

The NYC Commission on Human Rights Issues Sweeping Guidance Related to its Long-Standing Gender Discrimination Prohibitions

On December 21, 2015, the New York City Commission on Human Rights (the "Commission") issued [enforcement guidance](#) (the "Guidance") regarding discrimination on the basis of gender identity or expression. The Guidance explains that under the New York City Human Rights Law ("NYCHRL"), which prohibits discrimination on the basis of "gender identity, gender expression, and transgender status" or for being intersex, gender discrimination occurs whenever one is treated "less well than others on account of their gender." Guidance at 3 (quoting *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 39 (App. Div. 2009)). Prohibited discrimination "can be based on one's perceived or actual gender identity, which may or may not conform to one's sex assigned at birth, or on the ways in which one expresses gender, such as through appearance or communication style." *Id.*

The detailed Guidance provides numerous examples of unlawful gender-based discrimination, including discrimination on the basis of gender identity, gender expression, and transgender status. In addition, the Guidance provides a collection of gender-related definitions.¹ Employers' adoption of these terms may improve their ability to communicate clearly with managers and employees regarding their rights and duties under the NYCHRL. Although gender-based discrimination was previously prohibited by a number of New York City laws and regulations,² the new Guidance may nonetheless require revisions to employers' policies and practices.

Examples of Discriminatory Conduct

Examples of discriminatory conduct identified by the Guidance include:

- Failing to Use an Individual's Preferred Name or Pronoun. Intentional or repeated refusal to use an individual's preferred pronoun is a violation, as is conditioning use of this pronoun on a court-ordered name change or the provision of information related to medical history or medical procedures.
 - The Commission proposes "creating a policy of asking everyone what their preferred gender pronoun is so that no individual is singled out for such questions and by updating their systems to allow all individuals to self-identify their names and genders. [Employers] should not limit the options for identification to male and female only." Guidance at 4.
- Refusing to Allow Individuals to Utilize Single-Sex Facilities and Programs Consistent with Their Gender. The NYCHRL requires that individuals be permitted to use single-sex facilities and programs consistent with their gender, regardless of sex assigned at birth, medical history, appearance, or the sex indicated on their identification. This does not require the construction of additional restrooms or all-gender restrooms, but single-occupancy restrooms should be designated for use by all genders. Examples of violations include prohibiting a transgender woman from using the women's bathroom, requiring a transgender or gender non-conforming individual to provide proof of gender or identification in order to access the appropriate single-sex program or facility, barring someone from a program or facility out of concern that the transgender or gender non-

¹ Defined terms include Cisgender, Gender Identity, Gender Expression, Gender, Gender Non-Conforming, Intersex, Sex, and Transgender.

² These laws and regulations include the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin Code § 8-102(23), and the Transgender Rights Bill (New York City Local Law No. 3 (2002)).

conforming person will make others uncomfortable, and forcing a transgender or gender non-conforming person to use the single-occupancy restroom.

- The Commission proposes providing single-occupancy restrooms and private space within multi-user facilities when possible, and accommodating requests for single-occupancy restrooms when possible. It also encourages employers to create policies related to access to single-sex facilities and ensure that managers and employees understand the policy and their obligations under the law, including by “post[ing] a sign in all single-sex facilities that states ‘Under New York City Law, all individuals have the right to use the single-sex facility consistent with their gender identity or expression.’” Guidance at 4-5.
- Sex Stereotyping. Employers cannot require individuals to conform to stereotypical norms of masculinity or femininity. Manifestations of unlawful stereotyping can include, for example, using anti-gay epithets; attributing a particular sexual orientation to individuals who do not conform to sex stereotypes; overlooking a female employee for promotion because her behavior does not conform to the employer’s notion of how a female should behave at work; and enforcing a policy in which men may not wear jewelry or make-up at work.
 - Employers may avoid violations of the NYCHRL by training staff and “maintaining an environment free from sex stereotyping.” Guidance at 6.
- Imposing Different Uniforms or Grooming Standards Based on Sex or Gender. The Guidance takes the position that the NYCHRL, unlike federal law, prohibits having a grooming standard or dress code that differentiates based on gender.
 - The Commission states that employers may avoid violations of the NYCHRL by creating gender-neutral dress codes and grooming standards. Different options that are culturally typically male or female are permissible, but the employer cannot require an employee to wear one option over the other. Guidance at 6-7.
- Providing Employee Benefits that Discriminate Based on Gender. Employee benefit plans must apply equally to all employees regardless of gender, and it is unlawful to provide or deny services on the basis of gender. Health benefit plans must cover transgender care, which can include a range of treatments.
 - Employers may avoid violations of the NYCHRL by providing health benefit plans that include comprehensive coverage for transgender people, and by selecting plans that follow recognized professional standards or medical care for transgender individuals. Guidance at 8.
- Considering Gender when Evaluating Requests for Accommodation. Requests for leave or accommodations to address medical or health care needs related to an individual’s gender identity should be treated in the same manner as requests for all other medical conditions, and reasonable accommodations should be provided to individuals undergoing gender transition.
 - Employers may avoid violations of the NYCHRL by creating procedures to evaluate requests for an accommodation in a “fair and non-discriminatory manner.” Guidance at 9.
- Engaging in Discriminatory Harassment. Discriminatory harassment or violence on the basis of a person’s actual or perceived gender identity or expression is prohibited. Guidance at 9.
- Engaging in Retaliation. Employers may not retaliate against an individual for opposing discrimination, including

the filing of an internal or external complaint or participating in an investigation, or for requesting a reasonable accommodation. Actions that are likely to deter the lawful activity are considered unlawful retaliation, and can include assigning the person to undesirable shifts or assignments, demotion or termination, or failing to grant an accommodation that would have otherwise been granted.

- Employers may avoid violations of the NYCHRL by implementing policies and education programs, as well as procedures to internally report violations. “Covered entities that engage with the public should implement a policy for interacting with the public in a respectful, non-discriminatory manner consistent with the NYCHRL.” Guidance at 10.

Penalties

The Commission can impose civil penalties of up to \$125,000 for violations, which can be doubled if the violations are found to be willful, wanton, or malicious. In assessing penalties, the Commission will consider (a) the severity of the violation; (b) previous or subsequent violations; (c) the employer’s size and revenue; and (d) the employer’s knowledge of the NYCHRL.

Individuals may also assert claims under the NYCHRL through private litigation, and can seek damages for back and front pay, as well as other compensatory and punitive damages. In assessing liability and damages, the Commission may consider whether the employer had an adequate anti-discrimination policy in place.

Next Steps for Employers

Employers should read the detailed Guidance and consider revisions to their benefits, handbook, and employee policies in light of this Guidance. Training should be conducted for employees, ensuring that managers and supervisors understand their obligations and responsibilities to maintain a discrimination-free work place, and ensuring that employees understand their rights and obligations under the NYCHRL. And as specified by the Guidance, single-occupancy restrooms should be open to all.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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