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The Gender Conundrum in California Employment

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Objectives for this Session

- Learning the terminology.
- Learning the law affecting transgender employees and applicants.
- Learning best practices for managing transgender employees.



First, Some Terminology

- Sex refers to a person's biological status and is typically categorized as male or female. Indicators of biological sex include sex chromosomes, gonads, internal reproductive organs, and external genitalia.
- *Gender* refers to an individual's identity as a male or female as a social or cultural construct, as evidenced by behavior and mode of dress.



First, Some Terminology

- *Gender Identity* means a person's identification as male, female, or something else.
- *Gender Expression* means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's sex assigned at birth.



First, Some Terminology

- Gender is not necessarily *binary* (i.e., strictly male or female).
- Non-binary gender terms include agender, genderqueer, genderfluid, Two Spirit, bigender, pangender, gender nonconforming, and gender variant.
- The “Q” in “LGBTQ” stands for “queer” or “questioning.”



First, Some Terminology

- “*Intersex*” is a term used to describe natural bodily variations involving external genitalia, internal sex organs, chromosomes, or hormonal differences that transcend typical ideas of male or female.



First, Some Terminology

- *Gender identity* and *sexual orientation* are different concepts.
- *Sexual orientation* (i.e., being gay, straight or bisexual) refers to a person's enduring physical, romantic and/or emotional attraction to another person.



First, Some Terminology

- *Transgender* -- A person whose gender identity or gender expression is different than sex assigned at birth.
- *Transsexual* – A person who transitions from one sex to another, typically via hormones and/or sex-reassignment surgery.
- It is *not* necessary for a person to have medical intervention to qualify as transgender.



First, Some Terminology

- *Transitioning* – The process of switching from one gender to another; it may or may not include changes in name or pronoun, change of restroom, change in clothing, hormone treatments, sex reassignment surgery and/or psychotherapy.



The Transitioning Process

Name Change:

- Court order is required for legal name change.
- Person seeking name change must file a petition with the Superior Court.
- Where name is changed to conform to gender identity, no publication is required and no appearance in court is necessary if there are no objections.



The Transitioning Process

Birth Certificate Change of Name and Gender:

- Person born in California does not need a court order to issue a new birth certificate.
- Person need only submit a copy of name change court order and an affidavit to the State Registrar attesting to gender change.
- Prior requirement of submission of physician's statement that person has "undergone clinically appropriate treatment" no longer applies.



The Transitioning Process

Birth Certificate Change of Name and Gender:

- Person not born in California must obtain a court order to issue a new birth certificate.
- Person need only submit a copy of name change court order and an affidavit to the court attesting to gender change.
- Prior requirement of submission of physician's statement that person has "undergone clinically appropriate treatment" no longer applies.



The Transitioning Process

Driver's License Change of Gender:

- Person can apply for a driver's license with a new "gender category."
- "Gender category" options are male, female, or nonbinary.
- Medical certification form signed by physician or psychologist is no longer required.



The Transitioning Process

Social Security Number:

- Social Security card does not indicate gender, but Social Security Administration keeps record of gender.
- If enrolled in Medicare or Medicaid, the person's insurance record will be based on Social Security data and coverage for gender-specific medical services could be denied if gender on record is inconsistent.



The Transitioning Process

Gender Can Be Changed for Social Security Purposes By Submitting:

- U.S. passport with the new gender;
- Birth certificate with the new gender;
- Court order recognizing the new gender; or
- Signed letter from physician confirming that the person has received “clinically appropriate treatment to facilitate gender transition.”



The Transitioning Process

Passport Change:

- Can change gender marker on passport by submitting a physician's (M.D. or D.O.) certificate under penalty of perjury confirming that the person has received "clinically appropriate treatment to facilitate gender transition."
- No specific medical treatment is required.



Laws Protecting Transgender Employees

- California Fair Employment and Housing Act expressly covers gender identity and gender expression.
- EEOC and some (but not all) federal courts have taken the position that transgender individuals are covered by Title VII's prohibition on sex discrimination.



Laws Protecting Transgender Employees

California Law Prohibits:

- Discrimination against transgender applicants or employees, or against transitioning applicants or employees.
- Harassment of transgender employees.
- Application of dress codes to prohibit an employee from dressing or grooming consistent with his or her gender identity.



Laws Protecting Transgender Employees

California Law Prohibits:

- Requiring an employee or applicant to disclose whether he or she is transgender.
- Rejecting an applicant for indicating a gender on the job application different from the applicant's assigned sex at birth.



Laws Protecting Transgender Employees

California Law Prohibits:

- Inquiring about or requiring proof of a person's sex or gender as a condition of employment unless an employee requests an adjustment of working conditions or a BFOQ defense is asserted.
- BFOQ may exist where employee must conduct body searches or observe others while nude and it's offensive and harmful to have individual of different sex present.



Laws Protecting Transgender Employees

California Law Prohibits:

- Using a gender, name or pronoun to refer to or identify an employee other than the employee's preferred gender, name or pronoun.
- You may, however, require proof of a court order changing name or other evidence of legal name change before changing employee's name in payroll and benefits records.



Laws Protecting Transgender Employees

Which Restroom?

- You must allow employees to use restrooms, locker rooms and changing rooms that correspond to their gender identity or gender expression.
- You may not require transitioning employees to undergo or show proof of medical treatment in order to use facilities designed for use by a specific gender.



Laws Protecting Transgender Employees

Which Restroom?

- Effective March 1, 2017, “single user” restrooms in all business establishments must be identified as “all gender” (that is, not “men’s” or “ladies”).
- Single user restroom contains no more than one urinal and one water closet and a lock on door that can be locked by occupant.



Laws Protecting Transgender Employees

Which Restroom?

Compliant
signage for
single-user
restroom:





Laws Protecting Transgender Employees

Which Restroom?

- You may make a unisex restroom available for transgender employees to use but you may not *require* such use.
- Objections by other employees to a transgender employee's use of gender-conforming restroom is not a basis for prohibiting such use.



Laws Protecting Transgender Employees

Which Restroom?

- If a separate unisex restroom is not available you must provide alternative measures to protect employee privacy such as locking toilet stalls, staggered schedules for showering, shower curtains or other methods of ensuring privacy.



Laws Protecting Transgender Employees

Which Restroom?

- Inappropriate conduct in a restroom by a transgender employee may be disciplined the same as if it were committed by a non-transgender employee.
- Anti-harassment policy applies to *all* employees using restrooms, locker rooms and changing rooms.



Laws Protecting Transgender Employees

Religious Beliefs:

- You may not segregate or exclude a transgender employee because of a religious objection by co-workers or customers.
- This is consistent with the rules that employees may not impose their religious beliefs on others, and that “customer preference” will not justify discrimination.



Laws Protecting Transgender Employees

Required Poster

Employers must include poster on transgender rights among required posters:

THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

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." Gender identity and gender expression are protected characteristics under the Fair Employment and Housing Act. That means that employers, housing providers, and businesses may not discriminate against someone because they identify as transgender or gender non-conforming. This includes the perception that someone is transgender or gender non-conforming.

WHAT IS A 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 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 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.

How do employers implement dress codes and grooming standards? An employer who requires a dress code must enforce it in a non-discriminatory manner. This means that, unless an employer can demonstrate business necessity, each

employee must be allowed to dress in accordance with their gender identity and gender expression. Transgender or gender non-conforming employees may not be held to any different standard of dress or grooming than any other employee.

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 harassment in a gender-appropriate facility. Unless exempted by other provisions of 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 intake form on-line, by mail, or email, DFEH can assist you by scribing your intake 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:



DFEH-EDAP-ENGL / November 2017



Laws Protecting Transgender Employees

Required Training

- Harassment training of managers and employees required by AB 1825 and SB 1343 must address harassment based on gender identity, gender expression, and sexual orientation.
- Training must include use of practical examples.



Laws Protecting Transgender Employees

Employee Benefits:

- You must not discriminate on the basis of gender identity in providing employee benefits.
- Most challenges will come from application of health plan benefits to transgender employees.



Laws Protecting Transgender Employees

Employee Benefits:

- Regulations (45 CFR § 92.207) implemented under section 1557 of the ACA provide a hint of where law may be going.
- Those regulations (which prohibited discrimination based on sex and other classifications) would apply to health plans that received federal (DHHS) financial assistance, and not to most employers or private health plans generally.



Laws Protecting Transgender Employees

Employee Benefits:

- Under the ACA regulations, a health plan could not impose a categorical or automatic exclusion against coverage of services for gender transition.
- On the other hand, the ACA regulations did not require health plans to cover any specific procedure or service, such as sex reassignment surgery.



Laws Protecting Transgender Employees

Employee Benefits:

- A health plan could elect to cover only medically necessary procedures, or only certain medically necessary procedures, so long as coverage determinations do not discriminate against transgender persons.



Laws Protecting Transgender Employees

Employee Benefits:

- A health plan need not provide coverage of sex-specific services to a transgender person whose biological sex is not consistent with that service; e.g., prostate exams need not be covered for a transgender male who does not have a prostate.



Laws Protecting Transgender Employees

Employee Benefits:

- The ACA regulations permitted a health plan to inquire of a plan member's biological sex on the benefits application, and in the event coverage is denied as the result of a binary gender billing code mismatch, so long as the information was not used in a discriminatory manner and was maintained in compliance with HIPAA.



Laws Protecting Transgender Employees

Employee Benefits:

- On December 31, 2016, in *Franciscan Alliance, Inc. v. Burwell*, the court issued a preliminary injunction against enforcement of these regulations, holding that DHHS improperly interpreted Title IX's prohibition against sex discrimination to cover discrimination based on gender.



Laws Protecting Transgender Employees

Employee Benefits:

- As a result of the *Franciscan Alliance* ruling, insurers need not cover, and doctors and hospitals need not provide, medical services related to gender transition.
- California's Unruh Act, however, still prohibits “business establishments” from discriminating based on gender identity and gender expression.



Transgender Employees – Best Practices

Policies and Training:

- Ensure that policies against harassment and discrimination include gender identity, gender expression and gender transitioning.
- Include gender identity and expression and sexual orientation in manager and employee harassment training.
- Post transgender rights poster.



Transgender Employees – Best Practices

Hiring:

- Remove “Male or Female?” question from employment application.
- Do not inquire about gender identity or gender expression in interview process unless candidate raises the issue or a BFOQ applies to the job.



Transgender Employees – Best Practices

Dealing with Gender-Transitioning Employee:

- Address employee by preferred name and pronoun and require that all employees do so.
- Change payroll and benefits information when proper documents are presented.
- Become familiar with your health plan's process, if any, for changing gender markers.



Transgender Employees – Best Practices

Dealing with Gender-Transitioning Employee:

- Meet with employee and determine how best to notify co-workers and customers (if applicable) of gender change; honor employee's preference if feasible.
- Allow employee to use restroom/locker room that conforms with new gender.



Transgender Employees – Best Practices

Dealing with Gender-Transitioning Employee:

- If co-workers express religious objection to presence of, or restroom use by, transgender employee, explain that the company is not requiring anyone to change or abandon their religious beliefs but that it must provide a workplace that is inclusive and open to all employees without discrimination.



Transgender Employees – Best Practices

Dealing with Gender-Transitioning Employee:

- Be alert for instances of co-worker harassment and if it occurs, take appropriate disciplinary action and consider providing sensitivity training for employees involved.
- Be alert for a change in attitude or performance expectations by transitioning employee's managers.



Transgender Employees – Best Practices

Dealing with Gender-Transitioning Employee:

- Hold transgender employees to the same performance and conduct standards as other employees.
- If transitioning process becomes a distraction for employee or co-workers, address conduct and performance as you would for other employees.



Key Takeaways

- Terminology is complicated, but it's important to get it right.
- The law favors transgender employees and applicants.
- Some of that law (e.g., restrooms and changing rooms) seems counterintuitive.



Key Takeaways

- Expect to receive co-worker push-back, especially regarding restrooms and changing rooms.
- A sensitive approach is necessary at all times. HR will likely have to take a leadership role toward ensuring an inclusive workplace.



Thank You

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