



**Division of
Human Rights**

Guidance on Protections From GENDER IDENTITY DISCRIMINATION

Under the New York State Human Rights Law

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Table of Contents

GENDER IDENTITY PROTECTION IN NEW YORK STATE	4
DEFINITIONS	5
GENDER IDENTITY DISCRIMINATION EXPLAINED	6
Refusing to Use an Individual's Requested Name, Pronoun, or Title	6
Refusing to Allow Individuals to Use Facilities Consistent with Their Self-Identified Gender	7
Imposing Different Appearance Standards Based on Gender	8
Unequal Terms, Conditions or Benefits Based on Gender Identity	9
Revealing a Person's Transgender or Gender Non-conforming Status Without Their Consent	9
Harassment	10
HOW GENDER IDENTITY PROTECTIONS ARE ENFORCED BY DHR	11
Filing a Complaint	12
Complaint Investigation	12
Public Hearing	12
Final Orders and Remedies	12
Appeals	12
RESOURCES	13

GUIDANCE ON PROTECTIONS FROM GENDER IDENTITY DISCRIMINATION UNDER THE NEW YORK HUMAN RIGHTS LAW

On January 25, 2019, the New York State Human Rights Law (HRL) was amended to explicitly include “gender identity or expression” as a protected class in all areas of jurisdiction, including employment, places of public accommodation, public and private housing, educational institutions and credit. N.Y. Exec. L §§ 296, 296-a & 296-b. This amendment is known as the Gender Expression Non-Discrimination Act (GENDA).

GENDA defines “gender identity or expression” as “a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.” Exec. L. § 292(35).

Unlawful discrimination because of gender identity or expression can include:

- Questions about gender identity or expression, or assigned sex at birth, such as in a job or housing interview;
- Refusing to hire for a job or to rent an apartment;
- Denying equal access to places of public accommodation, to a school, or to credit;
- Terminating employment or housing;
- Denying the use of restrooms or other facilities consistent with a person's gender identity;
- Asking a transgender person to use a single-occupancy restroom because of someone else's concerns;
- Requiring individuals to show medical or other documents in order to use facilities, such as restrooms, locker rooms or residential facilities, consistent with their gender identity;
- Utilizing grooming, uniform or appearance standards based on sex stereotypes;
- Providing benefits, leave or reasonable accommodations that differ based on gender;
- Refusing to use an individual's requested name or pronouns;
- Subjecting an individual to harassment at work, school or places of public accommodation, or in connection with housing.

This guidance will explain the various areas in which gender identity discrimination can occur, including employment, housing, places of public accommodation and schools, and provide examples of discrimination. It will also provide information about how the Division of Human Rights can protect victims of gender identity discrimination.

GENDER IDENTITY PROTECTION IN NEW YORK STATE

The Division of Human Rights (DHR or Division) is the agency charged with the enforcement of the New York State Human Rights Law (HRL). The passage of GENDA makes clear to all New Yorkers that discrimination based on gender identity or expression is unlawful and that victims have recourse at DHR to vindicate their rights. DHR provides an efficient and cost-free process in which complaints alleging discrimination are promptly investigated and adjudicated, with monetary and other remedies awarded by DHR when discrimination is found.

As early as 1977, it was recognized by a New York court that sex discrimination claims under the Human Rights Law may be brought by individuals alleging discrimination because of their gender identity. In *Richards v. U.S. Tennis Association*, 93 Misc.2d 713 (Sup.Ct. N.Y. Co. 1977), the Court held a requirement that plaintiff, a professional tennis player who had undergone gender affirming surgery, pass the sex-chromatin test in order to be eligible to participate in the women's tournament was grossly unfair, discriminatory and inequitable, and violated plaintiff's rights under the New York Human Rights Law.

Since 1976, DHR has maintained a policy of accepting complaints alleging discrimination on the basis of gender identity or expression, under the protected classes of sex and, where appropriate, disability. In 2016, DHR adopted regulations to further protect individuals discriminated against based on their gender identity, which enshrined DHR's longstanding practice of accepting HRL complaints alleging discrimination because of gender identity or expression. 9 NYCRR § 466.13.

The DHR regulations make clear that in New York, gender dysphoria is considered a medical condition that falls within the broad definition of disability under the HRL. 9 NYCRR 466.13(d). Individuals with disabilities are entitled to reasonable accommodations in employment as long as it does not impose an undue hardship to the employer—a stark contrast to federal disability discrimination law, which excludes medical conditions related to gender identity or expression.

In 2018, the New York State Appellate Division recognized that a woman who identified as transgender had been discriminated against on the basis of sex and disability. In *Advanced Recovery, Inc. v. Fuller*, 162 A.D.3d 659 (2d Dept. 2018), the complainant worked as an auto mechanic. During her employment, she was diagnosed with gender dysphoria and transitioned to female. She began wearing clothing traditionally considered female. After complainant presented her supervisor with a court order changing her legal name to Erin Fuller, she was terminated. She was told her "job would be waiting for [her] as long as [she] c[a]me in wearing normal clothes." The employer failed to issue her final paycheck in her legal name. The Court upheld the Division's Final Order in its entirety.

Effective February 24, 2019, GENDA provides that "gender identity or expression" is a protected characteristic. The Division will continue to vigorously enforce the rights of transgender and gender non-conforming people on the basis of gender identity or expression, sex, and disability, and will liberally construe the provisions of the Human Rights Law as mandated by the statute. N.Y. Exec. L. § 300.

DEFINITIONS

The following definitions may help in understanding this guidance and the extent of the protections provided by GENDA:

Cisgender: a term used to describe a person whose gender identity is the same as their sex assigned at birth.

Gender: The term refers to the socially constructed system of categorizing people according to a range of characteristics often associated with masculinity or femininity. These characteristics may include social structures, attitudes, feelings, behaviors, and appearance. Different cultures and societies have different understandings of gender.

Gender Expression: External appearance of one's gender identity, usually expressed through behavior, clothing, haircut, or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with the sex assigned to an individual at birth.

Gender Identity: An individual's concept of self as male, female, a blend of both or neither. One's gender identity can be the same or different from their sex assigned at birth. An individual's gender identity may be consistent for their whole lives or may shift over time.

Gender Non-Conforming: A term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture or historical period.

Gender Dysphoria: A recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.

Intersex: An umbrella term that refers to people born with a range of variations in sex characteristics that fall outside of traditional conceptions of male or female bodies.

Misgendering: Attributing a gender to someone that is incorrect or does not align with the person's gender identity.

Non-Binary: A term used to describe a person who does not identify as exclusively male or female.

Transgender: A term used to describe a person whose gender identity and/or expression is different from the sex assigned to the person at birth.

GENDER IDENTITY DISCRIMINATION EXPLAINED

Gender identity discrimination occurs when a person is subjected to inferior treatment because of their gender identity or expression. The Human Rights Law prohibits such conduct in conditions or privileges in employment, schools, in the provision of housing or in places of public accommodation. Such discrimination may occur because an individual has transitioned or intends to transition from one gender to another or because the person is thought not to conform to sex stereotypes. Sex stereotyping occurs when behavior is considered inappropriate or unacceptable because it differs from societal norms or expectations relative to a particular sex, such as where a supervisor reacts negatively to a female employee because he considers her dress or personality traits inappropriate for a woman. Harassment because of gender identity is unlawful, as is retaliation because a person has opposed or otherwise complained about gender identity discrimination.

Under the HRL, it is not a defense to a discrimination claim that a discriminatory action was taken based on the preferences or prejudices of employees, customers, clients, or other tenants with regard to any protected characteristic. It is also not a defense that a discriminatory action was taken because of the personal religious beliefs of an employer, place of public accommodation, housing provider or other covered entity.

Some specific descriptions of gender identity discrimination are below, along with examples of what gender identity discrimination may look like. The examples are illustrative only, and any case brought to the DHR will be investigated and decided on its merits.

Refusing to Use an Individual's Requested Name, Pronoun, or Title

Misgendering occurs when a person is not referred to with pronouns that are consistent with their gender identity. Refusing to use requested names or titles is also misgendering.

Under the HRL, a covered entity, including an employer, housing provider, educational institution, or an owner or operator of a place of public accommodation may not deliberately refuse to use an individual's requested name, pronoun or title if the refusal is motivated by the individual's actual or perceived gender identity or expression.

New Yorkers have the right to use their requested names and titles regardless of their medical history, appearance, or the sex indicated on their identification. Asking someone in good-faith for their name and requested gender pronouns is not a violation of the HRL.

Example 1

A transgender woman, Anna Jones, has a medical appointment. She told the receptionist she uses the title "Ms." and filled out her intake paperwork accordingly. When it is time for her to see the doctor, the nurse calls out for "Mr. Jones."

Deliberately failing or refusing to include and use a patient's requested name and self-reported gender by medical or other staff is unlawful even if a patient's sex assigned at birth or gender transition may be recorded for the purpose of providing medical care.

Example 2

Daniel Smith is hired at XYZ corporation. The name associated with his social security number is a name he no longer uses because it is inconsistent with his gender identity. His employer refuses to assign an email account or issue business cards with the name Daniel until he obtains a court-ordered name change.

An employer may not condition an individual's use of their self-identified name on obtaining a court-ordered name change or otherwise require proof of identification with that name.

Example 3

Alison was hired for a job at ABC organization and identifies as a woman. Her manager learns that Alison was assigned male at birth and begins referring to her as "he" to other co-workers. Alison's manager says that he will use the correct pronouns if Alison "shows proof" of her identity.

Refusing to use Alison's requested pronoun of "she" is harassing conduct and employers may not require a person to provide information about their medical history or other documents in order to use an individual's requested name, pronoun, and titles. In addition, a covered entity may not deliberately disclose a person's transgender status without consent. (See also example 9 below.)

Refusing to Allow Individuals to Use Facilities Consistent with Their Self-Identified Gender

Multi-occupancy facilities, such as bathrooms or locker rooms, are commonly sex-segregated. Providing such sex-segregated facilities does not violate the HRL.

Covered entities may also offer single-occupancy facilities such as a restroom designed for one person to use at a time.

Regardless of the type of sex-segregated facilities available (multi-occupancy or single-occupancy), a covered entity must allow individuals to use facilities that are consistent with their gender identity, regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification.

It is unlawful to require a person to use a single-occupancy restroom because they are transgender, non-binary, or gender non-conforming. This is true even if other employees,

tenants or customers object to sharing a facility with a transgender, non-binary or gender non-conforming person.

Example 4

Jordan is a high school student who is non-binary. Jordan would feel safest using the single sex bathroom assigned to girls. The school administration tells Jordan to use single-occupancy restrooms only.

The school must allow Jordan to access the facilities consistent with Jordan's gender identity or expression. No one can be limited to using single-occupancy restrooms.

Example 5

Adrian is a transgender woman who needs to attend a residential drug treatment program. The program requires Adrian to submit proof of transition-related medical treatment before it will assign her to the women's rooms.

A program may not refuse to permit an individual to participate in or reside in facilities consistent with the individual's gender identity, regardless of whether the individual plans to or has undergone gender-affirming medical treatment. The preference of other participants with regard to Adrian's participation cannot be a reason to deny access.

Imposing Different Appearance Standards Based on Gender

Covered entities may not impose appearance standards based on gender.

Employers and covered entities are entitled to enforce 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.

Example 6

Leah is a gender non-conforming woman. She works as a flight attendant at an airline that requires uniforms. The only available options are either pants, vest and tie or a dress and a scarf. Leah requests to wear the option that includes pants, vest, and a tie.

The airline must permit Leah to wear the uniform that consists of pants, vest and a tie based on Leah's gender identity or expression. The fact that customers may object cannot be a reason for denial.

Example 7

A restaurant maintains a dress code for its customers that requires only men to wear ties and a jacket and requires only women to wear a dress or skirt.

The restaurant cannot impose a dress code that has different requirements based on gender. The restaurant may require dress clothes but cannot insist that a woman wear a dress rather than a jacket and tie.

Unequal Terms, Conditions or Benefits Based on Gender Identity

All employers, housing providers, places of public accommodation and schools must offer terms, conditions, and benefits equally, regardless of gender identity or expression.

Transgender and gender non-conforming individuals may not be denied equal opportunities for workplace advancement and may not be denied positions that interact with the public. Also, a housing provider, place of public accommodation or a school must permit a person to participate in a sex-segregated services or programs consistent with their gender identity or expression.

A person needing a reasonable accommodation at work for a gender-related disability must be treated in the same manner as other employees in the workplace needing accommodations for disabilities that are not related to gender. An employer may not provide medical leave or other benefits that discriminate based on gender identity. Employers must provide reasonable accommodations to individuals undergoing gender affirming or transition-related procedures, including leave for medical and counseling appointments, surgery and recovery, for treatments that remediate gender dysphoria, or for any other medical condition related to a person's gender identity or expression.

Example 8

Jim is a transgender man and asks his employer for necessary medical leave for gender-affirming treatment. The employer denies the leave time, indicating a religious objection to "facilitating" Jim's transition by providing the leave and the health insurance coverage for the treatment.

Jim is entitled to medical leave as a reasonable accommodation for his gender dysphoria, a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth. He is entitled to health insurance coverage on an equal basis with all other employees.

Revealing a Person's Transgender or Gender Non-conforming Status Without Their Consent

A covered entity may not deliberately disclose a person's transgender, gender non-conforming or intersex status, or their gender dysphoria without their consent.

Some covered entities may have access to a person's medical records or other personal information that reveals the sex assigned to that person at birth. In some circumstances, a person may not want it known that they have a gender identity that is different from the sex assigned to them at birth. Employers, schools or other covered entities must be careful not to inadvertently disclose a person's transgender, gender non-conforming, or intersex status.

Example 9

Jessie was born intersex, identifies as male and uses "he/him/his" pronouns. When filling out paperwork for company-sponsored life insurance, Jessie indicated "N/A" instead of checking either male or female, as this is factually true and consistent with his birth certificate. The Human Resources manager, who reviewed the paperwork, told other employees about this, and began referring to Jessie "it" when discussing him with other employees.

Calling Jessie "it" is harassing conduct. In addition, a covered entity may not deliberately disclose a person's intersex status without consent. (See also example 3 above.)

Example 10

Ben is a college student who identifies as a transgender man. He has not legally changed the name on his birth certificate but uses the name Ben as well as the pronouns he/him/his.

The college produces a student directory with photographs and contact information. In the student directory Ben's picture appears with the name given to him at birth, which appears on all formal records.

A covered entity may not deliberately disclose a person's transgender, gender non-conforming or intersex status without consent. Although Ben has not legally changed his name and student records still contain his former name, Ben has a right to be called by the name and pronoun he uses. The college has also improperly disclosed Ben's transgender status by using the name assigned to him at birth.

Harassment

A covered entity, including employers, housing providers, schools and places of public accommodation may not engage in harassment, such as by making humiliating, abusive or

threatening remarks, name-calling, inappropriate physical contact, or any other harassing conduct. Such covered entities may also be legally responsible for harassment committed by their employees or agents.

All persons working in a workplace have enhanced protection from harassment, including harassment on the basis of gender identity or expression, sex and disability, as well as sexual orientation, race any other basis covered by the HRL. Exec. L. § 296-d.

Unlawful harassment in the workplace now includes any harassing behavior that subjects a person to inferior terms, conditions or privileges of employment because of any protected characteristic. New York State has removed the requirement that harassment be “severe or pervasive” in order to be unlawful. Any inferior treatment is unlawful unless it is shown to be no more than petty slights or trivial inconveniences. Exec. L. § 296(1)(h).

All employers are required to have a sexual harassment policy and procedure and to see that all employees are provided with anti-harassment training annually.

Example 11

Luisa is a transgender woman working in a factory, whose co-workers sometimes make fun of her and call her names related to her transgender status. Luisa’s supervisors are aware of this harassment but tell her there is nothing they can do about it.

Luisa’s employer has knowledge of the harassment, through its supervisors. An employer is required to take corrective action to stop harassment, and may be held liable for harassment that occurs in the workplace.

Example 12

An individual rented an apartment and filled out the paperwork stating his name is Thomas. The landlord later learns that the sex assigned to Thomas at birth was female. The landlord threatens to evict Thomas, and also harasses him to try to get him to leave.

It is an unlawful discriminatory practice to harass a tenant or attempt to evict a person because of their gender identity.

HOW GENDER IDENTITY PROTECTIONS ARE ENFORCED BY DHR

Any person who feels they have suffered unlawful discrimination may file a complaint with DHR. All procedures of the DHR are free of charge, and the person filing the complaint does not need an attorney.

Filing a Complaint

DHR has regional offices around the state where information may be obtained, and a complaint filed. Complaint forms are also available on the Division's website, www.dhr.ny.gov.

Complaint Investigation

DHR investigates all complaints promptly, usually completing the investigation within 180 days. Based on all the evidence collected by the investigator, the Regional Director will make a determination as to whether there is probable cause to believe that discrimination occurred. If there is a determination of probable cause, the case is forwarded for a public hearing before an Administrative Law Judge. Attempts to conciliate and settle a case are made at all stages of the DHR process.

Public Hearing

At the public hearing before an Administrative Law Judge, testimony is taken under oath, witnesses are subject to cross-examination and a full record is made. Complainants may be represented by their own attorneys, or a Division attorney will be appointed to present the case in support of the complaint. The Administrative Law Judge submits a Recommended Order for the Commissioner's consideration.

Final Orders and Remedies

The Commissioner reviews all submissions, relevant evidence and the Recommended Order, and issues a Final Order either finding discrimination or dismissing the Complaint.

Where the Commissioner finds that discrimination has occurred, remedies may include:

- reinstatement to a job, with back pay;
- provision of housing or access to places of public accommodation;
- compensation for mental anguish;
- an order to cease the discriminatory policies;
- a requirement that training be conducted;
- civil fines and penalties;
- punitive damages;
- attorney's fees.

Appeals

Any DHR Final Order may be appealed to state court. DHR will seek court enforcement of a Commissioner's order finding discrimination if there is no compliance.

RESOURCES

- Governor's LGBTQ Landing Page
<https://www.governor.ny.gov/programs/advancing-lgbtq-equality>
- GENDA Public Awareness Campaign Website
<https://dhr.ny.gov/GENDA>
- Discrimination Based on Gender Identity or Expression
<https://dhr.ny.gov/sites/default/files/pdf/DHR-gender-identity-brochure.pdf>
- Gender Identity Discrimination by Hospitals
https://dhr.ny.gov/sites/default/files/pdf/DHR_Gender_Identity_Handout.pdf
- Connect with the Division by calling us at **1-888-392-3644** or email us at info@dhr.ny.gov
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