

Transgender Protections: Employment Law Update

Effective immediately, the New York State Division of Human Rights (“DHR”) has adopted new regulations that ban employment discrimination and harassment against transgender people and against those persons with gender dysphoria.

A transgender person is someone whose internal sense of their gender is different than the sex they were assigned at birth. People with gender dysphoria (formerly known as “gender identity disorder”) identify with a gender contrary to the one they were assigned at birth.

These regulations, which were first announced by Governor Andrew M. Cuomo back in October 2015, confirm that the DHR will accept sex discrimination claims based on gender identity and the status of being transgender. Further, gender dysphoria is now deemed to fall under the Human Rights Law’s definition of “disability,” allowing for additional protections against disability discrimination and harassment.

All New York public employers should already be familiar with the Sexual Orientation Non-Discrimination Act (“SONDA”), which has offered protections for transgender workers since 2003. SONDA prohibits discrimination on the basis of actual or perceived sexual orientation in the workplace. As described by the New York State Office of the Attorney General, “sexual orientation” is “heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived.” Relating to transgender employees, SONDA applies when an employer discriminates against a transgender employee based on his or her actual or perceived sexual orientation. For example, it is illegal under SONDA to refuse to hire an otherwise qualified transgender person because a retailer believes that person’s appearance might make customers uncomfortable. State courts have held that transgender people are also protected under other provisions of the New York Human Rights Law, including prohibitions against discrimination on the basis of sex and/or disability.

Moreover, court cases have steadily been popping up in recent years against employers who allegedly violate the rights of transgender workers. In early June, the Equal Employment Opportunity Commission (EEOC) filed a complaint in federal district court alleging that an employer violated Title VII of the 1964 Civil Rights Act by, among other things, denying a transgender female employee access to the women’s bathroom (*EEOC v. Deluxe Fin. Servs. Corp.*, D. Minn., No. 15-2646, complaint filed 6/5/15). Also in June, the Court of Appeals for the Second Circuit revived a transgender employee’s discrimination claims against his union. (*Fowlkes v. Ironworkers Local 40*, No. 12-336 (2d Cir. June 19, 2015).

Federal government agencies are issuing regulatory guidance as a means of increasing protections for transgender workers. While such guidance is not considered law, it is indicative of priority items on agency agendas. For example, although the New York State Public Employee Safety and Health Bureau (PESH) has yet to adopt them, public employers should be aware of recommendations issued by the Occupational Safety and Health Administration (OSHA), which has jurisdiction over private sector employers, on June 1, 2015 regarding restroom access for transgender workers. In those recommendations, OSHA advises that all workers, including transgender employees, should have access to restrooms that correspond to their gender identity. As noted, “gender identity” refers to the private sense and subjective experience of gender, which may be different than the sex a person was assigned at birth. As such, a transgender man is someone whose gender identity is that of a man, but who was considered a female at birth. Likewise, a transgender woman identifies as a woman, but was first

assigned the male gender. Many transgender people make the decision to “transition” from the gender they were assigned at birth to the gender with which they identify. For instance, a transgender man may transition from living as a woman to living as a man.

The basis for OSHA’s involvement in this area is expressed in its statement that restricting employees to using bathrooms that are inconsistent with their gender identity, or otherwise segregating them from other workers by having them use specific restrooms, “singles those employees out and may make them fear for their physical safety.” OSHA cautions further that restroom restrictions “can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.”

While many employers have begun to implement policies to ensure that all employees have access to appropriate sanitary facilities, OSHA suggests the following practices to avoid discrimination in workplace restroom accessibility:

1. Allow employees to determine for themselves which restrooms are the most appropriate and safest option;
2. Prohibit requests by supervisors for medical or legal documentation of gender identity in order to have access to gender-appropriate facilities;
3. Have single-occupancy, gender-neutral (unisex) facilities available for all employees to use;
4. Ensure that multiple-occupant, gender-neutral restroom facilities have lockable single-occupant stalls; and
5. Refrain from requiring transgender employees to use a segregated facility because of their gender identity.

NOTE: these suggestions are currently aimed at the private sector, and New York has yet to adopt this OSHA guidance for public workplaces.

In short, be it restroom access, discriminatory hiring or firing, or some other employment practice that could be perceived as treating transgender workers differently than other employees, public employers should be prepared to handle such issues before they arise.

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