

Local Laws and Government Policies Prohibiting Discrimination Based on Gender Identity in New York



the
Williams
INSTITUTE

Christy Mallory and Sarah Liebowitz

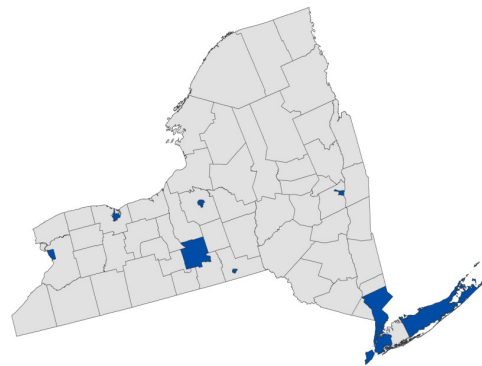
June 2013

Introduction

New York was the first state in the nation to enact a Human Rights Law.¹ As amended, the law prohibits discrimination on the basis of race, sex, religion, disability, national origin, marital status, sexual orientation, domestic violence victim status, military status, and predisposing genetic characteristics in employment, housing, public accommodations, education, credit, and union practices.²

The Human Rights Law does not explicitly prohibit discrimination based on gender identity. Absent a statewide law prohibiting discrimination on the basis of gender identity, twelve local ordinances and a gubernatorial executive order that applies only to state employees provide the only explicit protections from gender identity discrimination in New York law.³ Additionally, some lower courts in the state have interpreted the sex non-discrimination provisions in the state's Human Rights Law to protect transgender people.⁴

Localities Prohibiting Discrimination Based on Gender Identity in New York



These local ordinances, and judicial and agency interpretations, result in a patchwork of protections under state and local laws⁵ that vary in scope and provide different remedies. In many cases, the protections they provide are not as strong as the protections provided by the New York State Human Rights Law. Five of the localities that prohibit gender identity discrimination do not provide protections from discrimination in all of the areas covered by the state Human Rights Law. Three of the localities do not provide for a private right of action. Five of the localities do not provide for administrative enforcement of complaints. Four of the localities provide shorter statute of limitations periods for filing a private cause of action than the New York State Human Rights Law, and four localities provide a shorter statute of limitations period for filing an administrative complaint than the state law.

This report explains the current landscape of state and local non-discrimination protections for transgender New Yorkers, and compares the scope and remedies offered by these protections to the protections provided by the New York State Human Rights Law. Currently, 41% of New York's population, including an estimated 23,800 transgender people, is not covered by local laws that prohibit gender identity discrimination in areas such as private sector employment, housing, and public accommodations.⁶ If New York's Human Rights Law were amended to

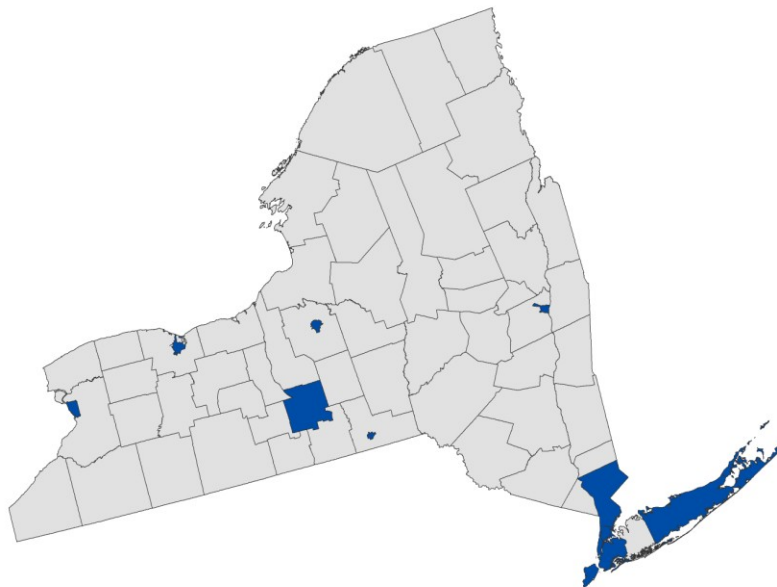
include gender identity, this portion of New York’s population would gain protection from discrimination in employment, housing, public accommodations, education, credit, and union practices. Additionally, in many ways, a state law would offer stronger protections to those already covered by local ordinances. Moreover, adding gender identity to the statewide non-discrimination law would establish clear and uniform non-discrimination requirements, procedures, and remedies across the state. Businesses and citizens who currently face a patchwork of obligations and protections regarding gender identity discrimination in New York would benefit from the consistency of a statewide law.

Local Ordinances Prohibiting Gender Identity Discrimination

Seven cities and three counties in New York have enacted local ordinances prohibiting discrimination based on gender identity in at least some private sector areas (such as private sector employment, housing, and public accommodations). Forty-one percent of New Yorkers live outside of jurisdictions that offer these protections from gender identity discrimination.⁷ Additionally, two towns in New York prohibit gender identity discrimination against their own town government employees.

New York City⁸ and the cities of Albany,⁹ Binghamton,¹⁰ Buffalo,¹¹ Ithaca,¹² Rochester,¹³ and Syracuse¹⁴ have gender identity non-discrimination ordinances. Three counties, Suffolk,¹⁵ Tompkins,¹⁶ and Westchester,¹⁷ also have local ordinances prohibiting gender identity discrimination. Additionally, two New York towns, Brighton¹⁸ and Rhineback,¹⁹ have ordinances that protect town government employees from discrimination based on gender identity. An ordinance prohibiting gender identity discrimination has been proposed Albany County, but it has not yet passed.²⁰

Localities Prohibiting Discrimination Based on Gender Identity in New York



Scope of Coverage

The New York State Human Rights Law prohibits discrimination based on age, race, religion, national origin, sexual orientation, military status, sex, marital status, disability, predisposing genetic characteristics, or domestic violence victim status in employment, housing, public accommodations, education, and credit.²¹

Local ordinances prohibiting discrimination based on gender identity vary in scope. Five of the localities do not provide protections from discrimination in all of the areas covered by the state Human Rights Law. These localities are shaded in the chart below.

Scope of Local Ordinances Prohibiting Gender Identity Discrimination

Locality	Discrimination prohibited in:						
	Employment	Contractors' Employment	Housing	Public Accommodations	Government Services	Education	Credit
Albany ²²	Yes	Yes	Yes	Yes	Yes	Unclear ²³	Yes
Binghamton ²⁴	Yes	No	Yes	Yes	No	Yes	No
Brighton ²⁵	Yes, for public sector employees	No	No	No	No	No	No
Buffalo ²⁶	Yes	No	Yes	Yes	Yes	Yes	Yes
Ithaca ²⁷	Yes	Yes	Yes	Yes	Yes, in public housing	Yes	Yes
New York City ²⁸	Yes	No	Yes	Yes	Yes, in public housing	Unclear ²⁹	Yes
Rhinebeck ³⁰	Yes, for public sector employees	No	No	No	No	No	No
Rochester ³¹	Yes	No	Yes	Yes	Yes	Yes	Yes
Suffolk County ³²	Yes	Yes	Yes	Yes	No	No	Yes
Syracuse ³³	Yes	Yes	Yes	Yes	Yes, in public housing	Yes	No
Tompkins County ³⁴	Yes	Yes	Yes	Yes	Yes, in public housing	Yes	Yes
Westchester County ³⁵	Yes	No	Yes	Yes	Yes, in public housing	Unclear ³⁶	Yes

All of the seven cities, three counties, and two towns that offer some form of protection from gender identity discrimination prohibit employment discrimination in the public sector. The seven cities and three counties also prohibit discrimination in private sector employment, housing, and public accommodations. All seven cities further prohibit discrimination in public education and at least one other type of government services. Two counties, Suffolk and Westchester, also prohibit discrimination in public education, but none of the counties extend protection from discrimination to other government services.

Enforcement

Private Cause of Action

The New York State Human Rights Law allows individuals who have experienced discrimination to file a private cause of action in court.³⁷ Three localities that prohibit gender identity discrimination do not provide for a private right of action.

All of the seven cities and two counties, Suffolk County and Tompkins County, like the state law, allow individuals who have experienced discrimination to file a private cause of action in court.³⁸ However, Suffolk County only allows individuals who have experienced discrimination in housing to file a private cause of action; a private cause of action is not available for other types of discrimination.³⁹ Neither of the towns that prohibit gender identity discrimination against their own town government employees—Brighton and Rhinebeck—provides for a cause of action in court. Westchester County does not expressly provide a private cause of action, but does empower its human rights commissions to investigate claims of discrimination and provide remedies, as discussed in more detail below.

Administrative Enforcement

The New York State Human Rights Law established the Division of Human Rights to enforce administrative complaints.⁴⁰ Five localities that prohibit gender identity discrimination do not provide for administrative enforcement of complaints.

All three counties and two of the cities with gender identity non-discrimination ordinances, New York City and Albany, have human rights commissions, which serve a quasi-judicial function similar to the state Division of Human Rights.⁴¹ Rochester does not have a human rights commission that can issue specific remedies under its ordinance, but it does have the Center for Dispute Settlement which is empowered to mediate claims of discrimination.⁴² Although Ithaca does not have its own government entity empowered to enforce its non-discrimination ordinances, complaints can be filed with the Tompkins County Human Rights Commission.⁴³ Since gender identity discrimination is prohibited by both the City of Ithaca and Tompkins County, citizens would not likely encounter a problem when filing a complaint.

The Westchester County Human Rights Commission provides an example of the duties and powers these local commissions frequently have. It can investigate complaints, issue subpoenas, hold hearings, and award compensatory and punitive damages to aggrieved parties. The commission can also obtain court orders to enforce its decisions.⁴⁴

Two cities, Binghamton and Syracuse, do not mention any enforcement body that is able to handle discrimination complaints, so it is unclear how, or if, these local governments enforce their non-discrimination provisions administratively. Buffalo also does not specify how, or if, its employment non-discrimination provisions can be enforced administratively, though the city's Fair Housing Office and Division of Urban Affairs are responsible for enforcing other non-discrimination requirements. It is also unclear how the two towns, Brighton and Rhinebeck, enforce their personnel policies.

Statute of Limitations

The New York State Human Rights Law provides a three-year statute of limitations period for filing a private cause of action,⁴⁵ and a one-year statute of limitations period for filing an administrative complaint.⁴⁶ Four localities that prohibit gender identity discrimination provide

shorter statute of limitations periods for filing a private cause of action than the New York State Human Rights Law. Additionally, four localities provide a shorter statute of limitations period for filing an administrative complaint than the New York State Human Rights Law.

In Rochester, Syracuse, and Tompkins County, the statute of limitations period for filing a private cause action is one year.⁴⁷ Suffolk County allows individuals who have experienced housing discrimination a period of two years to file in court.⁴⁸ New York City, like New York State, allows complainants a period of three years to file in court.⁴⁹ The other four cities, Albany, Binghamton, Buffalo, and Ithaca, do not specify a statute of limitations period for a private cause of action.

Two cities, Albany and New York, and two counties, Tompkins County and Westchester County, require that administrative complaints are filed within one year of the discriminatory incident.⁵⁰ The other localities do not specify a statute of limitations period that applies to filing an administrative complaint.

Remedies

The remedies available under the local ordinances are similar to the remedies available under the New York State's Human Rights Law. All nine localities that allow a complainant to file a private cause of action in court—the seven cities, Suffolk County, and Tompkins County—provide that the court may award damages and other appropriate relief.⁵¹ Binghamton, Buffalo, New York City, Syracuse, and Suffolk County explicitly provide that a court may award attorney's fees.⁵² New York City explicitly provides that a court may award punitive damages.⁵³

Four localities, Albany, New York City, Suffolk County, and Westchester County, specify the remedies that are available through administrative enforcement.⁵⁴ In all of these localities, the enforcement entities can award compensatory damages and back pay; and can require the employer to take certain actions such as hiring or reinstatement, and refraining from the unlawful practice. Westchester County is the only locality that allows for attorney's fees and punitive damages through administrative enforcement.⁵⁵ It is not clear which remedies are available through the administrative enforcement process in Rochester or Tompkins County.

Under the New York State Human Rights Law, the Division has the power to order the offender to stop engaging in the discriminatory practice; to take affirmative steps to remedy the discrimination, such as hiring or reinstating an employee; to provide back pay and compensatory damages to the aggrieved party; and to pay civil fines of up to \$100,000 to the state.⁵⁶ Additionally, punitive damages are allowed in housing discrimination cases.⁵⁷ If a person who has experienced discrimination chooses to file in court instead of proceeding through administrative enforcement, a court can award the same remedies.⁵⁸ The Human Rights Law does not explicitly provide for attorney's fees.

Executive Order Prohibiting Gender Identity Discrimination

In 2009, then-Governor David Paterson signed an Executive Order banning discrimination in state employment on the basis of gender identity.⁵⁹ The order covers only employees of the state executive branch. The order defined gender identity as "having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth." The executive order

directed the Office of Employee Relations to “implement a procedure to ensure the swift and thorough investigation of complaints,” but the order does not specify the remedies available to employees who have experienced discrimination.

Judicial Interpretations of New York State Human Rights Law Offering Protection from Discrimination Based on Gender Identity

Four lower courts in New York have interpreted the sex non-discrimination provisions of the state’s Human Rights Law to prohibit discrimination based on gender identity.⁶⁰ Two of these courts were federal courts— the District Court for the Southern District and the District Court for the Western District— and two were state superior courts.

Despite these rulings in favor of transgender plaintiffs, there is still no clear, statewide protection from gender identity discrimination in New York. First, no higher court has interpreted New York’s Human Rights Law to prohibit discrimination based on gender identity. Lower court decisions do not set binding precedent, and therefore courts in New York are not required to follow these interpretations in future cases. However, the opinions may have persuasive value to courts considering the same argument in the future. Furthermore, judicial interpretations of the sex non-discrimination provisions in the Human Rights Law do not provide the same clarity as would a state law that explicitly prohibits discrimination based on gender identity. As such, people in New York who face gender identity discrimination may not be aware that this form of discrimination is prohibited, and employers and other actors bound by the Human Rights Law may not fully understand their legal obligations.

Conclusion

An estimated 41% of New Yorkers, including approximately 23,800 transgender people, live in jurisdictions without local ordinances that prohibit discrimination based on gender identity. Amending the New York State Human Rights Law to include gender identity would provide protections for these people in employment, housing, public accommodations, education, credit, and union practices and, in many ways, would offer stronger protections to those already covered by local ordinances. Moreover, adding gender identity to the statewide non-discrimination law would establish clear and uniform non-discrimination requirements, procedures, and remedies across the state. Businesses and citizens who currently face a patchwork of obligations and protections regarding gender identity discrimination in New York would benefit from the consistency of a state law.

Endnotes

¹ New York State Division of Human Rights, Mission Statement, <http://www.dhr.ny.gov/mission.html> (last visited Apr. 15, 2013).

² N.Y. EXEC. § 296 (McKinney 2010).

³ Brighton, N.Y., Minutes of the Town Board, Exhibit No. 9 (Oct. 26, 2011); CITY OF ALBANY, N.Y., CODE art. III, §§ 48-1 to 48-27 (2013); BINGHAMTON, N.Y., CODE pt. I, ch. 45, §§ 45, 45-A (2013); BUFFALO, N.Y., CODE pt. II, § 154 (2013); CITY OF ITHACA, N.Y., CODE pt. II, § 215 (2013); NEW YORK CITY, N.Y. ADMIN. CODE §§ 8-101 to 8-1103 (2013); Rhineback, N.Y., Town Board Meeting Minutes (Dec. 11, 2006); ROCHESTER, N.Y., CODE pt. II, §§ 63-1 to 63-11 (2013); SUFFOLK CTY., N.Y., CODE pt. II, §§ 528-1 to 58-10 (2013); SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, §§ 8-1 to 8-10 (2013); TOMPKINS CTY., N.Y. CODE pt. II, §§ 92-1 to 92-6 (2013); WESTCHESTER CTY., CODE pt. IV, §§ 700.01-700.35 (2013); N.Y. Exec. Order No. 33 (Dec. 16, 2009).

⁴ Tronetti v. TLC HealthNet Lakeshore Hosp., 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Rentos v. OCE Office Sys., 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996); Hispanic Aids Forum v. Estate of Joseph Bruno, 839 N.Y.S.2d 691 (N.Y. Sup. Ct. 2007); Buffong v. Castle on the Hudson, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. Aug. 9, 2005).

⁵ There is no explicit statutory protection from gender identity discrimination at the federal level, however transgender employees have found protection under Title VII's prohibition of sex discrimination in some federal courts and the U.S. Equal Employment Opportunity Commission. See Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012). This report is limited to gender identity non-discrimination laws and policies at the state and local level in New York, so the body of case law that has developed under Title VII to protect transgender and gender non-conforming people is not discussed.

⁶ Jody L. Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents of New York*, THE WILLIAMS INST. 1 (Apr. 2013).

⁷ *Id.* at 2.

⁸ NEW YORK CITY, N.Y. ADMIN. CODE §§ 8-101 to 8-1103.

⁹ CITY OF ALBANY, N.Y., CODE art. III, §§ 48-1 to 48-27.

¹⁰ BINGHAMTON, N.Y., CODE pt. I, §§ 45, 45-A.

¹¹ BUFFALO, N.Y., CODE pt. II, §§ 35-12; 154.

¹² CITY OF ITHACA, N.Y., CODE pt. II, §§ 39-1; 215.

¹³ ROCHESTER, N.Y., CODE pt. II, §§ 63-1 to 63-11.

¹⁴ SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, §§ 8-1 to 8-10.

¹⁵ SUFFOLK CTY., N.Y., CODE PT. I, §189-24; pt. II, §§ 528-1 to 58-10.

¹⁶ TOMPKINS CTY., N.Y. CODE pt. II, §§ 92-1 to 92-6.

¹⁷ WESTCHESTER CTY., CODE pt. IV, §§ 700.01-700.35.

¹⁸ Brighton, N.Y., Minutes of the Town Board, Exhibit No. 9 (Oct. 26, 2011).

¹⁹ Rhineback, N.Y., Town Board Meeting Minutes (Dec. 11, 2006).

²⁰ Albany Cty., Local Law No. A: A Local Law for the County of Albany, New York Amending the Existing “Omnibus Human Rights Law for Albany County” (Feb. 11, 2013), *available at* http://www.albanycounty.com/legislature/resolutions/2013/20130211/13-LL_A-HumanRightsLaw.pdf.

²¹ N.Y. EXEC. CODE §§ 290 – 301 (2013).

²² CITY OF ALBANY, N.Y., CODE art. III, §§ 48-26.

²³ Albany’s non-discrimination ordinances do not explicitly prohibit discrimination in education, but the provisions prohibiting discrimination in government services and public accommodations are likely broad enough to cover at least public education.

²⁴ BINGHAMTON, N.Y., CODE pt. I, §§ 45-4 to 45-7.

²⁵ Brighton, N.Y., Minutes of the Town Board, Exhibit No. 9 (Oct. 26, 2011).

²⁶ BUFFALO, N.Y., CODE pt. II, §§ 154-1; 154-5, 154-17; 35-12.

²⁷ CITY OF ITHACA, N.Y., CODE pt. II, §§ 39-1; 215-3 to 215-9.

²⁸ NEW YORK CITY, N.Y. ADMIN. CODE § 8-107.

²⁹ New York City’s non-discrimination ordinances do not explicitly prohibit discrimination in education, but the provision prohibiting discrimination in public accommodation is likely broad enough to cover at least public education.

³⁰ Rhineback, N.Y., Town Board Meeting Minutes (Dec. 11, 2006).

³¹ ROCHESTER, N.Y., CODE pt. II, §§ 63-3 to 63-7.

³² SUFFOLK CTY., N.Y., CODE pt. II, §§ 528-6 to 528-8.

³³ SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, §§ 8-4; 8-8.

³⁴ TOMPKINS CTY., N.Y. CODE pt. II, § 92-5.

³⁵ WESTCHESTER CTY., CODE pt. IV, §§ 700.03-700.07.

³⁶ Westchester County’s non-discrimination ordinances do not explicitly prohibit discrimination in education, but the provision prohibiting discrimination in public accommodations is likely broad enough to cover at least public education.

³⁷ N.Y. EXEC. CODE § 297(9).

³⁸ CITY OF ALBANY, N.Y., CODE art. III, § 48-27(H); BINGHAMTON, N.Y., CODE pt. I, § 45-9; BUFFALO, N.Y., CODE pt. II, § 154-11; CITY OF ITHACA, N.Y., CODE pt. II, § 215-9.5(A); NEW YORK CITY, N.Y. ADMIN. CODE § 8-502;

ROCHESTER, N.Y., CODE pt. II, § 63-10(B); SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, § 8-7; SUFFOLK CTY., N.Y., CODE pt. II, § 528-7(20); TOMPKINS CTY., N.Y. CODE pt. II, § 92-5(B)(7).

³⁹ SUFFOLK CTY., N.Y., CODE pt. II, § 528-7(20).

⁴⁰ N.Y. EXEC. CODE §§ 293, 294, 295, 297.

⁴¹ CITY OF ALBANY, N.Y., CODE art. III, § 48-27; NEW YORK CITY, N.Y. ADMIN. CODE § 8-101 to 8-131; SUFFOLK CTY., N.Y., CODE pt. II, § 528-9; TOMPKINS CTY., N.Y. CODE pt. II, § 92-5(B); WESTCHESTER CTY., CODE pt. IV, § 700.08.

⁴² ROCHESTER, N.Y., CODE pt. II, § 63-10(A).

⁴³ CITY OF ITHACA, N.Y., CODE pt. II, § 215-9.5(B).

⁴⁴ WESTCHESTER CTY., CODE pt. IV, § 700.09.

⁴⁵ See N.Y. State Office of the Att’y Gen., The Sexual Orientation Non-Discrimination Act (“SONDA”), <http://www.ag.ny.gov/civil-rights/sonda-brochure> (last visited April 17, 2013).

⁴⁶ N.Y. EXEC. CODE § 297(5).

⁴⁷ ROCHESTER, N.Y., CODE pt. II, § 63-10(C); SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, § 8-6; TOMPKINS CTY., N.Y. CODE pt. II, § 92-5(C).

⁴⁸ SUFFOLK CTY., N.Y., CODE pt. II, § 528-7(20).

⁴⁹ NEW YORK CITY, N.Y. ADMIN. CODE § 8-502(b).

⁵⁰ CITY OF ALBANY, N.Y., CODE art. III, § 48-27(E); NEW YORK CITY, N.Y. ADMIN. CODE § 8-109(e); TOMPKINS CTY., N.Y. CODE pt. II, § 92-5(C); WESTCHESTER CTY., CODE pt. IV, § 700.12.

⁵¹ CITY OF ALBANY, N.Y., CODE art. III, § 48-27(H); BINGHAMTON, N.Y., CODE pt. I, § 45-9; BUFFALO, N.Y., CODE pt. II, § 154-11; CITY OF ITHACA, N.Y., CODE pt. II, § 215-9.5(A); NEW YORK CITY, N.Y. ADMIN. CODE § 8-502(a); ROCHESTER, N.Y., CODE pt. II, § 63-10(B); SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, § 8-7; SUFFOLK CTY., N.Y., CODE pt. II, § 528-7(20) (housing discrimination only); TOMPKINS CTY., N.Y. CODE pt. II, § 92-5(B)(7).

⁵² BINGHAMTON, N.Y., CODE pt. I, § 45-9; BUFFALO, N.Y., CODE pt. II, § 154-11; NEW YORK CITY, N.Y. ADMIN. CODE § 8-502(f); SYRACUSE, N.Y., REV. GEN. ORDINANCES pt. L, § 8-7; SUFFOLK CTY., N.Y., CODE pt. II, § 528-7(20) (housing discrimination only).

⁵³ NEW YORK CITY, N.Y. ADMIN. CODE § 8-502(a).

⁵⁴ CITY OF ALBANY, N.Y., CODE art. III, § 48-27(D)(3); NEW YORK CITY, N.Y. ADMIN. CODE § 8-120; SUFFOLK CTY., N.Y., CODE pt. II, § 528-10; SUFFOLK CTY., N.Y., CODE pt. II, § 528-10; WESTCHESTER CTY., CODE pt. IV, § 700.11(h).

⁵⁵ WESTCHESTER CTY., CODE pt. IV, § 700.11(h).

⁵⁶ N.Y. EXEC. CODE § 297(4)(c).

⁵⁷ Id.

⁵⁸ N.Y. EXEC. CODE § 297(9).

⁵⁹ N.Y. Exec. Order No. 33 (Dec. 16, 2009).

⁶⁰ Tronetti v. TLC HealthNet Lakeshore Hosp., 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Rentos v. OCE Office Sys., 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996); Hispanic Aids Forum v. Estate of Joseph Bruno, 839 N.Y.S.2d 691 (N.Y. Sup. Ct. 2007); Buffong v. Castle on the Hudson, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. Aug. 9, 2005).

About the Williams Institute

The Williams Institute is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A national think tank at UCLA Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public.

For more information

The Williams Institute, UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476
(310)267-4382
williamsinstitute@law.ucla.edu
www.law.ucla.edu/williamsinstitute