

Bond

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Recent Developments on Employment and Benefits Laws for LGBTQ+ Employees



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Theresa E. Rusnak

Associate
trusnak@bsk.com
Rochester, NY



Daniel J. Nugent

Associate
dnugent@bsk.com
Syracuse, NY



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 - New York Specific Protections

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Glossary of Terms

HELLO
MY NAME IS

*What's in a
Name?*



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Glossary of Terms: LGBTQ+

- **Lesbian**: A woman who is sexually and/or romantically attracted to other women.
- **Gay**: Most often associated with men, but broadly means a person who is sexually and/or romantically attracted to people of the same gender.
- **Bisexual**: A person who is sexually and/or romantically attracted to men and women.
- **Transgender**: A person whose gender identity does not correspond to the gender they were assigned at birth.
- **Questioning**: A person who is unsure about their orientation and/or gender identity
- **Plus (+)**: The inclusion of all gender identities and expressions.



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Glossary of Terms: Cont'd

- **Sexual Orientation**: The part of a person's identity related to whom they are sexually attracted.
- **Cisgender**: A person who identifies with their birth gender.
- **Non-Binary or Gender Non-Conforming**: A person who does not identify as a man or woman. They might identify as both, neither, or non-gendered.
- **Please note:**
 - Gender identity and sexual orientation are separate concepts.
 - In general, use the terms people use for themselves.



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The Genderbread Person

by www.ItsPronouncedMetrosexual.com

Identity
Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g., hormonal levels) and how you interpret what that means.

Orientation
Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.

Sex
Biological sex refers to the objectively measurable organs, hormones, and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; Intersex = a combination of the two.

Sexual Orientation
Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.

[read more](#)

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Supreme Court Decision(s)

June 15, 2020

Bostock v. Clayton County
Zarda v. Altitude Express
EEOC v. R.G. Harris Funeral Homes, Inc.

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Bostock v. Clayton County

- Gerald Bostock worked for Clayton County, GA, as a child welfare coordinator.
- In 2013, he began playing in a recreational softball league for gay men.
- County officials criticized his participation in the league.
- One month later, he was terminated for “conduct unbecoming of a County employee.”



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Zarda v. Altitude Express, Inc.

- Donald Zarda was a skydiving instructor working for Altitude Express in Long Island, New York.
- He disclosed his sexual orientation to women who were concerned about being strapped closely to him while he was skydiving with them.
- The Company found out that he was disclosing this information.
- In June 2010, Mr. Zarda was terminated for “sharing inappropriate information about his personal life” with a client of the business.



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EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

- Aimee Stephens worked as a funeral director and embalmer at Harris Funeral Homes in Livonia, Michigan.
- Ms. Stephens was assigned the male gender at birth.
- In 2014, after working for Harris as a male for several years, told her employer in a letter that she would be coming to work as her authentic self, wearing women's clothing.
- Two weeks later, Ms. Stephens was terminated because the funeral homes felt her gender identity would be upsetting to customers, and that her gender identity was a violation of the owner's religious beliefs.



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Supreme Court Decision(s)

- The Supreme Court ruled in all three cases with one opinion.
- The Court held that Title VII protects gender identity and sexual orientation, as connected to "sex," which Title VII has long protected.
- The Court wrote:
 - "An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."



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Impact of the Decision

- Employees who believe they have been discriminated against, retaliated against, or harassed based on their sexual orientation or gender identity can now bring claims in federal court.
- Claims under Title VII, if successful, can involve:
 - Back pay to the individual
 - Compensatory damages for emotional distress (up to \$300k, based on the size of the employer)
 - Punitive damages (capped)
- Employees have 180/300 calendar days after last act of discrimination to file a charge with the EEOC.



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New York Laws on Gender Identity



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Gender Expression Non-discrimination Act (GENDA)

- GENDA amended the Human Rights Law in 2019 by adding “gender identity or expression” as a protected category, 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”
- Protects the way a person expresses gender through speech, dress, and behavior



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Sexual Harassment

- Gender stereotyping is illegal sexual harassment
- Occurs when personality traits are considered inappropriate because they do not conform to other people’s ideas or perceptions about how individuals of either gender should look or act
- Extends to:
 - Looks, speech, personality, lifestyle,
 - Performing a job that is usually performed, or was performed in the past by persons of the opposite sex



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Common Concepts



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Pronoun Use

- Failure to use correct pronouns for individuals in the workplace is discrimination.
- Correct pronouns may include: they/them, he/him, she/her or ze/zem
- Illegal under NYC and NYS law; if use of incorrect pronouns is “severe and pervasive” harassment, illegal under Title VII as well.
 - In NYC, violators are subject to civil penalties of \$125,000, and up to \$250,000 for “willful” violations.
- Educate employees about the importance of correct pronouns, and impose consequences for violations.

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Restrooms

- Occupational Safety and Health Administration:
 - Using OSHA's sanitation standard, the agency explicitly favors allowing employees to use the restroom of consistent with their gender identity, as failure to do so could become a workplace safety concern.
- NY/NYC Human Rights Law:
 - Employers must allow employees to use the restroom of their choice.
- Federal Law:
 - The Supreme Court is silent on the impact of its decision on restrooms; however, likely that a harassment claim would result if a workplace does not allow usage consistent with an employee's gender identity.



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Client Objections

- All of the employers who went before the Supreme Court argued that their customers felt uncomfortable or that their public image was affected by their employees' gender or sexual orientation.
- However:
 - Presumed or actual customer/public prejudices are not sufficient bases to justify violations of Title VII or the NY/NYC Human Rights Law.
 - Loss of business or public perception are not defenses to an employer's discriminatory actions.



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Religious Objections

- The NY/NYC Human Rights Laws, as well as Title VII, prevent discrimination on the basis of an employee's religion.
- An employers actual or perceived religious objections do not justify discrimination, nor do a co-workers beliefs justify the same.
- It is not a violation of an employee's religious rights in the workplace to require the employee to follow the law.
- Note: For religious institutions, Title VII does not apply to employees in "ministerial" positions.



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Gender Dysphoria

- The American Psychiatric Association defines gender dysphoria as a conflict between a person's physical or assigned gender and the gender with which they identify. This may cause significant distress and/or problems functioning.
 - This is a somewhat controversial term, as many non-binary or transgender people do not believe that they have a psychiatric illness.
- In 2017, a federal court in Pennsylvania held that gender dysphoria could be a disability under the ADA because of the associated physical symptoms.
- NY/NYC Human Rights Laws view gender dysphoria as a disability, and require reasonable accommodations from employers.



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Practical Tips

- Review handbook policies:
 - Equal Employment Opportunity Policy
 - Sexual Harassment Policy
 - Dress Code/Grooming Policies
 - Create gender identity/sexual orientation non-discrimination policy
- Educate/train supervisors and employees
- Know which leave laws apply to gender identity related conditions:
 - FMLA may allow leave for surgeries or ongoing medical appointments
 - ADA and NY/NY Human Rights Laws may allow leave as a reasonable accommodation for those diagnosed with gender dysphoria



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Example Scenarios



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Example 1:

- Briana has supervised the same group of people for ten years. A few months ago, one of Briana's team members, Adam, transitioned from female to male.
- Briana calls Adam by the female pronoun repeatedly, and Adam corrects her each time.
- Three months after Adam's transition, Briana is still using the incorrect pronoun, and is not correcting other employees who do the same.
- Is this illegal?



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Example 2:

- Sandra was hired by XYZ Company two months ago, and has been using the women's restroom ever since.
- Recently, one of Sandra's coworkers learned from a mutual friend that Sandra is a transgender woman
- This co-worker refuses to use the women's bathroom with Sandra anymore, and told HR that she feels "unsafe" doing so. She demands that the Company stop Sandra from using the women's restroom, saying that it is giving her stress and anxiety at work to share with Sandra.
- What should the Company do?



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Example 3:

- Adam has been an employee at XYZ Company for ten years, and is devoutly religious.
- He has recently learned that one of the co-workers, Eve, identifies as a non-binary individual. Yesterday, Eve said to Adam, “The pronouns that should be used for me are ‘ze, zem or zer.”
- Adam refuses to use Eve’s correct pronouns, and when the HR Director tells him that he has to, he threatens to sue the Company for religious discrimination.

- What should XYZ Company do?



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Example 4:

- Jamie, an employee at XYZ Company, comes to Human Resources and says that they are non-binary, and that their correct pronouns are “they, them, and theirs.” In this meeting, Jamie also alludes to needing time off, but does not specify as to why.

- What are XYZ Company’s obligations?



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Revised Section 1557 Rule Overview

- The background of Section 1557 and its implementing regulations, including the prior final rule issued in 2016 (“2016 Rule”)
- Overview of the provisions of the 2020 final rule implementing Section 1557 (“2020 Rule”)
- Relationship between the 2020 Rule and *Bostock v. Clayton County*
- New York State Specific Protections



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Section 1557 Background

- Section 1557 is a civil right provision in the Affordable Care Act that prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.
 - Effective since 2010
 - Applied existing civil rights protections to certain areas of healthcare where they may not have previously applied



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2016 Rule

- Addressed a variety of topics, including:
 - Notice requirements
 - Post taglines in at least 15 languages spoken by limited English proficient populations statewide
 - Specific provisions prohibiting discrimination on the basis of sex
 - Meaningful access for individuals with limited English proficiency
 - Language assistance services; translators; translation services; restricted use of certain individuals to interpret
 - Effective communication for individuals with disabilities
 - “Take appropriate steps to ensure that communications with individuals with disabilities are effective as communications with others in health programs and activities”
 - No blanket religious exemption
 - “insofar as application of any requirement under this rule would violate applicable protections for religious freedom and conscience, such application would not be required”



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2016 Rule ctd.

- 2016 Rule defined discrimination “on the basis of sex” to include gender identity and termination of pregnancy
 - gender identity defined as “one’s internal sense of gender, which may be male, female, neither, or a combination of male and female.”
- Litigation
 - HHS had not had the ability to implement or enforce the provisions on gender identity and termination of pregnancy since December 2016



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2020 Rule

- Changes the 2016 Rule, as well as other related nondiscrimination protection regulations
 - Reduces the scope of the 2016 Rule
 - Eliminates definitions section of the 2016 Rule
 - Eliminates specific provisions from the 2016 Rule prohibiting discrimination on the basis of sex
 - Generally eliminates the Notice and Tagline requirement
 - Includes a specific Religious Exemption



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2020 Rule – Reduction of Scope

- Removal of Covered Entity Definition:
- 2020 Rule now applies to:
 - Any health program or activity, any part of which receives federal financial assistance provided by HHS (credits, subsidies, contracts of insurance);
 - Any program or activity administered by HHS under Title I of the ACA; or
 - Any program or activity administered by any entity established under Title I
- Entities and programs the 2020 Rule does not apply to



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2020 Rule – Reduction of Scope ctd.

- No specific definition of “health programs or activities” to which Section 1557 would apply – which was defined broadly in the 2016 Rule
 - Definition now only includes health care entities
 - Entities principally engaged in the business of providing health care that receive federal financial assistance
 - 1557 applies to the entire operations of these entities
 - Limited application to non-health care entities receiving federal financial assistance only to the part of their operation that receives the assistance
 - Defines health insurers as non-health care entities, therefore limiting the scope of nondiscrimination protections for health insurance products
 - The lines of business that do not receive federal financial assistance, such as the sale of non-ACA products or service as a TPA for a group health plan no longer have to comply with Section 1557



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2020 Rule – Discrimination Provisions

- Includes a general prohibition against discrimination based on race, color, national origin, sex, and disability
 - Eliminates many detailed prohibitions against specific forms of discrimination from the 2016 Rule
 - Eliminates the specific provisions prohibiting discrimination on the basis of sex
 - Does not formally adopt a new definition of “sex”
 - Indicates HHS interprets “sex” to mean “biological sex”



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2020 Rule – New Religious Exemption

- The 2020 Rule states that Section 1557 will not apply if any part of the rule would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections under a wide range of federal civil rights laws, and provider conscience provisions
 - 2016 Rule did not include a specific religious exemption



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2020 Rule – Notice and Tagline Requirements

- Eliminates the 2016 Rule's notice and tagline requirement under which covered entities were required to notify beneficiaries, applicants, and the public of key information, including that the entity does not discriminate on the bases prohibited by Section 1557, that appropriate aids and services (interpreters), and language assistance (translated documents) are available without charge and in a timely manner, and how to file a complaint
 - Covered entities were also required to include taglines in the top 15 non-English languages in the entity's state
- Taglines may still need to be provided
 - Summaries of Benefits and Coverage
 - if needed in order to ensure meaningful access for limited English proficient individuals



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Protections Afforded by the 2020 Rule

- Will enforce all applicable laws and regulations that prohibit discrimination on the basis of race, color, national origin, disability, age, and sex, according to the meaning of federal laws and based on civil rights regulations
- Retains 2016 Rule protecting individuals with disabilities by ensuring physical access for individuals with disabilities to healthcare facilities and appropriate communication technologies to assist persons who are visually or hearing impaired
- Retains 2016 Rule's qualifications for foreign language translators and interpreters for non-English speakers, and its limitations on the use of minors and family members as translators or interpreters
 - Adds a 4-factor analysis to ensure meaningful access for limited English proficient individuals while also securing flexibility to providers in meeting such obligation



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2020 Rule Relationship to Supreme Court Decision

- In *Bostock v. Clayton County*, the Court held that Title VII protects gender identity and sexual orientation, as connected to “sex”
- The section 1557 prohibition against discrimination on the basis of sex references Title IX, but not Title VII
- The Court limited the *Bostock* decision to Title VII
 - On the basis of sex under Title IX does not include sexual orientation and gender identity



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New York State Protections

- Implemented prior to the Final Rule
- Applies to entities and coverage subject to New York Law
- Protections:
 - Hospital were required to update their statements of patient rights to prohibit discrimination against transgender patients, and to affirmatively inform patients of their rights
 - 2016 NY DHR regulations clarified that the Human Rights Law protects transgender New Yorkers from discrimination because sex discrimination includes gender identity discrimination
 - NY DFS regulations expanded the scope of anti-discrimination protections for transgender individuals seeking access to health insurance
 - NY prohibits discrimination in the administration of large group policies



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New York State Protections ctd.

- 2017 NY DFS regulations ensured the full scope of the ACA's anti-discrimination protections were preserved and protected in New York, regardless of federal action
- Reminder that NY Human Rights law applies to hospitals and prohibits discrimination on the basis of gender identity



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Questions?

