

Resources

California's New Transgender Regulations: What Employers Need to Know

June 27, 2017

On July 1, 2017, new California regulations take effect that specifically address protections for transgender persons, including equal access to use of facilities, such as restrooms.

California's Fair Employment and Housing Act (FEHA) already prohibits discrimination or harassment against applicants or employees who identify as transgender, regardless of the person's sex assigned at birth.

An employee's right to appear or dress consistently with his/her gender identity or gender expression is also protected.

Now, these new FEHA regulations expand on the existing protections. The key changes are as follows:

Transitioning/Transitioned Employees

The new regulations specifically state that it is unlawful to discriminate against an individual who is transitioning, has transitioned or is perceived to be transitioning.

The **transitioning process** may involve a number of steps:

- Changes in name and pronoun usage.
- Facility usage.
- Participation in employer-sponsored activities, such as sports teams, team-building projects or volunteering.
- Undergoing hormone therapy, surgeries or other medical procedures.

An employer cannot base its treatment of a transitioning employee on completion of a particular step in the transition.

Employees' Name/Gender Requests

The new rules specify that employers must honor an employee's request to be identified by a preferred gender, name or pronoun, including gender-neutral pronouns.

One exception to the requirement to use the name/gender requested by the employee: An employer can use an employee's gender or legal name as indicated on a government-issued identification document *only if necessary to meet a legally-mandated obligation*.

Gender Information

Employers are prohibited from making inquiries that, directly or indirectly, identify an individual on the basis of sex, gender, gender identity or gender expression.

- You cannot inquire about or require documentation or proof of an individual's sex, gender, gender identity or gender expression as a condition of employment.

There are limited permissible defenses.

- The regulations impose tough rules regarding when a "**bona fide occupational qualification**" would allow you to require an employee be a particular gender for a job.

- Employers who have affirmative action reporting or recordkeeping requirements, such as EEO-1 reports, may request applicants to self-identify but **only on a voluntary basis**. Employers must not discriminate against an applicant because the applicant did not choose to self-identify.
- **If the employee initiates a discussion with the employer about working conditions**, then the employer and the employee can communicate about the employee's sex, gender, gender identity or gender expression. *The employer should not initiate the conversation or make any inquires.*

Equal Access to Restrooms and Other Facilities

Under the regulations, you must provide equal access to comparable, safe and adequate facilities without regard to the sex of the employee.

All employees have the right to use a **facility** that corresponds to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.

The term "facility" is meant to encompass bathrooms and other types of facilities, such as an employer locker room with a showering area.

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."

If you have **multi-user facilities**, the FEHA regulations *allow you to make a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe and adequate multi-user facilities*. For example, if an employee complained of being denied access to a restroom that corresponded with his/her gender expression, you could make a reasonable and confidential inquiry to the employee at that time.

Privacy Concerns

The new regulations address privacy concerns that employees may have. To protect the privacy interests of all employees, the **regulations require employers to provide feasible alternatives**, such as:

- Locking toilet stalls.
- Staggered schedules for showering.
- Shower curtains.
- Other feasible methods for ensuring privacy.

An Employer cannot require an employee to use a particular facility. For instance, you cannot tell transgender individuals that they can use only the single-stall bathroom. A unisex or single-stall bathroom can be used by any employee desiring increased privacy, regardless of the underlying reason.

Signage Requirements

There are also **specific signage requirements**, some found in the Health and Safety Code, and others in the FEHA regulations.

The new FEHA regulations state that employers with **single-occupancy facilities** under their control must use **gender-neutral signage** for those facilities, such as "Restroom," "Unisex," "Gender Neutral," "All Gender Restroom," etc. These regulations are effective on July 1, 2017.

Remember: a new law effective March 1, 2017, requires all single-user toilet facilities in any business establishment to be identified as "all-gender" toilet facilities.

Best Practices

- Revise *equal employment opportunity and anti-harassment policies*, as necessary.
- Revisit *dress codes*. Ensure that dress codes and related policies are **gender-neutral** and don't play to gender stereotypes. Do not impose dress, grooming or appearance standards which are inconsistent with an individual's gender identity or expression. If you think you have a business necessity for a gender-specific requirement, consult an attorney.
- Review *employment applications and other forms* to remove requests to identify sex or gender. If you need the information for government reporting, seek it on a voluntary basis only.
- Use care with *restroom issues*.
- Conduct *sensitivity training*. To prevent misconceptions and stereotypes from escalating into discrimination or harassment, incorporate sensitivity to gender identity and gender expression issues into EEO and anti-harassment training programs.
- Use correct *pronouns and names* as specified by the employee.
- Respect privacy and maintain confidentiality. Do not "out" your transgender employees.

For more information about this alert, please contact Laura P. Worsinger, Madeleine K. Lee, Jack Schaedel, Jamie Lopez, or your Dykema relationship attorney.

Attorneys

Laura P. Worsinger

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