

EMPLOYMENT UPDATE

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New York City's Guidelines on Transgender Claims Are Now In Effect and Lawsuits are Starting to Be Filed

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One of the first transgender discrimination lawsuits has been filed since the New York City Human Rights Commission ("Commission") issued guidelines expanding the scope of the City's gender-based protections. The Plaintiff, Victor Alexander, claims that during his employment with Whole Foods he was referred to as "she, her or it" at work and was subject to other insults because of his transgender status.

On December 21, 2015, the Commission issued a new set of guidelines, based on the Transgender Rights Bill enacted in 2002, expanding the scope of gender-based protections. Under the New York City Human Rights Law ("NYCHRL"), protection against gender-based discrimination now extends to discrimination based on "gender identity and expression."

The Commission's Legal Enforcement Guidance clarifies what constitutes "gender identity and gender expression" discrimination, and it articulates that this protection applies to individuals who identify as transgender or consider themselves "gender non-conforming." Additional guidance includes examples of violations and an additional section covers penalties for violations of the guidelines.

Under the NYCHRL, it is illegal for covered entities and employers to treat protected individuals "less well than others." As it applies to employers, it is unlawful to fire, refuse to hire or promote, or set different terms and conditions of employment, such as providing different benefits or work assignments to individuals protected under this law. The Commission lists the following categories of violations under the guidelines:

1. Failing To Use an Individual's Preferred Name or Pronoun
2. Refusing To Allow Individuals To Utilize Single-Sex Facilities and Programs Consistent with Their Gender
3. Sex Stereotyping
4. Imposing Different Uniforms or Grooming Standards Based on Sex or Gender
5. Providing Employee Benefits that Discriminate Based on Gender
6. Considering Gender When Evaluating Requests for Accommodations
7. Engaging in Discriminatory Harassment
8. Engaging in Retaliation

These guidelines impose a unique and additional set of concerns for employers and covered entities in the hospitality industry. Based on these guidelines, it is now unlawful for employers and covered entities such as restaurants to enforce stereotypical gender-specific dress codes for customers. Traditional dress codes, such as those requiring men to wear jackets and ties, are no longer enforceable, although the traditional requirement of "no jeans or sneakers" may still be enforceable, as this dress code can apply to both genders.

To maintain the covered entity's traditional dress code, covered entities may create gender-neutral dress codes and grooming standards, such as casual, business casual, casual elegant, or formal. Covered entities can also modify a gender-specific dress code from a "requirement" to a "suggestion." These general and gender-neutral dress codes can convey the same message to patrons, while satisfying the new standards under the law.

Violations of the NYCHRL's guidelines may result in severe penalties. These penalties include "civil penalties of up to \$125,000 for violations, and up to \$250,000 for violations that are the result of willful, wanton, or malicious conduct." There is also "no limit to the amount of compensatory damages the Commission may award to a victim of discrimination." The Commission provides the following factors to be considered, along with each specific set of circumstances:

- The severity of the particular violation;
- The existence of previous or subsequent violations;
- The employer's size, considering both the total number of employees and its revenue; and
- The employer's actual or constructive knowledge of the NYCHRL.

Therefore, it is of utmost importance for employers and other covered entities to adhere to these guidelines.

This advisory contains highlights of the guidelines and is not intended to be legal advice.

If you have any concerns regarding how this ruling may impact your business or any employment law-related questions, please contact Greg Reilly at (212) 916-0920 or gregory.reilly@mcblaw.com, Adam Guttell at (212) 916-0938 or adam.guttell@mcblaw.com or Melanie Ghaw at (212) 916-0954 or melanie.ghaw@mcblaw.com