

# LOWENSTEIN SANDLER PC CLIENT ALERT EMPLOYMENT

Attorney Advertising

## TRANSGENDERED INDIVIDUALS: A PROTECTED CLASS UNDER NEW JERSEY LAW AGAINST DISCRIMINATION

David M. Wissert, Esq. and Amy Komoroski Wiwi, Esq.\* September 2007

**We write to alert you to a new law that expands the class of individuals entitled to the protections and remedies of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 et seq. A recently enacted amendment to the NJLAD codifies a 2001 ruling by the New Jersey Appellate Division, holding that an employer who terminated its employment agreement with a transgendered physician based on physical changes she underwent in preparation for a sex change operation, wrongfully discriminated against her based on sex. The amendment goes further than the court ruling which inspired it, and shields a newly protected class against discrimination based on their "gender identity or expression." The amendment was signed into law by Governor Jon Corzine on December 18, 2006 and became effective as of July 17, 2007.**

### Background of NJLAD

Before the recent amendment, NJLAD protected employees against discrimina-

tion based on race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership status, affectional or sexual orientation, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status. The statute protects those specified classes of persons from discrimination in employment, any place of public accommodation, and housing. New Jersey courts view NJLAD as an important tool in combating employment discrimination on the basis of invidious classifications, and often liberally interpret NJLAD's provisions in favor of individuals seeking protection from discrimination.

### "Gender Identity or Expression" Amendment to LAD

Currently, nine states (Minnesota, Rhode Island, Illinois, New Mexico, California, Maine, Illinois, Hawaii, Washington, and now New Jersey) and the District of Columbia, as well as just under ninety cities and counties in the United States,

have enacted laws prohibiting discrimination based on gender identity or expression. New Jersey's new law defines the term "gender identity or expression" 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." Given New Jersey's historically liberal interpretation of NJLAD's coverage, and the expansive language used in the statute, employers should be aware of the potentially broad application of this new provision.

### Practical Guidance for Employers

Although it is too early to tell how courts will apply the broad language of the statute, we offer practical guidance for employers to consider regarding the amendment:

- **Compliance:** The gender identity or expression amendment to NJLAD became effective on July 17, 2007. As such, employers should modify employee handbooks and anti-harassment training materials to include gender identity or expression as a protected class.

## LOWENSTEIN SANDLER PC CLIENT ALERT EMPLOYMENT

• **Accommodations:** Be mindful that the new law prohibits discrimination in workplace accommodations that are traditionally restricted to persons of a particular gender such as restrooms and locker rooms. For example, according to the amendment, a person who is anatomically a man, but who identifies with the female gender, now should be entitled to use the women's restroom or locker room, consistent with her gender identity or expression. It is an open question as to how an employer should deal with employees who might feel uncomfortable sharing a restroom with a transgendered employee. Some commentators have suggested that an employer likely may make accommodations by designating a single-occupancy bathroom for employees who might feel uncomfortable sharing a restroom with a transgendered employee so as to curb sexual harassment or hostile work environment claims from those objecting employees. It is by no means certain that such an "accommodation" would not itself constitute a form of discrimination. Notably, a similar provision in Minnesota's gender identity and expression law was the subject of a lawsuit in 2001. There, a transgendered employee brought an action against her employer, claiming that a policy requiring employees to use the restroom in accordance with their "biological gender," violated Minnesota's prohibition against dis-

crimination on the basis of gender identity or expression. The Minnesota Supreme Court held that an employer may use its discretion, and balance the needs of other employees, in formulating a restroom use policy. *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). Given the NJLAD's lack of clear guidance on this point, New Jersey employers should consider carefully their options with counsel to appropriately accommodate all employees.

• **Notice:** The law does not indicate whether an employee must disclose his or her transgender status in order to benefit from the law's protection. In addition, the law does not speak to whether inquiries about the transgender status of an employee may violate the statute. Therefore, employers should exercise caution when assessing an individual's actual or perceived gender identity or expression.

• **Dress Codes:** Employers are now required to allow employees to dress and groom themselves "consistently with the employee's gender identity or expression," so long as it conforms to reasonable standards of workplace appearance. Because the law does not clarify whether an individual must disclose his or her status to enjoy the protections of the law, it is unclear whether a man may now wear a skirt to work so long as his appearance otherwise conforms with a company dress code.

*If you have any questions as to whether your workplace is in compliance with this new law, or any other employment-related matters, please contact:*

**David M. Wissert, Esq.**

*Chair  
Employment Litigation Practice Group  
Roseland, NJ  
973 597 2500*

**Charles Kaplan, Esq.**

*Member  
Employment and Labor Practice Group  
New York, NY  
212 262 6700*

**Amy Komoroski Wiwi, Esq.**

*Associate  
Employment and Labor Law Practice  
Roseland, NJ  
973 597 2500*

---

\*Summer associate Jennifer Fiorica assisted in the preparation of this alert.

This document is published by Lowenstein Sandler PC to keep clients informed about current issues. It is intended to provide general information only.

© 2007 Lowenstein Sandler PC

65 Livingston Avenue  
Roseland, NJ 07068  
973 597 2500

1251 Avenue of the Americas  
New York, NY 10020  
212 262 6700

[www.lowenstein.com](http://www.lowenstein.com)

**Lowenstein  
Sandler**  
ATTORNEYS AT LAW