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Labor and Employment Alert: New York City Issues Expansive Gender Identity Protections

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In 2002, the New York City Council enacted the Transgender Rights Bill to expand the gender-based protections under the New York City Human Rights Law (NYCHRL) and ensure protection for those whose “gender and self-image do not fully accord with the legal sex assigned to them at birth.” On December 21, 2015, the New York Civil Rights Commission issued an expansive enforcement guidance on discrimination on the basis of gender identity and expression. The Commission’s guidance far exceeds the protections under New York state and federal law for discrimination on the basis of actual or perceived transgender status, gender identity, self-image, appearance, behavior, or expression.

First, according to the guidance, failing to use a person’s preferred name, pronoun (including the made-up pronouns ze and hir), or title, regardless of the person’s sex, anatomy, gender, or appearance, would be discriminatory. The Commission recommends that, in order to avoid violations, employers establish a “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.”

Second, the NYCHRL requires that individuals be permitted to use single-sex facilities (such as restrooms) and programs consistent with their gender identity or expression. Thus, it would be unlawful to prohibit a transgendered woman from using the women’s bathroom. The Commission’s guidance recommends that 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 then train their employees and managers on their obligation under the NYCHRL “to provide nondiscriminatory access to single-sex facilities including for transgender and gender non-conforming people.”

Third, the Commission states that 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.”

The guidance notes this is different from what is permitted under federal law and that the NYCHRL provides greater protection to individuals in this regard. Indeed, under the NYCHRL, “the fact that the grooming standard or dress code differentiates based on gender is sufficient for it to be considered discriminatory, even if perceived by some as harmless. Holding individuals to different grooming or uniform standards based on gender serves no legitimate non-discriminatory purpose.” While employers may still impose a dress code or grooming or appearance standards, the requirements cannot be gender- or sex-specific. This means that “requiring employees of one gender to wear a uniform specific to that gender,” or “permitting only individuals who identify as women to wear jewelry or requiring only individuals who identify as male to have short hair,” would be discriminatory under the NYCHRL.

Finally, the guidance addresses other areas of potential harassment and discrimination – noting that it is unlawful gender discrimination under the NYCHRL to discriminate against an individual for failing to conform to sex stereotypes, to provide employee benefits on the basis of gender, and to consider gender when evaluating whether to provide an employee with a requested accommodation.

The Commission reminds employers that a violation of the prohibition against gender identity discrimination can subject employers to civil penalties up to \$125,000 for violations and up to \$250,000 for willful violations. Contact your Vorys lawyer if you have questions about how the new or expanded protections for gender identity and expression may impact your business.