

Management Alert



NYCCHR Issues Info Card Regarding Discrimination Based on Gender Identity and Expression

By Cameron Smith, Courtney Stieber, Maria Papasevastos, and Meredith-Anne Berger

Seyfarth Synopsis: *The New York City Commission on Human Rights has issued a Gender Identity and Expression “Info Card,” expanding on its recent enforcement guidance, and reminding covered entities that they must permit employees and members of the public to dress and use the restroom, pronoun, and name consistent with their gender identity or expression. The Commission states that refusing to use an individual’s preferred name or pronoun, or refusing to allow individuals to use single-sex facilities consistent with their gender identity or expression, will violate the New York City Human Rights Law.*

Recently, the New York City Commission on Human Rights issued a Gender Identity and Expression “[Info Card](#).” The New York City Human Rights Law prohibits discrimination based on gender, including gender identity, expression, and transgender status, in employment, public accommodations, and housing.¹ In December 2015, the Commission released enforcement [guidance](#) regarding discrimination on the basis of gender identity or gender expression. With its Info Card, enforcement guidance, and public trainings, the Commission appears to be taking steps to remind employers in New York City of their legal requirements surrounding gender identity and gender expression in the workplace.

The Info Card defines “gender identity” and “gender expression,” and specifies that individuals, regardless of their gender identity or expression, have the right to “use the bathroom or locker room most consistent with their gender identity and/or expression,” “be addressed with their preferred pronouns and name” “without being required to show ‘proof’ of gender,” and “follow dress codes and grooming standards consistent with their gender identity/expression.”

In both the enforcement guidance and Info Card, “gender identity” is defined as “one’s internal deeply-held sense of one’s gender which may be the same or different from one’s sex assigned at birth . . . Gender identity is distinct from sexual orientation.” Further, the guidance emphasizes that everyone has a gender identity and may profess a different gender expression. “Gender expression” is defined as “external representations of gender as expressed through, for example, one’s name, pronouns, clothing, haircut, behavior, voice, or body characteristics. Society identifies these as masculine and feminine, although what is considered masculine and feminine changes over time and varies by culture. Many transgender people align their gender expression with their gender identity, rather than the sex they were assigned at birth.”

¹ The guidance also suggests that some transgender individuals may have independent protections under the City law’s disability discrimination provision and the right to a reasonable accommodation because some transgender people have a diagnosis of “gender dysphoria,” which the Commission considers a disability under the City law.

² We previously reported on New York State’s regulations prohibiting discrimination based on gender identity, transgender status and gender dysphoria [here](#); and those regulations went into effect on January 20, 2016.

The Commission intends to interpret the New York City Human Rights Law as offering broader protection based on gender identity, gender expression, and transgender status than may be available under New York State or federal law.² In its enforcement guidance, the Commission provided definitions and examples of discrimination against transgender individuals, including:

- **Intentional failure or refusal to use an individual's preferred name or pronoun.** The Commission in its enforcement guidance states that "refusal to use a transgender employee's preferred name, pronoun, or title may constitute unlawful gender-based harassment." It states that conditioning use of an individual's preferred name or pronoun on obtaining a court-ordered name change or providing identification in that name or requiring an individual to undergo medical procedures in order to use their preferred name, pronoun, or title will violate the New York City Human Rights Law.
- **Refusing to allow individuals to use single-sex facilities and participate in single-sex programs consistent with their gender identity or expression.** The New York City Human Rights Law requires that individuals be permitted to use single-sex facilities (such as bathrooms or locker rooms) and participate in single-sex programs, consistent with their gender identity or expression, regardless of their sex assigned at birth, anatomy, medical history, appearance, or sex indicated on their identification. Employers may not condition use of such facilities on providing proof of gender, or require a transgender or gender non-conforming person to use a "single-occupancy" restroom. These facilities must be available to people of all genders.
 - However, the Commission makes clear in its enforcement guidance that the "law does not require entities to make existing bathrooms all-gender or construct additional restrooms." Objections from customers or other employees to sharing a facility with a transgender or gender non-conforming person are not a lawful reason to deny access to that transgender or gender non-conforming individual.
- **Sex stereotyping.** For example, overlooking a female employee for a promotion because her behavior does not conform to the employer's notion of how a female should behave at work.
- **Imposing different uniforms or grooming standards based on sex or gender.** Federal law permits different grooming or dress code standards based on sex or gender so long as they do not impose an undue burden, e.g., requiring that male servers wear ties. The Commission has made clear in its enforcement guidance that any grooming standard or dress code that differentiates based on gender is discriminatory, even if perceived by some as harmless, e.g., prohibiting a man from wearing makeup or jewelry in the workplace, requiring male servers to wear ties, or requiring female bartenders to wear makeup. Employers may enforce a dress code, or require specific grooming or appearance standards; however, they may not impose restrictions or requirements specific to gender or sex.
- **Employee benefits.** Providing discriminatory employee benefits and refusing to provide coverage for transition-related or gender-affirming care. However, the Commission clarified that employers that have selected a non-discriminatory plan will not be liable for the denial of coverage of a particular medical procedure by an insurance company, even when that denial may constitute discrimination based on gender.
- **Requests for accommodation.** The Commission's position is that considering gender when evaluating requests for accommodations, for example by requesting medical documentation to verify leave time from transgender employees but not from all employees, violates the New York City Human Rights Law.

In addition, covered entities "should" post 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." However, posting the encouraged language is *not* required by law. The Commission has also encouraged covered entities to create policies to ensure that all individuals are allowed to access the single-sex facility consistent with their gender identity or expression and train all employees, particularly managers and employees who have contact with members of the public, on their obligations under the New York City Human Rights Law to provide non-discriminatory access to single-sex facilities.

The Commission may impose civil penalties up to \$125,000 for violations and \$250,000 for willful, wanton, or malicious conduct, in addition to damages available to private individuals under the New York City Human Rights Law (including back and front pay, compensatory and punitive damages). Employers should carefully consider their policies and procedures to ensure compliance with the New York City Human Rights Law's prohibition of discrimination based on gender identity, gender expression, and transgender status.

If you would like further information, please contact your Seyfarth attorney, [Cameron Smith](mailto:casmith@seyfarth.com) at casmith@seyfarth.com, [Courtney Stieber](mailto:cstieber@seyfarth.com) at cstieber@seyfarth.com, [Maria Papasevastos](mailto:mpapasevastos@seyfarth.com) at mpapasevastos@seyfarth.com, or [Meredith-Anne Berger](mailto:mberger@seyfarth.com) at mberger@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | June 6, 2016

©2016 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.