

FAIR EMPLOYMENT AND HOUSING COUNCIL REGULATIONS REGARDING TRANSGENDER IDENTITY AND EXPRESSION

INITIAL STATEMENT OF REASONS

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

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and/or veteran status of any person.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed, substantive regulation or amendment and the reason it is necessary are described below. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subdivision, as applicable, when the proposed change goes beyond mere clarification.

Throughout these regulations, the Council proposes to use gender-neutral language. While this is not a substantive change, it is logically necessary when discussing transgender individuals who may not identify as either “male” or “female”; it does not change the rights of individuals who do identify as “male” or “female.” Using gender-inclusive language is consistent with one of the objectives of the FEHA - prohibiting discrimination and harassment regardless of a person’s sex.

§ 11030, Definitions

The purpose of this section is to define gender expression, gender identity, sex, sex stereotype, transgender, and transitioning within the employment context pursuant to FEHA. The Council proposes to add the definition of “transitioning” to explain the process of transitioning gender. This addition is necessary in order to provide clarity and a source of reference for the use of “transitioning” in the proposed changes to section 11034 of the regulations. Also, due to a past oversight, the Council proposes to add “gender” within the definition of “sex.” This addition is necessary to most accurately reflect the FEHA’s definition of “sex” in Government Code section 12926, subdivision (r)(2). Finally, the Council proposes to add Government Code section 12926 to the reference note, which is necessary for enhanced clarity because that section contains the definitions included in this regulation.

§ 11034, Terms, Conditions, and Privileges of Employment

The purpose of this section is to address specific types of prohibited conduct as it relates to sex discrimination in compensation; fringe benefits; lines of progression; dangers to health, safety, or reproductive functions; working conditions; physical appearance, grooming, and dress standards; recording of gender and name; documentation; and transitioning.

§ 11034, subd. (d) Working Conditions – Dangers to Health, Safety, or Reproductive Functions.

The Council proposes to switch the order of reasonable accommodations that employers must make when 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. This is not a substantive change and is necessary to enhance clarity by putting the more common reasonable accommodation first since altering working conditions is often easier than a temporary transfer.

§ 11034, subd. (e)(2) Working Conditions – Equal Access to Comparable, Safe, and Adequate Facilities

The Council proposes to elaborate upon the rule requiring equal access to facilities by clarifying that “facilities” include locker rooms, dressing rooms, dormitories, and other similar facilities in addition to restrooms; that 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; how to balance privacy interests; that transitioning employees shall not be required to undergo, or provide proof of, any particular medical treatment to use facilities designated for use by a particular gender; and that employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities. This proposed regulatory scheme is necessary because it is identical to federal guidance that already applies to many California employers and to school policies mandated by the Education Code and will help clarify an often misunderstood and increasingly prominent facet of the law. These subdivisions are modeled after the relevant District of Columbia Municipal Regulation (D.C. Mun. Regs. tit. 4, § 802.1 (2006)) and Colorado Regulation (3 Colo. Code Regs. § 708-1:81.9 (2014)). The legal background is as follows:

1. Access to facilities consistent with one’s gender identity and expression is a protected right under the FEHA

Government Code section 12940, subdivision (a) prohibits discrimination based on “gender identity” and “gender expression.” These express statutory provisions and the history of this legislation show that the Legislature intended to prohibit discrimination against transgender employees. The Legislature amended the FEHA to prohibit discrimination in employment and housing on the basis of sexual orientation in 1999. (Assem. Bill No. 1001 (1999-2000 Reg. Sess.)) In 2003, the Legislature expanded the definition of sex discrimination in the FEHA, Unruh Civil Rights Act, and Ralph Civil Rights Act to include discrimination on the basis of the person’s gender identity or gender related appearance and behavior. (Assem. Bill No. 196 (2003-2004 Reg. Sess.))

The Legislature amended the FEHA to expressly enumerate gender identity and gender expression as protected classes in 2011. (Assem. Bill No. 887 (2011-2012 Reg. Sess.)) The author of Assembly Bill 887 noted “[n]early 70% of transgender Californians have experienced discrimination or harassment at work.” (Assem. Com. on Judiciary, Rep. on Assem. Bill. No. 887 (2011-2012 Reg. Sess.) Mar. 29, 2011, p.3.) AB 887 was

introduced to “reduce confusion among those who bear the responsibility of ensuring that current anti-discrimination laws are enforced.” (*Id.* at 2.) AB 887 clarified the definition of gender in numerous anti-discrimination laws, including the FEHA and Education Code sections 200 and 220, to expressly include the terms “gender identity” and “gender expression” where only the term “gender” previously appeared. (*Ibid.*) Gender identity “refers to a person’s deeply felt internal sense of being male or female.” (*Id.* at 3.) Gender expression “refers to one’s behavior, mannerisms, appearance, and other characteristics that are perceived to be masculine or feminine.” (*Ibid.*)

2. Federal authority is consistent with the regulations and already applies to many California employers

A. The EEOC has interpreted Title VII in a manner identical to the Department’s proposed guidance

Title VII and the FEHA use similar language in an attempt to eliminate the same discriminatory conduct. (*Price v. Civil Service Com.* (1980) 26 Cal.3d 257, 271). Federal interpretations of Title VII “are unusually strong persuasive precedent” on construction of the FEHA. (*Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 203.) For instance, EEOC guidelines for Title VII are a relevant source of guidance in interpreting the FEHA. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607.)

In April 2015, the United States Equal Employment Opportunity Commission (EEOC) found that the Department of the Army discriminated against a transgender female employee in violation of Title VII when it barred her from using the restroom consistent with her female gender identity. The EEOC required the Army to permit her to use the female restroom. (*Tamra Lusardi, Complainant v. John M. McHugh, Secretary, Department of the Army*, EEOC DOC 0120133395 (April 1, 2015) 2015 WL 1607756.) Federal civil rights laws provide a floor beneath which state protections may not drop, not a ceiling above which they may not rise. (See 42 U.S.C.A. § 2000e-7 (West) (providing that a California statute requiring employers to provide leave to pregnant employees was not preempted by Title VII).) The EEOC decision in *Lusardi* thus operates as a floor for interpreting the FEHA as applied to access to facilities for transgender employees in California. This means that any California employer covered by Title VII already risks liability under federal law if it does not comply with the proposed regulations.

B. The United States Department of Labor has issued guidance identical to that proposed by the Council

The Occupational Safety and Health Administration (Fed/OSHA) is an agency of the United States Department of Labor that seeks “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” (29 U.S.C. § 651(b).) While California enacted and enforces its own occupational safety and health laws in the form of Cal/OSHA, California must provide worker protection that is at least as effective as the protection provided by Fed/OSHA. (29 C.F.R. § 1952.172(b)(1) (2012).)

In June 2015, Fed/OSHA published guidance for employers regarding restroom access

for transgender workers. The core principle is that “[a]ll employees, including transgender employees, should have access to restrooms that correspond to their gender identity.” (U.S. Dept. Labor’s Occupational Safety & Health Admin., Best Practices: A Guide to Restroom Access for Transgender Workers (June 1, 2015) p. 1, at <https://www.osha.gov/Publications/OSHA3795.pdf>. Fed/OSHA recognizes that “it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity.” (*Ibid.*) “Restricting employees to using only restrooms that are not consistent with their gender identity . . . singles those employees out and may make them fear for their physical safety.” (*Ibid.*) Furthermore, employees should “not [be] asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities.” (*Id.* at p. 2.) The Fed/OSHA Guide provides detailed guidance on restroom access, and the same rationale applies to access to other sanitary facilities, such as locker rooms and shower facilities.

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) has also determined that federal contractors must allow transgender employees access to the restroom and other facilities consistent with their gender identity. (See Office of Federal Contract Compliance Programs, Frequently Asked Questions – EO 13672 Final Rule at http://www.dol.gov/ofccp/lgbt/lgbt_faqs.html#Q35.)

3. The Education Code was amended to mandate policies in schools identical to the proposed regulations for workplaces

In August 2013, the Legislature amended the Education Code to require schools to provide students access to facilities corresponding to their gender identity and gender expression. The amendment added section 221.5 subdivision (f), which provides, “A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and *use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.*” (Emphasis added.) (Assem. Bill No. 1266 (2013-2014 Reg. Sess.)) A review of the legislative history confirms that the purpose of the amendment was to provide specific guidance on how to apply an existing mandate of non-discrimination in sex-segregated facilities. (Sen. Floor Analyses, Rep. on Assem. Bill. No. 1266 (2013-2014 Reg. Sess.) June 13, 2013, p.5, italics added.)

The amendment to the Education Code did not change but rather clarified existing anti-discrimination law. Prior to AB 1266, both the Education Code and the FEHA prohibited discrimination based on “gender, gender identity, [and] gender expression.” (Educ. Code, § 220, Gov. Code, § 12940, subd. (a).) But the Legislature found that “many school districts d[id] not understand and are not presently in compliance with their obligations to treat transgender students the same as all other students...some school districts are excluding transgender students from sex segregated activities and facilities.” (Sen. Floor Analyses, Rep. on Assem. Bill. No. 1266 (2013-2014 Reg. Sess.) June 13, 2013, p.5.)

It is appropriate to harmonize the gender identity and gender expression protections of Education Code section 221.5, subdivision (f) and Government Code section 12940. All legislative acts having the same general purpose “should be construed together if they

harmonize and achieve a uniform and consistent legislative purpose.” (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal. 3d 584, 590-91, internal citations omitted.) In applying this rule of construction, Courts should engage in “tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed.” (*Old Homstead Bakery v. Marsh* (1925) 75 Cal.App. 247, 258.)

Education Code section 221.5 provides that a student must be allowed to use facilities consistent with his or her gender identity. Identical protections exist in for transgender employees in the FEHA. Under settled rules of construction, the California non-discrimination statutes are to be construed together to achieve a uniform legislative purpose. If discrimination based on gender identity and gender expression is interpreted differently in the FEHA than in the Education Code, a female-to-male transgender high school student could be faced with a situation where he uses the male restroom/locker room at school, but must use the female restroom at his after-school job. Such inconsistent results are incompatible with the Legislature’s intent.

Finally, it is not uncommon for courts or the former Fair Employment & Housing Commission to look to the nondiscrimination provisions in the California Education Code when interpreting the statutes that the Department enforces, such as the Unruh Civil Rights Act (Unruh) and the FEHA. (See *Dept. Fair Empl. & Hous. v. Law School Admission Council, Inc.* (N.D. 2013) 2013 WL 1703383 (authorizing reliance on an Education Code provision to construe similar provisions of the FEHA); cf. *Dept. Fair Empl. & Hous. v. Univ. of Cal., Berkeley* (Nov. 18, 1993) No. 93-08 (1993 WL 726830 (Cal.F.E.H.C.)) (finding existence of provisions in the Education Code similar to those in FEHA did not preclude application of FEHA provisions).

§ 11034, subd. (g) Physical Appearance, Grooming, and Dress Standards

The Council proposes to reiterate that an employer or other covered entity may impose physical appearance, grooming or dress standards upon an applicant or employee that serve a legitimate business purpose, so long as any such standard does not discriminate based on an individual’s sex, gender, gender identity, or gender expression and also that it is unlawful to require individuals to dress or groom themselves in a manner inconsistent with their gender identity or gender expression. This is necessary to clarify employer’s preexisting obligations and does not alter existing law. This subdivision is modeled after the relevant District of Columbia Municipal Regulations (D.C. Mun. Regs. tit. 4, §§ 804.1 and 804.2 (2006)).

§ 11034, subd. (h)(1) and (h)(2) Recording of Gender and Name – Requiring Transgender Identification

The Council proposes to prohibit employers from requiring an applicant or employee to state whether the individual is transgender generally as well as on job applications. This is necessary to reiterate the basic premise of these regulations – employers may not discriminate based on sex, gender, gender identity, or gender expression, which includes transgender. It would violate basic notions of privacy and may constitute sexual harassment if applicants or employees were forced to state their gender and make the individuals more vulnerable to subsequent discrimination or harassment. These subdivisions are modeled after the relevant District of

Columbia Municipal Regulations (D.C. Mun. Regs. tit. 4, §§ 806.1 and 806.2 (2006)).

§ 11034, subd. (h)(3) and (h)(4) Recording of Gender and Name – Use of a Preferred Gender, Name, and/or Pronoun and Use of Legal Name

The Council proposes to clarify that if an employee requests to be identified with a preferred gender, name, and/or pronoun, an employer or other covered entity who fails to abide by the employee’s stated preference may be liable under the FEHA. This is necessary to reaffirm that conduct, in this case the misuse of an employee’s name, that is sufficiently severe or pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive may constitute sexual harassment. Also, the proposal aims to diffuse stereotyping, prevent discrimination, and provide support for individuals’ choice of facilities. The EEOC applied this analytical framework in *Lusardi*, EEOC DOC 0120133395 (April 1, 2015). Similarly, the Council proposes to clarify that an employer may use a transgendered 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. This addition is necessary to maintain consistency between laws and ensure that employers’ obligations are not altered by these regulations.

§ 11034, subd. (i)(1) Additional Rights – Documentation or Proof of Sex/Gender

The Council proposes clarifying that it is unlawful for employers and other covered entities to inquire or require documentation or proof of an individual’s sex, gender, gender identity, or gender expression as a condition of employment, unless the employer or other covered entity meets its burden of proving a Bona Fide Occupational Qualification defense or the employee initiates communication with the employer regarding any requested adjustment to the employee’s working conditions. This addition is necessary to demonstrate the use of the BFOQ defense in the transgender context. It is not a substantive change in the law but rather an application of existing law to a nontraditional context. This subdivision is modeled in part after the relevant District of Columbia Municipal Regulation (D.C. Mun. Regs. tit. 4, § 805.3 (2006)).

§ 11034, subd. (i)(2) Additional Rights – Discrimination in Hiring

The Council proposes to explicitly state that “[i]t is unlawful to deny employment to an individual based wholly or in part on the individual’s gender identity or gender expression.” This is not a substantive change and mirrors Government Code section 12940, subdivision (a), which contains gender identity and gender expression. This change is necessary to ensure that the regulations fully reflect the contents of the statute, in addition to interpreting it.

§ 11034, subd. (i)(3) Additional Rights – California Family Rights Act Rights

The Council proposes to clarify that nothing in these regulations shall prevent an applicant or employee from asserting rights under other provisions of the FEHA. This amendment would not alter existing law and is necessary to reaffirm that employees have additional rights in addition to those enumerated in these Regulations Regarding Transgender Identity and Expression, such as those provided by the California Family Rights Act and disability sections of the FEHA.

§ 11034, subd. (i)(4) Additional Rights – Transition Discrimination

The Council proposes to explicitly state that “[i]t is unlawful to discriminate against an individual who is transitioning or has transitioned.” This is not a substantive change and implements Government Code section 12940, subdivision (a), which contains gender identity and gender expression, since transitioning can be a component of one’s gender identity or gender

expression and is thus covered by the FEHA. This change is necessary to ensure that the definition of “transitioning” in section 11030 is effectuated in the broader prohibition of discrimination based on gender identity and gender expression.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments describe and clarify the Fair Employment and Housing Act without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State because the regulations centralize and codify existing law, clarify terms, and make technical without affecting the supply of jobs or ability to do business in California. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, and the State's judiciary by

clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.