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New York Enacts Gender Expression Non-Discrimination Act

On January 25, Gov. Andrew M. Cuomo signed into law a bill amending the New York State Human Rights Law (NYSHRL), which now prohibits discrimination by employers against individuals on the basis of gender identity or expression. The new law, known as the Gender Expression Non-Discrimination Act (GENDA), goes into effect on February 24, 2019.

The NYSHRL broadly prohibits employers from taking discriminatory employment actions against individuals (e.g., failure to hire or termination). Prior to this most recent amendment, the NYSHRL prohibited employment discrimination on the basis of a number of protected categories, including age, race, disability, sex, sexual origination, national origin and pregnancy. With the passage of GENDA, the protected categories under the NYSHRL now include an individual's gender identity or expression.

GENDA supplies an expansive definition of "gender identity or expression," which includes an individual'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." Although this definition confirms that gender identity or expression is meant to be read expansively under GENDA, it is not clear in explaining the terms "gender identity" or "gender expression." Broadly speaking, gender identity refers to individuals' perception of their own sex, such as male, female or neither, regardless of what sex the individual was "assigned" at birth. Gender expression, on the other hand, involves outward appearances and expressions rather than internal perceptions. Individuals may express their gender through, for example, their behavior, mannerisms, clothing or voice.

The NYSHRL's protection for individuals based on their gender identity or expression raises a host of practical issues for New York employers. For example, employers interviewing candidates will need to be mindful of references to an applicant's name or pronoun. Employers with employees transitioning genders or announcing their intention to do so will need to consider a variety of questions, such as how to establish a plan for restroom usage that is respectful, accessible and convenient for all employees. Of course, in ensuring their compliance with the NYSHRL, as amended by GENDA, the first place employers should start is with their own handbooks and policies, specifically including gender identity and expression as a protected category.

With the passage of GENDA, New York now joins more than 20 states, including Connecticut, Massachusetts and New Jersey, that also prohibit discrimination on the basis of gender identity and/or gender expression. Further, although Title VII of the Civil Rights Act of 1964 does not expressly prohibit discrimination on the basis of gender identity or expression, the Equal Employment Opportunity Commission and many courts have interpreted Title VII's prohibition of discrimination on the basis of sex to include such discrimination.

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