

## NYC Human Rights Commission Takes Expansive View of Gender ID Discrimination

By Kenneth W. Taber, Julia E. Judish and Andrew J. Lauria\*

*The New York City Commission on Human Rights has just released a Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression. The Guidance defines eight categories of discriminatory conduct in employment, public accommodations, and housing and provides examples of violations that, in some cases, treat as illegal decisions or behaviors that would generally be considered perfectly lawful under federal law. Accordingly, any employer or business with operations in New York City should familiarize its management employees with the strict requirements of these new Guidelines. Those employers and businesses may find it prudent to adopt NYCHRL-compliant policies on a company-wide basis.*

The New York City Commission on Human Rights (the Commission) is the law enforcement agency responsible for enforcing the New York City Human Rights Law (NYCHRL), which forbids discrimination in employment, public accommodations, and housing. On December 21, 2015, the Commission released official guidance on its interpretation of the application of the NYCHRL to discrimination on the basis of gender, particularly gender identity and gender expression.<sup>1</sup> The NYCHRL defines gender as one's "actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."<sup>2</sup>

<sup>1</sup> N.Y.C. Comm'n on Human Rights, Legal Enforcement Guidance on the Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code §8-102(23) (2015).

<sup>2</sup> N.Y.C. Admin. Code § 8-102(23).

In the Guidance, the Commission distinguishes between gender identity and gender expression. 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.” One’s gender identity could be male, female, both or neither. Gender expression, on the other hand, is defined as how one’s gender is represented through the individual’s choice of pronouns, clothing, haircut, behavior, voice or body characteristics. While gender identity is an individual’s *internal* perception of gender, gender expression is the individual’s *external* portrayal of gender.

The Guidance provides specific examples of ways that covered entities may take actions that constitute impermissible discrimination on the basis of gender identity or gender expression. The Guidance applies to all employers and to other covered entities with respect to their operations in New York City.

### Imposing Different Uniforms or Grooming Standards Based on Sex or Gender

Under federal law, employers and other covered entities may adopt dress code or grooming standards with gender-based differences, provided that the differing appearance standards do not impose an undue burden.<sup>3</sup> For example, federal law permits employers to set professional dress code standards calling for men to wear slacks, sport jackets or suits and ties, and requiring women to wear skirts or dresses.

The NYCHRL, by contrast, prohibits gender-based distinctions in dress codes, uniforms, or grooming or appearance standards. The Commission emphasizes that any grooming standard or dress code that differentiates based on gender is considered discriminatory, even if harmless, because different standards do not serve any legitimate non-discriminatory purpose and reinforce a culture of sex stereotyping.

New York City employers are therefore prohibited from, for example, allowing only women to wear jewelry, requiring men to have short hair, or having different standards for men and women with respect to wearing makeup. Employers may still enforce dress codes or grooming standards, but they may not impose restrictions or requirements specific to gender or sex. Employers may provide different uniform options that are culturally typically male or female, but the employer cannot require any employee to wear one style over another. For example, an employer may require all employees to wear either slacks or skirts, but it cannot require women to wear only skirts.

### Refusing to Respect an Individual’s Use of Preferred Names, Titles or Pronouns

The Commission has interpreted the NYCHRL to require employers to use an individual’s preferred name, pronoun, and title (e.g., Mr., Ms., or Mrs.) regardless of the individual’s sex assigned at birth, gender, or appearance. The Commission notes that, while many individuals, including transgender people, use male or female pronouns and titles, some transgender and gender non-conforming people may prefer to use other pronouns, such as them/they/their or ze/hir. Further, some transgender and gender non-conforming people may choose to use a name different from their given birth name. The Guidance specifies that all people, including employees, customers, and tenants, have the right to use their preferred name, regardless of whether they have identification in that name or have obtained a court-ordered name change. The Commission notes a very limited exception in circumstances where federal, state, or local law requires otherwise (e.g., to verify employment eligibility with the federal government). Merely asking someone their preferred gender pronoun and name does not violate the NYCHRL.

<sup>3</sup> See, e.g., *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004), *aff’d on reh’g*, 444 F.3d 1104 (9th Cir. 2006) (granting summary judgment for employer because employee failed to produce evidence that requiring female bartenders to wear makeup placed greater burden on women than men); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (holding that requiring men to have short hair and not women did not violate gender discrimination under Title VII).

It would thus be illegal for an employer to refer to a transgender employee as “he” or “Mr.” after she has made it clear that she uses “she” and “Ms.” It would also be illegal to call a woman “Mr.” if she uses female pronouns and titles, even though her appearance is more aligned with the traditional masculine stereotype.

Employers cannot condition an individual’s employment on the receipt of identification with that individual’s preferred name, nor can they require that an employee share the employee’s medical history to prove the individual underwent a sex reassignment procedure to use the individual’s preferred name, pronoun or title.

To avoid potential violations of the NYCHRL, the Commission suggests that employers implement a policy of asking every employee their preferred gender pronoun, so that no individual is singled out. Employers following this approach should not limit their employees’ gender options to male and female only.

### Other Forms of Prohibited Gender Discrimination

The Commission’s Guidance details other forms of gender identity or expression discrimination prohibited by the NYCHRL including:

- **Refusing to allow an individual to use a single-sex facility or program that is consistent with their gender:** Businesses may not prohibit a transgender woman from using the women’s restroom, and they may not bar someone from a single-sex program or facility out of concern that a transgender or gender non-conforming person will make others uncomfortable. To avoid NYCHRL violations, covered entities may provide single-occupancy restrooms and private space for anyone with privacy concerns.<sup>4</sup> It is unlawful, however, to require individuals to use a single-occupancy restroom simply because they are transgender or gender non-conforming. The Commission recommends that covered entities post a sign in all single-sex facilities (including restrooms) 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.” Covered entities may still adopt policies or codes of conduct for single-sex facilities delineating acceptable behavior for the use of the facilities so long as they are not discriminatory and do not single out transgender or gender non-conforming people.
- **Sex stereotyping:** Employers may not discriminate based on an individual’s failure to conform to stereotypes of how people of a particular sex or gender should behave.
- **Providing employee benefits that discriminate based on gender:** Employers must provide equal benefits to all employees regardless of gender. Health benefit plans must cover transgender care in order to be considered non-discriminatory.
- **Considering gender when evaluating accommodation requests:** Employers may not consider gender when evaluating requests for accommodations for disabilities or other requests for changes to employment terms and conditions. When an employer grants leave or time off of work for medical or health reasons, it shall 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. Employers shall provide reasonable accommodations to individuals undergoing gender transition, including medical leave for medical and counseling appointments, surgery and recovery from gender-affirming procedures, surgeries, and treatments, the same as they would for any other medical condition.

<sup>4</sup> The NYCHRL does not require covered entities to make existing restrooms all-gender or to construct additional restrooms.

- **Harassment:** The NYCHRL prohibits harassment or violence motivated by an individual's actual or perceived gender identity or expression.
- **Retaliation:** The NYCHRL prohibits retaliation against an individual for opposing discrimination (e.g., making a complaint about discrimination or participating in a discrimination investigation), or requesting a reasonable accommodation for a disability, based on gender identity or expression. Any action taken against an individual that is reasonably likely to deter them from engaging in such activities is considered unlawful retaliation.

### Administrative Penalties for Gender Discrimination

The Commission can impose civil penalties of up to \$125,000 for NYCHRL violations, and up to \$250,000 for violations resulting from willful, wanton or malicious conduct. These penalties are in addition to other remedies employees may obtain for successful civil claims under the NYCHRL, such as back and front pay, other compensatory damages and punitive damages. The Guidance explains that the Commission may consider the lack of an adequate anti-discrimination policy as a factor in determining liability.

In light of this Guidance, employers and businesses with operations in New York City should review their equal employment opportunity, dress code, reasonable accommodation, benefits, and other policies to ensure compliance with the NYCHRL, as now interpreted. Employers and businesses should also consider adopting NYCHRL-compliant policies on a company-wide basis, in order to reduce the likelihood of violations by employees who are insufficiently trained in locality-based differences in company policy, and in order to promote consistent treatment of employees, customers and tenants.

*\*Andrew J. Lauria, a senior law clerk in Pillsbury's New York City office, contributed to this alert.*

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Kenneth W. Taber [\(bio\)](#)  
New York  
+1.212.858.1813  
kenneth.taber@pillsburylaw.com

Julia E. Judish [\(bio\)](#)  
Washington, DC  
+1.202.663.9266  
julia.judish@pillsburylaw.com

Andrew J. Lauria [\(bio\)](#)  
New York  
+1.212.858.1234  
andrew.lauria@pillsburylaw.com

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