

New York State Adds Protected Classifications and Remedies for Workplace Discrimination

Morgan Lewis

Article By

[Douglas T. Schwarz](#)

[Kimberley E. Lunetta](#)

[Morgan, Lewis & Bockius LLP](#)

[Labor and Employment Law Flash](#)

- [Civil Rights](#)
- [Labor & Employment](#)
- [New York](#)

Friday, October 30, 2015

The new laws are designed to protect equality for female employees in New York State; Governor also proposes regulations that would extend protections to transgender employees.

On October 21, New York [Governor Andrew Cuomo signed into law multiple bills](#) designed to “protect and further women’s equality in New York State” through pay equality, reasonable accommodations for pregnant workers, protection from sexual harassment, and protection against discrimination on the basis of familial status. These changes in New York law are expected to take effect on January 19, 2016.

This LawFlash discusses the bills Governor Cuomo signed, the proposed anti-discrimination and anti-retaliation regulations proposed the following day, and steps employers should consider taking to address these changes in New York law.

Achieve Pay Equality Law

The Achieve Pay Equality legislation strengthens current state law that requires employers to provide men and women with equal pay for equal work and increases the available damages to 300% of wages due for an employer’s willful violation of

the law. This law expressly prohibits an employer from forbidding its employees from inquiring, discussing, or disclosing wages (with certain limitations). The law permits employers to implement written policies that establish reasonable limitations on the time, place, and manner of wage discussions and to prohibit employees from disclosing another employee's wages without obtaining his or her consent. Also, employees granted access to wage information as part of their essential job functions (i.e., payroll and human resources personnel) are not permitted by this legislation to disclose such information unless they are responding to a complaint, charge, or investigation.

Protect Women from Pregnancy Discrimination Law

The Protect Women from Pregnancy Discrimination legislation requires that employers engage in an individualized, interactive process and provide reasonable accommodations for pregnancy-related conditions. Employers cannot adopt bright-line rules that require a "one size fits all" approach to accommodating pregnant workers (e.g., requiring leave for those who cannot perform the essential functions of a job without providing accommodations, or permitting light duty for workers with work-related injuries while not offering the same accommodation for pregnant workers).

Protect Victims of Sexual Harassment Law

The Protect Victims of Sexual Harassment legislation expands coverage to allow employees who work for an employer with fewer than four employees to file a workplace sexual harassment complaint.

Remove Barriers to Remedying Discrimination Law

The Remove Barriers to Remedying Discrimination legislation allows successful parties to recover attorney fees in employment discrimination cases based on sex. Presently, plaintiffs who prevail in discrimination claims under New York State law cannot recover attorney fees at trial, although they can do so under federal Title VII and the New York City Human Rights Law.

End Family Status Discrimination Law

The End Family Status Discrimination legislation makes "familial status" a protected classification, making it illegal for an employer to make employment decisions based on whether an applicant or employee is pregnant, has children, or is in the process of securing legal custody of a minor.

Proposed Regulations to Protect Employees from Discrimination Based On Gender Identity, Transgender Status, and Gender Dysphoria^[1]

A day after signing the above-described bills into law, Governor Cuomo [introduced regulations](#) under the New York State Human Rights Law (HRL) that would prohibit discrimination and harassment based on gender identity, transgender status, and gender dysphoria.

The [proposed regulations](#) would do the following:

- Define “sex” as used in the HRL to include gender identity^[2] and the status of being transgender,^[3] making discrimination on these bases a violation of the law
- Deem harassment on the basis of a person’s gender identity or status of being transgender to be sexual harassment
- Define “disability” to include gender dysphoria,^[4] which would make discrimination on that basis illegal

The proposed regulations are subject to a 45-day notice and comment period. It is possible that arguments will be made that the regulations go beyond the scope of the statute by purporting to create protections that the legislature has not authorized.

Best Practices for Employers in Light of These Changes in the Laws

Employers should take steps to ensure that their current policies and training protocols adequately address these changes in New York law.^[5]

- **Pay Equality**—Employers should continue their efforts to ensure equal pay for equal work. Regarding employee discussion of wages, employers should review their confidentiality and non-disclosure policies for compliance with both state and federal law.^[6] These policies should not expressly or impliedly require employees to maintain absolute confidentiality of wage information. Employers should consider, however, implementing written policies that create reasonable limitations on the appropriate time and place for wage discussions.
- **Familial Status and Gender Identity**—Prior to the effective date of the newly enacted state laws, New York employers should consider expanding their anti-discrimination policies, anti-harassment policies, and related training materials to include familial status. If the proposed regulations are implemented, these policies should be further enlarged to include gender identity, gender dysphoria, and transgender status as protected classifications.

To further comply with these regulations if they go into effect, New York employers should consider implementing gender-neutral dress codes and reviewing their employee benefits packages (including short-term disability plans) to determine if gender dysphoria is excluded as a covered condition—either expressly or by reference to and incorporation of definitions of “disability” set forth under federal law.^[7] Employers should further consider how they will accommodate employees with gender dysphoria. It is important to note that the law is evolving on a state and local level with regard to

accommodations for employees who are transitioning from one gender to another. Therefore, employers are strongly encouraged to reach out to outside counsel to determine whether their policies are up to date.

- Reasonable Accommodation for Pregnancy-Related Conditions—Employers should also update their reasonable accommodation policies, procedures, and training materials, and those responsible for managing the interactive process should be trained in the ways in which pregnancy can be accommodated.

[1] Employers in New York City are reminded that the New York City Human Rights Law already prohibits employment discrimination based on a broad definition of “gender,” which includes “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.” N.Y.C. Admin. Code §8-102(23), available [here](#).

[2] “Gender identity means having or being perceived as having a 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 sex assigned to that person at birth.” 9 NYCRR §466.13(b)

[3] “A transgender person is an individual who has a gender identity different from the sex assigned to him or her at birth.” *Id.*

[4] Gender dysphoria “is a recognized medical condition related to an individual having a gender identity different from the sex assigned to him or her at birth.” *Id.*

[5] This legislation will only apply to claims that occur on or after the effective date.

[6] To comply with the National Labor Relations Act (NLRA) protections for “concerted activity,” employers must not prohibit employees, regardless of whether they are represented by a union, from discussing wage or other personnel information.

[7] The protections afforded to transgender employees under federal law are limited to diagnosed medical impairments and serious medical conditions. A transgender employee *receiving treatment* for gender identity disorder or gender dysphoria may be considered “disabled” under the Americans with Disabilities Act (ADA). And a transgender employee having sex reassignment surgery requiring overnight hospitalization, continued counseling or hormone therapy, may qualify for coverage under the Family and Medical Leave Act (FMLA). However, certain procedures and treatments for transgender employees and their spouses or partners may not qualify as “serious medical conditions” for purposes of the FMLA.

Source URL: <https://www.natlawreview.com/article/new-york-state-adds-protected-classifications-and-remedies-workplace-discrimination>