

Bond

CLE
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Gender Identity and Expression: Harassment Prevention



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& KING ATTORNEYS

Presentation Overview

- Glossary of Terms
- Federal Laws on Gender Identity
- State Laws on Gender Identity
- Gender-Based Stereotypes
- Pronoun Use
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- Religious Objections
- Gender Identity and Disabilities
- Non-Discrimination Policy
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Thoughts to Guide Our Discussion

- It is our intention to have an open, honest and respectful conversation about the laws applicable to New York employers on the topic of gender identity in the workplace.
- Remember: All people have unique life experiences that guide their perceptions and beliefs.
- Questions are encouraged



Glossary of Terms

HELLO
MY NAME IS

*What's in a
Name?*



Glossary of Terms: LTGBTQ+

- **Lesbian**: A woman who is sexually and/or romantically attracted to other women.
- **Gay**: Most often associated with men, but broadly means a person who is sexually and/or romantically attracted to people of the same gender.
- **Bisexual**: A person who is sexually and/or romantically attracted to men and women.
- **Transgender**: A person whose gender identity does not correspond to the gender they were assigned at birth.
- **Questioning**: A person who is unsure about their orientation and/or gender identity
- **Plus (+)**: The inclusion of all gender identities and expressions.



Glossary of Terms: Cont'd

- **Sexual Orientation**: The part of a person's identity related to whom they are sexually attracted.
- **Cisgender**: A person comfortable with their birth gender.
- **Non-Binary or Gender Non-Conforming**: A person who does not identify as a man or woman. They might identify as both, neither, or non-gendered.



Glossary of Terms: Disfavored Terms

- Transvestite
- Transsexual
- Lifestyle Choice or Alternative Lifestyle
- Sexual Preference
- Preferred pronouns
- Hermaphrodite

Remember, use the terms that people use for themselves.



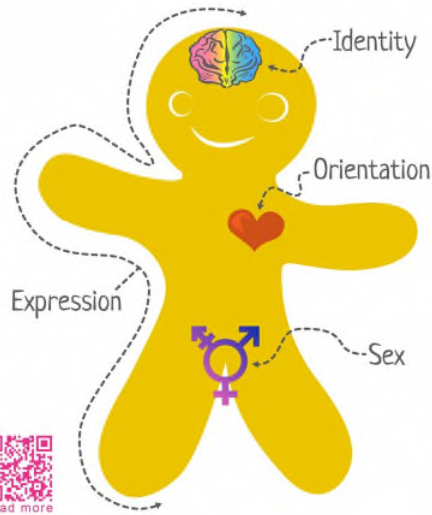
Practical Tips

- When referring to transgender people at a time in their lives before they transitioned, use their current pronouns/names.
 - Ex. Caitlyn Jenner went to the Olympics.
- Do not ask for a person's former name (pre-transition).
- Politely apologize if mistakes are made.



The Genderbread Person

by www.ItsPronouncedMetrosexual.com



Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g., hormonal levels) and how you interpret what that means.



Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.



Biological sex refers to the objectively measurable organs, hormones, and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; intersex = a combination of the two.



Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.



Federal Laws on Gender Identity



Federal Laws

- Currently, no federal laws offer explicit employment protection for non-binary or transgender people working in the private sector.
- Executive Order 13672 (2014): Made gender identity a protected category for federal employment.
- Some federal laws, such as ADA and FMLA, may be available for medical conditions related to gender identity.



Title VII

- Various courts around the country have held that Title VII protects transgender people, or at least may protect them.
 - Title VII prohibits discrimination in employment on the basis of sex, race, national origin, sexual orientation, and many other protected categories
 - Courts that have found protections have held that transgender identity is identity that is related to sex, and is therefore protected under Title VII



Title VII

- The Sixth and Eleventh Circuits have held that Title VII protects gender identity/transgender people.
 - Fifth Circuit ruled the opposite way in February 2019
- The Second Circuit has not ruled on this issue yet. A number of courts within the circuit have found that Title VII protects transgender people.
- EEOC recognizes transgender status and gender identity as protected categories under Title VII.



State Laws on Gender Identity



NYS Human Rights Law

- Makes it illegal for an employer to discriminate on the basis of age, creed, race, color, sex, sexual orientation, gender identity or expression, national origin, marital status, disability, military status, domestic violence victim status, criminal or arrest record, predisposing genetic characteristics or a known association with any of these.
- Retaliation against an individual for filing a complaint, opposing an unlawful practice, or testifying or assisting in an investigation or proceeding is also illegal.



NYS Human Rights Law: GENDA

- Gender Expression Non-Discrimination (GENDA)
 - Enacted on January 25, 2019
 - Effective immediately
- Amends the Human Rights Law by adding “gender identity or expression” as a protected category
- All policies should be updated accordingly

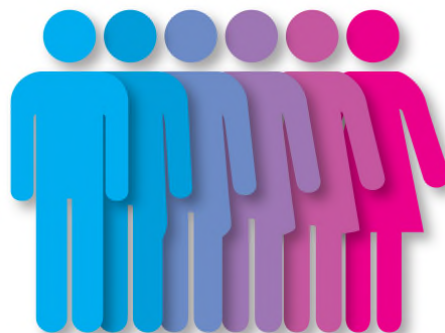


NYS Human Rights Law: GENDA

- 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”
- Protects the way a person expresses gender through speech, dress, and behavior



Gender- Based Stereotypes



Gender Stereotypes

- Gender stereotyping is illegal sexual harassment
- Occurs when personality traits are considered inappropriate because they do not conform to other people's ideas or perceptions about how individuals of either gender should look or act
- Extends to:
 - Looks, speech, personality, lifestyle,
 - Performing a job that is usually performed, or was performed in the past by persons of the opposite sex



Transgender Stereotypes

- Transgender people do not have to do any of the following to be considered protected under the NY Human Rights Law:
 - Change their legal names
 - Ask to be called by a different name
 - Have surgery
 - Take medications, including hormones



Transgender Stereotypes

- Transgender people do not have to do any of the following to be considered protected under the NY Human Rights Law:
 - Dress in a certain way
 - Use a particular pronoun
 - Produce medical records to the employer as proof of transition (limited exception for gender dysphoria)



Gender Identity Stereotypes

- Non-Binary/Gender Non-Conforming People
 - Are not “trying to make up their minds”
 - May use a variety of pronouns, including they/them, he/him, she/her or ze/zem
 - Do not have to dress in a stereotypically “male” or “female” way, although they may choose to do so
 - Do not have to have their names legally changed
 - Cannot be required to produce medical records to prove that they are non-binary



Pronoun Use



Pronoun Use

- Failure to use correct pronouns for individuals in the workplace is discrimination.
- Correct pronouns may include: they/them, he/him, she/her or ze/zem
- NYC Human Rights Law: Explicitly illegal to use incorrect pronouns; likely illegal under NYSHRL too.
- Remember the platinum rule: treat people the way they want to be treated

Pronouns: Illustration

- Zoe has supervised the same group of people for ten years. A few years ago, one of Zoe's team members, Adam, transitioned from female to male.
- Zoe calls Adam by the female pronoun repeatedly, and Adam corrects her each time.
- Three months after Adam's transition, Zoe is still using the incorrect pronoun.

Is This Illegal?

YES!!

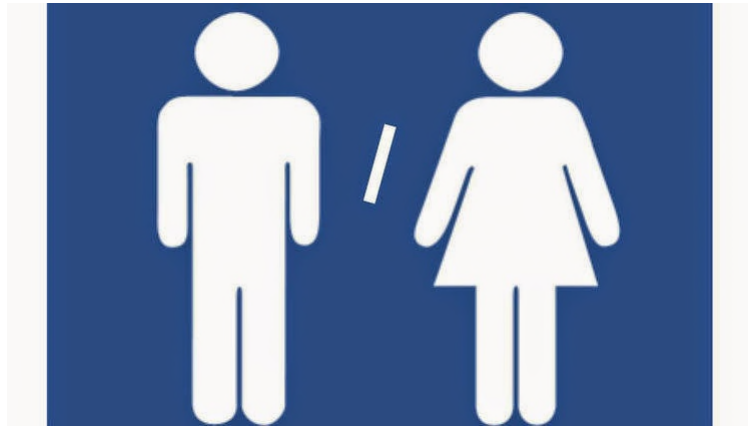


Pronoun: Illustration

- Zoe and Adam Cont'd
- Is Zoe's conduct illegal under NYSHRL?
 - **Yes.** Gender identity, including transgender status, is protected. Correct pronouns must be used.
- Is Zoe's conduct illegal under NYCHRL?
 - **Yes.** The Commission has explicitly stated that incorrect pronoun usage is discrimination.
 - Violators are subject to civil penalties of \$125,000, and up to \$250,000 for "willful" violations.



Restrooms and Gender Identity



Restrooms and Gender Identity

- Various State Laws
 - 2016: North Carolina law mandated that individuals use restrooms consistent with their biological attributes (repealed 2017)
 - Kentucky and Tennessee are considering similar bills
- There is no evidence that gender-segregated restrooms are safer for cisgender women than unisex restrooms
- UCLA 2013 Study: 70% of respondents said they were denied access, harassed or assaulted in public restrooms.

Restrooms: NYS Law

- No cases or specific NY laws on bathroom access for people based on gender identity
- GENDA/NYSHRL
 - Most likely, employers must allow individuals to use the restroom that conforms with their gender identity
 - To fail to do so is a **substantial legal risk**



Restrooms: NYC Law

- NYC Commission on Human Rights:
 - Has explicitly stated that failure to allow individuals to use the restroom consistent with their gender identity is a violation of the law
- The Division of Human Rights will more than likely take the same position, regarding restrooms.
 - National and local laws all trend in this direction
- **Effect: All employers in NY must allow employees to use the restroom of their choice**



Restrooms: OSHA

- 2015: Guidance to Restroom Access for Transgender Workers
 - Issued an advisory recommendation
 - Not binding law or official guidance
- Explicitly favors allowing individuals use the restrooms that conform with their gender identity
- Available at:
<https://www.osha.gov/Publications/OSHA3795.pdf>



Restrooms: OSHA

- “Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety.”
- “Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.”



Restrooms OSHA

- Under OSHA's sanitation standard, (Section 1910. 141), employers are required to provide their employees with access to toilet facilities.
- "OSHA has consistently interpreted Section 1910.141 to require employers to allow employees prompt access to sanitary facilities. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities."



Restrooms: Options

- Create single use restrooms that anyone, regardless of gender identity, can use.
- Educate employees regarding transgender rights and restrooms.
- To require a transgender individual to use a single use restroom and not allow use of a group restroom is discrimination under NYC law, and likely NY State law as well.



Restroom: Illustration

- Sandra was hired by XYZ Company two months ago, and has been using the women's restroom ever since.
- Recently, one of Sandra's coworkers learned from a mutual friend that Sandra is a transgender woman
- This co-worker refuses to use the women's bathroom with Sandra anymore, and told HR that she feels "unsafe" doing so. She demands that the Company stop Sandra from using the women's restroom, saying that it is giving her stress and anxiety at work to share with Sandra.
- What should the Company do?



Religion and Gender Identity



Religious Objections

- The Human Rights law prevents discrimination against employees on the basis of religion
- Some people may claim that they do not want to work with transgender or non-binary individuals, or will not use correct pronouns, or share a bathroom, for religious reasons
- Religious beliefs are not acceptable reasons for discrimination



Religious Objections

- To refuse to use correct pronouns, work with, or use the restroom with a non-binary or trans person is legally the same level of discrimination as refusing to use to do any of those things with anyone else because of their membership in a protected category.
- Ex. I refuse to use the bathroom with Susan because she is a transgender woman is the same as I refuse to use the bathroom with Susan because of her race.



Religious Objections

- In EEOC v. R.G. (2018), the Sixth Circuit held that religious objections do not justify non-compliance with Title VII.
 - Requiring the business owner “to comply with Title VII’s proscriptions on discrimination does not substantially burden his religious practice.”
 - Nor did presumed or actual customer biases against transgender people justify discrimination under Title VII



Religious Objections: Illustration

- Adam has been an employee at XYZ Company for ten years, and is devoutly religious.
- He has recently learned that one of the co-workers, Eve, identifies as a non-binary individual. Yesterday, Eve said to Adam, “The pronouns that should be used for me are ‘ze, zem or zer.’”
- Adam refuses to use Eve’s correct pronouns, and when the HR Director tells him that he has to, he threatens to sue the Company for religious discrimination.
- What should XYZ Company do?



Gender Identity and Disabilities



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Gender Dysphoria

- The American Psychiatric Association defines gender dysphoria as a conflict between a person's physical or assigned gender and the gender with which they identify. This may cause significant distress and/or problems functioning.
- This is a somewhat controversial term, as many non-binary or transgender people do not believe that they have a psychiatric illness.
- Still, it remains a diagnosable illness, and is used in legal statutes.

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Gender Identity: ADA

- Non-disabling conditions concerning sexual orientation and identity are not protected under the ADA
 - ADA regulations also state that transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders are not protected
 - Note that much of this language could be deemed offensive
- In 2017, a federal court in Pennsylvania held that gender dysphoria could be a disability under the ADA because of the associated physical symptoms
- After this decision, there may be grounds to find that gender dysphoria must be reasonably accommodated.



Gender Identity: NYS/NYC HRL

- The Human Rights Law lists gender identity or expressions as protected categories, but also views gender dysphoria as a disability.
- Employers must engage in the interactive process and reasonably accommodate all individuals with a medical diagnosis of gender dysphoria.
- This is a case where you could ask for medical documentation.



Gender Identity: NYS/NYC HRL

- To summarize:
 - Employers must not discriminate on the basis of transgender or gender identity status AND
 - Employers must reasonably accommodate employees who have a diagnosis of gender dysphoria
- So... if an employee discloses that they are transgender and asks for leave time, IF it is not normally leave time that you would give to another employee, you can ask for medical documentation.



Gender Identity: FMLA Leave

- To qualify for FMLA leave, a transgender employee must have a “serious medical condition” related to their transgender status. These can include:
 - Surgery
 - Continued counseling
 - Hormone therapy
- FMLA leave may also be available for treatments for gender dysphoria
- Individual circumstances will dictate outcomes



Disability Illustration

- Jamie, an employee at XYZ Company, comes to Human Resources and says that they are non-binary, and that their correct pronouns are “they, them, and theirs.” In this meeting, Jamie also alludes to needing time off, but does not specify as to why.
- What are XYZ Company’s obligations?



Disability Illustration: Bonus

- Jacob, an employee at XYZ Company, comes to Human Resources and says that his daughter is transgender, and that he needs time off to care for her after she has surgery.
- What are XYZ Company’s obligations?



Non-Discrimination Policy



Non-Discrimination Policy

- Consider adopting a gender identity non-discrimination policy for the workplace
- Elements:
 - Pronoun use
 - Name changes, including name changes on employer's documents

Non-Discrimination Policy

- Elements:
 - Restroom policy
 - Confidentiality policy
 - Reporting harassment/discrimination
 - Acknowledgement (if separate from handbook)



Takeaways

- Be mindful of correct names, pronouns, and other terminology
- Awareness of the impact of NYHRL, FMLA, and ADA when assessing leave requests
- Consider adopting a gender identity non-discrimination policy



Questions?