

THE STATE OF GENDA

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HOW NEW YORK IS ENFORCING THE GENDER EXPRESSION NON
DISCRIMINATION ACT



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Introduction

In 2019, after nearly two decades of effort by activists, New York State enacted the Gender Expression Non-Discrimination Act. This law amended the New York State Human Rights Law (HRL), which was first passed in 1945, to include protections against discrimination on the basis of “gender identity or expression.”

In this report, we describe the Gender Expression Non Discrimination Act (GENDA), the process to access protections under the law, and the process that led up to its passage. The data analyzed for this project included a close reading of the law, guidance documents from the New York State Division of Human Rights, and feedback from interviews conducted in the spring of 2022. We conducted five interviews with public officials and ten interviews with non-government actors who were involved in passing or implementing GENDA and/or who work on issues related to transgender and gender nonconforming (TGNC) people. Government interviewees included officials in the Governor’s Office of New York State, officials from the New York State Division of Human Rights (DHR), the New York City Commission on Human Rights and offices of legislative sponsors and supporters of the version of GENDA that eventually passed.

Through our interviews with DHR, we found that 396 GENDA complaints have been filed with the NYS Division of Human Rights. Of those complaints, 59 have been resolved in settlements or conciliations between the parties; 209 complaints have been dismissed for lack of probable cause or lack of jurisdiction; and 128 cases are pending resolution. To date, \$223,000 has been awarded to people through legal settlements filed under GENDA.

We believe the reason more cases are not filed is because of a low level of knowledge among community members, a lack of understanding about the process of bringing a complaint against an offender, and a lack of trust that doing so will result in a positive outcome. As a result, we believe GENDA has unfulfilled potential as a social change mechanism. We have an opportunity to meet community members where they are, to educate them about the law and inform them of what they should expect when bringing a claim. Our report recommends four strategic steps to increase the overall awareness and compliance of GENDA among stakeholders.

How GENDA Prohibits Discrimination

GENDA works in two ways. By prohibiting commercial actors (e.g. employers or business owners) from discriminating against current or potential customers and employees because of their gender identity or expression. And, by enhancing criminal penalties for crimes committed against people because of their gender identity or expression.

Under GENDA, discrimination based upon gender identity or expression is prohibited in the following areas:

- **Employment**
- **Public or Private Housing/Leasing/Selling**
- **Public Accommodations** (i.e. not allowing people of a certain identity into a hotel or theatre)
- **Commercial Discrimination** (not selling to or buying from certain kinds of people based on their identity)
- **Credit Discrimination** (offering no loans or worse terms to certain kinds of people because of their identity).



The remedy offered for violations of GENDA is to enforce the law by bringing civil lawsuits for money damages.

People who have experienced discrimination are empowered to bring lawsuits themselves or may seek enforcement through the appropriate government agency.

How to Access Protections Under GENDA

There are two factors that determine the best way to seek redress under GENDA: whether the discriminatory act is part of a pattern of discrimination or a one-off experience *and* whether the victim lives in New York City or not.

TGNC people who live in, or were discriminated against, in the five boroughs of New York City are protected by the New York City Human Rights Law. **This law is longer-standing and wider-ranging than GENDA.** As a result, GENDA is used infrequently in enforcement actions within New York City. Representatives from both the NYC Commission on Human Rights (NYCCHR) and the State Division of Human Rights (DHR) confirmed this.

A person who wants to enforce their rights under GENDA has two choices. They can hire a lawyer and sue in court at their own expense or they can file a complaint with a local or state Human Rights agency. As explained by an interviewee at DHR, "individuals can file complaints through a new online portal or by mail, email, or fax to one of the agency's 12 regional offices around the state. There is no charge to file a complaint with the NYS DHR, and DHR investigates every complaint that is submitted to the agency." The Division can also bring about its own investigations. As explained by the DHR interviewee, "The Division Initiated Action Unit (DIAU) works to investigate and bring complaints on behalf of the state that focus on systemic discrimination as opposed to singular instances of discrimination."

Materials prepared by the DHR indicate that, following the receipt of a complaint, the DHR conducts an investigation that is usually concluded within 180 days. The DHR then decides whether it will pursue the complaint in state court. If DHR pursues the complaint, the process usually takes a year or longer. The Court is empowered to award money to the victim of discrimination if the DHR's suit is successful - or if the accused party agrees, to a settlement. The Court may also issue other remedies, including orders requiring the offending party to change behavior.

Exercising Your Rights in NYC

If you experience discrimination based upon your gender identity or expression in New York City, you are likely protected by the New York City Human Rights Law.

1. The New York City Commission on Human Rights (NYCCHR) can help you protect yourself at no cost to you.
2. You can call them at (212) 416-0197 or file a complaint online at: <https://www1.nyc.gov/site/cchr/about/report-discrimination.page> (If you choose to, you can hire a lawyer at your own expense)
3. After you contact the NYCCHR, they should return your call within 1-2 weeks.
4. You will then get an appointment to visit NYCCHR in person to talk to an enforcement attorney.
5. There will be an investigation.
6. During the investigation, attorneys might look at your emails, text messages, and social media. They might ask you and anyone who might have seen the discrimination - including the person who discriminated you - questions.
7. You might need to take a few days off of work over the course of the investigation and trial in order for attorneys to question you.
8. If you suffer retaliation, the law contains protections, but you will need to report it to the NYCCHR attorney and it will become part of the discrimination lawsuit.
9. The NYCCHR attorney will decide, after investigation, whether to keep pursuing your case.
10. If they do pursue it, the attorney may work with the person who discriminated you, to come to an agreement instead of going to trial.
11. The case may eventually go to trial in front of an administrative law judge.
12. Once the administrative judge decides the case, the judge can try to help mitigate the damage that the discrimination caused. This often looks like money payments or court orders requiring the discriminator to change behavior.
13. If either side disagrees with the judge's decision, they can ask that another court review it. While this happens, usually there will not be any payments or court-ordered changes to the behavior you have reported.

(Steps 6-13 apply to DHR Investigations as well)

How DHR Enforces GENDA

1 Filing a Complaint

Any person over 18 who believes they have been subject to unlawful discrimination (within a year in most cases) may file a complaint without an attorney. Parents and guardians may file on behalf of a minor. The complaint form is available in digital and print at dhr.ny.gov. DHR provides necessary accommodations for visual impairments, language needs, and other special circumstances.

2 DHR Investigation

Investigators conduct interviews and evaluate all available evidence. An investigation will conclude with a case determination of "No Probable Cause" (which can be appealed within 60 days) or "Probable Cause". Probable cause exists where, after giving credence to the complainant's version of the facts, some evidence of discrimination exists and a hearing is warranted.

DHR Complaint Forms can be e-mailed to complaints@dhr.ny.gov
Faxed to (718) 741-8322
Postal mailed to the office nearest you.

3 Public Hearing

After most "Probable Cause" determinations, the Division will bring both sides together to see if a settlement is possible. If the complainant is not represented by a private attorney, a Division Attorney is assigned. If settlement is reached, a stipulation of settlement is submitted to the Division's Commissioner for approval. If a settlement is not reached, the case moves to a public hearing with an Administrative Law Judge who hears the case and issues a Recommended Order outlining their recommendation for the resolution of the case. Before the public hearing begins, you may instead request to take your claim to state or federal court.

4 Final Order

The Commissioner will review the allegations, evidence, and the recommended order and will issue a final Commissioner's Order. If the ruling is in favor of the complainant, the Order will specify a remedy such as change of policy, training, fines, and/or money damages. Parties to the complaint have 60 days to appeal the decision to New York State Supreme Court.

5 Compliance

DHR makes an inquiry into whether the respondent is compliant with the Commissioner's Order no later than one year after the order was issued. DHR can initiate litigation in court to enforce action in reference to a Commissioner's Order. In the case of settlements, DHR ensures compliance of the terms of the order before the orders are signed.

DHR's complaint form is available at:
dhr.ny.gov/complaint
For more information call (888) 392-3644

Barriers to Accessing Protections under GENDA

“From 2019 through 2021, DHR received 396 complaints of discrimination based on gender identity or expression.”

Transgender and Gender Non Conforming individuals may be reluctant to seek help from government officials due to prior negative interactions or fear of being dismissed. This sentiment is often measured as it relates to transgender people seeking healthcare. According to the New York State profile from the 2015 U.S. Trans Survey, 32% of respondents who saw a health care provider that year reported having at least one negative experience related to their gender identity, while 27% did not visit a doctor that year because of fear of mistreatment. This lack of trust and sense of affirmation must be considered when instructing transgender New Yorkers to contact government agencies to seek redress for experiencing discrimination.

All of the interviewees for this report stated that more public education needs to be done regarding GENDA – and that it needs to focus not only on community members, but also employers and places of public accommodation (e.g., movie theaters, airplanes, medical offices). When discussing employment discrimination, one activist said “when employers know about the law, they will likely be more careful and more inclusive. But in New York, there hasn’t been enough education in industry and in communities that [GENDA] benefits, but in time [GENDA] will help even more people.”

When asked if GENDA has affected how TGNC people are treated in their daily lives, the same interviewee responded: "Yes, to some degree - it all depends on who is aware of it. If you're running a business that has been educated and you want to stay compliant, and want to prevent lawsuits and complaints, you will be more careful serving TGNC people. If TGNC folks are fortunate enough to encounter these kinds of employers, then it is a win-win. But if not, it's really hard to be intentional about being compliant to these protections. This interviewee also went on to say that the TGNC community also needs to be educated "For example, if immigrant community members don't know that GENDA exists, then the protections aren't useful. A lot of it has to do with education. Both those who must uphold GENDA and those who benefit from GENDA."

GENDA's History Determined Language and Enforcement

As discussed above, GENDA is typically enforced when an individual or a Human Rights agency brings about a lawsuit. This process can be lengthy, difficult, and often intimidating to access.

GENDA provides protection against discrimination only in certain areas of life. The federal Civil Rights Act of 1964 laid the basic framework for many anti-discrimination protections that are still in place today. Both the basic structure of the law - the areas of life where discrimination is prohibited - and the enforcement mechanisms - including a lawsuit or investigation by an enforcement agency - provided the blueprint for GENDA.

New York City created an extensive system of legal protections known as the Human Rights Law of the City of New York - in 1965. Shortly thereafter, in 1968, New York State renamed the Law Against Discrimination, creating what is still known as the New York Human Rights Law. The State Commission Against Discrimination was likewise renamed the New York State Division of Human Rights.

Over time, the New York City and State legislatures have expanded the protections of their respective Human Rights Laws. Both the City and the State enacted laws that prohibited discrimination on the basis of sexual orientation in 2002. New York City, as distinguished from New York State, also prohibited discrimination on the basis of gender identity and expression, that year.

Advocates of the State legislation called the Sexual Orientation Non Discrimination Act (SONDA), had attempted to include gender identity and expression in the text of the bill. However, when faced with the option of enacting the bill if they would agree to drop these specific provisions, advocates capitulated. TGNC community members had felt "thrown under the bus." An attorney who helped draft GENDA, observed the extensive history of cisgender lesbian and gay individuals excluding TGNC people from political and civil rights movements. She reasoned that cisgender gay and lesbian individuals only wanted people who were "visibly straight looking to be a part of the movement."

GENDA's History Determined Language and Enforcement (Continued)

Opposition from outside of the community, coupled with reluctance from inside of the community, resulted in a long road to passage for GENDA that required extensive advocacy from community groups, coalitions, and multiple sponsors in the New York State Legislature. In 2016, by way of an Executive Order, DHR began implementing guidance to protect transgender New Yorkers from discrimination. While 18 states at the time had moved to codify those protections - it would take New York three more years to follow suit. GENDA was first introduced in 2003, but did not become law until 2019 – marking a 16 year campaign. The Assembly passed the bill every session for more than a decade, but the Senate Majority would consistently block the bill from coming to the floor for a vote.

State Senator Brad Hoylman, the Senate sponsor of the version of GENDA that was enacted, described the political obstacles in getting the bill passed: “Transgender people were viewed as too controversial by the Republican majority when SONDA first passed, so for more than a decade people could be fired from their place of employment, denied housing, even pushed out of public spaces like a restaurant specifically because they were transgender or gender nonconforming.”

As described by TGNC activists agitating to get GENDA passed, “We just wanted an equal playing field. We wanted to be recognized as a protected class just like any other ‘minority’. Not be fired because of anti-trans employers.”

Recalling the floor vote on the date the Senate passed GENDA, Senator Hoylman noted, “I remember a constituent and her trans son in the gallery above the debate floor. Governor Hochul presided over the Senate that day as the Lieutenant Governor. It was just incredibly moving. I remember her remarking how moving it was.”

Recommended Strategic Steps to Realize GENDA's Untapped Potential

There are two major areas of training where community leaders can help realize GENDA's untapped potential. One is in training potential violators of the law and the other is in training community members exactly how to exercise their rights under the law.

Small & Mid-Sized Employer Trainings

GENDA compliance trainings aimed at small and medium sized businesses, which are less likely to have covered GENDA with their employees, are ripe for trainings from government agencies and non profits. This could be accomplished through working with small business services and Chambers of Commerce.

Mandated Training for Public Health & Correction Officials

Similar to mandated Sexual Harassment trainings - GENDA trainings should be mandated for all public health officials in New York. Further, GENDA continues to be ignored in state and local jails. Passing the Gender Identity Respect Dignity and Safety Act, would help bolster protections for TGNC people in custody.

Public Dashboard

A public dashboard on the DHR website, containing information about how many complaints have been filed, the county where the discrimination took place and the current status of the case, will help foster greater transparency and accountability.

Funding for DHR

In addition to providing funding for public service announcements and trainings - the state should consider expanding funding for DHR personnel to help expedite and resolve cases of discrimination in a more timely fashion.

Notes:

Our findings do not include information on the specific types of complaints individuals have submitted to DHR (e.g., housing, employment, or credit based discrimination, or discrimination in public accommodations). Getting access to this information, as well as data about the localities where complaints are being filed (redacting any identifying information of complainants), would help identify where more training and public awareness is needed.

We believe feedback from individuals who are currently going through the complaint process under GENDA is necessary to gain a full understanding of how GENDA is implemented and to measure the overall satisfaction among Transgender and Gender Non Conforming individuals who seek redress. **If you are someone who is willing to share your story about how you filed a complaint under GENDA as a result of gender based discrimination, we want to hear from you. Please email us at: contact@newprideagenda.org.**

We'd like to acknowledge the well intentioned staff who work at DHR. NEW Pride Agenda has worked with several individuals from this agency who are doing meaningful work trying to spread the word about GENDA and protect the rights of TGNC individuals.

We note that our report does not include data regarding gender based discrimination cases submitted to the NYC Commission on Human Rights.

We extend a special thank you to all of the advocates, elected officials and organizations that helped to pass GENDA, including: **Senator Brad Hoylman, Senator Andrea Stewart-Cousins, New York Transgender Advocacy Group, Gender Equality New York, Equality New York, The LGBT Center, Pride Center of Western NY, Anti Violence Project, Destination Tomorrow, Translatinx Network, Transgender Legal Defense and Education Fund, New York Civil Liberties Union, District Leader Melissa Sklarz, GLAAD, the Human Rights Campaign, The National LGBTQ Taskforce and so many more.**

Lastly, we want to thank **Strength In Numbers Consulting** for their work on this report, and all of the interviewees who shared their thoughts with us.

Our goal is to ensure that TGNC New Yorkers know their rights, understand how to exercise them, and that they feel empowered to make informed decisions about their health, education, employment and housing - free of coercion.

REFERENCES:

- N.Y. Exec. L §§ 296, 296-a & 296-b Id.; see also N. Y. Exec. L. § 292(35) defining “gender identity or expression.”
- <https://dhr.ny.gov/complaint>
- See, e.g., Hersch, B. and Schinal, B., Fifty Years Later: The Legacy of the Civil Rights Act of 1964, *Journal of Policy Analysis and Management*, Vol. 34, No. 2, 424–456 (2015).
- <https://www1.nyc.gov/site/cchr/about/commissions-history.page>
- <https://dhr.ny.gov/agency-history>
- <https://dhr.ny.gov/system/files/documents/2022/04/nysdhr-genda-guidance-2020.pdf>
- <https://www1.nyc.gov/site/cchr/about/commissions-history.page>
- [https://transequality.org/sites/default/files/USTS%20NY%20State%20Report%20\(1017\).pdf](https://transequality.org/sites/default/files/USTS%20NY%20State%20Report%20(1017).pdf)

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