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NEW YORK CITY COMMISSION ON HUMAN RIGHTS ISSUES GUIDANCE ON GENDER AND TRANSGENDER DISCRIMINATION

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Under the New York City Human Rights Law (NYCHRL), it is illegal for employers and places of public accommodation to discriminate on the basis of gender or an individual's transgender status. Because of recent complaints of discrimination from the transgendered community, on December 22, 2015, the New York City Commission on Human Rights (the Commission) issued additional legal enforcement guidance concerning gender and transgender discrimination. In issuing this guidance, the Commission addressed various employment issues including the use of proper pronouns, bathroom use, gender specific uniforms and accommodations, providing specific examples of conduct that constitutes discriminatory activity under the NYCHRL.

Failing to Use an Individual's Preferred Name or Pronoun

According to the Commission, to avoid violating the NYCHRL, employers must refer to an employee by their preferred name or pronoun regardless of the individual's sex assigned at birth, gender, appearance or sex indicated on the individual's identification.

While most individuals, including transgender people, use female or male pronouns and titles, some transgender and gender non-conforming people prefer to use gender neutral pronouns such as they/them/theirs or ze/hir. Many transgender and gender non-conforming people also choose to use a different name than the one they were given at birth. According to the Commission, these individuals have the right to do so regardless of whether they have identification in that name or have obtained a court-

ordered name change. Asking someone their preferred gender pronoun and preferred name is not a violation of the NYCHRL.

The following are examples of conduct that would constitute violations of the NYCHRL:

1. Intentional or repeated refusal to use an individual's preferred name, pronoun or title. For example, repeatedly calling a transgender woman "him" or "Mr." after she has made clear which pronouns and title she uses;
2. Refusal to use an individual's preferred name, pronoun, or title because they do not conform to gender stereotypes. For example, calling a woman "Mr." because her appearance is aligned with traditional gender-based stereotypes of masculinity;
3. Conditioning an individual's use of their preferred name on obtaining a court ordered name change or providing identification in that name. For example, a covered entity may not refuse to call a transgender woman her preferred name, Jane, because her identification says that her first name is John;
4. Requiring an individual to provide information about their medical history or proof of having undergone particular medical procedures in order to use their preferred name, pronoun, or title.

Employers can avoid violations of the NYCHRL by

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. Alternatively, employers can revise policies so that gender pronouns are not used at all.

Single Sex Facilities and Programs

The Commission also advised that, under the NYCHRL, employees must be permitted to use single sex facilities, such as bathrooms and locker rooms, and single sex programs, consistent with their self-identified gender, regardless of their sex assigned at birth or appearance. However, employers are not required to make existing bathrooms all-gender or construct additional bathrooms. Employers that have single-occupancy bathrooms should make clear that they can be used by people of all genders. While some people, including, for example, co-workers, customers or other program participants, may object to sharing a facility or participating in a program with a transgender or gender non-conforming person, such objections are not a lawful reason to deny access to that transgender or gender non-conforming individual.

The following are examples of conduct that would constitute violations of the NYCHRL:

1. Prohibiting a transgender or gender non-conforming person from using the single-sex program or facility consistent with their gender identity or expression. For example, it is an unlawful discriminatory practice to prohibit a transgender woman from using the women's bathroom;
2. Requiring a transgender or gender non-conforming individual to provide proof of their gender in order to access the appropriate single-sex program or facility;
3. Requiring an individual to provide identification with a particular sex or gender marker in order to access the single-sex program or facility corresponding to their gender;
4. Barring someone from a program or facility out of concern that a transgender or gender

non-conforming person will make others uncomfortable; and

5. Forcing a transgender or gender non-conforming person to use the single-occupancy restroom.

Employers may avoid violating the NYCHRL by, wherever possible, providing single-occupancy restrooms and providing private space within multi-user facilities for anyone who has privacy concerns. As noted above, however, it is unlawful to require an individual to use a single-occupancy restroom because they are transgender or gender non-conforming. Employers should 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, but particularly all managers and employees who have contact with members of the public, on compliance with the policy, and their obligation under the NYCHRL to provide nondiscriminatory access to single-sex facilities. According to the Commission, employers should (but are not required to) 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."

An individual's assessment of their own safety should be a primary consideration. Employers should offer opportunities for people to come to them if they have safety concerns and should establish a corresponding safety plan if needed. For example, if a transgender resident requests assignment to a facility corresponding to their sex assigned at birth instead of a placement corresponding to their gender identity, that request should be honored.

Sex Stereotyping

The Commission also stated that discrimination based upon an individual's failure to conform to sex stereotypes is a form of gender discrimination under the NYCHRL. Sex stereotyping includes expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyle, activities, voice, mannerisms or body characteristics.

Sex stereotypes also relate to the roles or behaviors assigned to those who identify as male or female. Employers may not require individuals to conform to stereotypical norms of masculinity or femininity. The law also recognizes that unlawful sex stereotyping often manifests itself as antigay epithets, or attributing a particular sexual orientation to individuals who do not conform to sex stereotypes.

The following are examples of conduct that would constitute violations of the NYCHRL:

1. Using anti-gay epithets when speaking to or about an individual based on their non-conformity with gender norms;
2. 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; or
3. Enforcing a policy in which men may not wear jewelry or make-up at work.

In order to avoid such violations of the NYCHRL, employers should train all employees on maintaining an environment free of sex stereotyping.

Imposing Different Uniforms or Grooming Standards based upon Sex or Gender

In perhaps the most significant change from existing law, the Commission stated that under the NYCHRL, employers may not require dress codes or uniforms, or apply grooming or appearance standards, that impose different requirements for individuals based on sex or gender. This is in contrast to federal law, which permits different standards, so long as they do not impose an undue burden on employees, such as requiring male employees to wear ties and female employees to wear makeup.

Under the NYCHRL, the fact that the grooming standard or dress code differentiates based on gender is itself discriminatory and a violation of the law, even if perceived by some as harmless. According to the Commission, holding individuals to different grooming or uniform standards based on gender serves no legitimate non-discriminatory purpose and reinforces a culture of sex stereotypes and accepted cultural

norms based on gender expression and identity.

Employers and covered entities are entitled to enforce a dress code, or require specific grooming or appearance standards; however it must be done without imposing restrictions or requirements specific to gender or sex. In other words, the dress code or grooming/appearance standards must be gender neutral. It will not be a defense that an employer or covered entity is catering to the preferences of their customers or clients.

The following are examples of conduct that would constitute violations of the NYCHRL:

1. Maintaining grooming and appearance standards that applies differently to individuals who identify as men or women or which have gender-based distinctions. For example, requiring different uniforms for men and women, or requiring that female bartenders wear makeup;
2. Requiring employees of one gender to wear a uniform specific to that gender;
3. Permitting only individuals who identify as women to wear jewelry or requiring only individuals who identify as male to have short hair. Requiring all servers, for example, to always have long hair tied back in a ponytail or away from their face is not a violation unless it is applied unequally based on gender; and
4. Requiring all men to wear ties in order to dine at a restaurant.

Employers can avoid violations of the NYCHRL by creating gender-neutral dress codes and grooming standards. For example, a covered entity may require individuals to either wear their hair short or pulled back from the face or require that workers must wear either a pantsuit or a skirt suit. Covered entities may provide different uniform options that are culturally typically male and typically female. For example, an employer that provides uniform shirts may provide a shirt that is more typical of a woman's blouse and another that is looser fitting in a style more typical of

a man's button down shirt. It would be unlawful, however, to require an employee to wear one style over another.

Requests for Accommodations

The NYCHRL also prohibits employers from considering gender when evaluating requests for accommodations for disabilities, or other requests for changes to the terms and conditions of employment, which may include additional medical or personal leave or schedule changes. When an employer grants leave or time off of work to employees 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 must 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 as they would for any other medical condition.

The following are examples of conduct that would constitute violations of the NYCHRL:

1. An employer who has a policy of routinely granting unpaid medical leave upon request to individuals who have been working for the employer for over a year, who refuses to honor that policy when the request is made by a transgender individual;
2. When an employer or covered entity permits a reasonable accommodation for a woman seeking reconstructive breast surgery deemed medically necessary but refuses that same accommodation when requested by a transgender woman undergoing the same medically necessary surgery;
3. Requesting medical documentation to verify leave time from transgender employees or participants, but not other employees or participants; and

4. Determining the retention and accrual of benefits, such as seniority, retirement, and pension rights, during personal or medical leave periods for employees based on gender.

Employers may avoid violations under the NYCHRL by creating internal procedures to evaluate all requests for accommodations in a fair and non-discriminatory manner.

The Commission also noted that it is impermissible to subject an individual to discriminatory harassment or violence motivated by that individual's actual or perceived gender identity or expression and that an individual cannot be subjected to retaliation for complaining of same.

It is important to remember that violations of the NYCHRL can result in substantial civil penalties. If a violation of the NYCHRL is established, it may result in a civil penalty of up to \$125,000 and up to \$250,000 if the violation was the result of willful, wanton or malicious conduct. Significantly, these civil penalties are in addition to the remedies available to individuals who prevail on their claims under the NYCHRL including, but not limited to, back and front pay, and additional compensatory and punitive damages.

As a result of the guidance issued by the Commission, New York City employers should review their workplace policies to ensure that they comply with the guidance and ensure that they do not unintentionally discriminate against employees based upon their gender, gender identity or gender expression in the view of the Commission.

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