

COMMISSION ON HUMAN RIGHTS

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The New York City Commission on Human Rights (the “Commission”) is proposing to amend its rules to establish certain definitions and clarify the scope of protections with respect to gender in the New York City Human Rights Law.

When and where is the hearing? The Commission will hold a public hearing on the proposed rule. The public hearing will take place at 11am on September 25, 2018. The hearing will be in Spector Hall, located at 22 Reade Street, New York, New York 10007 on the first floor.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Commission through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to policy@cchr.nyc.gov.
- **Mail.** You can mail comments to Michael Silverman, New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007.
- **Fax.** You can fax comments to Michael Silverman at 646.500.7022.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by emailing policy@cchr.nyc.gov. You can also sign up in the hearing room before the hearing begins on September 25. You can speak for up to three minutes.

Is there a deadline to submit comments? You must submit written comments by September 25.

What if I need assistance to participate in the hearing? Please notify the Commission if you need a reasonable accommodation for a disability to participate in the Hearing. You must tell us if you need a sign language interpreter. You can tell us by mail or email at the addresses given above. Please tell us at least 7 days prior to the hearing date.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public on the Commission’s website.

What authorizes the Commission to make this rule? Sections 905(e)(9) and 1043 of the New York City Charter authorize the Commission to make this proposed rule. This proposed rule was not included in the Commission’s regulatory agenda for this Fiscal Year because it was not contemplated when the Commission published the agenda.

Where can I find the Commission's rules? The Commission's rules are in title 47 of the Rules of the City of New York.

What laws govern the rulemaking process? The Commission must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

The New York City Commission on Human Rights (the “Commission”) is proposing to amend its rules to establish certain definitions and clarify the scope of protections with respect to Local Law No. 3 of 2002 (“Local Law 3”) Local Law No. 38 of 2018 (“Local Law 38”), which amended the Administrative Code of the City of New York (“Administrative Code”) by defining the term “gender” to include actual or perceived sex, gender identity, and gender expression including a person’s actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth. Local Law 3 and Local Law 38 were enacted to make explicit that discrimination based on gender identity and expression is a violation of the City’s Human Rights Law. Local Law 3 declared that the ability of all New Yorkers to work and live free from discrimination based on gender must be the guiding principle of public policy and law.

The proposed rules would amend title 47 of the Rules of the City of New York to establish definitions for “cisgender,” “gender identity,” “gender expression,” “gender,” “gender non-conforming,” “intersex,” “sex,” and “transgender.” They would also describe and explain covered entities’ non-discrimination obligations.

The Commission’s authority for these rules is found in sections 905(e)(9) and 1043 of the New York City Charter.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 2-01 of title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-01 Definitions.

Adverse employment action. “Adverse employment action” refers to any action that negatively affects the terms and conditions of employment.

Applicant. “Applicant” refers to persons seeking initial employment, and current employees who are seeking or being considered for promotions or transfers.

Article 23-A analysis. “Article 23-A analysis” refers to the process required under subdivisions 9, 10, 11, and 11-a of section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.

Article 23-A factors. “Article 23-A factors” refers to the factors that employers must consider concerning applicants’ and employees’ conviction histories under section 753 of Article 23-A of the New York Correction Law.

Business day. “Business day” means any day except for Saturdays, Sundays, and all legal holidays of the City of New York.

Cisgender. “Cisgender” is an adjective sometimes used to describe a person whose gender identity conforms with their sex assigned at birth, i.e., someone who is not transgender. “Cisgender” is not indicative of gender expression, sexual orientation, hormonal makeup or physical anatomy.

Commission. “Commission” means the New York City Commission on Human Rights.

Conditional offer of employment. “Conditional offer of employment,” as used in section 8-107(11-a) of the Administrative Code and section 2-04 of this title for purposes of establishing when an applicant’s criminal history can be considered by an employer, refers to an offer of employment, promotion or transfer. A conditional offer of employment can only be revoked based on one of the following:

1. The results of a criminal background check, and only after the “Fair Chance Process,” as defined in this section, has been followed.
2. The results of a medical exam as permitted by the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101 et seq.
3. Other information the employer could not have reasonably known before making the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material.

For temporary help firms, a conditional offer is the offer to place an applicant in the firm’s labor pool, which is the group of individuals from which the firm selects candidates to send for job opportunities.

Consumer credit history. “Consumer credit history” is an individual’s credit worthiness, credit standing, credit capacity, or payment history, as indicated by (i) a consumer credit report, which shall include any written or other communication of any information by a consumer reporting agency that bears on a consumer’s creditworthiness, credit standing, credit capacity or credit history; (ii) a consumer’s credit score; or (iii) information an employer obtains directly from the individual regarding (a) details about credit accounts, including the individual’s number of credit accounts, late or missed payments, charged-off debts, debt collection lawsuits, nonpayment lawsuits, items in collections, credit limit, prior credit report inquiries, or (b) bankruptcies, judgments, or liens.

Consumer reporting agency. “Consumer reporting agency” is a person or entity that provides reports containing information about an individual’s credit worthiness, credit standing, credit capacity, or payment history. A consumer reporting agency includes any person or entity that, for monetary fees, dues, or on a cooperative nonprofit basis, engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information about consumers for the purpose of furnishing consumer reports or investigative consumer reports to third parties. A person or entity need not regularly engage in assembling and evaluating consumer credit history to be considered a consumer reporting agency.

Conviction history. “Conviction history” refers to records of an individual’s conviction of a felony, misdemeanor, or unsealed violation as defined by New York law or federal law, or the law of the state in which the individual was convicted.

Criminal background check. “Criminal background check” refers to when an employer, employment agency or agent thereof orally or in writing:

1. Asks a person whether or not they have a criminal record; or
2. Searches for publicly available records, including through a third party, such as a consumer reporting agency, the Internet, or private databases, for a person’s criminal history.

Criminal history. “Criminal history” refers to records of an individual’s convictions, unsealed violations, non-convictions, and/or currently pending criminal case(s).

Direct relationship. “Direct relationship” refers to a finding that the nature of the criminal conduct underlying a conviction has a direct bearing on the fitness or ability of an applicant or employee to perform one or more of the duties or responsibilities necessarily related to the license, registration, permit, employment opportunity, or terms and conditions of employment in question.

Domestic partners. “Domestic partners” means persons who have a registered domestic partnership, which shall include any partnership registered pursuant to chapter 2 of title 3 of the Administrative Code, any partnership registered in accordance with executive order number 123, dated August 7, 1989, and any partnership registered in accordance with executive order number 48, dated January 7, 1993, and persons who are members of a marriage that is not recognized by the state of New York, a domestic partnership, or a civil union, lawfully entered into in another jurisdiction.

Employer. “Employer” refers to an employer as defined by section 8-102(5) of the Administrative Code.

Fair Chance Process. “Fair Chance Process” refers to the post-conditional offer process mandated by section 8-107(11-a) of the Administrative Code when employers elect to withdraw a conditional offer of employment or deny a promotion or transfer based on an applicant’s conviction history.

Gender. “Gender” includes actual or perceived sex, gender identity, and gender expression including a person’s actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth.

Gender expression. “Gender expression” is the representation of gender as expressed through, for example, one’s name, choice of personal pronouns, clothing, haircut, behavior, voice, or other physical characteristics. Gender expression may or may not be distinctively male or female and may or may not conform to traditional gender stereotypes.

Gender identity. “Gender identity” is the internal deeply-held sense of one’s gender which may be the same as or different from one’s sex assigned at birth. A person’s gender identity may be male, female, neither or both, i.e., non-binary. Gender identity is not the same as sexual orientation and is not visible to others.

Gender non-conforming. “Gender non-conforming” is an adjective sometimes used to describe a person whose gender expression differs from traditional gender expectations. Not all gender

non-conforming people are transgender. Conversely, not all transgender people are gender non-conforming.

High degree of public trust. “High degree of public trust” as used in section 2-05 of this title refers only to the following City agency positions: (i) agency heads and directors; (ii) Commissioner titles, including Assistant, Associate, and Deputy Commissioners; (iii) Counsel titles, including General Counsel, Special Counsel, Deputy General Counsel, and Assistant General Counsel, that involve high-level decision-making authority; (iv) Chief Information Officer and Chief Technology Officer titles; and (v) any position reporting directly to the head of an agency.

Human Rights Law. “Human Rights Law” refers to Title 8 of the Administrative Code.

Intelligence information. “Intelligence information” means records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats.

Inquiry. “Inquiry,” when used in connection with criminal history, refers to any oral or written question asked for the purpose of obtaining a person’s criminal history, including without limitation, questions in a job interview about an applicant’s criminal history, and any search for a person’s criminal history, including through the services of a third party, such as a consumer reporting agency.

Intersex. “Intersex” is a term used to refer to a person whose reproductive or sexual anatomy and/or chromosomal pattern does not fit typical definitions of male or female.

Licensing agency. “Licensing agency” refers to any agency or employee thereof that is authorized to issue any certificate, license, registration, permit or grant of permission required by the law of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business or profession.

Members. “Members” means individuals belonging to any class of membership offered by the institution, club, or place of accommodation, including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses or domestic partners.

National security information. “National security information” means any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments.

Non-conviction. “Non-conviction” means any arrest or criminal accusation, not currently pending, that was concluded in one of the following ways:

1. Termination in favor of the individual, as defined by New York Criminal Procedure Law (“CPL”) section 160.50, even if not sealed;

2. Adjudication as a youthful offender, as defined by CPL section 720.35, even if not sealed;
3. Conviction of a non-criminal offense that has been sealed under CPL section 160.55; or
4. Convictions that have been sealed under CPL section 160.58.

“Non-conviction” includes a disposition of a criminal matter under federal law or the law of another state that results in a status comparable to a “non-conviction” under New York law as defined in this section.

Payment directly from a nonmember. “Payment directly from a nonmember” means payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.

Payment for the furtherance of trade or business. “Payment for the furtherance of trade or business” means payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events.

Payment indirectly from a nonmember. “Payment indirectly from a nonmember” means payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees, use of space, facilities, meals or beverages.

Payment on behalf of a nonmember. “Payment on behalf of a nonmember” means payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.

Per se violation. “Per se violation” refers to an action or inaction that, standing alone, without reference to additional facts, constitutes a violation of title 8 of the Administrative Code, regardless of whether any adverse employment action was taken or any actual injury was incurred.

Regular meal service. “Regular meal service” means the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.

Regularly receives payment. An institution, club or place of accommodation “regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business” if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.

Sex. “Sex” is a combination of primary sex characteristics such as chromosomes, hormones, and internal and external reproductive organs, and secondary sex characteristics which appear at puberty such as the presence of facial hair, vocal pitch, and development of breasts, and gender identity.

Statement. “Statement,” when used in connection with criminal history, refers to any communications made, orally or in writing, to a person for the purpose of obtaining criminal history, including, without limitation, stating that a background check is required for a position. Stop Credit Discrimination in Employment Act. “Stop Credit Discrimination in Employment Act” refers to Local Law No. 37 of 2015, codified in sections 8-102(29) and 8-107(9)(d), (24) of the Administrative Code.

Temporary help firms. “Temporary help firms” are businesses that recruit, hire, and assign their own employees to perform work or services for other organizations, to support or supplement the other organization’s workforce, or to provide assistance in special work situations such as, without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.

Terms and conditions. “Terms and conditions” means conditions of employment, including but not limited to hiring, termination, transfers, promotions, privileges, compensation, benefits, professional development and training opportunities, and job duties.

Trade secret. “Trade secret” means information that: (i) derives significant independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, both within the workplace and in the public; and (iii) can reasonably be said to be the end product of significant innovation. The term “trade secret” does not include general proprietary company information such as the information contained in handbooks and policies. The term “regular access to trade secrets” does not include access to or the use of client, customer, or mailing lists or other information regularly collected in the course of business. In considering whether information constitutes a trade secret for the purposes of an exemption under section 8-107(24)(b)(2)(E) of the Administrative Code, the Commission will consider various factors, including: (1) efforts made by the employer to protect and develop such information for the purpose of increasing competitive advantage; (2) whether the information was regularly shared with entry level and non-salaried employees and supervisors or managers of such employees; (3) what efforts would be required to replicate such information by someone knowledgeable within the field; (4) the value of the information to competitors; and (5) the amount of money and effort expended by the employer to develop the information.

Transgender. “Transgender” – sometimes shortened to “trans” – is an adjective used to describe an individual whose gender identity or expression is not typically associated with the sex assigned to the individual at birth. The term “transgender” is sometimes used to describe people with a broad range of gender identities and expressions and may include individuals who identify their gender as, for example, androgynous, gender queer, nonbinary, gender non-conforming, male, female, MTF (male to female), or FTM (female to male). “Transgender” is not indicative of gender expression, sexual orientation, hormonal makeup or physical anatomy.

§ 2. Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York is amended by adding a new section 2-06 to read as follows:

§ 2-06. Prohibition on Discrimination Based on Gender

The following requirements apply with respect to Title 8 of the Administrative Code's prohibition on unlawful discriminatory practices based on gender:

(a) *Deliberate Misuse of an Individual's Chosen Name, Pronoun or Title.* A covered entity's deliberate misuse or refusal to use an individual's chosen name, pronoun and gendered title constitutes a violation of §8-107 of the Administrative Code where the refusal is motivated by such individual's gender. This is the case regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification except in the limited circumstance where federal, state, or local law requires otherwise (e.g., for purposes of employment eligibility verification with the federal government). Asking someone in good faith if they have a chosen name or which pronoun they use is not a violation of the Human Rights Law.

a. Examples of violations.

- i. Deliberately calling a transgender woman "him" or "Mr." after she has made clear that she uses female pronouns and titles.
- ii. Conditioning an individual's use of their chosen name on obtaining a court-ordered name change or providing identification in that name. For example, a covered entity may not refuse to call a transgender woman by her chosen name because her chosen name does not appear on her identification.
- iii. Asking or requiring an individual to provide information about their medical history or proof of having undergone medical procedures to use their chosen name, pronoun, or title.
- iv. Refusing to use an employee's chosen name in their email account.
- v. Failing or refusing to include a patient's chosen name and self-reported gender in their medical record, resulting in the patient being misgendered by staff. This is the case even when a patient's sex assigned at birth or gender transition may be recorded for the purpose of providing medical care.

(b) *Refusing to Allow Individuals to Use Single-Sex Facilities or Participate in Single-Sex Programs Consistent with their Gender Identity.* Covered entities must allow individuals to use single-sex facilities – such as bathrooms, locker rooms, or hospital rooms – and participate in single-sex programs consistent with their gender identity, regardless of their sex assigned at birth, anatomy, medical history, appearance, or the sex indicated on their identification.

- a. It is not a defense to a charge of violating the Human Rights Law that some people, including, for example, customers, other program participants, tenants, or employees, may object to sharing a facility or participating in a program with a

transgender or gender non-conforming person. Such objections are not a lawful reason to deny access to that transgender or gender non-conforming individual.

b. Examples of violations.

- i. Prohibiting a transgender or gender non-conforming person from using the single-sex program or facility consistent with their gender identity or expression.
- ii. Requiring a transgender or gender non-conforming person to provide proof of their gender to access the single-sex program or facility corresponding to their gender.
- iii. Requiring a transgender or gender non-conforming person to use a single-occupancy restroom instead of a shared bathroom.
- iv. Forbidding a transgender person from sharing a room with people of the same gender in a residential treatment facility with single-sex shared rooms.

(c) *Imposing Different Dress or Grooming Standards Based on Gender.* Covered entities may not require dress codes or uniforms, or apply grooming or appearance standards, that impose different requirements for individuals based on their sex or gender.

- a. It is not a defense to a charge of discrimination that a covered entity has a violative dress code because it is catering to the preferences of its customers or clients.

b. Examples of violations.

- i. Requiring different uniforms for men and women. While covered entities may provide different uniform options that are typically associated with men and women, it is unlawful to require an employee to wear one style instead of the other.
- ii. Requiring or permitting only female employees to wear makeup or jewelry.
- iii. Requiring only men to wear ties to dine at a restaurant.

- c. Actors may be required to wear gender-specific costumes if a role requires that.

(d) *Covered Entities Must Provide Equal Employee Benefits Regardless of Gender.* Covered entities offering benefit plans not subject to the Employee Retirement Income Security Act (ERISA) must offer benefits equally to all employees regardless of gender and may not provide health benefit plans that deny, limit or exclude services based on gender. To be non-discriminatory with respect to gender, health benefit plans may not exclude coverage for transgender care, also known as transition-related care or gender-affirming care.

a. Examples of Violations

- i. Offering health benefits that exclude coverage for procedures based on gender. For example, offering health benefits that cover prostate cancer screening for cisgender men but not for transgender women.

- ii. Offering health benefits that exclude from coverage, or limit coverage for, health care related to gender transition, including, but not limited to, hormone replacement therapy, psychological or psychiatric treatment, hormone suppressers, voice training, or surgery.

Giving twelve weeks of paid parental leave to mothers but only two weeks to fathers. While a differential in parental leave may be permissible if based on physical recovery from childbirth, it may not be premised on a parent's gender.

- (e) Gender May Not Be the Basis for Refusing a Request for Accommodation. Gender may not be the basis for a covered entity to refuse, withhold, or deny a request for accommodation for disability or other request for changes to the terms and conditions of an individual's employment, participation in a program, or use of a public accommodation, which may include additional medical or personal leave or schedule changes. Covered entities must treat leave requests to address medical or health care needs related to an individual's gender identity in the same manner as requests for all other medical conditions. Covered entities must provide reasonable accommodations to individuals undergoing gender transition, including medical leave for medical and counseling appointments, surgery and recovery from gender affirming procedures, surgeries and treatments as they would for any other medical condition.

- a. Examples of Violations

- i. Providing a reasonable accommodation for a cisgender woman undergoing medically necessary reconstructive breast surgery but refusing to provide the same accommodation to a transgender woman undergoing the same medically necessary surgery.
- ii. Requesting medical documentation to verify leave time from transgender employees or participants, but not cisgender employees or participants.

- (f) Places or providers of public accommodation may be granted an exemption to the provisions of this subdivision relating to unlawful discriminatory practices based on gender under § 8-107(4)(b) of the Administrative Code.

**NEW YORK CITY LAW DEPARTMENT
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212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Prevention of Gender Identity-Based Discrimination

REFERENCE NUMBER: 2018 RG 022

RULEMAKING AGENCY: City Commission on Human Rights

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: July 20, 2018

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
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NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Prevention of Gender Identity-Based Discrimination

REFERENCE NUMBER: 2018 RG 022

RULEMAKING AGENCY: City Commission on Human Rights

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ MEAGAN L. JOHNSON
Mayor's Office of Operations

July 20, 2018
Date