Guidelines for Businesses on Gender Discrimination," Associated Press (Dec. 21, 2015), <http://www.usnews.com/news/business/articles/2015-12-21/new-york-city-unveils-new-rules-on-gender-discrimination>.
6. Reuters, "NYC Lays Out Transgender Protection on Dress Codes, Bathroom Use," Metro New York (Dec. 22, 2015), <http://www.metro.us/new-york/new-york-city-lays-out-transgender-protection-on-dress-codes-bathroom-use/zsJolv-ViLgUB183gvcU/>.
7. Guidance, supra note 1.
8. The New York City Human Rights Law, N.Y.C. Admin. Code §8 (2016).
9. Guidance, supra note 1.
10. Society of Human Resources Managers, "Managing Gender Transition in the Workplace" (Dec. 16, 2013), <http://www.shrm.org/templatestools/toolkits/pages/managinggendertransitionintheworkplace.aspx> (Managing Gender Transition).
11. New York City Bar, Comments on Gender Identity Discrimination, Proposed Regulation §466.13, I.D. HRT-44-15-00033-P (Dec. 21, 2015), <http://www2.nycbar.org/pdf/report/uploads/20073022-CommentsOnGenderIdentityDiscriminationLGBT12.21.15.pdf>.
12. Guidance, supra note 1.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. The provision of transgender care in New York goes beyond private health plans. For instance, in March 2015, the New York State Department of Health adopted new regulations for Medicaid coverage of care and services for transgender New Yorkers. N.Y. State Dep't of Health, "Transgender Related Care and Services" (March 11, 2015), https://www.health.ny.gov/regulations/recently_adopted/docs/2015-03-11_transgender_related_care_and_services.pdf.
19. Guidance, supra note 1.
20. Id.
21. Id.; World Professional Association for Transgender Health, "Standards of Care" (last visited Jan. 12, 2016), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351.
22. Guidance, supra note 1.
23. Id.
24. The New York City Human Rights Law, N.Y.C. Admin. Code §8 (2016).
25. Managing Gender Transition, supra note 10.
26. Id.
27. Id.
28. Id.
29. Guidance, supra note 1.
30. Id.
31. Id.
32. Id.