



LAW UPDATE LABOR AND EMPLOYMENT

PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

August 16, 2017

NEW EMPLOYMENT REGULATIONS REGARDING TRANSGENDER EMPLOYEES IT'S NOT JUST RESTROOMS ANYMORE

Over the summer the California Office of Administrative Law approved new regulations that specifically provide protections for transgender employees, including equal access to use of facilities, such as restrooms or locker rooms. The new regulations can be found at Title 5 CCR 11030 et seq. and were placed in effect on July 1, 2017. These regulations apply to all employers including public schools and community college districts.¹

The new regulations expand the existing protections under California's Fair Employment and Housing Act (FEHA). The FEHA specifically protects applicants and employees who identify as transgender and provides protections on the basis of both gender identity and gender expression – regardless of the person's assigned sex at birth.

Under the new regulations "gender identity" is now defined as each person's understanding of their gender or the perception of a person's gender identity and can now even include a combination of genders or no gender at all.²

In addition to reiterating existing protections on the basis of gender identity, gender expression and transgender status, the regulations also include the following amendments:

- New rules relating to seeking gender or sex-related information from applicants and employees. This includes rules prohibiting employers from seeking proof of an individual's sex, gender, or gender identity or expression (except in very limited circumstances or on a voluntary basis).³
- The new regulations also impose rules specifying that employers must honor an employee's request to be identified by a preferred gender, name or pronoun, including gender-neutral pronouns.⁴ Additionally now in most cases employers must allow employees to dress in a manner consistent with the employee's gender expression.⁵
- New expansion of existing gender expression, gender identity and transgender definitions to include "transitioning" employees and specific prohibitions on discrimination against transitioning employees and those perceived to be transitioning. The protections of employees transitioning also include allowing the

¹ Title 5 CCR 11008(d)(4)

² Title 5 CCR 11030(b)

³ Title 5 CCR 11034 (h) & (i)

⁴ Title 5 CCR 11030 (f) & 11034(h)(3)

⁵ Title 5 CCR 11034(g)

employee access to employer sponsored activities (including participation in volunteer activities) as the new sex they will be transitioning to or currently identify with.⁶

The regulations also specifically permit transgender employees to perform jobs or duties that correspond with the employees' gender identity or gender expression regardless of the employees' assigned sex at birth.⁷ These new rules should be carefully considered when a transgender employee is requesting assignments related to, physical education, coaching, or extra-curricular activities.

The new regulations do provide some highly limited exceptions under which an employer may limit a transgendered employee's job assignment for a reason constituting a "Bona Fide Occupational Qualification" (BFOQ) however the new regulations only justify a BFOQ where

- (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and
- (2) It would be offensive to prevailing social standards to have an individual of a different sex present, and
- (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of a different sex present."⁸

Given the potential for liability we recommend that administrators consult with legal counsel before denying an assignment request from a gender nonconforming employee based on a BFOQ.

The new regulations also provide new rules directing equal access to restrooms, locker rooms and similar facilities. They emphasize that an employee has the right under the FEHA to use a restroom or locker room that corresponds to the employee's gender identity or expression – regardless of the employee's assigned sex at birth. The regulations specifically state that employees cannot be "required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender."⁹

Also, remember that a new law effective March 1, 2017, requires all single-user toilet facilities in any business establishment, place of public accommodation or government agency to be identified as "all-gender" toilet facilities.

We have included a copy of the regulations. Should you have any further questions about these new regulations or require any further guidance in this regard please contact our office.

– Darren J. Bogié

Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.

⁶ Title 5 CCR 11030(f)

⁷ Title 5 CCR 11031(e)

⁸ Title 5 CCR 11031(b)

⁹ Title 5 CCR 11034 (e)(2)(D)

Fair Employment & Housing Council Regulations Regarding Transgender Identity and Expression

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing Chapter 5. Fair Employment & Housing Council Subchapter 2. Discrimination in Employment

Article 5. Sex Discrimination

TEXT

§ 11030. Definitions.

- (a) “Gender expression” means a person’s gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person’s sex assigned at birth.
- (b) “Gender identity” means each person’s internal understanding of their gender, or the perception of a person’s gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex assigned at birth, or transgender.
- (c) “Sex” has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender; gender identity; and gender expression, or perception by a third party of any of the aforementioned.
- (d) “Sex Stereotype” includes, but is not limited to, an assumption about a person’s appearance or behavior, gender roles, gender expression, or gender identity, or about an individual’s ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual’s sex.
- (e) “Transgender” is a general term that refers to a person whose gender identity differs from the person’s sex assigned at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as “transsexual.”

“Transitioning” is a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12940, 12943 and 12945, Government Code.

§ 11031. Defenses.

Once employment discrimination on the basis of sex has been established, an employer or other covered entity may prove one or more appropriate affirmative defenses as generally set forth in section 11010, including, but not limited to, the defense of Bona Fide Occupational Qualification (BFOQ).

(a) Among situations that will not justify the application of the BFOQ defense are the following:

- (1) A correlation between individuals of one sex and physical agility or strength;
- (2) A correlation between individuals of one sex and height;
- (3) Customer preference for employees of one sex;
- (4) The necessity for providing separate facilities for one sex;
- (5) The fact that an individual is transgender or gender non-conforming, or that the individual's sex assigned at birth is different from the sex required for the job; or
- (6) The fact that members of one sex have traditionally been hired to perform the particular type of job.

(b) Personal privacy considerations may justify a BFOQ only where:

- (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and
- (2) It would be offensive to prevailing social standards to have an individual of a different sex present, and
- (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of a different sex present.

(c) Employers or other covered entities shall assign job duties and make other reasonable accommodations so as to minimize the number of jobs for which sex is a BFOQ.

(d) It is no defense to a complaint of harassment based on sex that the alleged harassing conduct was not motivated by sexual desire.

(e) Employers shall permit employees to perform jobs or duties that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and 12945, Government Code.

§ 11034. Terms, Conditions, and Privileges of Employment.

(a) Compensation.

(1) Except as otherwise required or permitted by regulation, an employer or other covered entity shall not base the amount of compensation paid to an employee, in whole or in part, on the employee's sex.

(2) Equal Compensation for Comparable Work. (Reserved.)

(b) Fringe Benefits.

(1) It is unlawful for an employer to condition the availability of fringe benefits upon an employee's sex, including gender identity and gender expression.

(2) Insofar as an employment practice discriminates against one sex, an employer or other covered entity shall not condition the availability of fringe benefits upon whether an employee is a head of household, principal wage earner, secondary wage earner, or of other similar status.

(3) Except as otherwise required by state law, an employer or other covered entity shall not require unequal employee contributions by similarly situated employees to fringe benefit plans based on the sex of the employee, nor shall different amounts of basic benefits be established under fringe benefit plans for similarly situated employees.

(4) It shall be unlawful for an employer or other covered entity to have a pension or retirement plan that establishes different optional or compulsory retirement ages based on the sex of the employee.

(c) Lines of Progression.

(1) It is unlawful for an employer or other covered entity to designate a job exclusively for one sex-or to maintain separate lines of progression or separate seniority lists based on sex unless it is justified by a permissible defense. For example, a line of progression or seniority system is unlawful that:

(A) Prohibits an individual from applying for a job labeled "male" or "female," or for a job in a "male" or "female" line of progression; or

(B) Prohibits an employee-scheduled for layoff from displacing a less senior employee on a “male” or “female” seniority list.

(2) An employer or other covered entity shall provide equal opportunities to all employees for upward mobility, promotion, and entrance into all jobs for which they are qualified. However, nothing herein shall prevent an employer or other covered entity from implementing mobility programs to accelerate the promotion of underrepresented groups.

(d) Dangers to Health, Safety, or Reproductive Functions.

(1) If working conditions pose a greater danger to the health, safety, or reproductive functions of applicants or employees of one sex than to individuals of another sex working under the same conditions, the employer or other covered entity shall make reasonable accommodation to:

(A) Alter the working conditions so as to eliminate the greater danger, unless it can be demonstrated that the modification would impose an undue hardship on the employer. Alteration of working conditions includes, but is not limited to, acquisition or modification of equipment or devices and extension of training or education; or

(B) Upon the request of an employee of the more endangered sex, transfer the employee to a less hazardous or strenuous position for the duration of the greater danger, unless it can be demonstrated that the transfer would impose an undue hardship on the employer.

(2) An employer or other covered entity may require an applicant or employee to provide a physician's certification that the individual is endangered by the working conditions.

(3) The existence of a greater risk for employees of one sex than another sex shall not justify a BFOQ defense.

(4) An employer may not discriminate against members based on sex because of the prospective application of this subsection.

(5) With regard to protections due on account of pregnancy, childbirth, or related medical conditions, see section 11035.

(6) Nothing in this subsection shall be construed to limit the rights or obligations set forth in Labor Code section 6300 et seq.

(e) Working Conditions.

(1) Where rest periods are provided, equal rest periods must be provided to employees without regard to the sex of the employee.

(2) Equal access to comparable, safe, and adequate facilities shall be provided to employees without regard to the sex of the employee. This requirement shall not be used to justify any discriminatory employment decision.

(A) Employers shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.

(B) Employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as "Restroom," "Unisex," "Gender Neutral," "All Gender Restroom," etc.

(C) To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.

(D) Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender.

(E) Notwithstanding subsection (i)(1)(B) of this section, nothing shall preclude an employer from making a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.

(3) Support services and facilities, such as clerical assistance and office space, shall be provided to employees without regard to the employee's sex.

(4) Job duties shall not be assigned according to sex stereotypes.

(5) It is unlawful for an employer or other covered entity to refuse to hire, employ or promote, or to transfer, discharge, dismiss, reduce, suspend, or demote an individual on the grounds that the individual is not sterilized or refuses to undergo sterilization.

(6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services of a custodial nature for its employees or members who are responsible for the care of their minor children.

(f) **Sexual Harassment.** Sexual harassment is unlawful as defined in section 11019(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. An employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment. Sexually harassing conduct may be either "quid pro quo" or "hostile work environment" sexual harassment:

- (1) “Quid pro quo” (Latin for “this for that”) sexual harassment is characterized by explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.
- (2) Hostile work environment sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee’s work performance or create an intimidating, hostile, or offensive work environment.
 - (A) The harassment must be severe or pervasive such that it alters the conditions of the victim’s employment and creates an abusive working environment. A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. To be unlawful, the harassment must be both subjectively and objectively offensive.
 - (B) An employer or other covered entity may be liable for sexual harassment even though the offensive conduct has not been directed at the person alleging sexual harassment, regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.
 - (C) An employer or other covered entity may be liable for sexual harassment committed by a supervisor, coworker, or third party.

1. An employer or other covered entity is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or other covered entity knew or should have known of the harassment.
2. An employer or other covered entity is liable for harassment of an employee, applicant, or independent contractor, perpetrated by an employee other than an agent or supervisor, if the entity or its agents or supervisors knows or should have known of the harassment and fails to take immediate and appropriate corrective action.
3. An employer or other covered entity is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

An employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

- (g) Physical Appearance, Grooming, and Dress Standards. It is unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity (section 11010).

(h) Recording of Gender and Name. As provided in sections 11016(b)(1) and 11032(b)(2) of these regulations, inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense (section 11010). For recordkeeping purposes in accordance with section 11013(b), an employer may request an applicant to provide this information solely on a voluntary basis.

(1) An applicant's designation on an application form of a gender that is inconsistent with the applicant's assigned sex at birth or presumed gender may be considered fraudulent or a misrepresentation for the purpose of an adverse employment action based on the applicant's designation only if the employer establishes a permissible defense (section 11010).

(2) An employer shall not discriminate against an applicant based on the applicant's failure to designate male or female on an application form.

(3) If an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer or other covered entity who fails to abide by the employee's stated preference may be liable under the Act, except as noted in subsection (4) below.

(4) An employer is permitted to use an employee's gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally-mandated obligation, but otherwise must identify the employee in accordance with the employee's gender identity and preferred name.

(i) Additional Rights.

(1) It is unlawful for employers and other covered entities to inquire about or require documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment:

(A) Nothing in this subsection shall preclude an employer from asserting a BFOQ defense, as defined above.

(B) Nothing in this subsection shall preclude an employer and employee from communicating about the employee's sex, gender, gender identity, or gender expression when the employee initiates communication with the employer regarding the employee's working conditions.

(2) It is unlawful to deny employment to an individual based wholly or in part on the individual's sex, gender, gender identity, or gender expression.

(3) Nothing in these regulations shall prevent an applicant or employee from asserting rights under other provisions of the Act, including leave under the California Family Rights Act and rights afforded to individuals with mental or physical disabilities.

(4) It is unlawful to discriminate against an individual who is transitioning, has transitioned, or is perceived to be transitioning.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code; *Meritor Savings Bank v. Vinson* (1986) 477 S 57, 67-68; *Harris v. Forklift Systems* (1993) 510 US 17, 23; *Lyle v. Warner Bros.* (2006) 38 Cal.4th 264, 273; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608; *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446.



TRANSGENDER RIGHTS IN THE WORKPLACE

WHAT DOES "TRANSGENDER" MEAN?

Transgender is a term used to describe people whose gender identity differs from the sex they were assigned at birth. Gender expression is defined by the law to mean a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." People who identify as transgender are protected by the provisions of California's Fair Employment & Housing Act prohibiting discrimination based on sex, gender, gender identity, and gender expression.

THERE ARE TWO KINDS OF GENDER TRANSITION

- 1 "Social transition" involves a process of socially aligning one's gender with the internal sense of self (e.g. changes in name and pronoun, bathroom facility usage, participation in activities like sports teams).
- 2 "Physical transition" refers to medical treatments an individual may undergo to physically align their body with internal sense of self (e.g. hormone therapies or surgical procedures).

A transgender person does not need to complete any particular step in a gender transition in order to be protected by the law. An employer may not condition its treatment or accommodation of a transitioning employee upon completion of a particular step in a gender transition.

FAQ FOR EMPLOYERS

What is an employer allowed to ask? Employers may ask about an employee's employment history, and may ask for personal references, in addition to other non-discriminatory questions. An interviewer should not ask questions designed to detect a person's sexual orientation or gender identity, including asking about their marital status, spouse's name, or relation of household members to one another. Employers should not ask questions about a person's body or whether they plan to have surgery, because this information is generally protected by the Health Insurance Portability and Accountability Act (HIPAA).

How do employers implement dress codes and grooming standards? California law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. An employer who requires a dress code must enforce it in a non-discriminatory manner. This

means, for instance, that a transgender woman may not be held to any different standard of dress or grooming than any other woman in the workplace. And, in general, an employer may not impose any dress or grooming standard that is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity.

What are the obligations of employers when it comes to bathrooms, showers, and locker rooms? All employees have a right to safe and appropriate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity, regardless of the employee's assigned sex at birth. In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. Use of a unisex single stall restroom should always be a matter of choice. No employee should be forced to use one either as a matter of policy or due to continuing harassment in a gender-appropriate facility. Under state law, all single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency must be identified as all-gender toilet facilities.

FILING A COMPLAINT

If you believe you are a victim of discrimination you may, within one year of the discrimination, file a complaint of discrimination by contacting DFEH.

If you have a disability that prevents you from submitting a written pre-complaint form on-line, by mail, or email, DFEH can assist you by scribing your pre-complaint by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice). DFEH is committed to providing access to our materials in an alternative format as a reasonable accommodation for people with disabilities when requested.

To schedule an appointment or to discuss your preferred format to access our materials or webpages, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY) or by email at contact.center@dfeh.ca.gov.

FOR MORE INFORMATION

Department of Fair Employment and Housing
Toll Free: (800) 884-1684 TTY: (800) 700-2320 dfeh.ca.gov

Also find us on:

