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Labor and Employment Law for the Health Care Industry

Eight State Attorneys General Urge Eighth Circuit Not to Expand Scope of Title VII

By Nathaniel M. Glasser, Kate B. Rhodes & Amanda M. Gómez on June 20, 2018

POSTED IN EEOC, EMPLOYMENT TRAINING, PRACTICES & PROCEDURES

State attorneys general from Louisiana, Missouri, Oklahoma, Texas, Michigan, Nebraska, and South Dakota have joined Arkansas (collectively the "States") in an **amicus brief** to the Eighth Circuit, urging the court not to join the **Seventh Circuit** and **Second Circuit** in interpreting Title VII of the Civil Rights Act of 1964 ("Title VII") to prohibit sexual orientation discrimination.

The States submitted this brief in a case brought by **Mark Horton against Midwest Geriatric Management LLC** ("Midwest Geriatric") in which the plaintiff alleges sexual orientation and religious discrimination in violation of Title VII. More specifically, Horton alleges that Midwest Geriatric revoked his job offer after the company learned he was gay. In their brief, the States assert that Horton wrongly petitioned the court to ignore precedent and reverse its prior position that sexual orientation discrimination is not covered by Title VII.

The States argue that until last year, when the Seventh and Second Circuits expanded the scope of Title VII to encompass sexual orientation discrimination, federal courts had unanimously found that sexual orientation was not a protected category under Title VII, and the Eighth Circuit should follow this long-standing view. The States add that, despite numerous opportunities to revise Title VII to include sexual orientation, Congress has chosen not to do so. Finally, the States contend that Horton's arguments simply are not persuasive.

In addition to the States' brief, the Eighth Circuit has also received amicus briefs supporting Horton's argument from 18 other states and Washington D.C., in addition to the U.S. **Equal Employment Opportunity Commission** and various businesses.

The Eighth Circuit's decision remains pending, and we will be watching for it. In the meantime, employers operating within the Eighth Circuit—comprising Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota—are encouraged to evaluate their non-discrimination policies with this potential change to the federal law in mind, to the extent they have not already done so to comply with state or local laws.

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March 2018

An Assortment of Legal Issues Hospitality Employers Should Be Considering This Year

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For the latest employment, labor, and workforce management news and insights concerning the hospitality industry, please visit and subscribe to Epstein Becker Green's Hospitality Labor and Employment Law Blog.

The first quarter of 2018 has already stirred up an array of legal matters that employers in the hospitality industry should be conscious of, both in their day-to-day operations and long-term planning. In February alone, the U.S. House of Representatives passed legislation to curb lawsuits focused on the inaccessibility of brick-and-mortar business establishments and a federal appeals court ruled that discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964 ("Title VII"). Earlier this month, the U.S. Department of Labor announced a pilot program that will allow employers to avoid potential penalties for overtime and minimum wage violations. In addition, the #MeToo movement continues to be top of mind across all industries, and hospitality employers should be vigilant in their training and employee awareness efforts. Due diligence in change-of-ownership transactions should include labor relations issues, especially with unionized employees.

This edition of Epstein Becker Green's *Take 5* addresses important and evolving issues confronting employers in the hospitality industry:

1. **Will Congress Slam the Breaks on ADA "Drive By" Lawsuits?**
2. **Expanding Sex Discrimination Protection to LGBT Employees in the Hospitality Industry**
3. **Effective Compliance Training in the Hospitality Industry in the Wake of #MeToo**
4. **Transactional Due Diligence Should Include Labor Relations Issues**
5. **Voluntary PAID Program Permits Employers to Escape Potential High Penalties for Self-Reported FLSA Violations—but at What Risk?**

1. Will Congress Slam the Breaks on ADA "Drive By" Lawsuits?

By Joshua A. Stein

In any given week, dozens of lawsuits are filed in federal courts across the United States alleging that businesses violate Title III of the Americans with Disabilities Act ("ADA"), which governs the accessibility of places of public accommodation. While many of these lawsuits now focus on website accessibility, a significant number of them continue to focus on the alleged inaccessibility of brick-and-mortar business establishments, particularly restaurants and hotels. These "drive by" ADA lawsuits often focus on the inaccessibility of architectural elements that can be easily assessed by "testers" without even frequenting the establishment in question—e.g., parking spaces, sidewalks, entrances, public restrooms, host/check-in stations, and pools—sometimes even relying on online images. Moreover, the allegations asserted are often highly technical in nature—living and dying by a matter of centimeters—known only to those who specialize in accessibility. Notably, the vast majority of these claims are brought by a relatively small community of serial plaintiffs and plaintiffs' counsel for whom achieving compliance is secondary to quickly obtaining a settlement payment and attorneys' fees.

On February 15, 2018, in an effort to curb such drive-by ADA lawsuits, the U.S. House of Representatives passed legislation—the ADA Education and Reform Act (H.R. 620) ("ADAERA")—that would require that would-be plaintiffs first provide written notice of alleged architectural barriers and a period to cure before being able to commence a Title III litigation in federal court. Under ADAERA, before plaintiffs could file a Title III claim alleging architectural barriers in federal court, they would first have to provide written notice of the existence of barriers to accessibility (containing sufficient specificity, and citations to the relevant sections of the ADA, to allow the barriers to be identified by the business). The business would then have 60 days from receipt of the notice to provide a plan for the remediation of the existing barriers and an additional 120 days to eliminate the barriers or make substantial progress in doing so. If the business does not respond to the initial letter within 60 days or does not make substantial progress in eliminating the barriers within the following 120 days, then the plaintiff can commence a federal Title III litigation. ADAERA also seeks to create a model program for the use of alternative dispute resolution mechanisms in the resolution of federal Title III claims (e.g., a mediation program that stays discovery while the mediation proceeds). Of course, before it can become law, ADAERA still needs to be passed by the Senate (given the Senate's current composition, there is no guarantee that it will pass) and then signed by President Trump.

It should come as no surprise that ADAERA has been met with a wide range of reactions. Proponents of the bill argue that ADAERA would preserve the intended purpose of Title III—removing barriers to accessibility—but eliminate the existing incentives for plaintiffs' counsel to flood the courts with lawsuits premised on minute technical architectural violations with the primary goal of churning up and quickly collecting fees via a settlement. Opponents argue that, as the ADA has been law for more than 25 years, businesses that are not currently in compliance with Title III should not get the benefit of notice and additional time to comply with the long-established law. They fear that ADAERA would encourage businesses to ignore their Title III obligations until receiving a notice of deficiency.

Even if ADAERA, as currently constituted, ultimately becomes law, it could very well have unintended consequences that could create even less desirable circumstances for businesses. First, ADAERA would not prevent plaintiffs from bringing similar cases in state court under state and local accessibility laws, which often are even broader and more liberally interpreted than their federal counterpart. Indeed, plaintiffs often already include such claims as part of their federal actions because, unlike under the ADA, many state and local accessibility statutes allow plaintiffs to seek the recovery of damages and/or civil penalties. Second, as ADAERA does not impose notice requirements for claims under Title III relating to businesses' obligations to (i) make reasonable modifications to their policies, practices, and procedures, or (ii) provide auxiliary aids and services to enable effective communication, plaintiffs might simply turn their focus to a different type of federal Title III claim. In both of these instances, the result could very well be more protracted litigations under less favorable conditions (e.g., a less efficient forum or less clarity regarding requirements for compliance).

While ADAERA still has a way to go before becoming law, this is the furthest a legislative effort to reform Title III to prevent the rampant proliferation of drive-by filings has progressed, and it is worth tracking.

UPDATE: On March 28, 2018, forty-three Democratic senators united to protest the proposed H.R. 620. The filibuster-proof bloc sent a letter to Majority Leader Mitch McConnell warning that the proposal "will never receive a vote in the United States Senate during the 115th Congress." The letter also points out the H.R. 620, as contemplated, would do nothing to curb plaintiffs from pursuing damages claims under state/local laws. The senators instead favor investing in greater education about Title III's requirements and the development of a mediation program.

2. Expanding Sex Discrimination Protection to LGBT Employees in the Hospitality Industry

By Amanda M. Gómez and Kate B. Rhodes

In a move that could have broad national effects on the rights of lesbian, gay, bisexual, and transgender ("LGBT") employees in the workplace, the U.S. Court of Appeals for the Second Circuit recently ruled that discrimination based on sexual orientation violates Title VII, deciding in favor of the estate of a deceased skydiving instructor who was allegedly fired after telling a client that he was gay.

On February 26, 2018, the Second Circuit, in *Zarda v. Altitude Express*, became the second federal appeals court to rule that Title VII encompasses sexual orientation discrimination, joining the Seventh Circuit in its decision in *Hively v. Ivy Tech Community College* from last year. This issue has divided courts for years, and even caused a split between the Equal Employment Opportunity Commission ("EEOC") and the U.S. Department of Justice, with the former arguing in favor of including sexual orientation under Title VII's protections and the latter arguing against it. The Second Circuit's decision furthers a circuit split, which occurred when the Eleventh Circuit held that sexual orientation discrimination is not actionable under Title VII.

As places of public accommodation, hospitality employers are no strangers to discrimination claims based on sexual orientation. On February 23, 2018, for example, in *Cervelli and Bufford v. Aloha Bed & Breakfast*, a Hawaii state appeals court found that a Honolulu bed-and-breakfast operated in a private home cannot claim a religious right to refuse to rent a room to a lesbian couple on the basis of their sexuality. The U.S. Supreme Court is poised to review a similar issue in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, which involves a dispute over whether the Christian owner of a bakeshop in Colorado had a legal right to refuse to bake a cake for a same-sex wedding.

The Second Circuit's decision, however, should prompt employers to look toward their employee base as well as their patrons as the reach of Title VII's protection expands. Chief Judge Robert A. Katzmann delivered the majority opinion in *Zarda* and concluded the following:

> Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. Sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.

In so holding, the majority adopted each of the theories advanced by the EEOC. Applying the "comparative test" to determine whether an employment practice constitutes sex discrimination, the Second Circuit considered the example in the Seventh Circuit's *Hively* decision. In *Hively*, the court compared a lesbian woman to a heterosexual man and rejected the framing urged by the Department of Justice, which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex. Finding that sexual orientation acts as a proxy for sex, the majority concluded that a lesbian treated differently than a heterosexual man due to her sexual orientation would not have been subject to an adverse action "but for" her sex.

The majority opinion also concluded that sexual orientation discrimination constitutes actionable gender stereotyping, held to be unlawful under the Supreme Court decision in *Price Waterhouse v. Hopkins*, and associational discrimination, borrowing principles from another Supreme Court decision, *Loving v. Virginia*.

In his dissent, Judge Gerard E. Lynch argued that Congress did not intend to cover sexual orientation discrimination when drafting Title VII. The majority acknowledged this fact, but also recognized that the legal framework for evaluating Title VII claims has changed dramatically over time.

What Hospitality Employers Should Do Now

Like all employers operating within the Second Circuit—comprising New York State, Connecticut, and Vermont—hospitality employers already should have in place policies prohibiting sexual orientation discrimination because those states' laws expressly prohibit such conduct. But this decision provides a roadmap for the potential adoption by other circuits around the country and suggests that the Supreme Court may settle the current circuit split. Thus, hospitality employers are encouraged to adopt nationwide policies

prohibiting sexual orientation discrimination to the extent they have not done so, and incorporate these issues into their training programs.

Hospitality employers also should consider amending their nondiscrimination policies to cover gender identity. The Second Circuit's sex stereotype theory, which prohibits employers from discriminating against employees who fail to adhere to gender stereotypes, indicates that gender identity discrimination may be viewed as a form of sex discrimination, such that it is worthy of protection under an employer's nondiscrimination policies. In fact, less than two weeks after the Second Circuit's decision, the Sixth Circuit ruled in *EEOC v. R.G. &. G.R. Harris Funeral Homes* that discrimination against a worker based on gender identity or because the worker is transitioning is sex discrimination that violates existing federal law.

Taking a proactive approach to developing nondiscrimination policies that cover both sexual orientation and gender identity will not only help employers achieve compliance with the law articulated by these new court decisions but also may enhance recruitment efforts. Further, cities and states with strong protections for LGBT individuals are increasingly seen as particularly desirable for businesses seeking to expand and/or relocate their operations.

3. Effective Compliance Training in the Hospitality Industry in the Wake of #MeToo

By Andrea K. Douglas and Katrina J. Walasik

While the #MeToo movement rose to the national spotlight following revelations of sexual harassment in the entertainment industry, an EEOC report states, "Sexual harassment is a serious problem for women working in the hospitality industry, due in part to the unusual hours and conditions of work, the interactions of persons in the delivery service, and traditional personnel practices in the industry." In fact, EEOC data indicates more charges of sexual harassment come from the hospitality industry than any other industry. Now more than ever, it is important for employers in this industry to consider how to use training as a tool to empower supervisors and managers to prevent and correct harassment as part of a comprehensive antidiscrimination compliance program.

Effective Training as an Anti-Harassment Tool

The EEOC recently concluded that much of the anti-harassment training completed in the past 30 years has been an ineffective prevention tool because the training was focused on avoidance of liability rather than creating respectful workplaces. In some circumstances, these types of programs did little to change behaviors and reinforced gender stereotypes. Thus, rather than providing training for the sake of training, employers should now focus on providing the right kind of training:

Quality Training

The EEOC's Select Task Force on the Study of Harassment found that the most effective training is tailored to an employee's workplace. Thus, training for individuals employed in the hospitality industry would not be the same as training provided to another industry (e.g., training provided to employees working in a restaurant would be different from the training

provided to employees working in an accounting firm due to the different working environment). Additionally, the differences in work environments from industry to industry can significantly impact how, where, and in what capacity employees interact with one another. For example, the lack of individualized offices and work spaces in a restaurant or retail setting can blur boundaries regarding personal space for employees. So, tailoring training to specific industries affords an opportunity for training that is individualized to specific, applicable scenarios and, therefore, valuable to employees and managers. The task force also recommends that training be provided in person in an interactive format, rather than online.

Supervisor Empowerment Training

Because supervisors and managers have additional responsibilities with respect to harassment, the EEOC's Select Task Force on the Study of Harassment found that these employees should have additional, separate training on how to identify and respond effectively to harassment even before such harassment rises to the legally actionable level.

Effective harassment training for supervisors should therefore include the following:

- information about how to prevent and correct harassment, including identification of the risk factors for harassment and clear instructions on how to report harassment;
- a categorical statement that retaliation is prohibited; and
- clear explanations of the consequences for failing to fulfill their managerial duties related to harassment and retaliation.

Workplace Civility Training

Characterizing workplace incivility as a "gateway drug" to workplace harassment, the EEOC's Select Task Force also suggested that employers consider implementing other kinds of training programs as part of a holistic harassment prevention effort. For example, employers might consider implementing workplace civility training as part of a harassment prevention effort. Workplace civility training initiatives are aimed at creating a civil workplace for everyone by teaching employees to increase their awareness of respectful behavior.

Bystander Intervention Training

The goal of bystander intervention training is to empower everyone in the workplace—not just the victims—to stop harassment. The EEOC cited the success of bystander intervention training programs on college campuses and suggested that employers might use such training to teach employees how to disrupt harassment in progress, talk to harassers about their actions, and talk to targets of harassment.

An Ounce of Prevention Is Worth a Pound of Cure

In light of the #MeToo movement, employers in the hospitality industry need to be especially cautious about increasing their awareness and sensitivity to workplace harassment.

Employers should be vigilant about fostering and sustaining a work environment that is free from harassment, which can be efficiently achieved through proper and consistent in-person training for all employees in an interactive format.

4. Transactional Due Diligence Should Include Labor Relations Issues

By Michael F. McGahan

Before entering into a change-of-ownership transaction, joint venture, or similar transaction involving hospitality employers, the parties frequently perform thorough due diligence on financial and regulatory matters. Because employers in the hospitality industry typically employ large workforces, a due diligence review should include an examination of labor relations issues. A thorough and coordinated review of such issues can help limit the risk of post-transaction labor surprises that could have significant financial and operational implications for hospitality employers—even those currently without any unionized employees.

Looking Beneath the Surface to Anticipate Potential Post-Transaction Labor Issues in Nonunion Workforces

The time before and during a change of ownership, management, or corporate structure can be a period of great uncertainty for employees in the hospitality industry. Employees may worry not only about whether their compensation, benefits, and work environment will change but also about whether they will still have a job once the change of ownership is completed. The hospitality industry continues to be a target for union organizing, and this period of uncertainty can be ripe for union organizing activities in a nonunion workforce, or cause interest in an expansion of union representation where part of a workforce is already represented.

To begin with, the due diligence effort must address whether there are any ongoing attempts to organize the workforce, such as National Labor Relations Board representation proceedings, direct demands for recognition from unions, or evidence of organizing or card-signing campaigns. The parties to the transaction conduct an audit to identify vulnerabilities to union organizing efforts, analyze whether the seller is paying competitive wages and benefits, and examine records of employee complaints about workplace issues. In addition, the review should confirm proper compliance with the many laws governing employment (such as wage and hour laws; the Family and Medical Leave Act; laws prohibiting discrimination and harassment; and similar laws on federal, state, and, increasingly, local leave requirements), because unions could leverage an employer's poor compliance with those laws as a basis for organizing activities.

What to Look for When the Workforce Is Already Organized

When the workforce is represented, either in whole or in part, by a union, the due diligence review should start with the collective bargaining agreements ("CBAs"). The CBAs will disclose not just current wages and benefits but also scheduled increases in wages and employer contributions to pension and health care funds. Identifying the expiration date of CBAs will reveal trigger dates for a new round of bargaining. The CBAs may include

applicable successorship language that could require the acquiring entity to recognize the union and honor existing CBAs, or purport to require that the union be recognized by, and the CBAs applied to, any new or acquired facilities. It is also important to identify "neutrality" clauses, which require that the employer not oppose any union organizing efforts in unrepresented job classes or at other locations owned or operated by the employer.

When a CBA indicates that participation in multiemployer pension or health funds is required, the parties should expand their due diligence review to include the financial health of the plans and the benefits provided. A critical examination of multiemployer pension plans under the Pension Protection Act and the Multiemployer Pension Reform Act is particularly important—severely underfunded pension plans will likely have adopted rehabilitation plans that require hefty increases in employer contributions each year. They also carry the potential for massive withdrawal liability under the Employee Retirement Income Security Act of 1974 (otherwise known as "ERISA") if an employer ceases contributions to the fund or the fund suffers a "mass withdrawal" of employers. Parties also should determine whether a withdrawal has already occurred and withdrawal liability incurred, or whether the transaction itself will trigger withdrawal liability. Several recent federal court decisions have imposed withdrawal liabilities on successor employers in asset purchase agreements.[1]

Employee health plans, particularly multiemployer health plans, can have potential hidden liabilities for an acquiring or partnering entity. Not only should these plans be carefully evaluated for compliance with the many mandates of the Affordable Care Act, but also past increases in employer contributions or costs should be reviewed as part of projecting future increases in costs for providing health care coverage.

Both the interactions and working relationship between the entity and the unions representing the employees need to be carefully reviewed. A review of past and pending unfair labor practice charges, grievances, and arbitration proceedings should be made to evaluate the risk of adverse decisions. Pending grievances and arbitrations have the potential for new interpretations of existing CBA clauses and practices that may carry with them increases in operating costs. Further, liability for prior unfair labor practices can be imposed on successor employers.

Conclusion

Labor relations issues and terms of CBAs can have long-standing effects on future operations and significant financial implications both in the present and well into the future. An investment in labor relations diligence before entering into a transaction may prevent costly surprises after the transaction is completed.

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[1] *See, e.g., Resilient Floor Covering Trust Fund v. Michael's Floor Covering, Inc.*, Case No. 12-17675 (9th Cir. Sept. 11, 2015).

5. Voluntary PAID Program Permits Employers to Escape Potential High Penalties for Self-Reported FLSA Violations—but at What Risk?

By Jeffrey H. Ruzal and Adriana S. Kosovych

Earlier this month, the U.S. Department of Labor's Wage and Hour Division ("WHD") announced the Payroll Audit Independent Determination ("PAID") program, a nationwide pilot program that will allow employers to avoid potential penalties for overtime and minimum wage violations under the Fair Labor Standards Act ("FLSA") by voluntarily reporting those infractions to the WHD within a structured framework—with some important limitations and conditions. First, while all employers covered by the FLSA may use the PAID program, and the types of potential violations the program covers run the gamut, an employer *may not* initiate the process to resolve any issue for which it is already under investigation by the WHD or engaged in active or potential litigation. Second, once an employer initiates the process and reports one or more violations through the PAID program, the WHD takes over, effectively turning what began as a voluntary "self-audit" into an agency review, assessment, and determination of the back wages due for the identified violation(s).

The primary goals of the PAID program are twofold: *first*, to resolve such claims expeditiously, without litigation, to improve employers' compliance with overtime and minimum wage obligations under the FLSA, and *second*, to ensure that more employees receive the back wages they are owed, and sooner.

The PAID program is ostensibly straightforward. Participating employers conduct a self-audit of their compensation practices, and if the self-audit reveals any noncompliance practices—or if an employer believes that its practices are lawful but desires to proactively resolve any potential claims—the employer then identifies potential violations, affected employees, relevant timeframes, and the amount of back wages owed. The employer then reports that information to the WHD, certifying that it (i) reviewed the WHD's compliance assistance materials (which will be published on the WHD's website), (ii) is not litigating or being investigated for the compensation practices at issue, and (iii) will adjust its practices to avoid the same potential violations in the future. The WHD will then evaluate the information and may even request from the employer additional information that it considers necessary to assess the back wages due for the identified violations. After reviewing the employer's self-assessment (and presumably undertaking its own assessment based on the materials provided by the employer), the WHD will issue a summary of unpaid wages to the employer, as well as forms describing the settlement terms ("Claim Releases") for each employee, which the employee must sign to receive payment. It is then the employer's responsibility to issue prompt payment of the back wages to each of the employees.

Notwithstanding the apparent simplicity of the PAID program, the WHD's frequently asked questions leave several important questions unanswered, including the following:

Is additional Information required or the scope of the evaluation limited? The WHD guidance does not specify what type of additional information the agency may deem necessary to assess back wages, nor does it limit the scope of the WHD evaluation.

Without any such limitation, an employer voluntarily participating in the PAID program may risk exposure to a more comprehensive investigation by the WHD. Further, the guidance specifically states that the WHD does not waive its right to conduct any future investigations of an employer that has chosen to participate in the program, which could include directed investigations. Therefore, employers should consider conducting an internal investigation of its wage and hour practices with the assistance of counsel prior to participating in the PAID program.

Which claims will Claims Releases apply to? The Claim Releases issued by the WHD to the affected employees are narrowly tailored to the specific violation and time period covered by the assessment. Notably, the WHD's guidance does not specify whether the releases will apply to only FLSA claims or, more broadly, any state or local wage and hour claims that may also exist. If the program releases an employer only from FLSA claims, an employee who signs and accepts payment through the PAID program could potentially bring suit against that employer by relying on more protective state or local wage and hour laws, some of which also carry longer statutes of limitations. In this regard, the employer still faces costly litigation and potential liability, regardless of its proactive efforts to remedy any issues with its pay practices.

Is the employer being investigated? An employer may not necessarily know that it is already under investigation—for example, if the WHD has opened a file but has not yet assigned an investigator or sent notice of the investigation to the employer. Under these circumstances, an employer initiating the self-audit and reporting process under the auspices of the PAID program may unwittingly disclose violations to the WHD without being able to rely on the protections of the program, thus facing significant civil penalties.

According to the WHD's announcement, the PAID program is a "win win" for employers and employees: employees will receive 100 percent of the back wages paid to them, without having to pay any litigation expenses or attorneys' fees, while employers will avoid costly liquidated damages or civil monetary penalties that otherwise would be imposed. Given the number of open questions and uncertainty over the risks and benefits of the program, it is unclear how the successful the PAID program will be—including whether employers and employees will participate. Currently, the PAID program is set to last six months. At the end of the six-month pilot period, WHD will evaluate the program's effectiveness and determine whether to modify it, and whether to make the program permanent. For all the reasons discussed above, employers should be wary of the uncertainties surrounding the PAID program and may not want to subject themselves as a test case in this pilot program.

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Sixth Circuit Finds Title VII Covers Discrimination Based on Transgender Status

By Nathaniel M. Glasser & Amanda M. Gómez on March 12, 2018

POSTED IN CLASS ACTIONS - ALL STATE & FEDERAL DISCRIMINATION CLAIMS, EMPLOYMENT TRAINING, PRACTICES & PROCEDURES, HUMAN RIGHTS

In a significant decision on Wednesday, March 6, 2018, the U.S. Court of Appeals for the Sixth Circuit held in ***EEOC v. R.G. &. G.R. Harris Funeral Homes*** that discrimination against a worker on the basis of gender identity or transitioning status constitutes sex discrimination that violates Title VII.

In *R.G. & G.R.*, the funeral home's owner fired funeral director Aime Stephens after she informed him she intended to begin a gender transition and present herself as a woman at work. In finding gender identity to be covered by Title VII, the Sixth Circuit also upheld the EEOC's claim that the funeral home's dress code, which has different dress and grooming instructions for men and women, discriminates on the basis of sex.

In reaching its decision, the court concluded that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." As the court explained, "Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." Finding that Stephens would not have been fired if she had been a woman who sought to comply with the women's dress code, the court determined that Stephens's sex impermissibly affected the termination decision.

Harris Funeral Homes attempted to defend its termination decision under the Religious Freedom Restoration Act ("RFRA"), but the majority rejected this argument: "RFRA provides the funeral home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden [owner Thomas] Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination."

In addition to providing Title VII coverage to transgender and gender nonconforming individuals, the Sixth Circuit's decision marks another victory for the EEOC, whose position was similarly adopted less than two weeks ago by the Second Circuit in ***Zarda v. Altitude Express***. In that case, the Second Circuit **held** that discrimination on the basis of sexual orientation is discrimination based on sex and prohibited by Title VII. As federal courts begin to reexamine earlier rulings that deny coverage to LGBT employees, employers are advised to conform their policies to EEOC guidance prohibiting discrimination based on gender identity or expression.

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Hospitality Labor and Employment Law

News and Updates on Legal Issues Facing Hospitality Employers

Supreme Court Rules in Favor of Baker in LGBT Discrimination Case

By Amanda M. Gómez & Kate B. Rhodes on June 19, 2018

POSTED IN ANNOUNCEMENTS, DISCRIMINATION, EMPLOYMENT TRAINING, PRACTICES AND PROCEDURES

On June 4, the **Supreme Court** voted 7-2 in favor of a Christian Colorado baker and owner of Masterpiece Cakeshop, who had refused to create a custom wedding cake for a gay couple due to his religious objections to gay marriage.

Although the case previously had been litigated on free speech grounds, the Court's opinion largely avoids this constitutional question, and does not address whether Title VII prohibits discrimination based on sexual orientation. Instead, the decision focuses on the Colorado Civil Rights Commission's decision finding against Masterpiece Cakeshop and, more specifically, what Justice Kennedy described as the Commission's "impermissible hostility" as to the baker's religious beliefs.

In the underlying administrative proceeding that preceded the *Masterpiece Cakeshop* lawsuit, the Commission found that Masterpiece Cakeshop engaged in religious bias in violation of the First Amendment's free exercise clause. In its impassioned decision, one of the Commission members rejected the breadth of the free exercise clause as a justification for Masterpiece Cakeshop's actions, noting that "freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust." In dissent, Justice Ginsburg, joined by Justice Sotomayor, wrote that such comments in the Commission's decision should not be "taken to overcome" Masterpiece Cakeshop's conduct, given the "several layers of independent decision-making" throughout the various hearings leading up to the Supreme Court decision. Justice Ginsberg added that unlike other cases addressing freedom of religion (for example, where religious customers have requested anti-gay messages from secular bakers), here, the circumstances were fundamentally different because Masterpiece Cakeshop regularly made the kind of cake the couple requested and refused to sell it to them simply because of their sexual orientation.

The Court's decision is narrowly tailored, however, and leaves open the broader constitutional issues of sexual orientation discrimination and free exercise of religion. In addition, the ruling's effect on employers may be limited due to the extremely fact-specific nature of the decision. In fact, while the scope of Title VII, **has recently been expanded by Circuit Courts to include LGBT workers**, has not been considered by the Supreme Court and therefore all lower court precedents still apply. For example, the U.S. Supreme Court has refused to take any action in a **pending case** involving a **Washington florist** who refused to provide arrangements for a same-sex wedding, which presented similar constitutional issues as *Masterpiece Cakeshop*. Stay tuned for any further updates addressing these important issues.

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Special Report

Transgender Issues in the Workplace

Contents

Transgender Issues in the Workplace

*By **Sam Schwartz-Fenwick**, Partner, Seyfarth Shaw LLP and **Ben Conley**, Partner, Seyfarth Shaw LLP*

Employers are increasingly putting in place proactive policies to ensure that their transgender employees feel safe and welcome in the workplace. This primer highlights proactive policies addressing transgender issues that employers can incorporate in their workplaces to help increase diversity and inclusion while avoiding violations of relevant nondiscrimination laws that provide protections for transgender employees and applicants.

First, to understand the term transgender, it is important to differentiate between an individual's "sex," "sex assigned at birth," and "gender." "Sex" is defined as a combination of biological and physiological characteristics, including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics. "Sex assigned at birth" is the classification of a baby as male, female, or intersex based on visible genitalia at birth. The visible genitalia at birth often is assumed to predict gender; however, gender is separate and distinct from the genitalia one has at birth. "Gender" refers to an individual's emotional and psychological sense of having a gender. The feeling that one is a man, a woman, both, or neither (gender nonconformity) is referred to as "gender identity." Gender identity does not necessarily align with an individual's sex at birth. Related to gender identity is the concept "gender expression." Gender expression refers to appearance, traits, and mannerisms an individual presents to communicate gender identity. Any traits (masculine, feminine, androgynous) can be present in people of any gender or gender expression. As with gender identity, gender expression may or may not match a person's sex.

Individuals are transgender when their gender identity is different from the sex they were assigned at birth. "Gender transition" is the process by which individuals first identify as transgender and then change one or many aspects of their appearance and physical and sexual characteristics from those associated with their sex at birth. There is no one way to transition. Rather, transgender individuals transition in their own way. The transition process has both social and medical components.

23

States with EEO laws protecting gender identity (including Puerto Rico)

Social transitioning is the process by which individuals tell their transgender status to the people in their lives (e.g., family, friends, and co-workers). In addition, the social transition process may include changing one's name and asking to be referred to by a different gender pronoun. For many transitioning individuals, the social transition will include adopting a gender expression that more closely matches their gender identity.

For **some** transgender individuals, a gender transition will include a medical component. Notably, a person does not have to undergo a medical procedure to be considered transgender. Transgender status relates to persons' gender identity (i.e., how they feel inside as a "man" or "woman" or something in between, or neither), regardless of what steps they take to make this decision public. Contrary to popular belief, there is no one "transgender surgery." Indeed, many transgender individuals never take hormones or undergo any surgeries.

While many states expressly bar discrimination based on gender identity and expression, no federal law expressly prohibits workplace discrimination based on gender identity or expression. That said, the U.S. Equal Employment Opportunity Commission (EEOC) has promulgated guidance that interprets the prohibition of "sex" discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) to prohibit discrimination based on gender identity and expression.

42

Localities across the country (including counties/cities) with EEO laws protecting gender identity, including places where states have yet to pass similar laws like Ohio, Nebraska, and Texas

Despite the position of the EEOC, the current administration has taken the position that federal law does not prohibit discrimination based on gender identity and expression. As such, this area of the law will likely remain unsettled until federal law expressly prohibits transgender discrimination or the Supreme Court clarifies whether "sex" discrimination under Title VII encompasses transgender discrimination.

In order to avoid potential pitfalls and to increase the level of diversity and inclusion in a company, many employers are adopting a series of trans-inclusive policies. A nonexhaustive list of such policies is set forth below.

- **Nondiscrimination Policies:** Although the EEOC's position on the extension of Title VII to transgender claims is not binding, and there is no federal law which explicitly protects transgender employees from discrimination, employers should consider revising internal equal employment, nondiscrimination, and anti-harassment policies to include gender identity and expression as protected categories.
- **Conduct Training:** Employers also should help managers and employees become more sensitive to gender identity and expression by incorporating these topics into EEO and harassment training programs. Training reduces the risk of misunderstanding by explaining what a gender transition is and by stressing the employer's non-discrimination policy. Part of training is explaining to employees that regardless of their personal beliefs about transgender individuals it is important that employees behave appropriately and continue to work cooperatively and respectfully with their transgender colleagues. It should be clearly stated that failure to behave in this manner towards transgender colleagues could result in discipline, up to and including termination. Employers also may consider conducting a more targeted training when transgender employees announce that they are transitioning. Such training not only will support the employees and help manage the specifics of the transition process but also may foster respect, sensitivity, and understanding from other employees. In planning a targeted training, it is important to first check in with transitioning employees to determine whether or not they would like to attend.
- **Dress codes:** Policies that require professional business attire irrespective of sex or gender are recommended. For employers who have a "male" and "female" version of a uniform, employees should be allowed to wear the uniform that comports with their gender identity.
- **Use of Pronouns:** Employers should be mindful to use the appropriate pronouns consistent with transgender employees' gender presentation. To the extent there is uncertainty about employees' gender, it may be appropriate to respectfully communicate with them regarding their preference in a confidential matter and agree with them on a communications plan for notifying co-workers and customers of any change to pronoun or name use.
- **Develop Guidelines for Managing Workplace Transition:** It is prudent for employers to develop guidelines and procedures to manage situations

where employees announce that they will be transitioning. Such guidelines serve a number of functions, including: providing support and guidance to transgender employees; setting clear expectations for all employees to minimize the risk of a disruption in productivity when transgender employees transition; and developing the administrative processes needed to ensure that when transgender employees transition their gender and name are modified in the company's systems, including those for employee benefits. Employers should approach employees' transitions as an interactive process. This may involve, for example, designating a key human resources official or manager to serve as a liaison and point of contact for transitioning employees. Employers should have an open and continuous dialogue with employees and set clear expectations regarding how the transition will occur, the steps that need to take place (e.g., notification to clients, co-workers, and others), and the information employers will require from the transitioning employees.

- **Employee Privacy and Confidentiality:** Employers must be mindful that although a transgender employee's transition may become a matter of public knowledge in the workplace, personal details about any employee's transition are private and entitled to confidentiality.
- **Administrative and Personnel Records:** Employers should be prepared to update or change transgender employees' names and gender in certain employee records. For example, employers should consider which records must reflect employees' name and sex at birth and which records can be modified to assist employees in the transition (e.g., email addresses, nameplates, business cards, security badges).
- **Restroom Access:** Employers should consider policies regarding access to restrooms, locker rooms, and other gender-specific facilities. Employers should consider employees' full-time gender presentation and identity when making decisions regarding restroom access. It should be explained to co-workers who take issue with sharing a restroom or locker room with transgender colleagues that transgender employees are entitled to use the facility that corresponds with their gender identity. If employers have a single occupancy restroom or private changing areas, objecting employees should be provided with the opportunity to use those facilities. In engaging in this discussion with objecting employees, a very helpful resource is the "Guide to Restroom Access for Transgender Workers" by OSHA.
- **Health Insurance and Benefits:** Employers are increasingly including in their benefits offerings coverage for transgender medical procedures, such as genital surgery. The limited studies to date reflect that employers who have expanded such coverage have seen very little increase in health premiums. Employers also may coordinate with their benefit plan administrator to remove limitations on gender-specific services (e.g., mammograms) based on gender at birth or gender of record. Finally, employers might consider revising eligibility restrictions for infertility coverage by creating exceptions or otherwise amending benefits provisions that require employees to try to naturally conceive for at least a year (or some other period of time) before becoming eligible for infertility coverage.
- **Leave Policy:** Employers should consider modifying their leave policy to cover transition-related services. While such a policy is not clearly required under the federal Family and Medical Leave Act (or most state leave laws), many employers have decided to treat transgender medical procedures the same as they treat any other medically necessary procedures.

Checklist: Building an Inclusive Workplace for Transgender Employees and Applicants

Purpose: This checklist outlines policy areas that employers should consider to build an inclusive workplace for transgender employees and applicants while also helping to prevent employer EEO legal violations.

This checklist is adapted from the *Transgender Issues in the Workplace Primer* by Sam Schwartz-Fenwick, Partner, Seyfarth Shaw LLP, and Ben Conley, Partner, Seyfarth Shaw LLP.

Revise Nondiscrimination Policies

- ☐ Consider revising equal employment, nondiscrimination, and anti-harassment policies to include gender identity and expression as protected categories.

Conduct Training

- ☐ Incorporate gender identity and expression into EEO and harassment training programs. (Training reduces the risk of misunderstanding by explaining what a gender transition is and by stressing the employer's nondiscrimination policy.)
  - ☐ Explain to employees that regardless of their personal beliefs about transgender individuals it is important that employees behave appropriately and continue to work cooperatively and respectfully with their transgender colleagues.
    - ☐ State clearly that failure to behave in this manner towards transgender colleagues could result in discipline, up to and including termination.
  - ☐ Consider conducting a more targeted training when transgender employees announce that they are transitioning. (Such training not only will support the employees and help manage the specifics of the transition process but also may foster respect, sensitivity, and understanding from other employees.)
    - ☐ Check in first with transitioning employees in planning a targeted training to determine whether or not they would like to attend.

Update Dress Codes

- ☐ Consider employer policies that require professional business attire to be addressed irrespective of sex or gender.
- ☐ Allow employees to wear uniforms that comport with their gender identity if employers have a "male" and "female" version of uniforms.

Be Mindful of Pronouns

- ☐ Be mindful to use the appropriate pronouns consistent with transgender employees' gender presentation.
- ☐ Communicate respectfully with employees about their gender preference if there is uncertainty about employees' gender; such communication should occur in a confidential matter and there should be agreement with them on a communications plan for notifying co-workers and customers of any change to pronoun or name use.

Develop Guidelines for Managing Workplace Transition

- ☐ Develop guidelines and procedures to manage situations where employees announce that they will be transitioning. (Such guidelines serve a number of functions, including: providing support and guidance to transgender employees; setting clear expectations for all employees to minimize the risk of a disruption in productivity when transgender employees transition; and developing the administrative processes needed

to ensure that when transgender employees transition their gender and name are modified in the company's systems, including those for employee benefits.)

- ☐ Approach employees' transitions as an interactive process. This may involve, for example, designating a key human resources official or manager to serve as a liaison and point of contact for transitioning employees.
- ☐ Have an open and continuous dialogue with employees and set clear expectations regarding how the transition will occur, the steps that need to take place (e.g., notification to clients, co-workers, and others), and the information employers will require from the transitioning employees.

Ensure Employee Privacy and Confidentiality

- ☐ Be mindful that although a transgender employee's transition may become a matter of public knowledge in the workplace, personal details about any employee's transition are private and entitled to confidentiality.

Update Administrative and Personnel Records

- ☐ Prepare to update or change transgender employees' names and gender in certain employee records. For example, employers should consider which records must reflect employees' name and sex at birth and which records can be modified to assist employees in the transition (e.g., email addresses, nameplates, business cards, security badges).

Provide Restroom Access

- ☐ Consider policies regarding access to restrooms, locker rooms, and other gender-specific facilities.
  - ☐ Consider employees' full-time gender presentation and identity when making decisions regarding restroom access.
  - ☐ Explain to co-workers who take issue with sharing a restroom or locker room with transgender colleagues that transgender employees are entitled to use the facility that corresponds with their gender identity.
  - ☐ Provide objecting employees the opportunity to use a single occupancy restroom or private changing areas, if employers have those facilities.

Amend Health Insurance and Benefits

- ☐ Offer benefits coverage for transgender medical procedures, such as genital surgery. (The limited studies to date reflect that employers who have expanded such coverage have seen very little increase in health premiums.)
- ☐ Coordinate with benefit plan administrators to remove limitations on gender-specific services (e.g., mammograms) based on gender at birth or gender of record.
- ☐ Consider revising eligibility restrictions for infertility coverage by creating exceptions or otherwise amending benefits provisions that require employees to try to naturally conceive for at least a year (or some other period of time) before becoming eligible for infertility coverage.

Revise Leave Policies

- ☐ Consider modifying leave policies to cover transition-related services. (While such policies are not clearly required under the federal Family and Medical Leave Act (or most state leave laws), many employers have decided to treat transgender medical procedures the same as they treat any other medically necessary procedures.)

Model Policy: Equal Employment Opportunity

Adapted from Bloomberg Law's HR Policy Handbook. This policy complies with federal law. Be sure to check local and state requirements before using.

Model Policies

EMPLOYER complies with all federal, state, and local equal employment opportunity laws. In all hiring and employment practices, employer makes every effort to ensure that it doesn't discriminate against employees and applicants. This policy addresses EMPLOYER's commitment to providing equal opportunity employment for all employees and applicants and to promoting diversity in the workplace.

General Nondiscrimination Pledge

EMPLOYER complies with all laws prohibiting discrimination against employees and applicants based on race, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, citizenship status, disability, genetic information, or veterans' status. [*Employers that are federal contractors can add: EMPLOYER complies with all federal government contracting laws and is committed to providing equal employment opportunities for qualified employees and applicants, such as women, minorities, persons with disabilities, and certain groups of veterans. For more information, see EMPLOYER's affirmative action policy.*]

Equal opportunity extends to all aspects of the employment relationship, including hiring, promotions, training, working conditions, compensation, and benefits. [*Employers that are federal contractors can add: EMPLOYER won't discharge or otherwise discriminate against employees and applicants for asking about, discussing, or disclosing their compensation or other employees' and applicants' compensation. Employees who have access to other employees' and applicants' compensation information (as part of their essential job functions) can't disclose this information to anyone who doesn't otherwise have such access unless their disclosure is in response to formal complaints or charges; in furtherance of investigations (including investigations by EMPLOYER), proceedings, hearings, or lawsuits; or consistent with EMPLOYER's legal duty to provide information.*]

EMPLOYER's policies and practices are to reflect EMPLOYER's commitment to nondiscrimination in all areas of employment, including contracting opportunities for vendors and suppliers.

Promoting Diversity

EMPLOYER values and promotes diversity in its workplace. Diversity refers to human differences that exist in the workplace, including those based on culture, ethnicity, gender, and age. EMPLOYER believes that promoting diversity plays an important role in attracting the widest pool of qualified applicants, fostering greater innovation and creativity, and enhancing our communication and relationships with customers and the community.

EMPLOYER is committed to enhancing our diversity and demonstrating that commitment to our employees, customers, and community. EMPLOYER promotes diversity by developing policies, programs, and procedures that foster a work environment in which differences are respected and all employees are treated fairly. [*Employers that are federal contractors can add: EMPLOYER complies with federal affirmative action guidelines in all employment opportunities for qualified employees and applicants, such as women, minorities, persons with disabilities, and certain groups of veterans. For more information, see EMPLOYER's affirmative action policy.*]

Anti-Harassment

EMPLOYER strives to keep its workplace free from all forms of harassment. Some examples of conduct that can be considered harassment include ethnic slurs, racist jokes, pornographic emails, unwelcome touching, displaying offensive pictures, or any other verbal or physical conduct that has the purpose or effect of creating an intimidating, hostile, or offensive work environment.

EMPLOYER considers harassment in all forms to be a serious offense that violates EMPLOYER's EEO policy. EMPLOYER also prohibits harassment against anyone involved in reporting EEO violations or in investigations of EEO complaints. For more information, see EMPLOYER's harassment and sexual harassment policies. [*Employers that are federal contractors can add: Under EMPLOYER's affirmative action policy, employees and applicants are protected against harassment based on disability or certain veterans' status. For more information, see EMPLOYER's affirmative action policy.*]

Complaint Procedures

If employees or applicants believe that they have faced discrimination or if employees or applicants are aware of any actual or suspected workplace conduct that could be regarded as discriminatory, they should report such conduct immediately to [*Employers can indicate to whom employees should report discrimination*] in one of several ways, such as:

- emailing reports to [*indicate to whom to email reports of discrimination*];
- calling EMPLOYER's reporting hotline at [*indicate telephone number for reporting discrimination*]; or
- sending written reports to [*indicate to whom to send written reports of discrimination*].

EMPLOYER investigates all discrimination complaints promptly and supports employees' cooperation with investigations. Anyone involved in reporting EEO violations or in investigations of EEO complaints can expect confidentiality to the full extent afforded by law. Any information obtained during investigations also is kept confidential to the full extent possible under law.

Informal Dispute Resolution

Where appropriate, informal resolution of discrimination complaints is used. Such an approach can include counseling those who commit discrimination or serving as a mediator between the two parties.

When a discrimination complaint can't be resolved informally, a written report of the investigation that includes recommendations for further action is prepared and delivered to [*indicate who receives the report*] Recommendations can include discipline for those who commit discriminatory actions and restoration of the terms, conditions, or opportunities that were lost or denied employees or applicants because of discrimination.

Anti-Retaliation

EMPLOYER ensures that employees and applicants who complain about discrimination, oppose any discriminatory practice, or participate in investigations of such complaints are protected against retaliation. EMPLOYER doesn't discourage or obstruct employees and applicants from filing complaints with the federal Equal Employment Opportunity Commission or state or local EEO agency.

Employees also are protected against retaliation for talking about discrimination in response to questions that come up during internal investigations. No adverse employment actions are taken against employees and applicants who file EEO complaints, oppose discriminatory actions, or participate in investigations of such complaints. [*Employers that are federal contractors can add: Employees and applicants are protected against retaliation if they exercise any rights under the federal Rehabilitation Act or the federal Vietnam-Era Veterans' Readjustment Assistance Act. For more information, see EMPLOYER's affirmative action policy.*]

Discipline

All employees, including supervisors and managers, who engage in discriminatory conduct or harassment are subject to immediate disciplinary action, up to and including termination.

Communications

All government nondiscrimination posters and EMPLOYER's EEO policies are displayed permanently in conspicuous locations in all facilities and on EMPLOYER's internal homepage. Notices, advertisements, forms, job descriptions, and other specifications relating to employment don't indicate any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, citizenship status, disability, genetic information, or veterans' status. [*Employers that are federal contractors can add: EMPLOYER's affirmative action policy is displayed permanently in conspicuous locations at all worksites in a format accessible to employees and applicants with disabilities and employees and applicants who are disabled veterans.*]

Training

EMPLOYER requires all new hires, including managers and supervisors, to undergo training on complying with EMPLOYER's EEO policy. Thereafter, training on the policy is provided annually for all employees, including managers and supervisors.

Model Policy: Gender Transition

Adapted from Bloomberg Law's HR Policy Handbook. This policy complies with federal law. Be sure to check local and state requirements before using.

EMPLOYER is committed to promoting diversity in the workplace and affirming equal opportunity for all employees and applicants. As expressed in EMPLOYER's EEO policy, EMPLOYER doesn't discriminate based on gender identity or gender expression in any aspect of the employment relationship, including hiring, promotions, training, working conditions, compensation, and benefits.

EMPLOYER recognizes that an employee may wish to transition his or her gender. This policy addresses issues concerning employees who are transgender, wish to transition, or are transitioning. At any time, employees can contact their manager or the Transition Resource Coordinator (TRC) about any questions or concerns they have regarding this policy.

Definitions

The following definitions apply to EMPLOYER's gender transition policy:

Cisgender refers to a person who identifies as the same gender that he or she was assigned at birth.

Gender identity refers to a person's inner sense of gender (being male, female, both male and female, or neither male nor female), regardless of the sex assigned to him or her at birth. Gender identity isn't the same as a person's sexual orientation or gender expression.

Gender expression refers to a person's gender-related behavior or appearance, whether or not it conforms to traditional gender stereotypes or to the sex assigned to him or her at birth. It can include manner of dress, grooming, mannerisms, and speech patterns. Gender expression isn't the same as a person's gender identity or sexual orientation.

Sexual orientation typically refers to a person's physical, romantic, or emotional attraction to people of the same and/or opposite sex. Sexual orientation isn't the same as a person's gender identity or gender expression. Transgender people, like cisgender people, can identify as having any sexual orientation (such as heterosexual, gay, lesbian, bisexual, or asexual).

Transgender refers to a person whose gender identity or gender expression is different from that typically associated with the sex assigned to him or her at birth. Specifically, a "transgender woman" can refer to a person who was designated male at birth but identifies or expresses herself as female, and a "transgender man" can refer to a person who was designated female at birth but identifies or expresses himself as male. The term also includes a person who identifies as androgynous or nonbinary (being both male and female, neither male nor female, or gender fluid).

For purposes of this policy, a transgender employee is referred to as "him or her." However, employees can instead choose to be addressed and referred to by other nongendered pronouns such as "they," "ze," or "hir."

Transition is the process by which a person begins living as a different gender. It often refers to the process by which a transgender person begins living as the gender with which he or she identifies, rather than the sex assigned to him or her at birth. It can include undergoing medical treatment or procedures (such as hormone therapy or surgery), using a different name or pronoun, and using different facilities (such as restrooms or locker rooms). The process varies for each person, and

while some people might choose to undergo medical treatment or procedures, these steps aren't necessary for a person to transition his or her gender.

Transition Resource Coordinator (TRC) is a designated employee who is responsible for handling employees' gender transition concerns.

Nondiscrimination and Confidentiality

EMPLOYER strives to create a workplace where employees who are transgender can be their full selves without fear of discrimination, harassment, or retaliation. EMPLOYER is supportive of transgender employees who are considering or undergoing gender transition. Any discriminatory, harassing, or retaliatory actions taken against employees based on their gender identity, gender expression, or gender transition are considered violations of EMPLOYER's EEO policy and are subject to EMPLOYER's disciplinary policy.

EMPLOYER also recognizes that some employees may wish to keep information about their gender transition private. EMPLOYER respects employees' preferences regarding when and with whom to share such information. EMPLOYER only shares information about employees' gender transition as needed to implement changes they request and otherwise to the extent they agree to share such information. Transitioning employees are encouraged to inform their manager and coworkers about their transition to the extent they feel comfortable.

Transition Planning

EMPLOYER recognizes that there are specific workplace issues to be addressed throughout the gender transition process. Transitioning employees are encouraged to discuss their needs and expectations with EMPLOYER before, during, and after their transition. EMPLOYER addresses each employee's needs and expectations on an individualized basis. EMPLOYER also offers benefits — such as medical benefits, Employee Assistance Program (EAP) services, and employee support groups — to assist transgender employees who are considering or undergoing gender transition.

Employees can contact their manager or the TRC if they wish to inform EMPLOYER about their gender transition or if they have specific requests, questions, or concerns regarding their transition. Managers who are notified of any transition-related workplace requests should promptly notify the TRC, after obtaining employees' permission to do so.

If employees need EMPLOYER's assistance to implement workplace changes based on their gender transition, they should meet with the TRC to develop a transition plan that outlines these changes and the steps and time periods for their completion. The TRC coordinates with employees to establish this plan and discusses with them what they can expect from EMPLOYER during the transition process, including a review of relevant leave, benefit, and other policies. Employees also are encouraged to contact EMPLOYER's EAP or any employee support group for assistance as needed.

A transition plan can include any or all of the following considerations:

- A list of employees who need to be advised of the transition in order to implement requested workplace changes (HR personnel, the transitioning employee's manager, etc.) or as requested by the transitioning employee (other managers, coworkers, etc.).
- A plan for when and how those employees should be informed of the transition (through a staff meeting, email, etc.) and who will inform them (the transitioning employee, the TRC, etc.).
- The date on which the employee will begin to present in a manner consistent with his or her gender identity (which might be immediately), including the date(s) when the employee will begin using a different name or pronoun and different facilities (restrooms, locker rooms, etc.).

- A list of the employee's records that will need to be changed to reflect his or her gender identity and new name (if applicable), any documentation the employee will need to provide to effectuate these changes, and the expected date(s) on which these records will be changed.
- Any anticipated leave that the employee will take for transition-related medical treatment and any relevant benefits available to the employee during the transition.

Employees should work with the TRC to track the progress of their transition plan through a checklist or other document that can be shared with appropriate HR personnel and managers as needed and with employees' permission. The TRC should ensure that the plan is implemented in a timely manner.

EMPLOYER recognizes that employees' needs may change during their gender transition. The TRC works with employees to adapt their transition plan to accommodate additional requests that might arise.

Implementing Transition Plan

EMPLOYER utilizes the following procedures to implement transitioning employees' requested workplace changes:

Access to facilities. Employees are permitted to use facilities (restrooms, locker rooms, etc.) that correspond with their gender identity. It is a violation of EMPLOYER's EEO Policy to prevent transgender or transitioning employees from using facilities that correspond with their gender identity. EMPLOYER doesn't ask or require transgender or transitioning employees to use facilities that don't correspond with their gender identity or to use unisex/single-occupant restrooms instead of common restrooms designated for employees of one sex.

Dress and grooming standards. Employees are permitted to present themselves in accordance with their gender identity and/or gender expression or in a gender-neutral manner. Presentation includes their manner of dress or grooming. If employees are required to wear a uniform, transitioning or transgender employees are permitted to dress in the uniform that corresponds with their gender identity. EMPLOYER doesn't restrict any aspects of employees' appearance based on gender or gender stereotypes.

Employee records. EMPLOYER will update HR records as needed to accurately reflect transitioning employees' gender identity and new name (if applicable) when they choose to begin identifying with that gender and name. EMPLOYER also will update employees' ID badge, nameplate, email address, business cards, staff directory entry, and any other records or places bearing their name

For certain types of records, such as payroll and retirement records, EMPLOYER can't make updates until employees provide official documentation of their gender and/or name change. The TRC will coordinate with employees to determine what documentation is needed to make these changes. Employees aren't required to provide documentation to change their name on records or in places where supporting documentation isn't necessary (for example, their nameplate).

Name and pronouns. Employees can choose to be addressed and referred to by the name and pronoun of their choice (including "they," "ze," or "hir"), both verbally and in writing. If employees' chosen name differs from their legal name, they should sign legal or official documents using their legal name at the time of signing.

EMPLOYER encourages employees to take reasonable steps to inform their coworkers of their chosen name and pronoun. If a coworker is unsure of the name or pronoun to use in reference to a transgender or transitioning employee, the coworker can respectfully ask the employee how he or she wants to be addressed. Any intentional misuse of transgender or transitioning employees' name or pronoun is considered a violation of EMPLOYER's EEO Policy.

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Gender Identity/Gender Expression: Legal Enforcement Guidance

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New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23)

INDEX

The New York City Human Rights Law ("NYCHRL") prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." [1]

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint in New York State Supreme Court within three (3) years of the discriminatory act.

The NYCHRL prohibits unlawful discrimination in public accommodations, housing and employment on the basis of gender. Gender is defined as one's "actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether 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." [2] This document serves as the Commission's legal enforcement guidance of the NYCHRL's protections as they apply to discrimination based on gender, and gender identity and gender expression, which constitute gender discrimination under the NYCHRL. This document is not intended to serve as an exhaustive list of all forms of gender-based discrimination claims under the NYCHRL.

I. LEGISLATIVE INTENT

In 2002, the New York City Council passed the Transgender Rights Bill to expand the scope of the gender-based protections guaranteed under the NYCHRL, and ensure protection for people whose "gender and self-image do not fully accord with the legal sex assigned to them at birth." [3] The City's intent in amending the law was to make explicit that the law prohibits discrimination against transgender people. [4] The legislative history reflects that transgender people face frequent and severe discrimination such that protection from discrimination is "very often a matter of life and death." [5] Recognizing the profoundly debilitating impact of gender-based discrimination on transgender and other gender non-conforming individuals, the amendment makes clear that "gender-based discrimination – including, but not limited to, discrimination based on an individual's actual or perceived sex, and discrimination based on an individual's gender identity, self-image, appearance, behavior, or expression – constitutes a violation of the City's Human Rights Law." [6]

II. DEFINITIONS

These definitions are intended to help people understand the following guidance as well as their rights and responsibilities under the NYCHRL.

- Cisgender: an adjective denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex, i.e, someone who is not transgender.
- Gender Identity: one's internal deeply-held sense of one's gender which may be the same or different from one's sex assigned at birth. One's gender identity may be male, female, neither or both, e.g., non-binary. Everyone has a gender identity. Gender identity is distinct from sexual orientation.
- Gender Expression: the representation of gender as expressed through, for example, one's name, choice of pronouns, clothing, haircut, behavior, voice, or body characteristics. Gender expression may not be distinctively male or female and may not conform to traditional gender-based stereotypes assigned to specific gender identities.
- Gender: an individual's actual or perceived sex, gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned at birth.

- Gender Non-Conforming: an adjective sometimes used to describe someone whose gender expression differs from traditional gender-based stereotypes. Not all gender non-conforming people are transgender. Conversely, not all transgender people are gender non-conforming.
- Intersex: a term used to refer to a person whose reproductive or sexual anatomy and/or chromosomal pattern does not fit typical definitions of male or female. There are many different medical diagnoses or conditions that an intersex person may have.
- Sex: a combination of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, secondary sex characteristics, and gender identity. Most people are assigned male or female at birth based on the appearance of their external genitalia.
- Transgender: an adjective used to describe someone whose gender identity or expression is not typically associated with the sex assigned at birth. It can be used to describe people with a broad range of identity or expression. Someone who identifies their gender as androgynous, gender queer, non-binary, gender non-conforming, MTF (male to female), or FTM (female to male) may also consider themselves to be transgender.

III. VIOLATIONS OF THE NEW YORK CITY HUMAN RIGHTS LAW'S PROHIBITIONS ON GENDER DISCRIMINATION

Gender discrimination under the NYCHRL includes discrimination on the basis of gender identity, gender expression, and transgender status. [7] The definition of gender also encompasses discrimination against someone for being intersex. Under the NYCHRL, gender discrimination can be based on one's perceived or actual gender identity, which may or may not conform to one's sex assigned at birth, or on the ways in which one expresses gender, such as through appearance or communication style. Gender discrimination is prohibited in employment, housing, public accommodations, discriminatory harassment, and bias-based profiling by police and exists whenever there is disparate treatment of an individual on account of gender. When an individual is treated "less well than others on account of their gender," [8] that is gender discrimination under the NYCHRL.

Harassment motivated by gender is a form of discrimination. Gender-based harassment can be a single or isolated incident of disparate treatment or repeated acts or behavior. Disparate treatment can manifest in harassment when the incident or behavior creates an environment or reflects or fosters a culture or atmosphere of sex stereotyping, degradation, humiliation, bias, or objectification. Under the NYCHRL, gender-based harassment covers a broad range of conduct and occurs generally when an individual is treated less well on account of their gender. While the severity or pervasiveness of the harassment is relevant to damages, the existence of differential treatment based on gender is sufficient under the NYCHRL to constitute a claim of harassment. Gender-based harassment can include unwanted sexual advances or requests for sexual favors; however, the harassment does not have to be sexual in nature. For example, refusal to use a transgender employee's preferred name, pronoun, or title may constitute unlawful gender-based harassment. Comments, unwanted touching, gestures, jokes, or pictures that target an individual based on gender constitute gender-based harassment.

Unlawful gender-based discrimination is prohibited in the following areas:

- Employment: It is unlawful to refuse to hire, promote, or fire an individual because of a person's actual or perceived gender, including actual or perceived status as a transgender person. It is also unlawful to set different terms and conditions of employment because of an employee's gender. Examples of terms and conditions of employment include work assignments, employee benefits, and keeping the workplace free from harassment.

- Public Accommodations: It is unlawful for providers of public accommodations, their employees, or their agents to deny any person, or communicate intent to deny, the services, advantages, facilities or privileges of a public accommodation directly or indirectly because of their actual or perceived gender, including actual or perceived status as a transgender person. Simply put, it is unlawful to deny any person full and equal enjoyment of a public accommodation because of gender.
- Housing: It is unlawful to refuse to sell, rent, or lease housing to someone because of their actual or perceived gender, including actual or perceived status as a transgender person. It is unlawful to withhold from any person full and equal enjoyment of a housing accommodation because of their gender. [9]

1. Failing To Use an Individual's Preferred Name or Pronoun

The NYCHRL requires employers and covered entities to use an individual's preferred name, pronoun and title (e.g., Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification.

Most individuals and many transgender people use female or male pronouns and titles. Some transgender and gender non-conforming people prefer to use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir. [10] Many transgender and gender non-conforming people choose to use a different name than the one they were given at birth.

All people, including employees, tenants, customers, and participants in programs, have the right to use their preferred name regardless of whether they have identification in that name or have obtained a court-ordered name change, except in very limited circumstances where certain federal, state, or local laws require otherwise (e.g., for purposes of employment eligibility verification with the federal government). Asking someone their preferred gender pronoun and preferred name is not a violation of the NYCHRL.

<u>Examples of Violations</u>

- Intentional or repeated refusal to use an individual's preferred name, pronoun or title. For example, repeatedly calling a transgender woman "him" or "Mr." after she has made clear which pronouns and title she uses.
- Refusal to use an individual's preferred name, pronoun, or title because they do not conform to gender stereotypes. For example, calling a woman "Mr." because her appearance is aligned with traditional gender-based stereotypes of masculinity.
- Conditioning an individual's use of their preferred name on obtaining a court-ordered name change or providing identification in that name. For example, a covered entity may not refuse to call a transgender woman her preferred name, Jane, because her identification says that her first name is John. [11]
- Requiring an individual to provide information about their medical history or proof of having undergone particular medical procedures in order to use their preferred name, pronoun, or title.

Covered entities may avoid violations of the NYCHRL by creating a policy of asking everyone what their preferred gender pronoun is so that no individual is singled out for such questions and by updating their systems to allow all individuals to self-identify their names and genders. They should not limit the options for identification to male and female only.

2. Refusing To Allow Individuals To Utilize Single-Sex Facilities and Programs Consistent with Their Gender

The NYCHRL requires that individuals be permitted to use single-sex facilities, such as bathrooms or locker rooms, and participate in single-sex programs, consistent with their gender, regardless of their sex assigned at birth, anatomy, medical history, appearance, or the sex indicated on their identification. The law does not require entities to make existing bathrooms all-gender or construct additional restrooms. Covered entities that have single-occupancy restrooms should make clear that they can be used by people of all genders. [12]

Some people, including, for example, customers, other program participants, tenants, or employees, may object to sharing a facility or participating in a program with a transgender or gender non-conforming person. Such objections are not a lawful reason to deny access to that transgender or gender non-conforming individual.

Examples of Violations

- Prohibiting an individual from using a particular program or facility because they do not conform to sex stereotypes. For example, a women's shelter may not turn away a woman because she looks too masculine nor may a men's shelter deny service to a man because he does not look masculine enough.
- Prohibiting a transgender or gender non-conforming person from using the single-sex program or facility consistent with their gender identity or expression. For example, it is an unlawful discriminatory practice to prohibit a transgender woman from using the women's bathroom.
- Requiring a transgender or gender non-conforming individual to provide proof of their gender in order to access the appropriate single-sex program or facility.
- Requiring an individual to provide identification with a particular sex or gender marker in order to access the single-sex program or facility corresponding to their gender.
- Barring someone from a program or facility out of concern that a transgender or gender non-conforming person will make others uncomfortable.
- Forcing a transgender or gender non-conforming person to use the single-occupancy restroom.

Covered entities may avoid violations of the NYCHRL, by, wherever possible, providing single-occupancy restrooms and providing private space within multi-user facilities for anyone who has privacy concerns. Covered entities may accommodate an individual's request to use a single-occupancy restroom because of their gender. For example, an individual who is non-binary or who is in the process of transitioning may wish to use a single-occupancy restroom. As noted above, however, it is unlawful to require an individual to use a single-occupancy restroom because they are transgender or gender non-conforming. Covered entities should create policies to ensure that all individuals are allowed to access the single-sex facility consistent with their gender identity or expression and train all employees, but particularly all managers and employees who have contact with members of the public, on compliance with the policy, and their obligation under the NYCHRL to provide non-discriminatory access to single-sex facilities including for transgender and gender non-conforming people. Covered entities 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." Covered entities may adopt policies or codes of conduct for single-sex facilities delineating acceptable behavior for the use of the facilities that are not themselves discriminatory and do not single out transgender or gender non-conforming people.

An individual's assessment of their own safety should be a primary consideration. Covered entities should offer opportunities for people to come to them if they have safety concerns and should establish a corresponding safety plan if needed. For example, if a transgender resident requests assignment to a facility corresponding to their sex assigned at birth instead of a placement corresponding to their gender identity, that request should be honored.

3. Sex Stereotyping

Discrimination based on an individual's failure to conform to sex stereotypes is a form of gender discrimination under the NYCHRL. Sex stereotypes are widely-held over-simplified expectations about how people of a particular sex or gender should be or how they should act. They include expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyle, activities, voice, mannerisms, or body characteristics. Sex stereotypes also relate to the roles or behaviors assigned to those who identify as male or female. Covered entities may not require individuals to conform to stereotypical norms of masculinity or femininity. The law also recognizes that unlawful sex stereotyping often manifests itself as anti-gay epithets, or attributing a particular sexual orientation to individuals who do not conform to sex stereotypes.

Examples of Violations

1. Using anti-gay epithets when speaking to or about an individual based on their non-conformity with gender norms.
2. Overlooking a female employee for a promotion because her behavior does not conform to the employer's notion of how a female should behave at work.
3. Enforcing a policy in which men may not wear jewelry or make-up at work.

Covered entities may avoid violations of the NYCHRL by training all staff on creating and maintaining an environment free from sex stereotyping.

4. Imposing Different Uniforms or Grooming Standards Based on Sex or Gender

Under the NYCHRL, employers and covered entities may not require dress codes or uniforms, or apply grooming or appearance standards, that impose different requirements for individuals based on sex or gender. Under federal law, differing standards based on sex or gender are permitted so long as they do not impose an undue burden, an evidentiary standard that the plaintiff must prove. Differences that have been perceived by courts to be slight or that do not impose significantly greater burdens based on gender have generally been permitted; for example, courts have upheld requirements that female bartenders wear makeup, or that male servers wear ties. [13] While some courts have found uniforms and grooming standards that perpetuate sex stereotypes impermissible in extreme cases – for example, where an employer required only female employers to wear an overtly sexualized uniform [14] – courts have generally upheld such standards when courts deem them innocuous or based in long-held, traditional gender norms.

In keeping with the requirements of the Restoration Act of 2005, the NYCHRL looks to these cases as a floor rather than a ceiling, and to that end, does not require a showing that different uniform or grooming standards create an unequal burden or disparate effect to qualify as gender discrimination. Under the NYCHRL, the fact that the grooming standard or dress code differentiates based on gender is sufficient for it to be considered discriminatory, even if perceived by some as harmless. Holding individuals to different grooming or uniform standards based on gender serves no legitimate non-discriminatory

purpose and reinforces a culture of sex stereotypes and accepted cultural norms based on gender expression and identity.

The variability of expressions associated with gender and gender norms contrast vastly across culture, age, community, personality, style, and sense of self. Placing the burden on individuals to justify their gender identity or expression and demonstrate why a particular distinction makes them uncomfortable or does not conform to their gender expression would serve to reinforce the traditional notion of gender that our law has disavowed. Differing standards based on gender will always be rooted in gender norms and stereotypes, even when they may be perceived by some as innocuous. When an individual is treated differently because of their gender and required to conform to a specific standard assigned to their gender, that is gender discrimination regardless of intent, and that is not permissible under the NYCHRL.

Employers and covered entities are entitled to enforce a dress code, or require specific grooming or appearance standards; however it must be done without imposing restrictions or requirements specific to gender or sex. It will not be a defense that an employer or covered entity is catering to the preferences of their customers or clients.

Examples of Violations

- Maintaining grooming and appearance standards that apply differently to individuals who identify as men or women or which have gender-based distinctions. For example, requiring different uniforms for men and women, or requiring that female bartenders wear makeup.
- Requiring employees of one gender to wear a uniform specific to that gender.
- Permitting only individuals who identify as women to wear jewelry or requiring only individuals who identify as male to have short hair. Requiring all servers, for example, to always have long hair tied back in a ponytail or away from their face is not a violation unless it is applied unequally based on gender.
- Permitting female but not male residents at a drug treatment facility to wear wigs and high heels.
- Requiring all men to wear ties in order to dine at a restaurant.

Covered entities may avoid violations of the NYCHRL by creating gender-neutral dress codes and grooming standards. For example, a covered entity may require individuals to either wear their hair short or pulled back from the face or require that workers must wear either a pantsuit or a skirt suit. Covered entities may provide different uniform options that are culturally typically male and typically female. For example, an employer that provides uniform shirts may provide a shirt that is more typical of a woman's blouse and another that is looser fitting in a style more typical of a man's button down shirt. It would be unlawful, however, to require an employee to wear one style over another.

5. Providing Employee Benefits that Discriminate Based on Gender

The NYCHRL prohibits covered entities from offering employee benefits that discriminate on the basis of gender. To comply with the law, entities must offer benefits equally to all employees regardless of gender. Employee benefit plans that are covered by, and in compliance with, the Employee Retirement Income Security Act and applicable federal anti-discrimination laws are also in compliance with the NYCHRL. [15]

It is unlawful for an employer to provide health benefit plans that deny or exclude services on the basis of gender. To be non-discriminatory with respect to gender, health benefit plans must cover transgender care, also known as transition-related care or gender-affirming care. In no case, however, will an employer that has selected a non-discriminatory plan be liable for the denial of coverage of a particular

medical procedure by an insurance company, even when that denial may constitute discrimination on the basis of gender.

Transgender care is medically necessary, effective, and even life-saving for many transgender people. Transgender care includes a range of treatments, including, for example, hormone replacement therapy, voice training, or surgery. What a particular individual will seek differs according to their needs and overall health. Some insurance plans categorically exclude transgender care from coverage. Federal law requires self-insured plans governed by the Affordable Care Act to cover medically necessary transition-related care and New York State law requires fully-insured New York plans to do the same. [16]

Examples of Violations

- Employers offering health benefits to the opposite-sex spouses of employees, but not same-sex spouses.
- Employers offering health benefits that do not cover care when an individual's sex assigned at birth or gender otherwise recorded in a medical record or insurance plan is different from the one to which health services are ordinarily or exclusively available. For example, offering benefits that cover prostate cancer screening for cisgender men but not for transgender women.
- Employers offering health benefits that categorically exclude from coverage, or limit coverage for, health services related to gender transition.
- Employers offering any other employee benefits that discriminate on the basis of gender. For example, offering a stipend for child care to female but not male employees.

Covered entities may avoid violations under the NYCHRL by reviewing their existing health benefit plans, and if they do not already, provide an option that includes comprehensive coverage for transgender people. Employers should take care to select plans that follow recognized professional standards or medical care for transgender individuals, for example, the standards of care of the World Professional Association for Transgender Health. Because there are few health care providers currently performing certain transition-related and/or gender-affirming care, employers should consider selecting plans that do not prohibit, place limits on, or have significantly higher co-pays or low reimbursements rates for out-of-network care.

6. Considering Gender When Evaluating Requests for Accommodations

The NYCHRL prohibits covered entities from considering gender when evaluating requests for accommodations for disabilities, or other requests for changes to the terms and conditions of one's employment, participation in a program, or use of a public accommodation, which may include additional medical or personal leave or schedule changes. [17] When a covered entity grants leave or time off of work to employees for medical or health reasons, it shall treat leave requests to address medical or health care needs related to an individual's gender identity in the same manner as requests for all other medical conditions. Covered entities shall provide reasonable accommodations to individuals undergoing gender transition, including medical leave for medical and counseling appointments, surgery and recovery from gender affirming procedures, surgeries and treatments as they would for any other medical condition.

Examples of Violations

- An employer who has a policy of routinely granting unpaid medical leave upon request to individuals who have been working for the employer for over a year, who refuses to honor that policy when the request is made by a transgender individual.

- When an employer or covered entity permits a reasonable accommodation for a cisgender woman seeking reconstructive breast surgery deemed medically necessary but refuses that same accommodation when requested by a transgender woman undergoing the same medically necessary surgery.
- Requesting medical documentation to verify leave time from transgender employees or participants, but not cisgender employees or participants.
- Determining the retention and accrual of benefits, such as seniority, retirement, and pension rights, during personal or medical leave periods for employees based on gender.

Employers may avoid violations under the NYCHRL by creating internal procedures to evaluate all requests for accommodations in a fair and non-discriminatory manner.

7. Engaging in Discriminatory Harassment

The NYCHRL prohibits discriminatory harassment or violence motivated by a person's actual or perceived gender identity or expression that attempts to interfere with, or actually interferes with, the free exercise of a legal right. Discriminatory harassment includes violence, the threat of violence, a pattern of threatening verbal harassment, the use of force, intimidation or coercion, defacing or damaging real property and cyberbullying. For example, a tenant assaulting or threatening to assault a neighbor because of her gender expression, in addition to committing a crime, is also violating the NYCHRL.

8. Engaging in Retaliation

The NYCHRL prohibits retaliation against an individual for opposing discrimination or requesting a reasonable accommodation for a disability based on gender identity or expression. Opposing discrimination includes, but is not limited to, making an internal complaint about discrimination, making an external complaint of discrimination to the Commission or another government agency, or participating in an investigation of discrimination. An action taken against an individual that is reasonably likely to deter them from engaging in such activities is considered unlawful retaliation. The action need not rise to the level of a final action or a materially adverse change to the terms and conditions of employment, housing, or participation in a program to be retaliatory under the NYCHRL. When an individual opposes what they believe in good faith to be unlawful discrimination, it is unlawful to retaliate against the individual even if the conduct they opposed is not ultimately determined to violate the NYCHRL.

<u>Examples of Violations</u>

- Repeatedly assigning an individual to work the least desirable shifts contrary to the normal practice of rotating those shifts equally among staff after the individual makes an internal complaint of discrimination.
- Demoting or firing an individual who has filed a complaint with the Commission or has filed their own case in civil court.
- Failing to grant accommodations for an individual otherwise not required under the law but that are routinely provided by the employer after the individual was interviewed as a witness in a coworker's case alleging discrimination.
- Refusing to advance a program participant to the next stage of the program despite their successful completion of the previous stage because the participant raised concerns about unequal treatment.

Covered entities may avoid violations of the NYCHRL by implementing internal anti-discrimination policies to educate employees, tenants, and program participants of their rights and obligations under the NYCHRL with respect to gender identity and expression and regularly train staff on these issues. Covered entities should create procedures for employees, tenants, and program participants to internally report violations of the law without fear of adverse action and train those in supervisory capacities on how to handle those claims when they witness discrimination or instances are reported to them by subordinates. Covered entities that engage with the public should implement a policy for interacting with the public in a respectful, non-discriminatory manner consistent with the NYCHRL, respecting gender diversity, and ensuring that members of the public do not face discrimination, including with respect to single-sex programs and facilities.

IV. PENALTIES IN ADMINISTRATIVE ACTIONS

The Commission can impose civil penalties up to $125,000 for violations, and up to $250,000 for violations that are the result of willful, wanton, or malicious conduct. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the particular violation;
- The existence of previous or subsequent violations;
- The employer's size, considering both the total number of employees and its revenue; and
- The employer's actual or constructive knowledge of the NYCHRL.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with other compensatory and punitive damages. The Commission may consider the lack of an adequate anti-discrimination policy as a factor in determining liability, assessing damages, and mandating certain affirmative remedies.

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1 Local Law No. 85 (2005); see also N.Y.C. Admin. Code § 8-130 ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.")

2 Local Law No. 3 (2002); N.Y.C Admin. Code § 8-102(23).

3 Id.

4 Report of the Governmental Affairs Division, Committee on General Welfare, Intro. No. 24, to amend the administrative code of the city of New York in relation to gender-based discrimination (April 24, 2002) accessible through http://legistar.council.nyc.gov/Legislation.aspx.

5 Id.

6 Id.

7 N.Y.C. Admin. Code § 8-102(23).

8 Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 39 (App. Div. 2009)

9 Protections on the basis of gender under the NYCHRL are subject to the same limitations as all other protected categories. See N.Y.C. Admin. Code §§ 8-102(5); 8-107(5)(a)(4)(1),(2); 8-107(4)(b).

10 Ze and hir are popular gender-free pronouns preferred by some transgender and/or gender non-conforming individuals.

11 Where covered entities regularly request a form of identification from members of the public for a legitimate business reason, requesting a form of identification from transgender and/or gender non-conforming individuals is not unlawful. Just as is the case for many cisgender individuals, many transgender and/or gender non-conforming individuals' appearances may not appear the same as what is represented on their photo identification. Covered entities may use a form of identification to corroborate an individual's identification, but may not subject a transgender or gender non-conforming individual to a higher level of scrutiny than any other person presenting a form of identification.

12 A single-occupancy restroom is a room with a single toilet, walls, a sink, and a door.

13 See, e.g., Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076 (9th Cir. 2004) aff'd on reh'g, 444 F.3d 1104 (9th Cir. 2006) (granting summary judgment for defendant because plaintiff failed to produce evidence that requiring female bartenders to wear makeup placed greater burden on women than on men); Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977) (finding that a requirement that male employees wear ties was not sex discrimination under Title VII because it was not overly burdensome to its employees); Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977) (holding that "employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976) (holding that requiring short hair on men and not on women does not violate Title VII).

14 EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608-09 (S.D.N.Y. 1981), supplementing decision, 521 F. Supp. 263 (S.D.N.Y. 1981).

15 N.Y.C. Admin. Code § 8-107(e)(i).

16 Patient Protection & Affordable Care Act, 42 U.S.C. § 18116 (2010); N.Y. Dep't. of Fin. Serv., Insurance Circular Letter No. 7 on Health Insurance Coverage for the Treatment of Gender Dysphoria (Dec. 2014). The Commission does not have jurisdiction to enforce these laws.

17 While it is not the focus of this guidance, transgender individuals may have additional rights under Section 8-107(15) of the NYCHRL, including the right to reasonable accommodations. Some transgender people have a diagnosis of gender dysphoria, which is a disability within the meaning of the NYCHRL. As with any disability, covered entities must make reasonable accommodations for individuals with gender dysphoria.

File #:	Int 1186-2016 Version: A	Name:	Amending the definitions of sexual orientation and gender in the New York city human rights law.
Type:	Introduction	Status:	Enacted
		Committee:	Committee on Civil Rights
On agenda:	5/25/2016		
Enactment date:	1/11/2018	Law number:	2018/038
Title:	A Local Law to amend the administrative code of the city of New York, in relation to amending the definitions of sexual orientation and gender in the New York city human rights law		
Sponsors:	Daniel Dromm , Margaret S. Chin, Rosie Mendez, Corey D. Johnson, James Vacca, Carlos Menchaca, Ritchie J. Torres, Ydanis A. Rodriguez, Rafael Salamanca, Jr., Ben Kallos		
Council Member Sponsors:	10		
Summary:	This bill would amend the definitions for sexual orientation and gender in the New York City Human Rights Law.		
Attachments:	1. Summary of Int. No. 1186-A, 2. Summary of Int. No. 1186, 3. May 25, 2016 - Stated Meeting Agenda with Links to Files, 4. Committee Report 6/19/17, 5. Hearing Testimony 6/19/17, 6. Hearing Transcript 6/19/17, 7. Proposed Int. No. 1186-A - 12/12/17, 8. Committee Report 12/7/17, 9. Hearing Transcript 12/7/17, 10. December 11, 2017 - Stated Meeting Agenda with Links to Files, 11. Hearing Transcript - Stated Meeting 12-11-17, 12. Int. No. 1186-A (FINAL), 13. Fiscal Impact Statement, 14. Legislative Documents - Letter to the Mayor, 15. Local Law 38, 16. Minutes of the Stated Meeting - December 11, 2017		

History (13) | Text

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Date	Ver.	Prime Sponsor	Action By	Action	Result	Action Details	Meeting Details	Multimedia
1/17/2018	A	Daniel Dromm	City Council	Returned Unsigned by Mayor		Action details	Meeting details	Not available
1/11/2018	A	Daniel Dromm	Administration	City Charter Rule Adopted		Action details	Meeting details	Not available
12/18/2017	A	Daniel Dromm	Mayor	Hearing Scheduled by Mayor		Action details	Meeting details	Not available
12/11/2017	A	Daniel Dromm	City Council	Sent to Mayor by Council		Action details	Meeting details	Not available
12/11/2017	A	Daniel Dromm	City Council	Approved by Council	Pass	Action details	Meeting details	Not available
12/7/2017	*	Daniel Dromm	Committee on Civil Rights	Hearing Held by Committee		Action details	Meeting details	Not available

Date	Ver.	Prime Sponsor	Action By	Action	Result	Action Details	Meeting Details	Multimedia
12/7/2017	*	Daniel Dromm	Committee on Civil Rights	Amendment Proposed by Comm		Action details	Meeting details	Not available
12/7/2017	*	Daniel Dromm	Committee on Civil Rights	Amended by Committee		Action details	Meeting details	Not available
12/7/2017	A	Daniel Dromm	Committee on Civil Rights	Approved by Committee	Pass	Action details	Meeting details	Not available
6/19/2017	*	Daniel Dromm	Committee on Civil Rights	Hearing Held by Committee		Action details	Meeting details	Not available
6/19/2017	*	Daniel Dromm	Committee on Civil Rights	Laid Over by Committee		Action details	Meeting details	Not available
5/25/2016	*	Daniel Dromm	City Council	Referred to Comm by Council		Action details	Meeting details	Not available
5/25/2016	*	Daniel Dromm	City Council	Introduced by Council		Action details	Meeting details	Not available