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Sex and Gender Discrimination

You have the right not to be discriminated against at work on the basis of your sex or gender. This right is fundamental and encompasses many of the specific protections below. The law also protects you based on your gender identity, sexual orientation, and familial status.



No country can ever truly flourish if it stifles the potential of its women and deprives itself of the contributions of half of its citizens.”

– Michelle Obama,
Lawyer & Former First Lady
of the United States

What is Sex or Gender Discrimination?

Sex and gender discrimination are still a common reality, and they can occur in many different ways. You may be a victim of unlawful discrimination if you are treated differently than other applicants or employees and that treatment negatively impacts your employment or application for employment by an employer or potential employer, because of your gender, gender identity, and/or sexual orientation.

Note that sex discrimination includes conduct covered in certain sections that follow, such as sexual harassment, unequal pay based on sex or gender, and pregnancy discrimination. Those sections provide more detailed guidance on those forms of discrimination.

Sex or gender discrimination comes in many forms. Some examples of discrimination may include the following scenarios where an employer:

- Hires a man over a woman with the same qualifications.
- Refuses to hire you for a position, telling you that women aren't physically strong enough for the job.
- Has a practice of promoting men with less experience when there are women with more experience.
- Assigns women in the workplace to lower paying jobs. This

can occur in many types of workplaces, including at the office, on the farm, or in the service industry.

- Denies a request for an accommodation for a pregnancy-related medical condition when similar accommodations are provided to non-pregnant workers for other medical conditions.
- Pays a male worker with similar training and work experience more than a female worker doing the same work.
- Makes women, rather than men do tasks historically assigned to women, like making the coffee for the office or cleaning up.
- Issues an employee a poor performance evaluation due to the fact that the employee is perceived as lacking femininity or masculinity or is not "conforming" to a gender role.
- Engages sexual harassment (see next section on sexual harassment).

NOTE: Depending on the size of your employer, other forms of discrimination are also prohibited, some of which often overlap with sex- or gender-based discrimination, including discrimination based on age, race, color, national origin, religion, disability, and family status.

Who is Protected by the Law?

Generally, all employers are covered, although exceptions do exist.

Anywhere in the United States, you have the right to work in an environment free from sex discrimination if you **work for an employer with 15 or more employees**, including private employers, government employers, employment agencies, and labor organizations.¹

In New York State and New York City, sex discrimination is prohibited if it is based on your gender (including actual or perceived gender identity), familial status, or sexual orientation if **you work for an employer or licensing agency with 4 or more employees**. As of February 8, 2020, this prohibition will apply to all employers regardless of the number of individuals employed.² The law specifically protects women planning on having a family (for example, women who are trying to get pregnant or adopt), and also protects trans women and others within the LGBTQ community.

The law now extends protections to non-employees such as contractors, vendors, and consultants.³

 **DOMESTIC WORKERS:** Domestic workers, even those working as the sole employee, are protected against sex discrimination.⁴

NYC: In New York City, employers are also prohibited from discriminating against you because you are a caregiver. You are a caregiver if you are responsible for caring for a young child, a covered relative (such as your spouse, partner, parent, sibling, grandchild, or grandparent), or a person who resides in your household who relies on you for medical care and assistance.⁵

 **IMMIGRATION STATUS:** Although an employer can refuse to hire you if you do not have work authorization,⁶ once you are hired, it is unlawful for your employer to discriminate against you based on your sex (or other factors such as race or ethnicity), regardless of your immigration status. This applies even if you don't have work authorization. It is also against the law for your employer to threaten to report you to authorities if you file a complaint or try to assert your legal rights to protect yourself from sex discrimination. In short, once you are hired, it is unlawful for your employer to use your immigration status against you if you seek to report workplace discrimination or to penalize you for doing so.⁷

Federal law also protects certain individuals from employment discrimination based on national origin or

immigration/citizenship status.⁸ For example, while the law does not protect “unauthorized aliens,” it does protect U.S. citizens, recent permanent residents, asylees, and refugees. The law prohibits employers from discriminating against individuals based on their citizenship or immigration status in hiring, firing, recruitment, and referral for a fee. For example, you may have suffered unlawful discrimination if you were not hired for a job or fired from one because you are a non-citizen with work authorization and an employer chooses not to hire you or keep you on because it does not want to “deal with the hassle” of completing additional paperwork.

In conducting its employment verification, an employer must accept any document you present from the designated verification list so long as it reasonably appears to be genuine and relates to you and not another person. Employers are prohibited from demanding only specific documents, from requiring more documents than required by the government, or from requiring an applicant to submit documents before accepting a job offer. For more information, including the list of acceptable documents, visit: <https://www.uscis.gov/i-9-central/employee-rights-resources/preventing-discrimination>.

You also have certain privacy protections. For example, if you file a federal, state, or local discrimination complaint in New York State, the agency or the court should not ask you about your immigration status and you can assert your right to privacy if they do.⁹

NYC: In New York City, city agencies and law enforcement are prohibited from asking you about your immigration status or disclosing your status, except in limited circumstances.¹⁰

Note that if you decide to file a complaint or take legal action, you are equally protected by the law but you may not be entitled to the same remedies in court.¹¹

It is unlawful for an employer to retaliate against you for exercising your rights under these laws; however, that does not mean that your employer will not penalize you.

If you think your rights have been violated, contact a legal advocate or an attorney to determine the best way to protect yourself. For assistance, visit the Additional Resources section at the end of this Toolkit.

 **DOMESTIC WORKERS:** If you are a domestic worker (e.g., someone working for another person in a private home caring for children, an elderly person, or a person with a disability, or someone providing home care services, house cleaning, cooking, or gardening services), New York State prohibits employers from discriminating against and harassing you on the basis of your gender if the harassment creates an intimidating, hostile, or offensive working environment.¹² For more information regarding your rights, see the Domestic Workers Bill of Rights: <https://www.labor.ny.gov/legal/domestic-workers-bill-of-rights.shtm>.

 **FARMWORKERS:** Note that if you are a farmworker, certain labor laws may not apply to you. However, you are covered by anti-discrimination laws, and it is unlawful for your employer to discriminate against or harass you because you are a woman or based on your race, ethnicity, national origin, or any other protected category.

NOTE: Certain laws only apply to workers classified as “employees.” However, just because you are not considered an “employee” by your employer does not mean that you are not covered as an “employee” under the law. If you have questions about whether a law applies to you, speak with a lawyer or legal advocate. One common misconception (which employers use to their advantage) is that whatever your employer calls you—for example an “independent contractor”—is what you are under the law. That may not be true for you depending on the circumstances of your employment.

What are My Legal Rights?

In New York State, if you are covered by the law, the law prohibits your employer from treating you negatively because **1** you are a woman or identify as a woman, **2** you are pregnant, or **3** you have, or are responsible for caring for, a young child. For the unfavorable treatment to qualify as prohibited conduct, it must negatively impact the “terms and conditions” of your employment. This means that your employer cannot use one of the characteristics above to decide to not hire you, or to fire you, demote you, deny a promotion, pay you less, change your work duties or conditions in a bad way (such as schedules, shifts,

or locations), or deny or limit your access to advancement and training opportunities.

If you believe you are being discriminated against and you report it to your employer, your employer has a responsibility to investigate your complaint and correct any discrimination in a timely manner.

RETALIATION: Employers are legally prohibited from engaging in “retaliation” (punishing you) if you address or challenge discrimination. This includes: reporting discrimination, helping

your coworkers to report, working with other employees to challenge discrimination in the workplace, filing a discrimination complaint or lawsuit, or participating in an internal or external investigation.

In New York State, “retaliation” is defined as any negative employment action taken by the employer. In other words, your employer cannot fire you, demote you, suspend you, cut your pay or work hours, assign you more difficult work duties, or start issuing poor performance evaluations to punish you for reporting sex discrimination. Retaliation can also include more intensive or critical supervision, surveillance, or bad-mouthing you to your coworkers.

NYC: In New York City, “retaliation” is defined more broadly because it is not just limited to a negative employment action and, instead, includes *any* action taken by the employer to discourage you, or any other employee, from reporting discrimination. Therefore, for immigrants and migrant workers, it is unlawful for an employer to threaten to report you to immigration authorities if you report discrimination.

While retaliation is illegal, your employer may still do it. Engaging in retaliation is a separate violation of the law, meaning that, in some cases, even if an employer is found not to have discriminated against you, if they retaliated against you, that is still illegal—and they may still be required to pay damages.

Note, however, that even if you have complained of discrimination you must still comply with workplace rules, and you can still be subject to discipline or penalized for poor performance or for breaking workplace rules.

NOTE: In New York, workers are generally employed “at will,” which means that you can be fired at any time for almost any reason or for no reason, so long as it is not for an illegal reason such as discrimination or retaliation based on a protected classification like sex or gender. However, you may not be an “at will” employee if you are covered by a union or if you have an employment contract that establishes different standards. In that situation, you may have greater protections than an “at will” employee.



What Can I Do to Assert My Rights?

“Each time a woman stands up for herself, without knowing it possibly, without claiming it, she stands up for all women.”

— Maya Angelou,
Poet and Civil Rights Activist

If you believe you have been discriminated against in the workplace, there are various actions you can take to advocate for yourself.

CONSULT WITH COLLEAGUES: Speak with trusted colleagues regarding their workplace experiences. Talking with co-workers is a good way to identify broader or similar problems.

REVIEW YOUR WORKPLACE POLICY, EMPLOYMENT CONTRACT, AND/OR UNION CONTRACT:

If you feel you have been the victim of sex discrimination in the workplace, you should obtain a copy of your workplace policy, if one exists, so that you know the procedure to follow and how to make a complaint. Your employer may provide stronger protections than what is in the law. If you have a contract or some form of employment agreement, review that as well to determine if it places any limitations on how you can challenge your employer or if it

includes extra protections. If you are in a union, contact your union representative to find out about the union’s policies, ways they can advocate on your behalf, and any additional protections they may have negotiated on your behalf.

SEEK LEGAL GUIDANCE EARLY: If you think you have been subjected to sex discrimination in the workplace, you should contact an attorney or legal services organization early in the process. Sometimes simply informing your boss about the law can solve the problem. Existing law is also complicated and imposes certain procedural requirements, reporting deadlines, and legal standards that you must meet in order to bring a claim. New laws are also creating new legal protections of which you may be unaware. Many non-profits provide free consultations and may be able to provide free or low-cost legal assistance depending on your income or status. An attorney or advocate can provide you with necessary legal advice, help determine if you have a valid complaint, and help you figure out a strategy.

For guidance or a referral, contact Legal Momentum's Helpline: (212) 925-6635, ext. 650 or help@legalmomentum.org.

DOCUMENT THE DISCRIMINATION: Discrimination can be difficult to prove and employers can often justify negative treatment by pointing to factors other than an employee's gender. To strengthen your case, you should document everything that happens in detail as early as possible (including names, dates, places, times, witnesses, and the nature of any incident). Your documentation should include, if possible, the names and treatment of employees of the opposite (or favored) gender so that you can better prove the difference in treatment. Keep a paper trail of relevant evidence, including threats of retaliation. Save copies of any and all evidence that relates to your complaint such as copies of emails, text messages, written letters or notes, voicemails, and photos. Save and print copies of all documentation and keep electronic and/or hard copies on a personal device or a folder that you maintain at home in case you are terminated or have to leave work and can no longer access your work computer or files.

REPORT INTERNALLY: Once you notify your employer of workplace discrimination, your employer has a responsibility to act quickly to take reasonable steps to correct the problem and prevent it in the future. In fact, your employer may be legally responsible if it does not take adequate corrective measures to address the discrimination. Therefore, if you want your employer to take action or if you seek to hold your employer accountable, it is important that you report the discrimination to your employer. If you decide not to report discrimination to your employer, you may not be able to raise legal claims against your employer.

If and when you are ready to report discrimination to your employer, start by requesting a copy of your workplace policy to find out the procedures to follow and who to contact. If your workplace does not have a policy, start by reporting to Human Resources or your supervisor (if s/he is not the one who discriminated against you). In a small business setting, this may be the only avenue for reporting. If you belong to a union, you can contact your union representative for additional guidance. You should keep a clear record of the complaint you filed and your employer's response, so try to submit everything in writing and request decisions in writing. If your employer refuses to provide written decisions, you should keep a written record, either by memorializing your verbal conversations in emails or by keeping detailed notes of your verbal conversations.

FILE AN ADMINISTRATIVE COMPLAINT: If you feel like your employer did not appropriately address your discrimination complaint, you can contact or file a formal administrative complaint with the following agencies:

- Your local fair employment agency
- The New York State Division of Human Rights (NYS-DHR): <https://dhr.ny.gov/contact-us>.

- The federal Equal Employment Opportunity Commission (EEOC): <https://www.eeoc.gov/field/newyork/charge.cfm>.

Act quickly because the law imposes strict deadlines for filing a formal complaint with local, state, and federal agencies and for bringing a lawsuit. In New York State, if you want to file a federal complaint with the EEOC, you generally must do so within 300 calendar days from the date the discrimination took place. To file a state complaint with the New York State Division of Human Rights, you generally must file your complaint within one year from the date the discrimination took place. Local agencies have different deadlines as well. Keep in mind, however, that figuring out the deadline that applies to you can be a complex determination, involving various factors, so consult an attorney for guidance.

The sooner you compile your documentation and file your complaint, the better—even if the discrimination is still ongoing (you can always supplement a complaint with additional instances if necessary). Depending on where you file, the agency can take different forms of action, such as helping you mediate the dispute, investigating your employer, requiring your employer to change practices, imposing fines, awarding damages, prohibiting your employer from firing or terminating you, or ordering your employer to rehire you if you were fired.

You can file a complaint with an administrative agency on your own. However, if you can obtain legal representation, having the assistance of a lawyer can help you comply with legal requirements and put the strongest complaint forward.

FILE A LAWSUIT: If you feel like your employer did not appropriately address your discrimination complaint, you can file a lawsuit against your employer under federal, state, and/or local law. To do so, you may have to meet certain prerequisites or follow certain procedures. For example, if you want to file a federal suit under Title VII of the Civil Rights Act for sex discrimination, you must first file a complaint with the EEOC. If you choose to only bring claims under New York State law, you do not need to file a complaint with an administrative agency before going to court, however, you should consult an attorney or legal advocate to determine which option is best for you.

If you file a lawsuit in federal or state courts, there are various types of remedies you can obtain, including lost wages, future wages, out-of-pocket expenses, and compensatory damages for emotional distress. You may now also be eligible to obtain punitive damages (damages that exceed compensation and are intended to serve as a penalty) and attorney's fees in state court.¹³

Keep in mind that bringing a lawsuit can be a complicated, costly, and lengthy process, so you should consult an attorney or a legal services organization to help you assess your claim and to find out what steps you must follow. As noted above, you may be able to obtain free or low-cost legal assistance depending on your income or status.