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Nevada has passed an amendment to its law against employment discrimination that adds gender identity and expression to the list of legally protected categories.

Nevada Adds Gender Identity to Categories Protected from Employment Discrimination

By Roger Grandgenett and Jamie Chu

Effective October 1, 2011, Nevada law will be amended to prohibit discrimination based on gender identity or expression of a person. The amendments, enacted through Assembly Bill 211 ("AB 211"), are primarily intended to extend protections and prohibit discrimination against transgender employees. The bill adds protections against discrimination based on gender identity and expression to Nevada's existing employment non-discrimination laws.

AB 211 defines gender identity or expression as "gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth." However, the definition of "gender" adopted by the Nevada Legislature goes beyond protecting against transgender discrimination. It also prohibits discrimination based on an individual's identity, appearance, expression or behavior as they relate to the individual's gender.

The law makes it unlawful "to fail to hire or to fire or otherwise discriminate" against employees based on their "gender identity or expression." Employers with 15 or more employees will be subject to the law. Nevada law already prohibits job discrimination based on a person's color, race, sex, religion, age, disability, national origin, or sexual orientation. Employees who believe they have been discriminated against under the new law can file complaints with the Nevada Equal Rights Commission.

Although employers cannot discriminate against people based on their gender "identity or expression," employers will be able to require all of their employees to wear appropriate workplace clothing. They will also be able to require employees to maintain grooming standards that are consistent with their preferred gender. The new law states, "It is not an unlawful employment practice for an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards so long as such requirements are not precluded by law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression." For example, it appears that a policy prohibiting males from wearing make-up would be valid, as long as an employee identifying with the male gender is also prohibited from wearing make-up.

It is unclear whether under AB 211 an employer can require that an employee use only

the restroom used by members of his or her biological sex. As a general matter under similar laws in effect elsewhere, usage policies for restrooms and locker room facilities are within the discretion of the employer, so long as those policies do not contravene applicable law. For example, in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), the Minnesota Supreme Court held that, under Minnesota's law, an employer may establish policies relating to restroom access based upon an individual's biological gender, as opposed to gender presentation, so long as the employer applies such policies consistently. It is common, however, for employers to permit employees to utilize these facilities based on their gender presentation to facilitate the transition for transgender employees.

In addition to employment practices, AB 211 further amends the law to state that it is the public policy of the State of Nevada to protect "the welfare, prosperity, health and peace of all the people of the State, and to foster the right of all persons reasonably to seek, obtain and hold employment without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, gender identity or expression, national origin or ancestry."

It is estimated that Nevada is the home of 25,000 to 50,000 transgender people. The signing of AB 211 into law makes Nevada the 14th U.S. state, along with California, Colorado, Hawaii, Illinois, Maine, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, Iowa, Oregon, Washington, and the District of Columbia, to provide some level of protection based on gender identity and/or expression. Connecticut is now the 15th state, as the Governor of Connecticut signed into law on July 1, 2011, an amendment adding "gender identity or expression" to the state's employment discrimination law. The Connecticut amendment also is effective on October 1, 2011.

In preparation for these amendments, Nevada employers should review and revise antidiscrimination policies and other handbook provisions to ensure compliance. Policies that may require modifications, include, but are not limited to:

- Policies establishing dress codes and other appearance standards;
- Policies and procedures for changing identification cards, personnel records, name changes, and issuance of new email addresses;
- Policies relating to nondisclosure of medical information and/or to general employee privacy;
- Policies on pre-employment screening and background or security clearances;
- Policies regarding the usage of bathrooms, locker rooms, and other gender-specific facilities;
- Codes of conduct; and
- Benefits policies, including removing exclusions from company-provided health care and short-term disability coverage for certain procedures that are medically necessary for employees in the process of gender affirmation/transitioning.

Employers should further incorporate discrimination and harassment issues relating to gender identity and expression into any employee and manager training. Employers also may want to consider creating guidelines that specify steps to be followed for gender transitions/affirmations by company employees before the issue arises.

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