

## **NYC Commission on Human Rights**

### **Legal Enforcement Guidance on**

### **Discrimination on the Basis of Gender Identity or Expression:**

### **Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102**

The New York City Human Rights Law (“NYCHRL”) prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed “independently from similar or identical provisions of New York state or federal statutes,” such that “similarly worded provisions of federal and state civil rights laws [are] a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.”<sup>1</sup>

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the NYCHRL. People interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission’s Law Enforcement Bureau within one (1) year of the discriminatory act or, in the case of gender-based harassment, within three (3) years of the discriminatory act.<sup>2</sup> Alternatively, a complaint can be filed in court within three (3) years of the discriminatory act.

The NYCHRL prohibits discrimination by most employers,<sup>3</sup> housing providers,<sup>4</sup> and public accommodations<sup>5</sup> on the basis of gender. The term gender “shall include actual or perceived sex, gender identity, and gender

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<sup>1</sup> Local Law No. 85 (2005); *see also* N.Y.C. Admin. Code § 8-130(a) (“The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.”)

<sup>2</sup> N.Y.C. Admin. Code § 8-109(e).

<sup>3</sup> The NYCHRL prohibits unlawful discriminatory practices in employment and covers entities including employers, labor organizations, employment agencies, joint labor-management committee controlling apprentice training programs, or any employee or agent thereof. N.Y.C. Admin. Code § 8-107(1). Under the NYCHRL: “The term ‘employer’ does not include any employer with fewer than four persons in the employ of such employer,” except claims for gender-based harassment apply to employers of all sizes. N.Y.C. Admin. Code § 8-102. With regards to counting employees, “natural persons employed as independent contractors to carry out work in furtherance of an employer’s business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.” *Id.* “The term ‘employment agency’ includes any person undertaking to procure employees or opportunities to work.” *Id.* “The term ‘labor organization’ includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection in connection with employment.” *Id.*

<sup>4</sup> The NYCHRL prohibits unlawful discriminatory practices in housing and covers entities including the “owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof.” N.Y.C. Admin. Code § 8-107(5)(a). Covered entities also include real estate brokers, real estate salespersons, or employees or agents thereof. *Id.* Under the NYCHRL: “The term ‘housing accommodation’ includes any building, structure or portion thereof that is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings. Except as otherwise specifically provided, such term includes a publicly-assisted housing accommodation.” N.Y.C. Admin. Code § 8-102. However, the NYCHRL exempts from coverage: “the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner members or the owner’s family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or (2) to the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner’s family reside in such housing accommodation.” N.Y.C. Admin. Code § 8-107(5)(4).

<sup>5</sup> The NYCHRL prohibits unlawful discriminatory practices in public accommodations and covers entities including “any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation.” N.Y.C. Admin. Code § 8-107(4). Under the NYCHRL: “The term ‘place or provider of public accommodation’ includes

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.”<sup>6</sup>

This document serves as the Commission’s legal enforcement guidance on the NYCHRL’s protections as they apply to discrimination based on gender, gender identity, and gender expression, which constitute gender discrimination under the NYCHRL. This document is not intended to serve as an exhaustive list of all forms of gender-based discrimination claims under the NYCHRL.

## I Legislative Intent

In 2002, the New York City Council passed the Transgender Rights Bill to expand the scope of the gender-based protections guaranteed under the NYCHRL and to ensure protection for people whose “gender and self-image do not fully accord with the legal sex assigned to them at birth.”<sup>7</sup> The City’s intent in amending the law was to make explicit that the law prohibits discrimination against people based on gender identity.<sup>8</sup> The legislative history reflects that people face frequent and severe discrimination based on gender identity, and protection from discrimination is “very often a matter of life and death.”<sup>9</sup> Recognizing the profoundly debilitating impact of gender-based discrimination on transgender, non-binary, and other gender non-conforming people, the amendment makes clear that “gender-based discrimination—including, but not limited to, discrimination based on a person’s actual or perceived sex, and discrimination based on a person’s gender identity, self-image, appearance, behavior, or expression—constitutes a violation of the City’s Human Rights Law.”<sup>10</sup> In 2018, City Council amended the definition of “gender” in the NYCHRL to reflect a broader and inclusive understanding of gender.<sup>11</sup>

## II Definitions

These definitions are intended to help people understand the following guidance as well as their rights and responsibilities under the NYCHRL. In addition to the terms listed below, there are many other terms related to gender, gender identity, and gender expression with which a person may identify, including but not limited to, androgynous, gender diverse, gender expansive, gender fluid, agender, bigender, genderqueer, pangender, MTF (male to female), and FTM (female to male). Readers should bear in mind that language evolves, and the best practice is to refer to people with the term(s) they use to self-identify.

**Cisgender.** “Cisgender” is a term used to describe a person whose gender identity conforms with their sex assigned at birth.

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providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term does not include any club which proves that it is in its nature distinctly private ... [or] a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law [which] is deemed to be in its nature distinctly private.” Admin. Code § 8-102.

<sup>6</sup> Local Law 38 (2018); N.Y.C Admin. Code § 8-102.

<sup>7</sup> Local Law No. 3 (2002).

<sup>8</sup> Report of the Governmental Affairs Division, Committee on General Welfare, Intro. No. 24, to amend the administrative code of the city of New York in relation to gender-based discrimination (April 24, 2002) accessible through <http://legistar.council.nyc.gov/Legislation.aspx>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Compare Local Law 38 (2018) (“gender’ shall include 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”) with Local Law 3 (2002) (“gender’ shall include actual or perceived sex and shall also include a person’s gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth”).

**Gender.** “Gender” 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.<sup>12</sup>

**Gender expression.** “Gender expression” is 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 expression is not the same as sexual orientation or gender identity. Terms associated with gender expression include, but are not limited to, androgynous, butch, female/woman/feminine, femme, gender non-conforming, male/man/masculine, or non-binary.

**Gender identity.** “Gender identity” is 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 identity is not the same as sexual orientation or gender expression. Terms associated with gender identity include, but are not limited to, agender, bigender, butch, female/woman/feminine, female to male (FTM), femme, gender diverse, gender fluid, gender queer, male/man/masculine, male to female (MTF), man of trans experience, pangender, or woman of trans experience.

**Gender non-conforming.** “Gender non-conforming” is a term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture or historical period. Terms associated with gender non-conformity include, but are not limited to, gender expansive, gender variant, or gender diverse.

**Intersex.** “Intersex” is a term used to refer to a person whose sex characteristics (chromosomes, hormones, gonads, genitalia, etc.) do not conform with a binary construction of sex as either male or female. This term may not be the same as a person’s gender identity and is not the same as a person’s sexual orientation.

**Non-binary.** “Non-binary” is a term used to describe a person whose gender identity is not exclusively male or female. For example, some people have a gender identity that blends elements of being a man or a woman or a gender identity that is neither male nor female.

**Sex.** “Sex” is a combination of chromosomes, hormones, internal and external reproductive organs, facial hair, vocal pitch, development of breasts, gender identity, and other characteristics. Gender identity is the primary determinant of a person’s sex.

**Transgender.** “Transgender”—sometimes shortened to “trans”—is a term used to describe a person whose gender identity does not conform with the sex assigned at birth.

### III Violations of the New York City Human Rights Law’s Prohibitions on Gender Discrimination

Gender discrimination under the NYCHRL includes discrimination on the basis of gender identity (including being transgender, non-binary, or gender non-conforming) and gender expression.<sup>13</sup> The definition of gender also encompasses discrimination against someone for being intersex. Under the NYCHRL, gender discrimination can be based on one’s perceived or actual gender identity, which may or may not conform to one’s sex assigned at birth, or based on the ways in which one expresses gender, such as through appearance or communication style. Gender discrimination is prohibited in employment, housing, public accommodations, discriminatory harassment, and bias-based profiling by law enforcement and exists when a person is treated “less well than others on account

<sup>12</sup> N.Y.C. Admin. Code § 8-102.

<sup>13</sup> *Id.*

of their gender.”<sup>14</sup> For example, firing an employee because they are transgender, or allowing a non-binary employee to be subjected to a hostile work environment because of their gender identity constitute discrimination on the basis of gender.

Harassment motivated by gender is a form of discrimination. Gender-based harassment can be a single or isolated incident of disparate treatment or repeated acts or behavior. Disparate treatment can manifest in harassment when the incident or behavior creates an environment or reflects or fosters a culture or atmosphere of sex stereotyping, degradation, humiliation, bias, or objectification. Under the NYCHRL, gender-based harassment covers a broad range of conduct and occurs generally when a person is treated less well on account of their gender. While the severity or pervasiveness of the harassment is relevant to damages, the existence of differential treatment based on gender is sufficient under the NYCHRL to constitute a claim of harassment. Gender-based harassment can include unwanted sexual advances or requests for sexual favors; however, gender-based harassment does not have to be sexual in nature. For example, refusal to use a transgender employee’s name, pronouns, or title may constitute unlawful gender-based harassment. Comments, unwanted touching, gestures, jokes, or pictures that target a person based on gender constitute gender-based harassment.

**Unlawful gender-based discrimination is prohibited in the following areas:**

**Employment:**

It is unlawful to refuse to hire, promote, or fire a person because of a person’s actual or perceived gender, including being or being perceived to be transgender, non-binary, or gender non-conforming. It is also unlawful to set different compensation or terms and conditions of employment because of an employee’s gender. Examples of terms and conditions of employment include work assignments, employee benefits, and keeping the workplace free from harassment.

**Public Accommodations:**

It is unlawful for providers of public accommodations, their employees, or their agents to deny any person, or communicate intent to deny, the services, advantages, facilities or privileges of a public accommodation directly or indirectly because of their actual or perceived gender, including being or being perceived to be transgender, non-binary, or gender non-conforming. Simply put, it is unlawful to deny any person full and equal enjoyment of a public accommodation because of gender.

**Housing:**

It is unlawful to refuse to sell, rent, or lease housing to someone because of their actual or perceived gender, including being or being perceived to be transgender, non-binary, or gender non-conforming. It is unlawful to withhold from any person full and equal enjoyment of a housing accommodation because of their gender.

**1. Failing To Use the Name or Pronouns with Which a Person Self-Identifies**

The NYCHRL requires employers and covered entities to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.)<sup>15</sup> with which a person self-identifies, regardless of the person’s sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person’s identification.

Most people and many transgender people use female or male pronouns and titles. Some transgender, non-binary, and gender non-conforming people use pronouns other than he/him/his or she/her/hers, such as

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<sup>14</sup> *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 39 (1st Dep’t 2009).

<sup>15</sup> The gender-neutral title Mx. is pronounced “mèks” (similar to “mex”) or “mıks” (similar to “mix”).

they/them/theirs or ze/hir.<sup>16</sup> They/them/theirs can be used to identify or refer to a single person (e.g., “Joan is going to the store, and they want to know when to leave”). Many transgender, non-binary, and gender non-conforming people use a different name than the one they were assigned at birth.

All people, including employees, tenants, customers, and participants in programs, have the right to use and have others use their name and pronouns regardless of whether they have identification in that name or have obtained a court-ordered name change, except in very limited circumstances where certain federal, state, or local laws require otherwise (e.g., for purposes of employment eligibility verification with the federal government). Asking someone in good-faith for their name and gender pronouns is not a violation of the NYCHRL.

Covered entities may avoid violations of the NYCHRL by creating a policy of asking everyone what their gender pronouns are so that no person is singled out for such questions and by updating their systems, intake forms, or other questionnaires to allow all people to self-identify their name and gender. Covered entities should not limit the options for identification to male and female only.

### Examples of Violations

- a. Intentional or repeated refusal to use a person’s name, pronouns, or title. For example, repeatedly calling a transgender woman “him” or “Mr.” after she has made clear that she uses she/her and Ms.
- b. Refusal to use a person’s name, pronouns, or title because they do not conform to gender stereotypes. For example, insisting on calling a non-binary person “Mr.” after they have requested to be called “Mx.”
- c. Conditioning a person’s use of their 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 man who introduces himself as Manuel by that name because his identification lists his name as Maribel.<sup>17</sup>
- d. Requiring a person to provide information about their medical history or proof of having undergone particular medical procedures in order to use their preferred name, pronouns, or title.

## 2. Refusing To Allow People To Utilize Single-Gender Facilities and Programs Most Closely Aligned with Their Gender

The NYCHRL requires that people be permitted to use single-gender facilities, such as restrooms or locker rooms, and to participate in single-gender programs, that most closely align with their gender, regardless of their gender expression, sex assigned at birth, anatomy, medical history, or the sex or gender indicated on their identification. Covered entities that have single-occupancy restrooms should make clear that they can be used by people of all genders.<sup>18</sup>

Some people, including customers, other program participants, tenants, or employees, may object to sharing a facility or participating in a program with a transgender, non-binary, or gender non-conforming person. Such objections are not a lawful reason to deny access to that transgender, non-binary, or gender non-conforming person. In those circumstances, a covered entity may offer alternatives for the individual expressing discomfort, by, for example, providing a single-occupancy restroom to change in.

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<sup>16</sup> Ze and hir are gender-neutral pronouns.

<sup>17</sup> Where covered entities regularly request a form of identification from members of the public for a legitimate business reason, requesting a form of identification from transgender, non-binary, or gender non-conforming people is not unlawful. Just as is the case for many cisgender people, many transgender, non-binary, and gender non-conforming people’s appearances may not appear the same as what is represented on their photo identification. Covered entities may use a form of identification to corroborate a person’s identification, but may not subject a transgender, non-binary, or gender non-conforming person to a higher level of scrutiny than any other person presenting a form of identification.

<sup>18</sup> N.Y.C. Admin. Code § 28-315.9. A single-occupancy restroom is a room with a single toilet, walls, a sink, and a door.

Covered entities may avoid violations of the NYCHRL, by, wherever possible, providing single-occupancy restrooms and providing private space within multi-user facilities for anyone who has privacy concerns. Covered entities may accommodate a person's request to use a single-occupancy restroom because of their gender. For example, a person who is non-binary or a person who is in the process of transitioning may wish to use a single-occupancy restroom. As noted above, however, it is unlawful to require a person to use a single-occupancy restroom because they are transgender, non-binary, or gender non-conforming. Covered entities should create policies to ensure that all people can access the single-gender facility most closely aligned with their gender 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 non-discriminatory access to single-gender facilities including for transgender, non-binary, and gender non-conforming people. Covered entities should post a sign in all single-gender facilities indicating, "Under New York City Law, all people have the right to use the single-gender facility most closely aligned with their gender identity or gender expression." Covered entities may adopt policies or codes of conduct for single-gender facilities delineating acceptable behavior for the use of the facilities that are not themselves discriminatory and do not single out transgender, non-binary, or gender non-conforming people.

A person's assessment of their own safety should be a primary consideration. Covered entities 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 person requests assignment to a facility corresponding to their sex assigned at birth instead of corresponding to their gender identity because of safety concerns, that request should be honored.

### **Examples of Violations**

- a. Prohibiting a person from using a particular program or facility because they do not conform to gender stereotypes. For example, a women's shelter may not turn away a transgender woman because she looks too masculine. Similarly, a men's shelter cannot deny service to a transgender man because he does not look masculine enough.
- b. Prohibiting a transgender person from using the single-gender program or facility most closely aligned with their gender identity. For example, a public university cannot prohibit a transgender man from using the men's restroom.
- c. Requiring a gender non-conforming person to provide identification or proof of their gender in order to access the appropriate single-gender program or facility.
- d. Barring a non-binary student from a single-gender after-school program out of concern that they will make other students uncomfortable.
- e. Forcing a transgender, non-binary, gender non-conforming, or intersex person to use a single-occupancy restroom instead of a shared restroom.

### **3. Gender Stereotyping**

Discrimination based on a person's failure to conform to gender stereotypes is a form of gender discrimination under the NYCHRL. Gender stereotypes are over-simplified expectations in a given culture or historical period about how people of a particular gender should be or how they should act. They include expectations of how a person represents or communicates gender to others, such as behavior, clothing, hairstyle, activities, voice, mannerisms, or body characteristics. Gender stereotypes also relate to the roles or behaviors in a society. Covered entities may not require people to conform to stereotypical norms of masculinity or femininity. The law also recognizes that unlawful gender stereotyping often manifests itself as anti-gay epithets or attributing a particular sexual orientation to people who do not conform to gender stereotypes.



Covered entities may avoid violations of the NYCHRL by training all staff on creating and maintaining an environment free from gender stereotyping.

#### **Examples of Violations**

- a. Making unwelcome jokes about a person's sexuality based on their non-conformity with gender norms.
- b. Overlooking a female employee for a promotion because her behavior does not conform to the employer's notion of how a woman should behave at work.
- c. Enforcing a policy in which men may not wear jewelry or make-up at work.

#### **4. Imposing Different Uniforms or Grooming Standards Based on Gender**

Under the NYCHRL, employers and covered entities may not require dress codes or uniforms, or apply grooming or appearance standards, that impose different requirements for people based on gender. 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 people to different grooming or uniform standards based on gender serves no legitimate non-discriminatory purpose and reinforces a culture of gender stereotypes and cultural norms based on gender expression and identity.<sup>19</sup>

The variability of expressions associated with gender and gender norms contrast vastly across culture, age, community, personality, style, and sense of self. Placing the burden on people to justify their gender identity or expression and to demonstrate why a particular distinction makes them uncomfortable or does not conform to their gender expression would serve to reinforce a notion of gender that the NYCHRL has disavowed. When a person is treated differently because of their gender and required to conform to a specific standard assigned to their gender, that is gender discrimination regardless of intent, and is not permissible under the NYCHRL.

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. It will not be a defense that an employer or covered entity is catering to the preferences of their customers or clients.

Covered entities may avoid violations of the NYCHRL by creating gender-neutral dress codes and grooming standards. For example, a covered entity may require people 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 masculine and typically feminine. 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 because of gender.

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<sup>19</sup> As stated in N.Y.C. Admin. Code § 8-130(a), protections against gender discrimination under the NYCHRL are broader than protections against sex discrimination under federal law. Federal courts have established a higher threshold to find discrimination with respect to grooming and dress standards: differing standards based on sex or gender are permitted so long as they do not impose an undue burden, an evidentiary standard that the plaintiff must prove. *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004) *aff'd on reh'g*, 444 F.3d 1104 (9th Cir. 2006) (granting summary judgment for defendant because plaintiff failed to produce evidence that requiring female bartenders to wear makeup placed greater burden on women than on men). By comparison, the NYCHRL must analyze claims "separately and independently from any federal and state law claims," 2005 Restoration Act, *supra* note 1, and is required to construe the law "broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (denying summary judgment for the defendant because, under the more liberal standard of NYCHRL, the plaintiff provided sufficient evidence that gender discrimination may have occurred).

### Examples of Violations

- a. Maintaining grooming and appearance standards that apply differently to 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.
- b. Requiring employees of one gender to wear a uniform specific to that gender.
- c. Permitting only women to wear jewelry or requiring only men to have short hair. By contrast, requiring all servers, 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.
- d. Permitting cisgender women but not transgender women who are residents at a drug treatment facility to wear wigs and high heels.
- e. Requiring all men to wear ties in order to dine at a restaurant.

### 5. Providing Employee Benefits that Discriminate Based on Gender

The NYCHRL prohibits covered entities from offering employee benefits that discriminate on the basis of gender. To comply with the law, entities must offer benefits equally to all employees regardless of gender. Employee benefit plans that are covered by, and in compliance with, the Employee Retirement Income Security Act and applicable federal anti-discrimination laws are also in compliance with the NYCHRL.<sup>20</sup>

It is unlawful for an employer to provide health benefit plans that deny or exclude services on the basis of gender. To be non-discriminatory with respect to gender, health benefit plans must cover gender-affirming care, also known as transition-related care or transgender care. An employer that has selected a non-discriminatory plan will not be liable for the denial of coverage of a particular medical procedure by an insurance company, even when that denial may constitute discrimination on the basis of gender. However, if an employer is on notice that the employer's selected benefit plan routinely denies gender-affirming care, then the employer should take action to remedy the violation.

Gender-affirming care is medically necessary, effective, and even life-saving for many transgender, non-binary, and gender non-conforming people. Gender-affirming care includes a range of treatments, including, for example, hormone replacement therapy, breast augmentation/reconstruction, mastectomy, facial feminization, voice training, or surgery. The treatment different people receive may differ according to their needs and overall health. In addition to protections under the NYCHRL, federal law requires self-insured plans governed by the Affordable Care Act to cover medically necessary gender-affirming care and New York State law requires fully-insured New York plans to do the same.<sup>21</sup>

Covered entities may avoid violations under the NYCHRL by reviewing their existing health benefit plans, and if they do not already, provide an option that includes comprehensive coverage for transgender, non-binary and gender non-conforming people. Employers should take care to select plans that follow recognized professional standards or medical care for transgender people, for example, the standards of care of the World Professional Association for Transgender Health. Because relatively few health care providers currently perform certain transition-related or gender-affirming care, employers should consider selecting plans that do not prohibit, place limits on, or have significantly higher co-pays or low reimbursements rates for out-of-network care.

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<sup>20</sup> N.Y.C. Admin. Code § 8-107(e)(i).

<sup>21</sup> Patient Protection & Affordable Care Act, 42 U.S.C. § 18116 (2010); N.Y. Dep't. of Fin. Serv., Insurance Circular Letter No. 7 on Health Insurance Coverage for the Treatment of Gender Dysphoria (Dec. 2014).



**Examples of Violations**

- a. Employers offering health benefits to the opposite-sex spouses of employees, but not same-sex spouses.
- b. Employers offering health benefits that do not cover care when a person's sex assigned at birth or gender otherwise recorded in a medical record or insurance plan is different from the one to which health services are ordinarily or exclusively available. For example, offering benefits that cover prostate cancer screening for cisgender men but not for transgender women.
- c. Employers offering health benefits that categorically exclude from coverage, or limit coverage for, health services related to gender transition, for example by categorically deeming certain procedures as "cosmetic" without an individualized assessment of medical necessity.
- d. Employers offering any other employee benefits that discriminate on the basis of gender. For example, offering a stipend for child care to female but not male employees.

**6. Considering Gender When Evaluating Requests for Accommodations**

The NYCHRL prohibits covered entities from considering gender when evaluating requests for accommodations for disabilities, or other requests for changes to the terms and conditions of one's employment, participation in a program, or use of a public accommodation, which may include additional medical or personal leave or schedule changes.<sup>22</sup> When a covered entity 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 a person's gender identity in the same manner as requests for all other medical conditions. Covered entities shall provide reasonable accommodations to people 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.

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

**Examples of Violations**

- a. An employer who has a policy of routinely granting unpaid medical leave upon request to people 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 person.
- b. When an employer or covered entity permits a reasonable accommodation for a cisgender 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.
- c. Requesting medical documentation to verify leave time from transgender employees or participants, but not cisgender employees or participants.
- d. 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.

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<sup>22</sup> While it is not the focus of this guidance, transgender people may have additional rights under § 8-107(15) of the NYCHRL, including the right to reasonable accommodations. Some transgender, non-binary and gender non-conforming people have a diagnosis of gender dysphoria, which is a disability within the meaning of the NYCHRL. As with any disability, covered entities must make reasonable accommodations for people with gender dysphoria.

## 7. Engaging in Discriminatory Harassment

The NYCHRL prohibits discriminatory harassment or violence motivated by a person's actual or perceived gender, gender identity, or gender expression that attempts to interfere with, or actually interferes with, the free exercise of a legal right. Discriminatory harassment includes violence, the threat of violence, a pattern of threatening verbal harassment, the use of force, intimidation or coercion, defacing or damaging real property, and cyberbullying. For example, a tenant assaulting or threatening to assault a neighbor because of her gender expression, in addition to committing a crime, is also violating the NYCHRL.

## 8. Engaging in Retaliation

The NYCHRL prohibits retaliation against a person for opposing discrimination or requesting a reasonable accommodation for a disability based on gender. Opposing discrimination includes, but is not limited to, making an internal complaint about discrimination, making an external complaint of discrimination to the Commission or another government agency, or participating in an investigation of discrimination. An action taken against a person that is reasonably likely to deter them from engaging in such activities is considered unlawful retaliation. The action need not rise to the level of a final action or a materially adverse change to the terms and conditions of employment, housing, or participation in a program to be retaliatory under the NYCHRL. When a person opposes what they believe in good faith to be unlawful discrimination, it is unlawful to retaliate against the person even if the conduct they opposed is not ultimately determined to violate the NYCHRL.

Covered entities may avoid violations of the NYCHRL by implementing internal anti-discrimination policies to educate employees, tenants, and program participants of their rights and obligations under the NYCHRL with respect to gender, gender identity, and gender expression and regularly train staff on these issues. Covered entities should create procedures for employees, tenants, and program participants to internally report violations of the law without fear of adverse action and to train those in supervisory capacities on how to handle those claims when they witness discrimination or instances are reported to them by subordinates. Covered entities that engage with the public should implement a policy for interacting with the public in a respectful, non-discriminatory manner consistent with the NYCHRL, respecting gender diversity, and ensuring that members of the public do not face discrimination, including with respect to single-gender programs and facilities.

### Examples of Violations

- a. Repeatedly assigning a person to work the least desirable shifts contrary to the normal practice of rotating those shifts equally among staff because the person made an internal complaint of discrimination.
- b. Demoting or firing a person because they have filed a complaint with the Commission or filed their own case in civil court.
- c. Failing to grant accommodations for a person otherwise not required under the law but that are routinely provided by the employer because the person was interviewed as a witness in a coworker's case alleging discrimination.
- d. Refusing to advance a program participant to the next stage of the program despite their successful completion of the previous stage because the participant raised concerns about unequal treatment.

## IV Penalties in Administrative Actions

The Commission can impose civil penalties up to \$125,000 for violations, and up to \$250,000 for violations that are the result of willful, wanton, or malicious conduct. The amount of a civil penalty will be guided by the following factors, among others:

- The number of violations;
- The severity of the violation;

- The existence of previous or subsequent violations;
- The willfulness of the violation;
- The employer's size, considering both the total number of employees and its revenue;
- Any efforts the employer has made to promptly remedy violations; and
- The employer's actual or constructive knowledge of the NYCHRL.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with other compensatory and punitive damages. The Commission may consider the lack of an adequate anti-discrimination policy as a factor in determining liability, assessing damages, and mandating certain affirmative remedies.