



Labor and Employment Law Update

TEL: 661.636.4830
FAX: 661.636.4843
E-mail: sls@kern.org
www.schoolslegalservice.org

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TRANSGENDER ISSUES AND EMPLOYMENT

With the recent passage of Assembly Bill 1266, which requires California public schools to accommodate students based upon their self-perceived gender identity, the topics of “gender expression,” “gender identity,” “transgender” and “gender-related appearance” have elicited questions from districts not only regarding student issues, but also about transgender matters in the workplace.

What is “transgender?” According to a 2011 study by the Williams Institute of the UCLA School of Law, an estimated 0.03% of the American population identifies as “transgender” although other sources estimate the number as between 1% – 5%. “Transgender” is an umbrella term used to identify the transgender and transsexual community. “Transgender” refers to one whose gender expression (communication of gender) is considered non-traditional for the sex they were assigned at birth. “Gender identity” refers to a person’s internal sense of being male or female. “Gender expression” refers to the way a person communicates gender identity to others through their behavior, clothing, hairstyle, voice, or body characteristics.

History of California’s Laws Regarding Transgender. In 2003, Governor Gray Davis signed Assembly Bill 196 which amended California’s Fair Employment and Housing Act (“FEHA”) to prohibit California employers from discriminating against transgender or transvestite employees or applicants. Although FEHA had always protected employees from discrimination based upon “sex,” AB 196 expanded the definition of “sex” to include a person’s “gender.” On January 1, 2006, the California Insurance Gender Nondiscrimination Act (AB 1586), which was signed by Governor Schwarzenegger, took effect which bars insurance companies and health care service plans from discriminating on the basis of gender identity in the creation or maintenance of service contracts or the provision of benefits or coverage.¹

Subsequently, on October 9, 2011, Governor Jerry Brown signed into law the Gender Non-Discrimination Act (AB 877) which became effective on January 1, 2012. The Gender Non-Discrimination Act (“GNDA”) expressly added the terms “gender identity” and “gender expression” to the FEHA and other various provisions that define sex as including gender.² GNDA defined “gender expression” as meaning a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.³ It also required an employer to allow an employee to

¹ Health and Safety Code § 1365.5; see also Insur. Code § 10140

² Govt. Code § 12940(a)

³ Govt. Code § 12926(q)(2); see also Penal Code § 422.56(c)

appear or dress consistently with the employee's gender expression and/or the employee's gender identity.⁴

Basic California Transgender Employment Laws and Facts.

1. Do Not Discriminate or Allow Discrimination. In California, it is illegal for an employer to discriminate against a transgender applicant and/or employee, and co-workers are prohibited from harassing or discriminating against an employee based upon their transgender status.⁵

2. Restrooms. Employees have the right to use the restroom that corresponds with their gender identity. When possible, an employer should provide access to a unisex bathroom for an employee desiring increased privacy, or for those employees who do not wish to share a bathroom with a transgender co-worker. Use of a unisex bathroom should always be voluntary.⁶

3. Names. An employee has the right to be addressed by the name and pronoun (he or she) that corresponds with their gender identity. An employee need not provide an employer with a court order or other legal document evidencing their "legal" name change. Failing to address an employee by their gender-identified pronoun is an actionable form of discrimination.⁷

4. Medical Privacy and Leave. An employer must maintain the confidentiality of every employee's medical information. In the case of a transgender employee, the employer must treat an employee's "transition" as confidential even when the transition is visibly obvious. An employee cannot be compelled to disclose or discuss whether or not they will obtain gender reassignment surgery. This information is protected under the Health Insurance Portability and Accountability Act (HIPAA). An employee may use medical leave to obtain a transition-related surgery on the same terms as they would be allowed to take leave for any other medically-related condition (subject also to California Family Rights Act ["CFRA"]).⁸

5. Dress. Although FEHA allows an employer to impose reasonable workplace dress and grooming standards upon employees, it also provides that employees must be allowed to dress in a manner consistent with their gender identity.

⁴ Govt. Code § 12949

⁵ Govt. Code § 12940, *et seq.*

⁶ Courts have not ruled specifically on restroom use for transgendered employees. There is support for the notion that businesses are engaging in unlawful sex discrimination under California's Unruh Civil Rights Act when excluding transgender individuals from certain public accommodations. (*In the Matter of the Accusation of the Department of Fair Employment and Housing v. Marion's Place*, 2006 WL 1130912 (Cal.F.E.H.C.)) Additionally, it seems obvious that transgender school employees will be afforded the same restroom rights as transgendered students who are now provided restroom protections under AB 1266. The common recommendations from California HR professionals and legal advocacy groups is to permit transgendered employees to use facilities based upon their gender identity/expression and to provide other employees the option of sharing restrooms with the transgender employee and/or provide objectors with access to a unisex restroom.

⁷ California recognizes "common law name change" (Code Civ. Proc. § 1279.5; see *Lee v. Superior Court* 11 Cal.Rptr.2d 763 (Cal.App.2 Dist., 1992); see also Assembly Bill 1121 (2013) – passed by State Assembly, now pending in State Senate to amend health and safety code to streamline name changes on legal documents such as birth certificates). Additionally, the DMV allows change to one's gender on State ID/Drivers' Licenses by use of DMV form DL-329 to request the change, without court order or permission.

⁸ 45 C.F.R. § 160.101, *et seq.* In April 2003, the California Department of Managed Health Care (DMHC) ordered California's health plans to remove blanket exclusions of coverage based on gender identity or gender expression in order to comply with the California Insurance Gender Nondiscrimination Act (AB 1586)

Federal Law

Federal law currently bans employment discrimination based upon race, religion, sex, national origin, age and disability, but not on sexual orientation or gender identity. The Employment Non-Discrimination Act (“ENDA”) is legislation currently proposed in the United States Congress that seeks to add further prohibitions against hiring and employment discrimination based upon sexual orientation and gender identity. Without a federal ban on orientation and/or gender identity discrimination, workers in 29 states are not protected from being fired because of their sexual orientation and, in 34 states, workers can be fired for being transgender. (As previously stated, California bans all forms of discrimination based upon sex, gender, orientation, etc.) In July, ENDA cleared the United States Senate Committee on Health, Education, Labor and Pensions and the Senate may vote on the bill as early as September.

Issues for School Districts

In the event an employee decides to transition while employed, be sure to – at a minimum – follow the five guidelines listed above. Additionally, students, parents, board members, co-workers or others may express questions or concerns about an employee who transitions. How the district responds will be critical. Transgender status is protected in California just like race, religion, or national origin.

Should any issues arise at your district regarding possible, or actual, transgender employees, please contact Schools Legal Service for additional information and assistance.

— *Tenielle E. Cooper, Esq.*

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