

California's New Regulations Offer More Protection for Transgender Individuals

By Michelle E. Phillips and Cary G. Palmer

June 30, 2017

California's Department of Fair Employment and Housing (DFEH) has approved new regulations to protect transgender individuals, effective July 1, 2017.

The new regulations expand protections available for people who identify as transgender. They also expand protections for gender identity and gender expression. California has adopted similar regulations in the past, such as gender-neutral restrooms, to ensure protection for more individuals.

The regulations are in California Code of Regulations, Title 2, sections 11030, 11031, and 11034.

Expanded Definitions for Gender

Gender expression is defined under the regulations as someone's gender-related behavior or appearance, or perceived behavior or appearance, regardless of conformity to stereotypical behavior and appearance for the individual's sex assigned at birth.

Gender identity is a person's understanding of their gender, or perception of their gender identity (which may include male, female, a combination of both, or neither of those), a gender differing from the one assigned at birth, or transgender.

Transitioning Defined

The DFEH's regulation adds a definition for "transitioning," to ensure that no employee or potential employee is discriminated against while transitioning.

Transitioning is defined under the regulations as "the 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." Some activities that may occur during the transition period include alterations in name or pronoun usage, facilities use, engagement in office-related activities, or beginning hormone therapy, surgery, and other related medical procedures. Employers may not discriminate against a person who has transitioned, is in the process of transitioning, or is believed to be transitioning.

No Requests for Documentation or Proof

Employers may not request an employee to disclose information related to sex, including gender, gender expression, or gender identity, unless it is requested on a voluntary basis for recordkeeping purposes.

Further, employers cannot inquire about or request documentation or proof of someone's gender, gender expression, gender identity, or sex.

Changes to BFOQ Defenses

The DFEH added another exception to a Bona Fide Occupational Qualifications (BFOQ) defense. Employers may no longer use a BFOQ defense to establish the fact that a person is transgender, gender non-conforming, or that their sex assigned at birth is not the one required for the position.

Other Rights

Other notable expanded rights in the new regulations include those related to work conditions and job performance. Employers must allow employees to use facilities that correspond with their gender identity or gender expression, not the sex assigned to them at birth. Further, single-occupancy facilities under the employer's control must be labeled with gender neutral terms such as "Unisex, Gender Neutral or All Gender Restroom." (For more on the signage, see our blog, [California Adopts Broad Gender-Neutral Bathroom Rules – Signage Rules Expand Beyond ADA Concerns.](#))

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For job performance, employers must allow employees to carry out duties that correspond with the person's gender expression or gender identity, not the sex assigned to the person at birth.

Recommendations

Employers should review their policies to ensure full compliance with the new regulations and implement a comprehensive Transgender Policy addressing the gender transition plan, the legal name change and personal pronouns, restroom and locker room usage, privacy and medical records, training and the go live date.

As the regulations are effective July 1, 2017, employers should promptly review all affected policies. While every situation is unique, Jackson Lewis has developed best practices regarding pre-hire and post-hire documentation, gender transition talking points, LGBTQ sensitivity training, and related company policies. Should you have any questions about the new regulations, please contact a Jackson Lewis attorney.

(We thank Summer Associate Dalia Khatib for assisting with this legal update.)

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