

OPINION

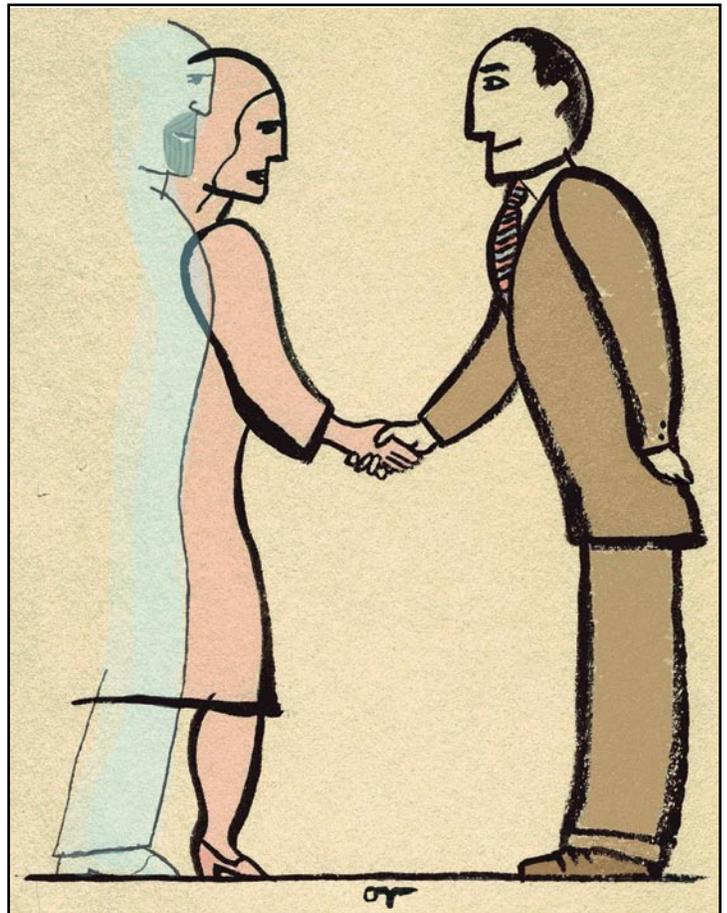
■ EMPLOYMENT DISCRIMINATION LAWS

Protecting gender identity

By *Alan I. Model* SPECIAL TO THE NATIONAL LAW JOURNAL

ON JUNE 17, New Jersey legislators amended the state's already extensive Law Against Discrimination (LAD) to prohibit employers from discriminating against individuals based on "gender identity or expression." New Jersey became the 10th state to expressly prohibit employment discrimination on the basis of gender identity or expression. (The other states are California, Illinois, Iowa, Maine, Minnesota, New Mexico, Rhode Island, Vermont and Washington.) On Aug. 3, Colorado became the 11th state to enact such protections and, on Jan. 1, 2008, Oregon's new legislation will go in to effect, making it the 12th state. In addition, several other states have court opinions or executive orders protecting gender identity or expression, and almost 100 municipalities have such protections in place as well. I applaud all the states that afford these protections to employees, and counsel employers to adapt to this ever-changing landscape of anti-discrimination standards.

Without some clarification, the scope of this new amendment to the LAD may leave many perplexed. According to the New Jersey Legislature, the phrase "gender identity or expression" means "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth." Unfortunately, it seems that many employers and employees alike find them-



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selves scratching their heads or burdened by a blank stare in response to this “formal definition.” This new protection, however, is not to be confused with the prohibition against “sexual orientation” discrimination, which has long been a part of New Jersey’s LAD.

Many will praise the New Jersey legislature for stepping up and embracing an ongoing commitment to diversity in the workplace. Others, however, less sensitive to the direct beneficiaries of this amendment and the societal significance, will likely be resistant to accepting the new protection. The reality is that state lawmakers, unfortunately, cannot magically eliminate workplace discrimination, whether it is based upon gender identity or expression or some other protected category. This goal can be realized only by the full acceptance and cooperation of the state’s employers.

Obviously, the threat of costly and damaging employment litigation is always a serious deterrent pushing certain employers toward embracing anti-discrimination measures and practices. But we cannot fool ourselves into believing that the mere enactment of a legislative change, albeit morally driven, will automatically eliminate gender-identity prejudice or stereotyping in the workplace. It is likely that, during the next months and years, the true test of the new legislation will be seen through court battles pinning employees against their employers.

Employers will not benefit by sitting on the sidelines regarding these new laws. They should not wait until service of a gender-identity or -expression dis-

crimination complaint before examining and/or adjusting their current workplace standards and practices. For example, employers should promptly consider the following actions to comply with the new laws and embrace diversity: First, assume that all individuals, regardless of whether their appearance fits into what is traditionally viewed as masculine or feminine, or into the gender into which they were born, may be covered by the law. Second, update diversity, anti-harassment and equal employment opportunity policies to cover “gender identity or expression,” and train the management team and employees about these issues. Third, review the dress code to ensure that it does not prohibit employees from dressing in conformity with their gender identity or expression. Employers must understand that the question is not if they will have to deal with these issues—but when. Adopting such a perspective will force employers to develop a plan to address gender identity and expression issues before they occur (e.g., how to deal with bathroom or locker room issues).

The hope is that most employers will view the protections afforded to individuals based on their gender identity and expression as another necessary step toward the acceptance of societal and workplace diversity. Those employers that may choose to brush off this workplace protection as just another expansion of the already liberal, pro-employee laws should think of it this way: The new legislation is a reminder that diversity is a core cultural value and our workplaces must reflect

such. Difference breeds genius, and without the ability to pool from the entire universe of available talent, companies can’t offer or sustain a high level of service to their clients. Workplace diversity provides an inclusive environment where ideas are exchanged freely and everyone has the opportunity for advancement. The present and future is clear: Employers that can’t, or won’t, effectively manage diversity will most likely perish in the long run. Such “unenlightened companies” will fall prey to those competitors that value and embrace diverse ideals. In the short run, those companies unwilling to accept diversity will face increased exposure to expensive and time-consuming lawsuits.

The survival tip is easy: Employers should follow their state legislatures’ lead and openly accept the anti-bias laws as further evidence of the societal commitment to diversity in our workplaces. ■