On February 24, 2019, the Gender Expression Non-Discrimination Act (GENDA) became effective in the state of New York. GENDA bars discrimination, harassment, and retaliation on the basis of "gender identity or expression," which is defined 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." As with conduct based upon an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status or marital status, the state of New York now:

- prohibits employers or licensing agencies from "refusing to hire or employ or to bar or to discharge from employment" an individual because of an individual's gender identity or expression;
- prohibits discrimination "in compensation or in terms, conditions or privileges of employment" because of an individual's gender identity or expression;
- prohibits employment agencies from "acting upon an applications for its services or in referring an applicant or applicants to an employer or employers" because of an individual's gender identity or expression;
- prohibits employers or employment agencies from printing or circulating statements, or from utilizing applications or making inquiries "which express[] directly or indirectly, any limitation, specification or discrimination" based upon gender identity or expression;
- makes it unlawful to deny or withhold admission to or participation in any "occupational training or retraining program" because of an individual's gender identity or expression; and
- makes it unlawful to discriminate against a person in the terms, conditions or privileges of such programs based upon gender identity or expression.

Prior to the enactment of GENDA, the New York State Division of Human Rights (DHR) in October 2018 published regulations stating that discrimination on the basis of gender identity constituted sex discrimination, and explaining that harassment on the basis of a person's gender identity or the status of being transgender constituted sexual harassment. In addition, several cities and counties throughout New York, including New York City, adopted legislation prohibiting discrimination based upon gender identity or expression. As a result, businesses that previously modified their policies and practices based upon these regulations or local laws may not need to make significant adjustments, if any, to them.
Nevertheless, employers with operations in the state of New York may want to consider reviewing and, if necessary, updating documents utilized in the recruitment process to ensure compliance with the relevant provisions of GENDA, and assessing whether additional education for managers or others involved in the recruitment process is warranted to ensure compliance with GENDA. Employers may also want to revisit existing sexual harassment policies and training materials to ensure that these materials address the prohibitions against harassment and discrimination based upon gender identity and expression.

Although the DHR’s model policy and training addresses discrimination based upon gender identity or expression, employers utilizing these or similar materials may want to develop additional written guidance or training materials appropriate to the industry or occupation to educate managerial, supervisory, and other employees about specific conduct that is prohibited, as well as behaviors that are expected, to promote lawful treatment of all individuals regardless of their gender identity or expression. For example, employers might consider providing guidance relating to the use of names and pronouns, the types of conduct that constitute gender stereotyping, and the applicability of existing anti-harassment and anti-retaliation prohibitions to conduct based upon an individual’s gender identity or expression.

Employers may also want to evaluate existing grooming or appearance standards, as well as uniform or dress code policies, to determine whether modifications may be advisable in light of the requirements established by GENDA. Additionally, employers may want to consider whether additional guidance is appropriate for members of their workforces concerning the use of single-gender or single-occupancy restroom facilities to ensure compliance with GENDA.

Now that GENDA has taken effect, businesses classified as places of public accommodation, resort, or amusement; non-sectarian education corporations or associations; entities that sell, rent, or lease housing accommodations; real estate brokers or salespersons; and entities that offer credit may want to educate their employees and agents about the prohibitions against withholding or denying the accommodations, advantages, or facilities of such businesses based upon gender identity or expression.

Ogletree Deakins will continue to monitor developments on state and local legislation, and will post updates on the firm’s blog as additional guidance becomes available.