

Management Alert



New York City Commission on Human Rights Proposes New Rules Broadening the Definition of Gender and Prohibited Discriminatory Conduct

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Seyfarth Synopsis: The New York City Commission on Human Rights (the “Commission”) is proposing to amend its rules to establish certain definitions and clarify the scope of protections with respect to gender under the New York City Human Rights Law. The proposed amendments include: (1) adding definitions for the terms “cisgender,” “gender identity,” “gender expression,” “gender,” “gender non-conforming,” “intersex,” “sex,” and “transgender;” and (2) expanding what is considered prohibited discriminatory conduct based on gender, such as failure to use an employee’s preferred name, pronoun or title, access to single-sex facilities / single-sex programs, certain dress and grooming standards, employee benefits, and employee accommodations. The Commission has opened the comment period for the proposed rule change and will hold a public hearing on September 25, 2018.

The Commission’s recent proposal to amend Title 47 of the Rules of the City of New York (the “Rules”) to establish certain definitions and clarify the scope of protections provided under [Title 8, Chapter 1 of the Administrative Code of the City of New York, Human Rights Law](#) (“NYCHRL”) is part of a long history by which New York City has created one of the broadest set of protections from discrimination on the basis of gender.

By way of background, in 2002 the New York City Council passed Local Law No. 3 of 2002 (also known as the Transgender Rights Bill) in an effort to ensure protection for people whose gender and self-image “do not fully accord with the legal sex assigned to them at birth.” Under this law, the term “gender” was broadened to include “actual or perceived sex” and it was codified that “discrimination based on an individual’s gender identity, self-image, appearance, behavior, or expression” constituted a violation of the NYCHRL. Earlier this year, the New York City Council passed Local Law No. 8 of 2018, further broadening the definitions of “sexual orientation” and “gender” under the NYCHRL.

In an effort to help people understand their rights and responsibilities under the NYCHRL, the Commission published its [Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression](#). While not law, the guidance provides insight into how the Commission enforces the NYCHRL’s protections as they apply to discrimination based on gender, gender identity, and gender expression. Thus, while much of what is contained in the proposed amendment to the Rules already exists in the guidance, amending the Rules would codify the definitions and employers’ non-discrimination obligations under the NYCHRL.

There are two key proposed changes to the Rules, which can be reviewed in full [here](#).

1. Adding Definitions for Specific Terms.

First, the proposed amendments include adding definitions for each of the following terms: "cisgender," "gender identity," "gender expression," "gender," "gender non-conforming," "intersex," "sex," and "transgender." By defining these terms, the Commission will further clarify the protected characteristics under the NYCHRL.

2. Prohibited Unlawful Discriminatory Practices Based on Gender.

Second, the proposed amendments also include new language setting forth prohibited unlawful discriminatory practices based on gender. Specifically, the amendments include the following:

(a) Deliberate Misuse of an Individual's Chosen Name, Pronoun or Title.

Under the proposed rules, employers who deliberately misuse or refuse to use an employee's chosen name, pronoun or gendered title would be in violation of the NYCHRL if the refusal to do so is motivated by the individual's gender, irrespective of the employee's sex assigned at birth, except in the limited circumstances where federal, state or local law requires otherwise (such as for purposes of employment eligibility verification with the federal government). It would not be a violation to ask someone in good faith if they have a chosen name or a preferred pronoun.

The proposed rule also provides examples of prohibited actions, which include: (i) conditioning an individual's use of their chosen name on obtaining a court-ordered name change, (ii) requiring proof of medical procedures to use their chosen name, pronoun, or title, and (iii) refusing to use an employee's chosen name in their email account.

(b) Refusing to Allow Individuals to Use Single-Sex Facilities or Participate in Single-Sex Programs Consistent with their Gender Identity.

Under the proposed rules, employers would be required to allow employees to use single-sex facilities (such as bathrooms, locker rooms or hospital rooms) and participate in single-sex programs consistent with their gender identity, regardless of their sex assigned at birth, anatomy, medical history, appearance, or the sex indicated on their identification. It would not be a defense that other employees, customers, or program participants object to sharing a facility or participating in a program with a transgender or gender non-conforming person.

Examples of prohibited conduct would include: (i) requiring a transgender or gender non-conforming person to use a single-occupancy restroom; or (ii) requiring him or her to provide proof of their gender to access the single-sex program or facility.

(c) Imposing Different Dress or Grooming Standards Based on Gender.

Employers would also be prohibited from requiring dress codes or uniforms, or applying grooming or appearance standards, that impose different requirements for individuals based on their sex or gender. Under the proposed amendments, it is not a defense to a charge of discrimination that the employer has a violative dress code policy because it is catering to the preferences of its customers or clients.

Examples of prohibited policies would be: (i) requiring different uniforms for men and women (while different uniform options may be offered, it is unlawful to require an employee to wear one style as opposed to another); and (ii) requiring or permitting only female employees to wear makeup or jewelry.

(d) Employers Must Provide Equal Employee Benefits Regardless of Gender.

Employers offering benefit plans not subject to the Employee Retirement Income Security Act ("ERISA") must, under the proposed rule, offer benefits equally to all employees regardless of gender and may not provide health benefit plans that deny, limit or exclude services based on gender. According to the proposed rule, to be non-discriminatory with respect to gender according, health benefit plans may not exclude coverage for transgender care.

Examples of benefit plans that would violate the rule include: (i) offering health benefits that exclude coverage for procedures based on gender (such as covering prostate cancer screening for cisgender men but not for transgender women); (ii) offering benefits that exclude from coverage or limit coverage for health care related to gender transition, including but not limited to hormone replacement therapy, psychological or psychiatric treatment, hormone suppressors, voice training, or surgery; and (iii) basing paid parental leave policies on a parent's gender—such as giving twelve weeks of paid parental leave to women versus to men—as opposed to basing it on physical recovery from childbirth, which remains acceptable.

(e) Gender May Not Be The Basis for Refusing a Request for Accommodation.

Employers would be prohibited, per the proposed rule, from using gender as the basis to deny a request for accommodation for disability or other request for changes to the terms and conditions of an individual's employment, participation in a program, or use of a public accommodation—which may include medical or personal leave or schedule changes. Employers would need to treat leave requests to address medical or health care needs related to an individual's gender identity in the same manner as requests for all other medical conditions, as well as provide reasonable accommodations to individuals undergoing gender transition.

Comment Period and Next Steps:

The Commission has opened the public comments period through September 25, 2018. Comments can be submitted by website, email, mail, or fax. Further details about how to submit comments can be found [here](#). The Commission will also hold a public hearing on the proposed rule. The public hearing will take place at 11:00 a.m. on September 25, 2018. The hearing will be in Spector Hall, located at 22 Reade Street, New York, New York 10007 on the first floor.

Employers should consider how these proposed changes may impact their businesses and whether they want to submit comments on the proposed amendments. For any questions regarding the proposed changes, attorneys at Seyfarth Shaw LLP are available.

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