

NYC Employers Risk New Penalties in 2016: Gender and Caregiver Discrimination, Paying Freelancers

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In December 2015, New York City lawmakers introduced or approved three important legal actions that will affect the City's employers: (1) publication of enforcement guidance on gender, gender identity, and gender expression discrimination claims; (2) a law that protects individuals from employment discrimination based on their status as "caregivers"; and (3) proposed legislation that, if enacted, will protect freelance workers against non-payment or late payment of compensation by the companies that engage them and mandate that such companies have written contracts with their freelance workers. To help employers comply, we have provided a summary of these actions below.

I. NYC Commission on Human Rights Issues Enforcement Guidance on Gender-Based Discrimination Claims

In April 2002, the New York City Human Rights Law ("NYCHRL") was amended to unambiguously afford protection to persons discriminated against on the basis of gender identity.¹

On December 21, 2015, the New York City Commission on Human Rights ("Commission"), the government agency responsible for enforcing the NYCHRL, [issued new guidance](#) on what constitutes discrimination on the basis of gender, gender identity, or gender expression ("Guidance").² The Guidance outlines the range of violations

¹ Under the NYCHRL, the term "gender" was defined as "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."

² Guidelines published by the New York City Commission on Human Rights in December of 2004, titled "[Guidelines Regarding Gender Identity Discrimination](#)," outlined the purpose, terms, and areas of application of the law, along with how to avoid discriminatory practices under the law, but did not provide instruction as to what would be considered a violation under the law.

under the NYCHRL, provides examples of those violations, and offers advice to covered entities on complying with the law.

The Guidance stresses that the NYCHRL prohibits employers from discriminating against transgender and gender non-conforming individuals in New York City. Gender discrimination exists, the Guidance explains, when an individual is treated “less well than others on account of their gender.” The Guidance reminds employers and covered entities that harassment motivated by gender is also a form of discrimination.

In the employment area, the Guidance emphasizes that prohibited gender-based discrimination includes: (1) refusing to hire or promote or firing an individual due to their actual or perceived gender, including actual or perceived status as transgender or gender non-conforming; and (2) setting different terms and conditions of employment because of an employee’s gender.

Below, we have highlighted some of the violations, examples, and advice provided in the Guidance:

- Under the NYCHRL, employers are required to use an individual’s preferred name, pronoun (e.g., “he” or “she”), and title (e.g., “Mr.” or “Ms.”). A deliberate or repeated refusal to use an individual’s preferred name, pronoun, or title is a direct violation of the law. The Guidance suggests that employers may avoid this type of violation by establishing a policy of asking individuals to provide their preferred name and gender pronoun. The Guidance notes that, while inquiries about sexual orientation are not permitted under the NYCHRL, asking someone for his/her preferred gender pronoun and preferred name does not violate the law.
- According to the Commission, employers and other covered entities may not prohibit individuals from using single-sex programs or facilities, such as bathrooms or locker rooms. Employers are also not allowed to require that a transgender or gender non-conforming person provide identification or proof of his/her gender in order to use single-sex facilities. Importantly, prohibiting an individual from a program or facility out of concern that a transgender or gender non-conforming individual will make others uncomfortable constitutes unlawful gender discrimination.
- Further, the Guidance states that employers are prohibited from requiring employees to wear different uniforms or apply different grooming and appearance standards based on that individual’s sex or gender. For example, it is unlawful to require only men to have short hair. But a policy that requires all employees, regardless of gender, to either have short hair or pull long hair back into a clip or ponytail is lawful. A policy that allows only women to wear earrings is unlawful as well. To avoid liability under the NYCHRL, the Commission recommends that covered entities create gender-neutral dress codes and grooming standards.
- The NYCHRL prohibits covered entities from offering employee benefits that discriminate on the basis of gender. In this regard, the Guidance states:

To be non-discriminatory with respect to gender, health benefit plans must cover transgender care, also known as transition-related care or gender-affirming care. In no case, however, will an employer that has selected a non-discriminatory plan be liable for the denial of coverage of a particular medical procedure by an insurance company, even when that denial may constitute discrimination on the basis of gender.

- Employers must also provide reasonable accommodations to employees who are undergoing a gender transition, and may not engage in retaliation against an individual who makes a complaint of discrimination, either internally or externally, or participates in an investigation.

Civil penalties for violations under the NYCHRL can reach up to \$125,000, and up to \$250,000 if the violation is found to be the result of willful, wanton, or malicious conduct. These amounts are *in addition to* any back or front pay, compensatory, or punitive damages.

II. NYC Human Rights Law Amended to Prohibit Discrimination Based on an Individual's Status as a Caregiver

Following New York State's recent [enhanced protections](#) for employees, the New York City Council passed on December 16, 2015, an [amendment](#) ("Amendment") to the NYCHRL that extends protection to an individual's actual or perceived status as a "caregiver." A copy of the press release is available [here](#).

Under the Amendment, New York City employers are prohibited from discriminating against potential applicants or employees who act as caregivers, with respect to hiring or firing, compensation, and conditions or privileges of employment.

The Amendment defines "caregivers" as persons who provide direct and ongoing care for children under the age of 18 or a care recipient. The term "children" includes biological, adopted, or foster children, or children for whom the caregiver has assumed a primary parental role. "Care recipients" are defined as individuals with a disability, who rely on the caregiver for medical care or to meet the needs of daily living, and either (i) are a covered relative, or (ii) reside in the caregiver's household.³

The Amendment takes effect on May 4, 2016. The Commission may take any actions necessary prior to such effective date for the implementation of the Amendment.

³ "Covered relatives" under the NYCHRL include a "caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver as designated by the rules of the Commission."

III. Proposed “Freelance Isn’t Free Act” May Change the Way Employers Do Business with Independent Contractors

On December 7, 2015, Councilman Brad Lander introduced legislation that creates new rules for businesses that contract with New York City’s estimated 1.3 million independent workers. The bill, entitled “[Freelance Isn’t Free Act](#)” (“the Act”), would create administrative and legal remedies for freelancers who are not paid on time, or at all, in accordance with their contracts.

What the Proposed Rules Would Require

If passed, the Act would require any party hiring a freelance worker to execute a written contract that includes, at a minimum:

- an itemized list of the services that will be provided,
- the rate and method of compensation, and
- the date when payment is due.

The Act defines “freelance worker” as “any sole proprietor who is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation in an amount equal to or greater than \$200.” The Act exempts any contractual relationships between federal, state, or city governments and independent workers in New York City. The Act would require businesses that contract with freelancers to compensate those freelancers within 30 days after the completion of services, or at a date specified in the contract, whichever is later.

The Act would create both administrative and legal remedies for aggrieved independent workers. A freelance worker who is not paid within the applicable time period would be able to file a complaint with the New York City Department of Consumer Affairs (“DCA”).⁴ If, after an investigation, the DCA finds wrongdoing, it may impose double damages, attorneys’ fees and costs, and civil penalties upon the entity contracting with the freelancer. As an alternative to filing an administrative complaint, independent workers who are not paid on time could file a complaint in court for double damages, injunctive relief, and other remedies. Prevailing plaintiffs would receive reasonable attorneys’ fees, costs, and disbursements.

For persons found guilty of willful violation, the Act proposes civil penalties of a fine not to exceed \$5,000 and an additional penalty of up to \$100 for each day the violation continues. Moreover, the Act proposes criminal penalties of a fine not to exceed \$500, imprisonment for up to three months, or both.

⁴ The Department of Consumer Affairs also administers the Earned Sick Time Act.

What Employers Should Do Now

- Review and update employee handbooks, policies, and procedures to ensure they reflect all categories protected by the law, or at least a “catch-all” reflecting categories covered by applicable state and local law.
- Revise dress code policies to ensure that they are gender-neutral.
- Review health care plans in connection with the new Guidance to ensure transgender employees receive coverage in compliance with the law.
- Ensure contracts with freelancers contain at least the terms required by the Act.
- Train human resources personnel and supervisors regarding these new laws, to ensure compliance.

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