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**PRESENT**

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**AN ANNUAL EMPLOYMENT LAW UPDATE**

**HR BOOT  
CAMP  
SERIES**



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Southern New Jersey  
*Where Business Grows*

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**AN ANNUAL EMPLOYMENT LAW UPDATE**

# **HR BOOT CAMP SERIES**

**Harassment Investigations  
and Training**



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**LEGAL AND EMPLOYMENT UPDATE:  
*HARASSMENT INVESTIGATIONS AND TRAINING***

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**SJ CHAMBER HR BOOT CAMP SERIES**

**DAY 3**

**November 11, 2020**

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# The Legal Significance: Employer Liability

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- Employers may be liable to their employees who are subjected to harassment
- Liability will often depend on whether the employer has taken proper steps to
  - Avoid the harassment,
  - Investigate the harassment; and
  - Remediate harassment.



# Employer Liability

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- If harassment done by a co-worker, employer subject to a negligence standard: was employer negligent by failing to exercise *due care to avoid harassment in the workplace*.
- If by a supervisor, part of defense requires a showing that you “exercised reasonable care to prevent and correct promptly any sexually harassing behavior”



# Anti-Harassment Policy

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- Have One.
- Complaints Should Go to HR, Not Anyone who is a Supervisor
- Have an Alternate Person to Whom Employees Can Complain.



# Anti-Harassment Policy

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- Note That the Policy Covers Inappropriate Conduct *Regardless if Unlawful*
- Actually Distribute the Policy. Be Able to Prove It.



# Harassment Training

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- Need More Than Just a Policy
- NJ Supreme Court: employers cannot “hide behind a paper anti-discrimination policy” or policies which “exist in name only.” Aguas v. State of New Jersey
- The Existence (or Non-Existence) of Actual Harassment Training is a Factor When Deciding Employer Liability





# States That Require Anti-Harassment Training

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- New York
- Connecticut (TWO HOURS!)
- Delaware
- Maine
- Illinois
- California



# Governor Murphy Proposed Harassment Law

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- 2/18/20- Proposed law
- Would amend the NJ Law Against Discrimination
- would mandate that all employers in New Jersey train their employees regarding the avoidance of harassment and discrimination in the workplace.



# Governor Murphy Proposed Harassment Law

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- If have 50 or more employees, would have to provide live, in-person training that must be interactive so employees can pose questions.
- For non-supervisory employees, employers must provide the training within 90 days of hire and at least once every two years.
- For supervisory employees, employers must provide the training within 90 days of hire or promotion, and at least once every two years.



# Governor Murphy Proposed Harassment Law

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- Requires employers with 50 or more employees to track and provide data to the Division on Civil Rights annually regarding any employee complaints of harassment, discrimination or retaliation.
- Reasonable person standard to analyze harassment claim BUT complainant's "subjective responses" to the conduct are also relevant



# Governor Murphy Proposed Harassment Law

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- Other Hostile Work Environment Factors:
  - “cumulative effect” as opposed to “individual incidents in isolation”
  - But a “single incident of harassing conduct may be sufficiently severe to create a triable issue of fact”
  - employee’s knowledge of harassment directed to others, regardless if witnessed the harassing conduct



# Governor Murphy Proposed Harassment Law

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- Expanded Statute of Limitations
  - From 2 years to 3 years to file in court
  - From 180 days to 1 year to file with the NJ Division on Civil Rights
- Would Provide Protections to Interns even if not actually employees
- Would Require Written Anti-Harassment Policy



# Responding to Complaints

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- *I think she said the “H” Word*
- Don't bury your head in the sand!





# Responding to a Complaint

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- Duty to investigate arises when you have knowledge *or reasonably should know*.
- **DO NOT IGNORE COMPLAINTS**
- Must investigate complaints even when “victim” asks you not to.





## Beware of Social Media

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- Supervisor is FRIEND of employee on Facebook
- Supervisor is forwarded Facebook post
- Supervisor is linked (via text or email) to YouTube or Twitter Comment
- **ALL: Knowledge to Employer**



# Why Supervisors and Managers May Do Nothing

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- “It’s he said, she said.”
- “I saw it happen, it wasn’t all that bad and she’s just being sensitive.”
- “If she wants to work out in the shop, she’s got to be used to this stuff.”
- “She didn’t seem to mind and she even laughed at some of the stuff.”



# The Investigation Process

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- Interview the Complaining Party, with a witness in room if possible
- Prepare Questions
  - When Did This Occur?
  - Any Other Times?
  - Any Witnesses?
  - Any documents?
  - What resolution are you seeking?



# The Investigation Process

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- Telling Complaining Party Will Keep Confidential?
  - Can Advise will keep it confidential as much as possible
  - But do NOT guarantee confidentiality
  - Will have to discuss with the accused/witnesses



# The Investigation Process

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- Separate the Accused from the Complaining Party
- Not Always Easy but really should be done
- Consider a suspension/leave pending the investigation



# The Investigation Process

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- Assemble and analyze all relevant documents.
  - Emails/Texts
- Interview ALL Witnesses Identified by the Complaining Party
- THEN interview the accused



# The Investigation Process

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- When Interviewing the Accused
  - Stress No Retaliation
  - Present ALL the specific claims
  - Get the Accused's Side of the Story
- May then have to follow up with complaining party



# The Investigation Process

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- Prepare a report of facts, conclusions and recommendations.
- Make a decision on how to proceed.
- Action must be reasonably calculated to end harassment.
- Let both sides know the results.
- Always think – How will this look to a jury?





# SHHH! Don't Tell Anyone About The Investigation

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## Confidentiality

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- 2015, NLRB held can only require on case by case basis that employees involved in investigation keep it confidential
- 2019, NLRB has now held CAN require confidentiality when requirement is limited to the duration of the investigation



# Quick Summary

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- Have a Written Anti-Harassment Policy
- Train EVERYONE
- Investigate Complaints. Promptly
- Do Not Harass Anyone



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# **HR BOOT CAMP SERIES**

**LGBTQ Rights in  
the Workplace**



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# **LGBTQ Rights in the Workplace**

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# Discrimination and LGBTQ Rights

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*Bostock v. Clayton County, Georgia*

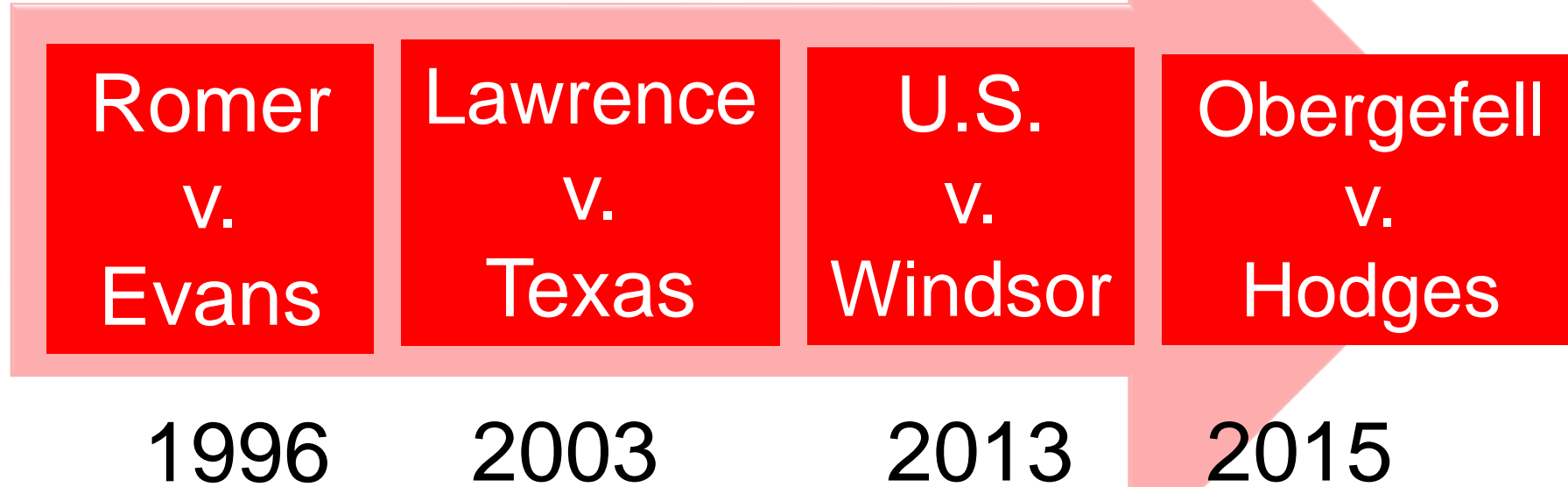
140 S. Ct. 1731 (2020)





## LGBTQ Landmark Decisions

The Bostock Decision was the most recent victory in a series of landmark decisions for the LGBTQ community





# LGBTQ Landmark Decisions

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- In 1996, the Supreme Court ruled for the first time that a state's discrimination against "homosexuals" violated the 14<sup>th</sup> Amendment's Equal Protection Clause. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).
- In 2003, the Supreme Court held that a state law making gay sex a crime was unconstitutional in violation of the guarantee of liberty in the 14<sup>th</sup> Amendment's Due Process clause. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
- In 2013, the Court struck down Section 3 of the Defense of Marriage Act, limiting the definition of marriage to different-sex couples. In effect, the federal government must recognize same-sex marriages authorized by states. United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
- In 2015, the Court held that gay individuals have the same fundamental right to marriage under the Due Process and Equal Protection Clauses of the 14<sup>th</sup> Amendment, which was previously limited to straight individuals. Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)





# Bostock

- The four previous landmark decisions involved interpretations of Constitutional Due Process and Equal Protection
- *Bostock* was a matter solely of Title VII's statutory interpretation
- Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin in the employment context
  - Specifically Title VII makes it “unlawful...for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. §2000e–2(a)(1).
- In *Bostock*, the issue was whether Title VII’s prohibition against discrimination based on sex, encompassed discrimination based on sexual orientation and gender identity

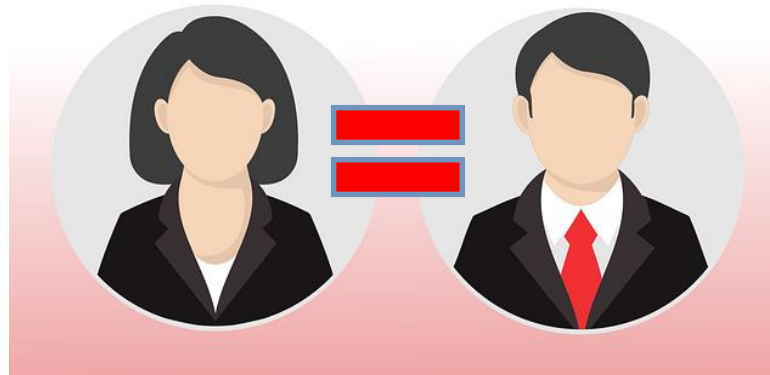


# Bostock

- The Supreme Court held that sex-based discrimination includes discrimination based on sexual orientation and gender identity
- Employees, through Title VII, are now protected against such discrimination on a federal level
- Employers are prohibited from making employment decisions based on an individual's sexual orientation and gender identity

Female  
Employee/Applicant

- Bachelor's Degree
- Master's Degree
- 3 years experience
- 2 recommendation letters
- Attracted to Men



Male  
Employee/Applicant

- Bachelor's Degree
- Master's Degree
- 3 years experience
- 2 recommendation letters
- Attracted to Men



# Exception!

## Affirmative Defense

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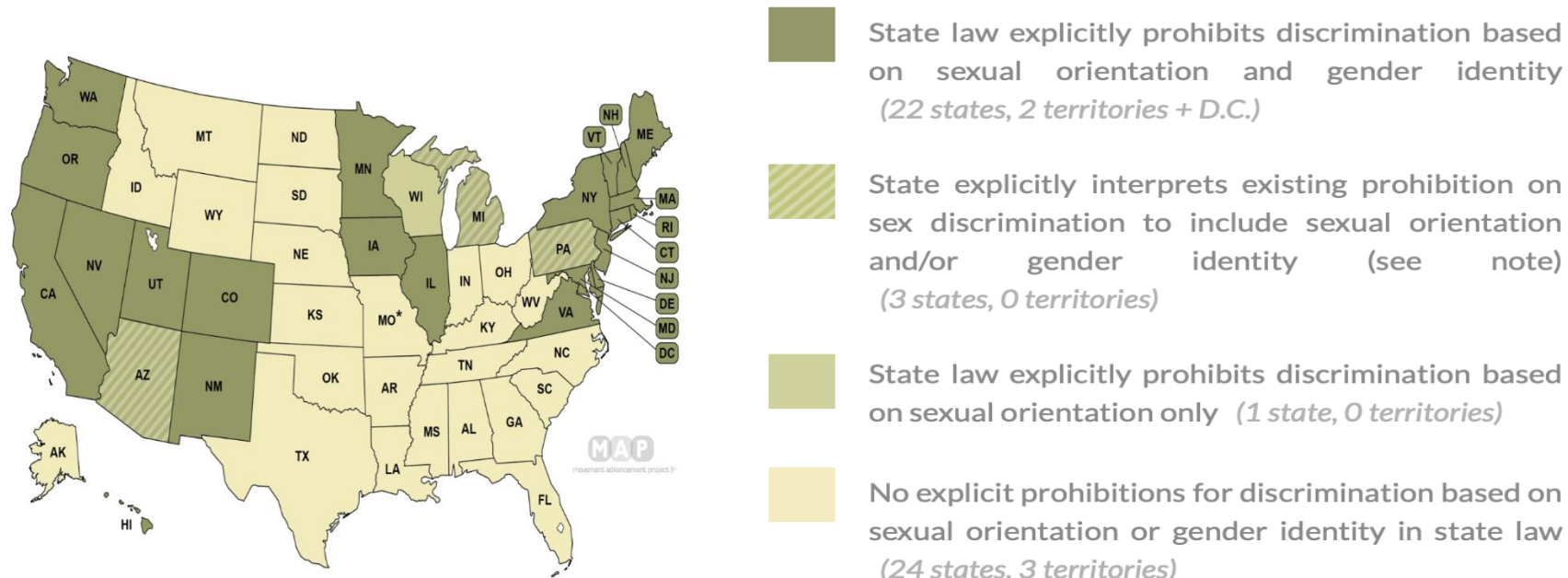
- Bona Fide Occupational Qualification
  - Employers can discriminate against employees on the basis of a protected category, including sex, if it is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise
- Note: the exception never applies to discrimination based on race

**BFOQ**



# Impact of the decision

- Historically, there were less than 25 states that had states laws that protected discrimination based on sexual orientation and gender identity.





# Bostock Implications

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- Justice Samuel Alito in his dissent said: “What the Court has done today — interpreting discrimination because of ‘sex’ to encompass discrimination because of sexual orientation or gender identity — is virtually certain to have far-reaching consequences.” He also added that “Over 100 federal statutes prohibit discrimination because of sex.”
- Religious Freedoms ?
  - As a result of *Bostock*, it may negatively impact an employer’s ability to claim religious exceptions to their hiring practices.
  - *Our Lady of Guadalupe School v. Morrissey-Berru* 140 S. Ct. 2049 (2020) – broadened the ministerial exception to anti-discrimination laws



# Transgender Accommodations in the Workplace

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- *Bostock* decision did not address whether employers have to provide reasonable accommodations to transgender employees
- Reasonable accommodations are NOT governed by Title VII, but by Americans with Disabilities Act (ADA)
- ADA only requires reasonable accommodations for persons with disabilities, not anything “because of” sex



# Transgender Accommodations in the Workplace

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- BUT, some courts have considered whether an employee's transgender status is a "disability," entitling them to possible accommodations
- ADA definition of "disability" expressly EXCLUDES "transvestism, transsexualism . . . and gender identity disorders not resulting from physical impairments" Section 12211(b)(1) of ADA
- The issue is whether the mental/emotional impacts of transgender status is part of that exclusion
- Potential Accommodations
  - Right to use bathroom of gender opposite of what person was born as
  - Right to use employee uniform of opposite sex
  - Medical/other procedures during sex-change
- Court decisions on whether accommodations required by ADA are limited and mixed
- *Bostock* provides possible pattern change but no direct legal impact



# Transgender Accommodations in the Workplace

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- Are accommodations required?
- UNCLEAR under federal law
  - Blatt’s v. Cabela’s (E.D. Pa. 2017) – Court held that reasonable accommodation was required for transgender employee because it found the ADA carve-out only applied to identifying as a different gender, and not the stress/other impairments associated with it
  - Doe v. Mass. Dept of Correction (D. Mass 2018) – Court held that reasonable accommodation may be required; relied in part on developing medical research that gender dysphoria has a possible physical etiology, so ruled it is possible it is covered by ADA and not within carve-out
    - Shorter v. Barr (N.D. Fl. 2020) and Iglesias v. True (S.D. Ill. 2019) reached same conclusion
  - Parker v. Strawser Construction (S.D. Ohio 2018) – Reached completely opposite conclusion, no requirement to offer a reasonable accommodation without a physical impairment
    - Doe v. Northrup Grumman (N.D. Ala. 2019) and Michaels v. Akal. Sec. (D. Colo. 2010) reached same holding as Parker
- Trend is towards expanding employee rights, such as happened in *Bostock*
- BUT transgender accommodations are covered by ADA carve-out
- State laws may require accommodations above federal law





# Transgender Accommodations in the Workplace for New Jersey Employees?

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- Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 777 A.2d 365, (App. Div. 2001)
- Confronted with two issues:
  - (1) Whether the LAD precludes an employer from discriminating on the basis of someone's sexual identity or gender
  - (2) Whether gender dysphoria or transsexualism is a disability/handicap under the NJ LAD



# Transgender Accommodations in the Workplace for New Jersey Employees?

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- NJ Appellate Division held that plaintiff was discriminated against because of sex
  - “It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”



# Transgender Accommodations in the Workplace for New Jersey Employees?

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- Gender dysphoria is a disability and protected by the LAD because it is a “mental, psychological or developmental disability...resulting from anatomical, psychological, physiological or neurological conditions which ...is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.”
- NJ LAD, unlike the ADA, does not contain a requirement that the impairment be one which substantially limits a major life activity



# Gender Identity and Expression Protected by NJ Law

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- New Jersey Law Against Discrimination includes “gender identity and expression” as a protected category
  - NJ LAD definition: “having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s sex at birth”
- BUT....transgender status does not automatically entitle an employee to any requested accommodation, and the standard remains the same—is there a reasonable accommodation that the employer can provide without imposing an undue hardship?



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