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**DATE:** January 19, 2016  
**TO:** All New York Clients  
**FROM:** Kane Kessler, P.C.  
[Labor and Employment Practice Group](#)  
**RE:** NYC Commission on Human Rights Issues Guidance on Current Law Against Gender Discrimination

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**Introduction**

On December 21, 2015, the New York City Commission on Human Rights (the “Commission”) issued guidance on the anti-discrimination provisions of the New York City Human Rights Law (“NYCHRL”) that are already in effect in New York City, specifically the laws prohibiting discrimination based on gender identity and gender expression (the “Guidance”), which cover employers with four (4) or more employees. The Guidance is an extremely broad approach to transgender protection in the workplace, in housing, and public accommodations. However, in our view, the Guidance fails to recognize the practical realities facing businesses, particularly hospitality businesses. We will first summarize the Guidance and then address some of our concerns. The Guidance prohibits:

- **Refusing to Use an Individual’s Preferred Name, Pronoun or Title:** It is unlawful for covered entities to prohibit an individual from using a preferred name, pronoun or title or to refuse to acknowledge the same, regardless if such preferred name, pronoun, or title conforms to general notions of that individual’s gender. The Guidance points out that some transgender and gender non-conforming individuals prefer pronouns such as they/them/their or ze/hir, which are popular gender-free pronouns. Employers are required to adhere to an individual’s preference and the Guidance clarifies that asking an employee their preferred pronoun or name is not a violation of the NYCHRL.
- **Refusing to Allow Individuals To Utilize Single-Sex Facilities and Programs Consistent with Their Preferred Gender:** The NYCHRL requires that individuals be permitted to use single-sex facilities, including bathrooms and locker rooms, and participate in single-sex programs consistent with their preferred gender, regardless of their sex assigned at birth. Objections by others are not a lawful reason to deny an individual access to such facilities or programs. For example, it is unlawful to deny a transgender woman the use of a women’s bathroom. It is also unlawful to require an individual to show proof of gender in order to utilize a facility or participate in a program.

- **Sex Stereotyping:** Sex stereotyping is broadly construed and includes, for example, using anti-gay epithets, overlooking a female for promotion because she does not conform to the employer’s notion of how a female should behave at work, and enforcing a policy prohibiting men from wearing make-up or jewelry at work.
- **Imposing Different Uniforms or Grooming Standards Based on Sex or Gender:** The Guidance bans an employer from imposing on employees any uniform or grooming standards that are gender specific, regardless if the same are perceived as innocuous. For example, employers cannot require women to wear a skirt suit and men to wear a traditional suit. Employers are permitted to impose such uniform standards, but they cannot require an employee to wear one over the other. This strays drastically from current state and federal law, which permits the requirement of grooming standards and uniforms that are gender specific so long as the requirement does not impose an undue burden on the employee.
- **Providing Employee Benefits that Discriminate Based on Gender:** Employers are prohibited from providing health benefits that are discriminatory based on gender. Health benefits are, therefore, required to cover transgender care, including hormone replacement therapy, voice training, and surgery. Offering health benefits to opposite-sex spouses of employees, and not same-sex spouses, is violative of the law, as is offering a child care stipend to female, but not male, employees.

The Guidance also broadens the scope of what may constitute sexual harassment and retaliation. New York City defines gender discrimination as when an individual is treated “less well than others on account of their gender.” Harassment based on gender may occur from an isolated incident depending on the circumstances, for example, the refusal to use an individual’s preferred name or pronoun. This standard is much broader than current state and federal law, which require repeated and pervasive acts of disparate treatment in order to constitute harassment.

The Guidance imposes civil penalties of up to \$125,000 for unintentional violations and \$250,000 for willful violations. In considering penalties, the Commission will take into account the severity of the violation, any prior record of violations, the size of the employer, and the employer’s actual or constructive knowledge of the law.

The Guidance is effective immediately.

### Comments

The Guidance appears to fail to recognize the following situations:

- The Guidance directs that individuals – employees and patrons – must be permitted to use single area facilities such as bathrooms, but fails to take into account, or provide instruction, on how businesses are to police these areas from possible predators or perverts.
- The Guidance suggests that employees create a policy of asking every employee their preferred pronoun or name and to allow their human resources and payroll system to permit individuals to self-identify their gender. We recognize, however, that in some

situations it is better for the employer that it not know of an individual's protected status as a means to avoid welcoming discrimination or retaliation claims.

- It appears that under the law, employers can impose grooming and uniform standards, so long as such standards are imposed on all genders. For example, an employer cannot require women, but not men, to wear skirts. If, instead, an employer permits women to wear skirts, men must be permitted to do the same. In this instance, the law allows an employer to impose grooming standards on both men and women, for example, the requirement that both men and women must shave their legs and wear stockings if they choose to wear a skirt to work. In our view, this forces employers, particularly those in the hospitality industry, to reconsider grooming and dress code policies that presently can be perceived as having a significant level of detail and differentiation between genders.
- The Guidance requires that employers provide benefit plans that cover transgender care. Employers are advised to discuss with their insurance brokers the implication of the Guidance and ensure that health benefits comply with the law.

If you have any questions, please do not hesitate to contact [David R. Rothfeld](#), [Robert L. Sacks](#), [Lois M. Traub](#), [Alexander Soric](#), [Michael C. Lydak](#) or [Jaclyn Ruocco](#).

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*It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances*