

New York City and State Expand Protections for Transgender, Non-Binary, Gender Non-Conforming Workers

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Protections for transgender, non-binary, and gender non-conforming employees in New York have been given a boost. Significant changes to the New York City Human Rights Law (NYCHRL) will expand the scope of prohibited discriminatory conduct. Additionally, New York State has enacted the Gender Expression Non-Discrimination Act (GENDA), which went into effect on February 25, 2019.

NYCHRL Rule Changes Generally

The New York City Commission on Human Rights (NYCCHR) adopted rules that amend and significantly broaden protections against workplace discrimination based on an individual's gender, including gender identity or gender expression. The rule changes amend the definitions of key terms previously omitted or undefined by the NYCHRL. The rule changes also include new examples of discriminatory conduct, such as imposing different dress or grooming standards based on gender. The rules were proposed in September 2018 and will go into effect on March 9, 2019.

New Examples of Discriminatory Conduct

The new NYCHRL rules provide [examples of unlawful discriminatory practices](#) based on the new, broader definition of gender. Examples include:

- Deliberately refusing to use an individual's self-identified name, pronoun, or title, as in the following situations:
 - Deliberately calling a transgender woman "Mr." after she makes clear she uses female titles;
 - Requiring a court-ordered name change or proof of a medical procedure before agreeing to use an individual's preferred name, pronoun, or title;
 - Refusing to use a preferred name in an email account;
- Refusing to allow individuals to use single-gender facilities or single-gender programs consistent with their gender identity;
- Imposing different dress or grooming standards based on gender (except for actors required to wear gender-specific costumes if required by a role);
- Denying, limiting, or excluding employees from benefits or services based on gender; and
- Using gender as a basis for refusing a request for accommodation for disability or other request for changes to the terms or conditions of employment.

The rule amendments make clear that the list of examples does not rule out other potential violations of the NYCHRL.

New Definitions for Key Terms

The NYCHRL rules amend a number of definitions and effectively broaden the scope of covered individuals. While the NYCHRL has long-prohibited workplace discrimination based on gender identity or expression, the new rules add prohibitions against discrimination based on an individual's "actual or perceived" gender or "other gender-related characteristics."

The rule changes also set out a number of new definitions for gender-related terms described in the amendments:

- "Cisgender" is a term describing "a person whose gender identity conforms with their sex assigned at birth."

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- “Gender” is defined as “includ[ing] actual or perceived sex, gender identity and gender expression, including a person’s actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth.”
- “Gender expression” is the “representation of gender as expressed through one’s name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics”
- “Gender non-conforming” is “a term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture and historical period”
- “Intersex” is defined as “a term used to refer to a person whose sex characteristics ... do not conform to a binary construction of sex as either male or female.”
- “Non-binary” is “used to describe a person whose gender identity is not exclusively male or female. For example, some people have a gender identity that blends elements of being a man or a woman or a gender identity that is neither male or female.”
- “Sex” is defined as “a combination of several characteristics,” including, but not limited to, “chromosomes, hormones, internal and external reproductive organs, facial hair, vocal pitch, development of breasts, and gender identity.”
- “Transgender” is “a term used to describe a person whose gender identity does not conform with the sex assigned at birth.”

The effect of the new definitions is to broaden the definition of “gender” in the NYCHRL to cover a wider range of individuals and situations. Please see our article, [New York State and New York City Guidance Focus on Transgender Discrimination](#), for a comprehensive review of the prior NYCHRL rules regarding gender identity.

GENDA Enacted in New York State

The new NYCHRL rules follow New York State’s enactment of GENDA, which adds “gender identity or expression” as protected categories in the New York State Human Rights Law (NYSHRL). The NYSHRL now defines “gender identity or expression” as “a person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-based characteristic regardless of the sex assigned to that person at birth, including but not limited to the status of being transgender.” Under existing protections in the NYSHRL, employers found liable for discrimination may be responsible for back pay and compensatory damages.

Next Steps for Employers

Taken together, these changes in City and State law provide robust protections against discrimination based on gender identity or gender expression. Employers should consider the following to avoid liability under the new rules:

Employee training: Employees, including managers and supervisors, should receive training on prohibitions under state and city law regarding gender discrimination and harassment. Managers training may include how to respond to reports of harassment based on gender identity or expression and requests for an accommodation based on a gender transition. Managers should be aware of potential privacy issues regarding an employee’s transgender status and how best to implement a gender transition plan. Staff trainings should give all employees the tools to know what to do or not to do when a colleague or subordinate discusses his or her gender identity and how to avoid misgendering or labeling someone improperly. As part of New York State and City’s mandatory anti-harassment training to new and existing employees, employers should ensure that such trainings encompass the new prohibitions, particularly they are covered by the NYCHRL.

Conduct a policy/documentation review: Employers should review their handbooks for compliance with the new State and City rules. In particular, employers should include explicit prohibitions against discrimination based on gender identity and gender expression. Employers may need to give special attention to policies regarding accommodations, dress code, facilities usage, and employee email and identification protocols, all of which may contain gender references that may be unlawful under the new rules. Additionally, employers should review documentation such as applications and benefit forms to ensure such paperwork allows new and existing employees to select their pronoun preference. Employers should consider the adoption of a transgender/gender transition policy (discussed below) to address each of the above issues.

Gender transition plan: Employers should consider implementing a gender transition plan that details how to proceed when an employee announces a plan to transition or a recently completed transition. Among other things, the plan should address how to handle identification and email account changes, employee record changes, security clearance issues, facilities usage, sensitivity training, privacy, and complaint procedures. When designing such plans, key considerations include the timeline for implementation, how to handle requests for confidentiality, and how communications, if any, will be handled regarding the transition.

Review employee benefit plans: Employers should review benefit policies to ensure equal benefits, without regard to gender, including gender identity or expression. The forms and other requirements placed on employees should be equal for cisgender and gender non-conforming individuals. Plans should allow gender non-conforming individuals access to transition services.

Please contact the authors or the Jackson Lewis attorney with whom you regularly work with any questions about policies, training for management and employees, and other preventive practices.

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