

# ATTACHMENT B

## Fair Employment & Housing Council

### Modifications to 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

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Text proposed to be added for the 15-day comment period is displayed in double underline type.

Text proposed to be deleted for the 15-day comment period is displayed in ~~double striketrough~~ type.

In some instances, the text currently under consideration will be both single stricken and double underlined, which means it is text that was previously proposed to be deleted from an existing regulation, which the Council has restored and is no longer proposing to delete. Similarly, text that is both single underlined and double stricken means that the text was previously proposed to be added, but the Council subsequently decided to remove it.

#### § 11030. Definitions.

(a) “Facility” includes, but is not limited to, restrooms, locker rooms, dressing rooms, dormitories, and other similar facilities.

~~(b)~~ “Gender expression” means a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth.

~~(c)~~ “Gender identity” means a person’s self-identification of their gender which may include as male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex at birth, or transgender.

~~(d)~~ “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.

~~(e)~~ “Sex Stereotype” means an assumption about a person’s appearance or behavior, 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 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.”

(f) “Transitioning” is ~~the~~ a multi-step 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 or may not include, but is not limited to, changes in name and pronoun usage, bathroom, facility usage, participation in activities like sports teams, hormone therapy, sex reassignment 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; ~~or~~

(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

~~(5)~~ (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 ~~the~~ different ~~opposite~~ sex present, and
- (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of ~~the~~ different ~~opposite~~ sex present.

(c) Employers or other covered entities shall assign job duties and make adjustments 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 where otherwise required by state law, an employer or other covered entity shall not require unequal employee contributions by similarly situated ~~male and female~~ 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 ~~male and female~~ 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~~classify a job ~~exclusively for one sex as male or female~~ 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~~female from applying for a job labeled “male” or “female,” or for a job in a “male” or “female” line of progression, ~~and vice versa;~~ or

(B) Prohibits an ~~employee~~male scheduled for layoff from displacing a less senior employee on a “male” or “female” ~~on a “female”~~ seniority list, ~~and vice versa.~~

(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 ~~the~~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, ~~or~~

~~(B) 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.~~

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

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

(4) An employer may not discriminate against members ~~based on~~<sup>of one</sup> 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~~of both sexes~~.

(2) Equal access to comparable, safe, and adequate toilet~~restrooms, locker rooms, dressing rooms, dormitories, and other similar~~ facilities (“facilities”) shall be provided to employees without regard to the sex of the employee~~of both sexes~~. 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) To balance the privacy interests of all employees, employers shall provide alternatives if no individual facility is available, such as, locking toilet stalls, staggered schedules for showering, shower curtains, or other method of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.

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

(D) 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.

(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 ~~of one sex and not the other~~ 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.

4. 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 lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards that serve a legitimate business purpose, so long as any such standard does not discriminate based on an individual's sex, including gender, gender identity, or gender expression. However, if such a standard discriminates on the basis of sex and if it also significantly burdens the individual in his or her employment, it is unlawful. It is unlawful to require individuals to dress or groom themselves in a manner inconsistent with their gender identity or gender expression. 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 grooming or dress standard serves a legitimate business purpose and does not discriminate based on an individual's sex, including gender, gender identity, or gender expression.~~

(h) Recording of Gender and Name

(1) It is unlawful to require an applicant or employee to state whether the individual is transgender.

(2) If a job application form requires an individual to identify as male or female, designation by the applicant of a gender that is inconsistent with the applicant's assigned sex at birth or presumed gender shall not be considered fraudulent or a misrepresentation for the purpose of adverse action based on the applicant's designation.

(3) An employer shall not discriminate against an applicant based on the applicant's failure to designate male or female on an application form, except as noted in subsection (5) below.

(34) 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 ~~division~~ (45) below.

(45) An employer may 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.

(i) Additional Rights.

(1) 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 BFOQ defense, as defined above, or the employee initiates communication with the employer regarding any requested adjustment to the employee's working conditions.~~

(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 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, ~~or~~ 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 US 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; U.S. Dept. of Labor's Occupational Safety & Health Admin., <https://www.osha.gov/Publications/OSHA3795.pdf>; *Tamra Lusardi, Complainant v. John M. McHugh, Secy, Dept of the Army*, EEOC DOC 0120133395 (April 1, 2015) 2015 WL 1607756.