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Understanding New York Regulations Regarding Prohibited Discrimination on the Basis of Gender Identity, Transgender Status, or Gender Dysphoria

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New York State and New York City both recently enacted regulations and enforcement guidance designed to prohibit discrimination on the basis of gender identity, transgender status, gender expression and gender dysphoria.¹ Both have now taken effect.

I. NEW YORK STATE REGULATIONS EFFECTIVE JANUARY 20, 2016

On October 22, 2015, the New York State Division of Human Rights promulgated new proposed regulations under the New York State Human Rights Law (“NYSHRL”), prohibiting discrimination or harassment on the basis of gender identity, transgender status, or gender dysphoria.² These new regulations took effect on January 20, 2016. The state regulations provide that:

- Discrimination on the basis of gender identity is sex discrimination, and the protections in the NYSHRL against gender discrimination also prohibit discrimination on the basis of gender identity or transgender status.
- Harassment on the basis of a person’s gender identity or transgender status constitutes sexual harassment.
- Discrimination on the basis of gender dysphoria is disability discrimination, and the prohibitions in the NYSHRL against disability discrimination prohibit gender dysphoria.

1 “Gender dysphoria” is defined as a medical condition related to an individual having a gender identity different from the sex assigned to him or her at birth, and recognized as a disability under the New York State Human Rights Law. 9 N.Y.C.R.R. § 466.13(b)(3),(d).

2 9 N.Y.C.R.R. § 433.13.

- Refusal to provide reasonable accommodations for persons with gender dysphoria, where requested and necessary,³ is disability discrimination.
- Harassment on the basis of a person's gender dysphoria is harassment on the basis of disability.⁴

II. NEW YORK CITY COMMISSION ON HUMAN RIGHTS ENFORCEMENT GUIDANCE

On December 21, 2015, the New York City Commission on Human Rights (“the City Commission”) issued lengthy and detailed Legal Enforcement Guidance (“the Guidance”) addressing the scope of prohibitions against discrimination on the basis of gender identity and gender expression.⁵ The Guidance details several prohibited activities that are considered unlawful discrimination on the basis of gender identity and gender.

The New York City Human Rights Law (“NYCHRL”) was amended in 2002 to change the definition of “gender” for the purposes of the NYCHRL to “include 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.”⁶

More than 13 years after the amendment, riding a wave of progressive legislation from the City Council and a growing list of states and municipalities providing specific protections from discrimination on the basis of gender identity,⁷ the City Commission issued the Guidance, which for the first time identified specific conduct that constitutes unlawful discrimination on the basis of gender identity or gender expression.

A. Conduct Constituting Unlawful Discrimination on the Basis of Gender Identity or Gender Expression

The Guidance clarifies that the NYCHRL prohibits discrimination in the terms and conditions of employment based upon gender identity or gender expression. The protections, like most prohibitions against discrimination on the basis of a protected category, apply to employment, housing and public accommodations.

The Guidance identifies the following eight distinct categories of conduct that constitutes unlawful discrimination on the basis of gender identity or gender expression:

1. Failing to Use and Individual’s Preferred Name or Pronoun

The Guidance takes the position that covered employers⁸ and entities are legally required to use an individual’s preferred name, pronoun and title (such as Mr., Ms. or Mrs.) regardless of their gender at birth, their anatomy, gender, medical history, appearance, or the gender listed on their identification. It violates the NYCHRL to intentionally or repeatedly refuse to use an individual’s preferred name, pronoun or title, or to require that they provide a court-ordered name change or certification in order to use their preferred name. An employer cannot refuse to call a transgender woman by her preferred name, e.g., “Alice,” because her identification states her name is “David.” An employer may not require an individual to provide information about their medical history or proof of having undergone medical procedures in order to use their preferred name, pronoun or title.

2. Refusing to Allow Individuals to Use Single-Sex Facilities and Programs Consistent With Their Gender Identity

The Guidance provides that employers and businesses must permit individuals to use single-sex facilities, such as restrooms or locker rooms, and participate in single-sex programs consistent with their gender identity. The Guidance clarifies that the

³ Regulations governing reasonable accommodations for disabilities under New York Law are set forth in 9 N.Y.C.R.R. § 466.11.

⁴ 9 N.Y.C.R.R. 466.13 (c)(2), (3), (d) (3) – (5).

⁵ See <http://www.nyc.gov/html/cchr/html/law/gender-identity-legalguidance.shtml>

⁶ N.Y.C. Admin. Code § 8-102(23).

⁷ Currently 19 states and over 200 municipalities prohibit discrimination on the basis of transgender status and/or gender identity. See <http://transgenderlawcenter.org/equalitymap>; http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies (last visited on January 20, 2016).

⁸ Both the NYSHRL and the NYCHRL cover employers with four or more persons in their employ. N.Y.C. Admin Code § 8-102.5. However, the NYSHRL was amended, effective January 19, 2016 so that sexual harassment claims may be brought regardless of the number of employees. N. Y. Exec. L. § 292.5.

law does not require employers or places of public accommodation to make existing restrooms unisex or construct additional restrooms. However, the Guidance also clarifies that objections by employees, customers, and program participants about sharing a facility with a transgender or gender non-conforming individual are not a lawful reason to deny that individual access to a single-sex facility.

Violations of the NYCHRL include prohibiting an individual from using a facility or program because they are transgender, gender non-conforming or do not conform to sex stereotypes, requiring a transgender or gender non-conforming person to provide proof of their gender or identification showing a particular sex in order to access same sex facilities or programs, barring such an individual from participating in a program or using a facility because they may make someone uncomfortable, or forcing such individual to use a single occupancy restroom. So, an employer or business open to the public cannot lawfully ban a transgender employee or patron from a single-sex bathroom because other employees or patrons are uncomfortable, no matter how vociferously the employees or patrons protest.

3. Sex Stereotyping

The Guidance explains that discriminating against an individual because they do not conform to gender stereotypes is a form of gender discrimination. Such acts constitute treating an individual differently because they do not conform to widely held stereotypes of how people of a particular gender should look, act or dress – that is, they are insufficiently masculine or feminine. Violations of NYCHRL based on sex-stereotyping include using anti-gay or derogatory epithets when speaking to or about an individual based on their nonconformity with gender norms, or overlooking a female employee for promotion because her behavior does not conform to how the employer expects a female to behave at work.

4. Imposing Differential Uniform or Grooming Standards Based on Gender

The Guidance states that employers and covered entities may not require dress codes, uniforms, or grooming or appearance standards that differ based upon sex or gender. So, employers and businesses cannot require that only men wear ties, that male and female waiters wear different uniforms, or that only female employees may wear skirts or make-up. This standard differs from prior federal court decisions which have held that different dress and grooming standards based on sex or gender are lawful if they do not impose an undue burden.⁹ Under the NYCHRL, in contrast, “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.”¹⁰ Covered employers and businesses are entitled to enforce a dress code or require specific grooming or appearance standards, as long as those standards do not differentiate on the basis of gender.

5. Providing Employee Benefits that Discriminate Based on Gender

The NYCHRL prohibits offering benefits that discriminate on the basis 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 comply with the NYCHRL.¹¹ However, the Guidance specifically states that to be non-discriminatory, *health benefit plans must cover transgender-related medical procedures and transition-related healthcare* (also known as transition-related care or gender-affirming care). Employers are not, however, responsible for denial of coverage for a medical procedure by an insurance carrier if the plan itself does not discriminate. Violations of the NYCHRL relating to the provision of employee benefits include offering health benefits to opposite sex spouses of employees but not same-sex spouses, offering health services that provide certain procedures to others but which are not covered for transgender employees (for example, covering prostate cancer screenings for men but not for transgender women), categorically excluding from coverage health services related to gender transition, or any other benefits that discriminate by gender (for example offering child care benefits to female but not male employees).

⁹ See, e.g., *Jespersion 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) (gender discrimination claims dismissed because plaintiff failed to demonstrate that requiring female bartenders to wear makeup placed a greater burden on women).

¹⁰ Guidance at p. 7.

¹¹ N.Y.C. Admin Code § 8-107(e)(i).

6. Considering Gender When Evaluating Requests for Accommodations

It is unlawful under the NYCHRL to consider gender when evaluating requests for accommodation for disabilities, changes to the terms and conditions of employment, participation in a program, or use of a public accommodation. Such requested accommodations may include medical or personal leave or changes in work schedule. Violations of the NYCHRL relating to requests for accommodation include an employer refusing to honor its policy of unpaid medical leave when the request is made by a transgender employee, an employer who permits an accommodation for a “cisgender”¹² female employee to have medically necessary reconstructive breast surgery but refuses the same accommodation for a transgender employee undergoing the same medically necessary surgery, requesting medical documentation to verify leave time from transgender employees but not cisgender employees, or determining the retention and accrual of benefits such as seniority and pension rights based on gender.

7. Discriminatory Harassment

Discriminatory harassment or violence motivated by a person’s actual or perceived gender identity or expression violates the NYCHRL.

8. Retaliation

The NYCHRL prohibits an employer from retaliating against an individual for opposing discrimination or requesting a reasonable accommodation. These prohibitions apply with equal force when the discrimination complained of is gender identity discrimination, or the accommodation request is based upon the individual’s gender identity. Any action taken against an individual because of such a request that is “reasonably likely to deter them from engaging in such activities” is unlawful retaliation.¹³ Unlawful retaliation includes firing or demoting an individual who files a complaint, assigning the individual to work less desirable shifts contrary to standard practice, failing to grant routinely provided accommodations, and refusing to advance an individual in a program because of their complaints.

B. Penalties for Discrimination Based on Transgender Status or Gender Identity

Employees claiming discrimination on the basis of their gender identity, gender expression or transgender status may file a complaint of discrimination with the City Commission or the State Division of Human Rights within one year of the discriminatory conduct or file a lawsuit within three years.¹⁴ A prevailing plaintiff can recover back pay, front pay, compensatory damages and, under New York City law, reasonable attorneys’ fees and punitive damages.¹⁵ In addition, the Commission can impose civil penalties of up to \$125,000 for violations and up to \$250,000 for violations it finds to be “willful, wanton and malicious.”¹⁶ In assessing a civil penalty, the Commission will look to several factors, including the severity of the violation, whether or not there were previous or subsequent violations, the employer’s size and its knowledge of the NYCHRL.

C. Recommendations for Employers

Discrimination on the basis of gender identity should be treated just as seriously as any other type of unlawful discrimination. Employers should read both the New York State Regulations and the Commission Guidance, and review their existing policies and procedures for compliance. Employers should consider revisions to their policies, benefits programs and handbooks to ensure they do not violate the NYSHRL and NYCHRL. Disability accommodation policies should be reviewed to ensure they cover medically necessary gender reassignment or transition procedures and do not exclude gender dysphoria as a disability.

The Guidance endorses a number of actions by employers to avoid each category of unlawful conduct described above including, among other things, education programs to inform supervisors and employees of the requirements of the NYCHRL. Employers should consider providing compliance training to supervisors, managers, human resources and recruiting personnel,

¹² “Cisgender” is a term used to denote to someone who is not transgendered; that is, someone whose gender identity corresponds to their biological sex.

¹³ Guidance at pp. 9-10.

¹⁴ N.Y. Exec. L. § 297; *Priore v. New York Yankees*, 761 N.Y.S.2d 608, 613 (App. Div. 1st Dep’t 2003) (New NYSHRL limitations period) N.Y.C. Admin Code § 8-109(e); N.Y.C. Admin Code § 8-502(d) (NYCHRL limitations period).

¹⁵ N.Y.C. Admin Code § 8-502(a),(f).

¹⁶ Guidance at p. 10.

and in-house counsel to ensure they understand their obligations to ensure lawful treatment of transgender employees. Further, employers must make sure that reporting procedures are available to employees so they can address questions that arise and any complaints get escalated.

Employers should consult experienced employment counsel to assist them in ensuring their policies, programs and benefits do not violate the law, and to provide them with best practices for compliance going forward.