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Insider’s Look at California’s New Gender Identity Regulations: Restroom Access, Pronoun Preference, and More

Article By:

Patti C. Perez

Andrea L. Fellion

Regulations drafted by California's Fair Employment and Housing Council addressing issues related to gender identity will become effective July 1, 2017. These first-of-their-kind California regulations will seek to do what other council regulatory projects have also attempted to do: provide information beyond the legislative language and case law rulings that emphasizes California’s strong commitment to protecting employee rights while also providing guidelines for employers to comply with the law and provide a safe and fair workplace for all Californians.

Public Policy Emphasis

California’s Fair Employment and Housing Act (FEHA) has long included gender identity and gender expression as protected categories. As is true with all regulations, the recently-issued gender identity regulations do not create new law, but rather clarify existing law and provide all constituents (employees, employers, advocates, etc.) with a one-stop shop on issues related to gender identity and expression. An underlying theme of these regulations and other regulatory projects promulgated by the council is to provide employers with the message that they should approach these issues in ways that are methodical, thoughtful, and intentional.

Although other states and federal agencies (most notably, the Occupational Safety and Health Administration) have provided regulatory guidelines on the issue of gender identity, these are the first set of California regulations that address and clarify the topic and will likely be viewed as the most forward-looking and comprehensive set of regulations on the topic. The regulations address several key issues, including the following:

1. Updated definitions
2. Guidance on issues related to the use of facilities (restrooms, showers, locker rooms, etc.)
3. Use of information related to gender and inquiries regarding gender

4. Pronoun and name preferences
5. Dress and grooming standards
6. Communication between employees and company representatives

Definitions

The regulations begin by providing updated and comprehensive definitions, including updated definitions for “gender identity,” as well as “gender expression,” “transgender,” and “transitioning,” among others:

- “Gender identity” is defined as a person’s internal understanding of their gender, or the perception of a person’s gender identity. The definition was expanded to include employees who do not identify as either male or female (commonly referred to as nonbinary) and to employees who identify as a combination of male and female.
- “Gender expression” is defined as a person’s gender-related appearance or behavior, or perception of the same, whether or not stereotypically associated with the person’s sex assigned at birth.
- “Transgender” generally refers to a person whose gender identity differs from their sex assigned at birth.
- “Transitioning” is defined as “a 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 include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.” Although transitioning is not a new protected category, the regulations make it clear that an employee who is transitioning (or has transitioned) is protected by California law under the gender identity protections.

Facility Access and Use: Employee Choice is Key

The regulations require employers to allow employees to use the restroom, locker room, dressing room, or dormitory (referred to collectively as “facilities”) that corresponds to the employee’s gender identity or gender expression, regardless of the employee's sex assigned at birth. The main point of the regulations is that an employer must abide by how the employee identifies. There are a few details related to this issue that warrant emphasis:

- The regulations do not include any reference to the word “accommodation.” Because this term has become a legal term of art—particularly in the disability, pregnancy, and religion realms—and because the word implies an obligation for the employer and employee to engage in an “interactive process” (yet another term of art), the regulations purposely do not use that word so that there is no confusion. Unlike a request for a “reasonable accommodation,” a request to use a particular restroom (or other facility) based on the employee’s gender identity or expression is not subject to an analysis for reasonableness.

- The regulations expressly prohibit an employer from asking for or requiring “proof” of gender prior to granting an employee’s request to use a particular restroom or other facility.

- Employers may not interfere with employees’ ability to use the facilities of their choice simply because it makes other employees uncomfortable. If other employees would like more privacy due to the fact that a person who was born a different sex is using their restroom, the employer can allow the employee to use a single-gender facility or provide a “feasible alternative” to achieve increased privacy, such as locking toilet stalls, staggered shower schedules, shower curtains, or other methods.

- Finally, the regulations state that employers that have single-user facilities shall use gender-neutral signage (examples include “restroom,” “unisex,” and “all gender restroom,” but an employer can choose other language as long as it makes clear that an individual of any gender may use that restroom).

Inquiries Regarding Gender

A section of the regulations that might be overlooked is one that might have the most consequential impact on employers: the prohibition from using a “gender box” on employment applications. The rationale behind this is that the FEHA clearly states that no inquiries can be made regarding any protected category (for example, employment applications cannot seek information about an applicant’s age or religion). The regulations make clear that employers may still ask for individuals to provide this information voluntarily, for example for purposes of EEO data collection (similar to the way information is collected for race and veteran status, for example).

Name and Pronoun Preference: Employee Choice Prevails, Unless Mandated by Law

The regulations address issues related to requests from employees to change their names or the pronouns to be used to address them. One of the main points of this section is that, much like the language related to facility usage, employee choice is usually controlling (the only exception being when a law mandates the use of the employee’s legal name). An easy rule of thumb for employers is to make any requested changes that are under its control and explain to the employee the changes that the company is not allowed to make. For example, if the employee would like a new email address or new business cards with their preferred name, or if the employee requests to be called by a different pronoun (or by a gender-neutral pronoun), an employer should honor these requests, as they are all within the employer’s control. Of course, this requires open and respectful communication with the employees to ensure their wishes are executed in an appropriate way (for example, the employee may request that human resources or the department manager send out an email with this information, or they might prefer for the request to only be communicated to a limited group of people).

On the other hand, if the name change requests involves a legally-mandated duty, such as Internal Revenue Service documentation or reports to other governmental agencies, then an employer can (and indeed in most cases must) continue to use the employees’ legal names (and, if applicable, genders), as it appears on their official identification documents. In other words, although an employer can issue a new name placard for the employee’s desk, an employer cannot issue paychecks in a name that is different from the employee’s legal identification.

An important note on this topic involves legal liability. The regulations make clear that an employer *may* be liable for failing to use the name or pronoun requested by the employee. The regulations clarify that an employer will not be automatically liable in the event, for example, that someone at the company simply forgets and reverts back to using the employee's previous name or pronoun. However, the responsibility falls on the appropriate company representative to have a plan in place to address name and pronoun change requests and to make sure that employees and managers know the importance of the request. Although it is understandable that there might be a short period during which colleagues get used to the new name and/or pronoun, at some point it might be seen as a willful violation if the employer does not adequately communicate the request and employees or managers continue refer to the employee by the wrong name or pronoun and are not corrected or reminded.

Dress and Grooming Standards

The regulations make clear that it is unlawful to impose any physical appearance, grooming, or dress standard that is inconsistent with an individual's gender identity or gender expression (unless the employer can establish a legitimate business defense).

The council received a comment objecting to this section that resulted in the council explaining exactly why this rule is the law. The comment, submitted by an employer representative, indicated that an employee who was transitioning from male to female and began wearing her hair long should not be allowed to have long hair if doing so could be unsafe for a particular job. However, this example highlights the importance of this rule: that rules and procedures (whether related to safety or for other reasons) should be implemented fairly and consistently, irrespective of gender identity. In that scenario, if the safety rule is that an employee in a particular job cannot have long hair (for example, if the employees work on a factory line and long hair could get caught in the machinery), then the rule should be applied equally regardless of gender or gender identity. In that case, the "no long hair" rule (or a rule requiring employees with long hair to tie it back or wear a hairnet) should apply to everyone with long hair, no matter their gender, their gender identity, or their gender expression.

Communication

Finally, the regulations emphasize the need for open and respectful communication between employees and employers. They emphasize that, generally speaking, an employer should not make inappropriate inquiries about gender identity or require any proof in order to grant a request (for facility usage or name preference). However, the regulations cite two exceptions to this general rule. First, an employer is allowed 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." Additionally, the regulations expressly allow—and even encourage—communication between the employee and an employer representative when the employee initiates communication with the employer regarding the employee's working conditions. In short, if a company representative (usually someone in human resources) receives a request regarding any of these topics (preferred name or gender, or the use of a different facility), the company should respond to this inquiry quickly, confidentially, respectfully, and consistently.

Tips and Takeaways

- Big-picture takeaways:

- As the definitions section indicates, there is terminology that you or your employees might find unfamiliar. Employers may want to make it a goal to become better-versed and more comfortable with these terms; doing so will increase the probability that they will be able to communicate with employees in a professional and respectful way.

- In addition to making an effort to address these issues professionally, employers may want to ensure that managers and employees also understand their responsibility to be respectful. Employers may find it helpful to not address these issues from a political or moral perspective, but rather with an emphasis on the type of behavior expected from and towards all employees.

- With few exceptions, employee choice will be determinative.

- Facility usage and change in name/pronoun:

    - Employers may want to train managers on the nuances related to employee choice and inform them that they are not allowed to ask for “proof” of gender and that there is no negotiation when it comes to an employee’s use of facilities or name choice.

    - Employers may want to create a checklist for issues to discuss if an employee approaches them with a request to be called a different name or referred to by a different pronoun. The checklist can call for a discussion about how and to whom the request will be communicated, a discussion of the areas where a name can be changed (e.g., Do you need to order new business cards? Do you need to contact IT to change an email address?), and a clear discussion of areas in which a name cannot be changed (e.g., tax documentation, paychecks, benefits information).

- Employers may want to review their policies to ensure that employer dress and/or grooming standards are applied according to the employee’s gender identity or gender expression.

- Employers may want to review their employment applications to ensure that there is no “gender box” on the section of the application that an applicant must complete.

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