

FEHA EXPANDS PROTECTIONS FOR GENDER IDENTITY AND EXPRESSION

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PRACTICE AREAS

Employment

The Fair Employment and Housing Act (FEHA) now has additional protections against discrimination on the basis of gender identity and gender expression in the workplace. The new FEHA regulations, entitled “Regulations Regarding Transgender Identity and Expression,” apply to individuals who identify as transgender, including those who are transitioning, have transitioned, or are perceived to be transitioning. FEHA applies to any California employer with five or more full-time or part-time employees. To keep pace with these changes, employers subject to FEHA should be mindful of the following key provisions:

- **RESTROOMS:** The regulations provide that employers permit employees to use the restroom facilities that correspond to the employee’s gender identity or gender expression, regardless of the employee’s sex at birth. Employers must also use gender-neutral signage for single-occupancy restroom facilities under their control. The regulations forbid an employer from requiring proof of sex or gender for an employee to use a particular facility.
- **DRESS CODE:** Employers must permit employees to dress consistent with their gender expression or identity under the new regulations. The one exception to this is if the employer can show a “business necessity” for mandating that the employee maintain a certain physical appearance. Note, however that employers must meet a high threshold to show a “business necessity.”
- **NAME AND IDENTITY:** The regulations require employers to honor an employee’s request to be referred to by their chosen name and preferred gender pronouns. Only human resource professionals may still use the legal name of the employee if needed to meet legal obligations, such as for tax reporting.
- **GENDER INQUIRIES:** Employers under the new regulations may not ask about or require proof of an employee’s sex, gender, or gender identity or expression as a condition of employment. However, if it is a “reasonable and confidential inquiry” solely to ensure appropriate access to multi-user facilities, the employer may seek this information. Employers and

employees may communicate about this information when the employee initiates the communication with the employer about the employee's working conditions. Employers can also request this information for record-keeping purposes, but it is unlawful to discriminate against an applicant who fails to designate "male" or "female" on an application form. As a precaution, employers are advised to revise their employment applications to remove questions about gender.

Going forward, employers should review and update their employment applications and policies regarding gender-related issues in the workplace. Additionally, managers should receive updated discrimination and harassment training relating to gender identity and gender expression.

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