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New Transsexual Rights Law Leaves Lawyers Guessing About Its Terms

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A new law barring "gender identity or expression" discrimination, in effect as of June 17, is already stirring debate among New Jersey employment lawyers, who say its provisions are so broad that they will require fine tuning by the courts.

The statute, which amends the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., shields transsexuals and other individuals never before protected as a class. New Jersey is the sixth state to do so, after California, Illinois, Minnesota, New Mexico and Rhode Island.

Under the law, employers would be required to allow employees to dress and groom themselves "consistently with the employee's gender identity or expression," subject to reasonable standards for workplace appearance.

The immediate effect may be a new awareness of gender-identity issues, followed by the emergence of a new wave of civil rights cases based on employment, housing and public-accommodation bias.

"This is a population that is so discriminated against, so underground, I haven't seen a lot" of cases, adds Nancy Erika Smith, a plaintiffs' employment lawyer in Montclair. "Now that there's a movement for acceptance for all kinds of gender identities, we may see more."

Transgender people overall have high rates of unemployment or underemployment, says Jillian Weiss, a professor at Ramapo College who studies transgender issues in the workplace, and the revised LAD gives hope that they will get help from the legal system.

The new law was motivated by an Appellate Division ruling that found physician-diagnosed "gender dysphoria" a handicap, implicating the protection of N.J.S.A. 10:5-4.1. Gender dysphoria means being uncomfortable with one's gender, usually that assigned at birth.

Prior to *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501 (App. Div. 2001), no New Jersey court had recognized gender dysphoria as a handicap under the LAD. Carla Enriquez, a physician who

was diagnosed with the disorder, alleged she was fired as medical director of an outpatient treatment facility after she began taking medically necessary steps to transition from male to female. A trial court dismissed her claim, but the Appellate Division reinstated it.

The court said that to establish a handicap under the LAD, Enriquez had to prove that she had gender dysphoria and that the disorder was diagnosed by "accepted clinical or laboratory diagnostic techniques." Since the record was silent as to whether the doctor's technique was "accepted," the case was remanded.

Montclair solo Leslie Farber, who chairs the State Bar Association's Gay, Lesbian, Bisexual and Transgender Committee, says the statutory codification will give the law more force and clarity, making it easier to understand and apply.

But the new law goes considerably further than the case it codifies. Under the amended LAD, "gender identity or expression" includes not only transgender status but also "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth."

The law thus does not require any diagnosed disorder, such as would be needed to prove a handicap, but only a feeling of identification with the opposite sex. The law appears to cover not only individuals who have undergone or are in the process of a sex change operation but also those who choose to assume the identity of the opposite sex. Employment lawyers say the definition is vague and will require interpretation.

Among the nagging questions:

- Must an employee disclose his or her transgender status to enjoy the law's protection?
- Do employers step over the line if they inquire about a worker's transgender status?
- Is a man who wears a skirt to work in hot weather protected by the law?
- And, most nettlesome, can a person who is anatomically a man but who identifies with the female gender use the ladies' restroom?

The issue of notice to employers is troublesome, says Thomas Lewis, chair of the employment group at Stark & Stark in Lawrenceville. "Let's assume the employee does not put you on notice. Is it incumbent on the employer to ask questions if something doesn't seem right? That's going to be the hard issue to resolve," Lewis says.

The restroom question is even trickier, and it's one for which the statute provides little guidance. The statute says that where restrooms, locker rooms or other accommodations are sex-segregated, individuals should be admitted "based on their gender identity or expression."

Weiss says she believes the New Jersey statute gives transgender people the freedom to use the restroom consistent with the gender identity they choose, regardless of their anatomy.

Mark Diana, an employment lawyer at Ogletree, Deakins, Nash, Smoak & Stewart in Morristown, says

such an arrangement can subject an employer to a hostile work environment claim by other employees who object to sharing facilities with a transgender worker. He suggests that people invoking the LAD's transgender protection be required to give notice that they wish to begin using the opposite gender's restroom, so a company can make special arrangements, like designating a single-occupancy restroom for those who object to sharing.

Richard Schey, an employment lawyer at Jackson Lewis in Morristown, says that in the workplace — as opposed to a public accommodation — the statute lets a company dictate which restroom a worker uses. “To me, that’s the part that may be getting out in front of what the public might be comfortable with,” he says.

Farber says the statute is deliberately vague on restroom usage because the best solution may vary according to situation.

Litigation may arise in the form of hostile work environment claims based on name-calling or harassment by colleagues of transgender employees, defense lawyers say. With that in mind, the lawyers are advising employers to beef up their anti-harassment training for workers and managers to include gender identity issues. Training materials should define terms such as transvestite, they say.

Prior to the recent amendment, the only LAD provisions bearing on gender prohibited discrimination based on "sex" or "affectional or sexual orientation." The latter is defined as "heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

The Legislature gave final approval to the transsexual rights bill on Dec. 18, and Gov. Jon Corzine signed it immediately.