

LEGISLATIVE UPDATE

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NEW JERSEY ADDS “GENDER IDENTITY AND EXPRESSION” AS A PROTECTED CATEGORY UNDER STATE CIVIL RIGHTS LAW

On December 19, 2006, the New Jersey Legislature amended the NJ Law Against Discrimination (“LAD”) to prohibit discrimination on the basis of “gender identity or expression.” The change becomes effective 180 days after enactment (June 17, 2007). The change makes it unlawful for an employer to refuse to hire, fire, or otherwise discriminate against employees or applicants on the basis of their gender identity or expression.

“Gender identity or expression” is defined as “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 definition refers to transgender individuals, or those who have been assigned one biological gender, usually at birth and based on their genitals, but feel that gender is a false or incomplete description of themselves. Transgender individuals include transsexuals (people who strongly identify with being a member of the opposite biological sex and may seek to live as a member of that sex by undergoing surgery and/or hormone therapy to obtain the necessary physical appearance), transvestites (people who adopt the dress and often the behavior typical of the opposite sex but, unlike transsexuals, do not wish to change sexes) and those who appear androgynous (people who identify as neither specifically masculine nor specifically feminine).

The amendment treats gender identity or expression as separate from sexual orientation, which is also a protected characteristic under the LAD. Sexual orientation refers to an individual’s attraction to others, while gender identity or expression refers to an individual’s own identity or expression.

This change to the LAD has the potential to raise issues in the workplace. For example, a similar law in Minnesota led to a lawsuit about which restroom a transgender employee should use. Goins v. West Group, 635 N.W.2d 717 (Minn. 2001). In Goins, an employee who was born biologically male but who identified as female legally changed his name to a woman’s and had a state court declare his legal gender to be female. After beginning a new job, the employee insisted on using the women’s restroom at work. Some female colleagues complained, the employer adopted a policy stating that employees must use the restroom according to their “biological gender,” and instructed the transgender employee to use the men’s restroom. The transgender employee quit and then sued. The Minnesota Supreme Court ultimately decided that the state anti-discrimination law was not violated and permitted the employer to use its discretion in creating a restroom use policy.