

# THE DAILY RECORD

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## HR CONNECTION

# The correct answer first requires asking the right question

Apparently, my ability to identify potential issues or problems in situations that most people wouldn't recognize is one reason for my wife and daughter's repeated use of a "SMH" (shaking my head) emoji when they text me. While they may find this skill irritating, it's an extremely useful occupational hazard.

Recently, while reviewing a client's new hire paperwork for the most up-to-date forms and to ensure they are gathering only necessary and appropriate information, I had an "SMH" moment. New employee data sheet. Name, address, email, cellphone, emergency contact — check, check, and check. It also asked for the employee's gender. After a quick call I learned the information is used to ensure they report the correct number of male and female employees to their disability insurance carrier.

As I ate my lunch and reviewed other documents, the word "gender" continued to stick in my mind. Then, halfway through my tuna sandwich, I realized that the ultimate purpose — to correctly report the number of male and female employees for disability insurance billing purposes — and the question "what is your gender" don't align.

From a societal and regulatory standpoint, gender no longer simply refers to male or female. Therefore, to properly answer a question that assumes and accepts only one of two answers — is the employee biologically male or female — it is in-



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creasingly important to ask the employee the correct question: For disability insurance reporting, what is your sex?

What caused the word "gender" to stick in my mind? It was something I read a few weeks ago. On Jan. 25, 2019, Governor Cuomo signed the Gender Expression Non-Discrimination

Act (GENDA) into law. Effective Feb. 25, 2019, GENDA adds gender identity and gender expression to the list of protected classes under the New York State Human Rights Law (NYSHRL). With this, New York now joins 20 other states and the District of Columbia that have statutes prohibiting gender identity discrimination in the workplace.

GENDA amends Section 296(1) of the state's Executive Law, making it unlawful for an employer with four or more employees to discriminate against an individual because of their "gender identity or expression." GENDA also amends Section 296-b of the Executive Law to prohibit harassment of domestic workers based on "sexual orientation, gender identity or expression." Further, with the addition of Subsection 35, GENDA amends Section 292 of the Executive

Law to now recognize "gender identity or expression" as a "person'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 the New York State Division of Human Rights adopted regulations in 2016 to protect transgender individuals under the NYSHRL's prohibition of discrimination and harassment of individuals on the basis of sex, GENDA codified those protections for transgender and gender non-conforming individuals. Under GENDA, employers in New York cannot refuse to hire a prospective employee, terminate an employee, or discriminate against an employee in the terms, conditions or privileges of employment on the basis of the individual's gender identity or gender expression.

Employers with operations in New York City (NYC) should also note that discrimination based on gender identity is prohibited by the NYC Human Rights Law (NYCHRL).

Recently, the NYC Commission on Human Rights (NYCCHR) updated and expanded the definitions of "sexual orientation" and "gender" under the NYCHRL. With these changes, the NYCHRL makes it unlawful to discriminate against an individual based on their sexual orientation, including "an individual's actual or

perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender. A continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, bisexuality, asexuality, and pansexuality.” It is also unlawful to discriminate against an individual based on their gender, which includes an individual’s “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.”

There are a few things employers should do in light of GENDA, and if applicable the updates to the NYCHRL:

Review and update existing nondiscrimination policies to ensure they reflect the protections provided through GENDA, and if applicable the NYCHRL’s updated definitions of sexual orientation and gender;

Train the executive team, managers, and supervisors on the employee handbook policy updates, with a specific focus on the updated nondiscrimination poli-

cies, to ensure understanding and compliance;

Include a section on GENDA in all discrimination and harassment prevention training;

Review and update internal forms and documents that request information on an employee’s gender or sex to ensure the terms are not being used interchangeably, that the correct information is being requested, and that there is a valid business reason for requesting the information; and

Ensure that all complaints of discrimination and harassment, including gender-based complaints, are taken seriously, investigated fully, and addressed and resolved appropriately.

Through my experiences of working with many great clients, I’ve learned several important lessons. For example, business owners, managers and employees don’t spend their days immersed in the details of employment laws and regulations. I learned that ignorance — whether it’s of the laws, of the changes in society, or of something as simple as the feelings of others — is no excuse for even the most unintentional harassment or discrimination. I’ve also learned that

a great deal of harassment and discrimination is unintentional and virtually without exception rooted in some form of ignorance.

But, most importantly, regardless of intent or level of ignorance, the consequences of discrimination and harassment are bad for the business, bad for the employees and often devastating for everyone involved. Now imagine the potential devastation resulting from a supervisor — ignorant of the laws, changes in society, and feelings of others — asking a new employee who identifies as transgender the wrong question.

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