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## NY City Commission on Human Rights Adopts Rules on Gender Identity and Expression

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The New York City Commission on Human Rights (the Commission) recently adopted new rules addressing discrimination based on gender identity or expression under the New York City Human Rights Law (NYCHRL). These new rules, which go into effect on March 9, 2019, address NYC employers' obligations towards gender non-conforming employees. The rules have two primary purposes: (1) provide examples of behavior that the Commission will deem to be in violation of the NYCHRL; and (2) establish definitions for a number of gender-related terms. The Commission previously published enforcement guidance on discrimination based on gender identity in December 2015 as noted in our January 2016 [alert](#).

NYC employers should become familiar with these new rules as they create new avenues of potential liability for employers of gender non-conforming employees.

### Examples of Prohibited Gender-Based Behavior Under the NYCHRL

#### *Deliberate Refusal to Use an Individual's Self-Identified Name, Pronoun or Title*

An employer's deliberate refusal to use an employee's self-identified name, pronoun, or title is a violation of the NYCHRL when that refusal is motivated by the individual's gender, according to the Commission. Employers cannot refuse to use an employee's self-identified name, pronoun, or gendered title, even if it may be inconsistent with that employee's sex assigned at birth, sex indicated on an employee's identification, anatomy, gender, or medical history. The only exception provided by the Commission is where federal, state, or local law may

require otherwise, such as for purposes of employment eligibility verification with the federal government. Employers are allowed to ask someone in good faith what their name is or which pronoun they prefer without violating the NYCHRL.

The Commission has identified examples of behavior it believes violates the NYCHRL with respect to an employer's use of an employee's name, pronoun, or title, including the following:

- An employer's refusal to use an employee's self-identified name in their email account;
- Calling a transgender woman "Mr." after she has informed the employer she uses female pronouns;
- Using the pronoun "he" for a non-binary person who may be perceived as male but has said they identify as non-binary and use the pronouns "they," "them," and "theirs";
- Requiring an employee to obtain a court-ordered name change or provide identification that matches an employee's self-identified name before allowing the employee to use their self-identified name at work; or
- Requiring an employee to provide information about their medical history in order to use their self-identified name, pronoun, or title.

#### *Denying Individuals' Use of Single-Gender Facilities or Participation in Single-Gender Programs Consistent with Their Gender Identity*

Employers must allow individuals to use single-gendered facilities and participate in single-gendered

programs that are consistent with an employee's gender identity, including bathrooms and locker rooms. An employer cannot use the objections of others to sharing a single-gendered facility with a transgender, non-binary, or gender non-conforming person as a defense to this requirement. Employers also cannot require that an employee provide any proof of their gender before allowing them to use the single-gendered facility of their choosing nor can an employer require that a gender non-conforming employee use a unisex facility instead of a single-gendered one.

### ***Imposing Different Dress or Grooming Standards Based on Gender***

The Commission's rules prohibit employers from imposing different dress or grooming standards on their employees based on their gender. Thus, employers cannot require different uniforms for men and women, but may provide different options that are typically associated with men and women so long as the employer does not require an employee to wear one style instead of the other. For example, an employer may not allow only female employees to wear makeup or jewelry or only allow male employees to wear ties. There is no exception to this rule for the preferences of an employer's customers or clients. The only exception to this rule is for actors who may be required to wear gender-specific clothing if a role requires it.

### ***Employers Must Provide Equal Employee Benefits Regardless of Gender***

Employer benefit plans must offer benefits equally to all employees regardless of gender and may not provide health benefit plans that deny, limit, or exclude services based on gender. Benefit plans may not exclude coverage for transgender care, transition-related care, or gender-affirming care, such as hormone replacement therapy, psychological or psychiatric treatment, hormone suppressors, voice training, or surgery.

This prohibition extends to employer leave policies as well. Employers may not provide different amounts of parental leave to mothers than they do for fathers. Leave policies may differentiate the amount of leave given to new parents to allow for

additional time for the physical recovery from childbirth, but employers may not otherwise premise differences in the amount of parental leave given based on a parent's gender.

### ***Gender May Not Be the Basis for Refusing a Request for Accommodation***

Gender may not be used as a reason to deny an employee's request for an accommodation or for other changes to the terms and conditions of employment, including additional medical or personal leave or schedule changes. The Commission requires that employers treat leave requests to address medical or health care needs related to gender identity the same as employers would treat requests for any other medical condition. Employers also must provide reasonable accommodations for employees undergoing a gender transition. This includes providing leave time for medical and counseling appointments, surgery, and for recovery from gender-affirming procedures, surgeries, or treatments, as they would for any other medical condition. As an example, the Commission states that employers cannot refuse to provide a reasonable accommodation for a transgender woman undergoing medically necessary reconstructive breast surgery when it would provide an accommodation to a cisgender woman undergoing the same surgery.

### ***New Gender-Related Definitions***

The new rules provide definitions for a wide range of terms relating to gender and gender identity, including definitions for "gender" and "sex." Employers should become familiar with these terms because, as discussed above, improper use of terms relating to gender and gender identity could run the risk of an employer violating the NYCHRL.

- **Gender:** includes 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.

- **Sex:** 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.
- **Cisgender:** a term used to describe a person whose gender identity conforms with their sex assigned at birth.
- **Gender expression:** the representation of gender as expressed through one's name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics. Gender expression may or may not conform to gender stereotypes, norms, and expectations in a given culture or historical period. Terms associated with gender expression include, but are not limited to, androgynous, butch, female/woman/feminine, femme, gender non-conforming, male/man/masculine, or non-binary.
- **Gender identity:** the internal deeply-held sense of one's gender which may be the same as or different from one's sex assigned at birth. A person's gender identity may be male, female, neither or both, i.e., non-binary. Terms associated with gender identity include, but are not limited to, agender, bigender, female/woman/womxn/feminine, female to male (FTM), gender diverse, gender fluid, gender queer, male/man/masculine, male to female (MTF), man of trans experience, pangender, or woman of trans experience.
- **Gender non-conforming:** a term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture and historical period. Terms associated with gender non-conforming include, but are not limited to, androgynous, gender expansive, gender variant, or gender diverse.
- **Intersex:** a term used to refer to a person whose sex characteristics (chromosomes, hormones, gonads, genitalia, etc.) do not conform with a binary construction of sex as either male or female.

- **Non-binary:** a term 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 nor female.
- **Transgender:** sometimes shortened to "trans," is a term used to describe a person whose gender identity does not conform with the sex assigned at birth.

### ***Next Steps for NYC Employers***

Employers in NYC should take immediate steps to ensure that they are in compliance with these new rules. Among other things, employers should take the following actions as soon as possible:

- Review all employee handbooks and personnel policies to ensure that they contain protections from discrimination based on an employee's gender identity or expression.
- Review all leave of absence and reasonable accommodation policies, including parental leave policies, to ensure that employees are not being given different benefits based on their gender. These policies should also be reviewed to ensure that gender non-conforming employees are not being given different benefits or have different requirements placed upon them than are given or placed upon cisgender employees.
- Review any and all benefit plans, including medical benefit plans, to verify that they do not discriminate against employees based on their gender. In particular, employers must ensure that limitations are not placed on gender non-conforming employees covered by their plans and that the plans provide coverage for services related to gender transition.
- Review all employment-related documents upon which an employee's name appears and the policies and procedures that cover such documentation. Employees must be allowed to use their self-identified name, title, and pronoun in the workplace and be able to have

that information changed at their request. This would include, but not be limited to:

- Email addresses;
  - Business cards;
  - Company directories;
  - Job applications;
  - New hire documents;
  - Benefit applications;
  - Human resources or other personnel databases; and
  - Employer website.
- Create procedures to update all records that may contain an employee's name, title or pronoun to avoid running afoul of the rules by inadvertently failing to update certain documents when an employee informs you of a change to their gendered pronouns. Employers also must take care to ensure that employees are given the option of choosing more than just male or female pronouns or titles when completing applications or other forms to allow non-binary employees to indicate their preferences.
  - Train managers and human resources staff on gender identity issues. Managers and human resources personnel need to know what to do when an employee informs them of information relating to an employee's gender identity, including requests to use an employee's self-identified name, pronoun, or title.

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