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GUIDANCE ON PROTECTIONS FROM GENDER IDENTITY OR EXPRESSION DISCRIMINATION UNDER THE NEW YORK HUMAN RIGHTS LAW

On January 25, 2019, the New York State Human Rights Law (HRL) was amended to explicitly include "gender identity or expression" as a protected class in all areas of jurisdiction, including employment, places of public accommodation, public and private housing, educational institutions and credit. N.Y. Exec. L §§ 296 & 296-a. This amendment is known as the Gender Expression Non-Discrimination Act (GENDA).

GENDA defines "gender identity or expression" as "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender." Exec. L. § 292(35).

Unlawful discrimination because of gender identity or expression can include:

- Questions about gender identity or expression, or assigned sex at birth, such as in a job or housing interview;
- Refusing to hire for a job or to rent an apartment;
- Denying equal access to places of public accommodation, to a school, or to credit;
- Terminating employment or housing;
- Denying the use of restrooms or other facilities consistent with a person's gender identity or expression;
- Asking a transgender person to use a single-occupancy restroom because of someone else's concerns;
- Requiring individuals to show medical or other documents in order to use facilities, such as restrooms, locker rooms or residential facilities, consistent with their gender identity or expression;
- Utilizing grooming, uniform or appearance standards based on sex stereotypes;
- Providing benefits, leave or reasonable accommodations that differ based on gender;
- Refusing to use an individual's requested name or pronouns in verbal communication or documentation;
- Subjecting an individual to harassment at work, school or places of public accommodation, or in connection with housing;

This guidance will explain the various areas in which gender identity or expression discrimination can occur, including employment, housing, places of public accommodation and schools, and provide examples of discrimination. It will also provide information about how the New York State Division of Human Rights (DHR) can protect victims of gender identity or expression discrimination.

GENDER IDENTITY AND EXPRESSION PROTECTION IN NEW YORK STATE

The passage of GENDA makes clear to all New Yorkers that discrimination based on gender identity or expression is unlawful and that victims have recourse through DHR. DHR is the New York State agency charged with the enforcement of the HRL. DHR provides an efficient and cost-free process in which complaints alleging discrimination are promptly investigated and adjudicated, with monetary and other remedies awarded by DHR when discrimination is found.

As early as 1977, it was recognized by a New York court that sex discrimination claims under the HRL may be brought by individuals alleging discrimination because of their gender identity. In *Richards v. U.S. Tennis Association*, 93 Misc.2d 713 (Sup.Ct. N.Y. Co. 1977), the court held a requirement that plaintiff, a professional tennis player who had undergone gender affirming surgery, pass the sex-chromatin test in order to be eligible to participate in the women's tournament was grossly unfair, discriminatory and inequitable, and violated plaintiff's rights under the New York Human Rights Law.

Since 1976, DHR has maintained a policy of accepting complaints alleging discrimination on the basis of gender identity or expression, under the protected classes of sex and, where appropriate, disability. In 2016, DHR adopted regulations to further protect individuals discriminated against based on their gender identity or expression, which enshrined DHR's longstanding practice of accepting HRL complaints alleging discrimination because of gender identity or expression. 9 NYCRR § 466.13.

The DHR regulations make clear that in New York, gender dysphoria is considered a medical condition that falls within the broad definition of disability under the HRL. 9 NYCRR 466.13(d). Individuals with disabilities are entitled to reasonable accommodations in employment as long as it does not impose an undue hardship to the employer—a stark contrast to federal disability discrimination law, which excludes medical conditions related to gender identity or expression.

In 2018, the New York State Appellate Division recognized that a transgender woman was discriminated against on the basis of sex and disability. In *Advanced Recovery, Inc. v. Fuller*, 162 A.D.3d 659 (2d Dept. 2018), the complainant worked as an auto mechanic. During her employment, she was diagnosed with gender dysphoria and began wearing clothing traditionally considered female. After complainant presented her supervisor with a court order changing her legal name to Erin Fuller, she was terminated. She was told her "job would be waiting for [her] as long as [she] c[a]me in wearing normal clothes." The employer failed to issue her final paycheck in her legal name. The court upheld DHR's determination that the complainant was unlawfully discriminated against.

Effective February 24, 2019, GENDA provides that "gender identity or expression" is a protected characteristic under the HRL. DHR will continue to vigorously enforce the rights of all New Yorkers on the basis of gender identity or expression, sex, status of being transgender, and/or disability, and will liberally construe the provisions of the HRL as mandated by the statute. N.Y. Exec. L. § 300.

DEFINITIONS

The following definitions may help in understanding this guidance and the extent of the protections provided by GENDA:

Cisgender: A term used to describe a person whose gender identity aligns with their sex assigned at birth.

Gender: The term includes actual or perceived sex, gender identity, and gender expression including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth.

Gender Expression: The representation of gender as expressed through one's name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics. Gender expression may or may not conform to gender stereotypes, norms, and expectations in a given culture or historical period.

Gender Identity: The internal deeply-held sense of one's gender which may be the same as or different from one's sex assigned at birth. A person's gender identity may be male, female, neither or both, i.e., non-binary or genderqueer.

Gender Non-Conforming: A term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture or historical period.

Gender Dysphoria: A recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.

Sex: A combination of chromosomes, hormones, internal and external reproductive organs, facial hair, vocal pitch, development of breasts, gender identity, and other biological characteristics.

Intersex: An umbrella term that refers to people born with a range of variations in sex characteristics that fall outside of the binary concept of sex as either male or female.

Misgendering: Attributing a gender to someone that is incorrect or does not align with the person's gender identity.

Non-Binary: A term used to describe a person who does not identify as exclusively male or female.

Transgender: A term used to describe a person whose gender identity and/or expression is different from the sex assigned to the person at birth.

GENDER IDENTITY AND EXPRESSION DISCRIMINATION EXPLAINED

It is unlawful discrimination to subject a person to inferior treatment because of their gender identity or expression. The HRL prohibits such discrimination in conditions or privileges in employment, places of public accommodation, public and private housing, educational institutions and credit. Exec. L §§ 296 & 296-a.

Gender identity or expression discrimination may occur when an individual has transitioned, or intends to transition, from one gender to another or because the person may not conform to gender stereotypes. Gender stereotyping occurs when behavior or appearance is considered inappropriate or unacceptable because it differs from societal norms or expectations relative to a particular gender. For example, if a supervisor reacts negatively to a female employee because he considers her dress or personality traits inappropriate for a woman. Under the HRL, it is not a defense to a discrimination claim that a discriminatory action was taken based on the preferences or prejudices of employers, managers, supervisors, employees, customers, clients, or tenants with regard to any protected characteristic. It is also not a defense that a discriminatory action was taken because of the personal religious beliefs of an employer, place of public accommodation, housing provider or other covered entity.

Retaliation against a person who opposed or otherwise complained about gender identity or expression discrimination is also unlawful under the HRL. Exec. L § 296(7).

Some specific descriptions and examples of gender identity or expression discrimination are below. The examples are illustrative only. Any complaint made to DHR will be investigated and adjudicated on the specific facts and merits of the case.

Refusing to Use an Individual's Requested Name, Pronoun, or Gendered Title

Misgendering occurs when a person is not referred to by the names, pronouns, or gendered titles that are consistent with their gender identity.

Under the HRL a covered entity, including an employer, housing provider, educational institution, or an owner or operator of a place of public accommodation may not deliberately refuse to use an individual's requested name, pronoun or gendered title if the refusal is motivated by the individual's actual or perceived gender identity or expression.

New Yorkers have the right to use their requested names, pronouns and gendered titles regardless of their medical history, appearance, or the sex indicated on their identification. Asking someone in good-faith for their name and pronouns is not a violation of the HRL.

Example 1
A transgender woman, Anna Jones, has a medical appointment. She told the receptionist she uses the title "Ms." and filled out her intake paperwork accordingly. When it is time for her to see the doctor, the nurse calls out for "Mr. Jones."

Deliberately failing or refusing to include and use a patient's requested name and self-reported gender by medical or other staff is unlawful even if a patient's sex assigned at birth or gender transition may be recorded for the purpose of providing medical care.

Example 2
Daniel Smith is hired at XYZ corporation. The name associated with his social security number is a name he no longer uses because it is inconsistent with his gender identity. His employer refuses to assign an email account or issue business cards with the name Daniel until he obtains a court-ordered name change.

An employer may not condition an individual's use of their self-identified name on obtaining a court-ordered name change or otherwise require proof of identification with that name.

Example 3
Alison was hired for a job at ABC organization and identifies as a woman. Her manager learns that Alison was assigned male at birth and begins referring to her as "he" to other co-workers. Alison's manager says that he will use the correct pronouns if Alison "shows proof" of her identity.

Refusing to use Alison's requested pronoun of "she" is harassing conduct and employers may not require a person to provide information about their medical history or other documents in order to use an individual's requested name, pronoun, and gendered titles. In addition, a covered entity may not deliberately disclose a person's transgender status without consent. (See also Example 10 below.)

Refusing to Allow Individuals to Use Facilities Consistent with Their Gender Identity or Expression

Multi-occupancy facilities, such as bathrooms, residential dorms, or locker rooms, are commonly gender segregated. Providing such gender-segregated facilities does not violate the HRL.

Covered entities may also offer single-occupancy facilities such as a restroom designed for one person to use at a time.

Regardless of the type of gender-segregated facilities available (multi-occupancy or single occupancy), a covered entity must allow individuals to use facilities that are consistent with their gender identity, regardless of

the individual's sex assigned at birth, anatomy, gender expression, medical history, appearance, or the sex indicated on the individual's identification.

It is unlawful to require a person to use a single-occupancy restroom because they are transgender, intersex, non-binary, or gender non-conforming. This is true even if other employees, tenants or customers object to sharing a facility with a transgender, intersex, non-binary or gender non-conforming person.

Example 4
Jordan is a high school student who is non-binary. Jordan would feel safest using the single-gendered bathroom assigned to girls. The school administration tells Jordan to use single-occupancy restrooms only.

The school must allow Jordan to access the facilities consistent with Jordan's gender identity or expression. No one can be limited to using single-occupancy restrooms. Covered entities are encouraged to post a sign in all single-gender facilities indicating that individuals have the right to use the single-gender facility most closely aligned with their gender identity.

Example 5
Adrian is a transgender woman who needs to attend a residential drug treatment program. The program requires Adrian to submit proof of gender-affirming surgery before it will assign her to the women's rooms.

A program may not refuse to permit an individual to participate in or reside in facilities consistent with the individual's gender identity, regardless of whether the individual plans to or has undergone gender-affirming care. The preference of other participants or staff with regard to Adrian's participation cannot be a reason to deny access.

Imposing Different Appearance Standards Based on Gender

Employers and covered entities may not impose appearance standards based on gender. Employers and covered entities are entitled to enforce or require specific grooming or appearance standards; however, it must be done without imposing restrictions or requirements specific to gender.

The fact that appearance standards differentiate based on gender is sufficient for it to be considered discriminatory, even if perceived by some as harmless. Moreover, it will not be a defense that an employer or covered entity is catering to the preferences of their customers or clients.

Example 6
Leah is a gender non-conforming woman. She works as a flight attendant at an airline that requires uniforms. The only available options are either pants, vest and tie or a dress and a scarf. Leah requests to wear the option that includes pants, vest, and a tie.

The airline may provide uniform options that are culturally typically masculine and typically feminine. However, the airline must permit Leah to wear the uniform that she chooses based on her gender identity or expression. The airline may not require Leah to justify her choice of uniform. The fact that customers may object cannot be a reason for denial.

Example 7
A restaurant maintains a dress code for its customers that requires only men to wear ties and a jacket and requires only women to wear a dress or skirt.

The restaurant cannot impose a dress code that has different requirements based on gender. The restaurant may require dress clothes but cannot insist that a woman wear a dress rather than a jacket and tie.

Unequal Terms, Conditions or Benefits Based on Gender Identity or Expression

All employers, housing providers, places of public accommodation and schools must offer terms, conditions, and benefits equally, regardless of gender identity or expression.

Transgender and gender non-conforming individuals may not be denied equal opportunities for workplace advancement and may not be denied positions that interact with the public. Also, a housing provider, place of public accommodation or a school must permit a person to participate in a gender-segregated services or programs consistent with their gender identity or expression.

A person requiring a reasonable accommodation at work for a gender-related condition must be treated in the same manner as other employees in the workplace needing accommodations for conditions that are not related to gender. As such an employer may not provide medical leave or other benefits that discriminate based on gender identity. Employers must provide reasonable accommodations to individuals undergoing gender affirming surgery, transition care, or any other medical condition related to a person's gender identity or expression. This includes, but is not limited to, leave for medical or counseling appointments, surgery and recovery, or treatment related to gender dysphoria.

Example 8
Jim is a transgender man and asks his employer for necessary medical leave for gender-affirming care. The employer denies the leave time, indicating a religious objection to "facilitating" Jim's transition by providing the leave and the health insurance coverage for the treatment.

Jim is entitled to medical leave as a reasonable accommodation for his gender dysphoria, a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth. He is entitled to health insurance coverage on an equal basis with all other employees.

Example 9
Mary, a transgender woman, enrolls in an adult recreational basketball league that is gender-segregated. The basketball league refuses to let her play in the women's league because her gender identity is different from her sex assigned at birth.

The adult recreational basketball league is a public accommodation under the HRL and must allow Mary to participate in the gender-segregated league consistent with her gender identity.

Revealing a Person's Gender Dysphoria, Transgender, Intersex or Gender Non-Conforming Status Without Their Consent
A covered entity may not deliberately disclose a person's transgender, gender non-conforming or intersex status, or their gender dysphoria without their consent.

Some covered entities may have access to a person's medical records or other personal information that reveals the sex assigned to that person at birth. In some circumstances, a person may not want it known that they have a gender identity that is different from the sex assigned to them at birth. Employers, schools or other covered entities must not purposefully or inadvertently disclose a person's gender dysphoria, transgender, gender non-conforming, or intersex status.

Example 10

Jessie was born intersex, identifies as male and uses “he/him/his” pronouns. When filling out paperwork for company-sponsored life insurance, Jessie indicated “N/A” instead of checking either male or female, as this is factually true and consistent with his birth certificate. The Human Resources manager, who reviewed the paperwork, told other employees about this, and began referring to Jessie as “it” when discussing him with other employees.

Calling Jessie “it” is harassing conduct. In addition, a covered entity may not deliberately disclose a person’s intersex status without consent. (See also Example 3 above.)

Example 11
Ben is a college student who identifies as a transgender man. He has not legally changed the name on his birth certificate but uses the name Ben as well as the pronouns he/him/his. Ben informed the college of his gender identifying pronouns and name.

The college produces a student directory with photographs and contact information. In the student directory Ben’s picture appears with the name given to him at birth, which appears on all formal records.

A covered entity may not deliberately disclose a person’s gender dysphoria, transgender, gender non-conforming or intersex status without consent. Although Ben has not legally changed his name and student records still contain his former name, Ben has a right to be called by the name and pronoun he uses. The college has also improperly disclosed Ben’s transgender status by using the name assigned to him at birth.

Harassment

A covered entity, including employers, housing providers, schools and places of public accommodation may not engage in harassment based on a person’s gender identity or expression. This includes but is not limited to humiliating, abusive or threatening remarks, name-calling, inappropriate physical contact, or any other harassing conduct. Such covered entities may also be legally responsible for harassment committed by their employees or agents.

Moreover, all employees, contractors, subcontractors, vendors, consultants, independent contractors, or temporary workers have enhanced protection from harassment in the workplace. This includes harassment on the basis of gender identity or expression, sex and disability, as well as sexual orientation, race any other basis covered by the HRL. Exec. L. § 296-d.

Unlawful harassment in the workplace includes any harassing behavior that subjects a person to inferior terms, conditions or privileges of employment because of any protected characteristic. Exec. L. § 296(1)(h). Harassment in the workplace does not need to be severe or pervasive to be illegal. It can be any harassing behavior that rises above petty slights or trivial inconveniences. Every instance of harassment is unique to those experiencing it, and there is no single boundary between petty slights and harassing behavior. Notably, the intent of the behavior, for example making a joke, does not neutralize a harassment claim. Not intending to harass is not a defense. The impact of the behavior on a person is what counts.

Under New York State Labor Law § 201-g, all employers are required to have a sexual harassment policy and procedure and to see that all employees are provided with anti-harassment training annually. Sexual harassment includes discrimination due to a person’s sex, self-identified or perceived sex, gender, gender identity or expression, sexual orientation, and/or status of being transgender.

Example 12

Luisa is a transgender woman working in a factory. Her co-workers sometimes make fun of her and call her names related to her transgender status. Luisa's supervisors are aware of this harassment but tell her there is nothing they can do about it.

Luisa's employer has knowledge of the harassment, through its supervisors. An employer is required to take corrective action to stop harassment and may be held liable for harassment that occurs in the workplace.

Example 13
An individual rented an apartment and filled out the paperwork stating his name is Thomas. The landlord later learns that the sex assigned to Thomas at birth was female. The landlord threatens to evict Thomas and also harasses him to try to get him to leave.

It is an unlawful discriminatory practice to harass a tenant or attempt to evict a person because of their gender identity.

HOW GENDER IDENTITY AND EXPRESSION PROTECTIONS ARE ENFORCED BY DHR

A complaint alleging unlawful discrimination under the New York State Human Rights Law may be filed either with DHR or in New York State Supreme Court. Exec. L. § 297(1).

Filing a Complaint

A report of discrimination must be filed with DHR within three years of the most recent act of discrimination. If an individual does not report the discrimination to DHR, they can bring a lawsuit directly in state court under the HRL, within three years of the alleged discrimination. An individual may not file with DHR if they have already filed an HRL complaint in state court related to the same incident.
Complaining internally to an employer or covered entity does not extend the time to file with DHR or in court. The three years are counted from the date of the most recent incident of discrimination. Exec. L. § 297(5).
Reporting discrimination to DHR is free, and you do not need an attorney. The easiest way to report discrimination to DHR is through the agency's call center at (844) 697-3471. Another option is to complete a discrimination report using DHR's online Discrimination Reporting Form at dhr.ny.gov/report. Please note, the information provided at this stage is not an official complaint. After a discrimination report is filed, DHR will review the information to determine whether the discrimination is covered by the HRL. If the incident is covered by the law, DHR will help the person file an official complaint.

Complaint Investigation

DHR will then investigate the complaint and determine whether there is probable cause to believe that discrimination occurred. Cases with a probable cause determination receive a public hearing before an Administrative Law Judge. Before a public hearing is held, DHR will hold pre-hearing meetings with the opportunity to settle the complaint.

Public Hearing

At the public hearing before an Administrative Law Judge, testimony is taken under oath, witnesses are subject to cross-examination and a full record is made. Exec. L. § 297(4)(a). Complainants may be represented by their own attorneys, or a DHR attorney will be appointed to present the case in support of the complaint. The Administrative Law Judge then submits a Recommended Order for the DHR Commissioner's consideration.

Final Orders and Remedies

The Commissioner reviews all submissions, relevant evidence and the Recommended Order before issuing a Final Order either finding discrimination or dismissing the complaint. Exec. L. § 297(4)(c).

Where the Commissioner finds that discrimination has occurred, remedies may include:

- reinstatement to a job, with back pay;
- provision of housing or access to places of public accommodation;
- compensation for mental anguish;
- an order to cease the discriminatory policies;
- a requirement that training be conducted;
- civil fines and penalties;
- punitive damages;
- attorney's fees.

Appeals

Any DHR Final Order may be appealed to state court. Exec. L. § 298. DHR will seek court enforcement of a Commissioner's order finding discrimination if there is no compliance.

DHR RESOURCES

- Contact the New York State Division of Human Rights by calling (844) 697-3471 or TDD/TTY at 718-741-8300.

- Complete a DHR discrimination report online at dhr.ny.gov/report.

- For general inquiries email info@dhr.ny.gov.

- Follow DHR on Social Media:
  Instagram: @nyshumanrights (instagram.com/nyshumanrights)
  Facebook: @nyshumanrights (facebook.com/nyshumanrights)

- DHR's central office is located at: One Fordham Plaza, Bronx, NY 10458.