

RESPECTING GENDER IDENTITY IN THE WORKPLACE

DAVID NAHMIA



Each of us has a gender identity—deeply held internal sense of being male, female, or something in between. A transgender person is someone whose sex assigned to them at birth is different from their gender identity.¹ Today, transgender people may undergo a “transition” process whereby they align their sex and gender identity through a series of social, legal, and medical steps. Medical professionals and associations like the American Medical Association (AMA) and the American Psychiatric Association (APA) widely agree that a person’s gender status is innate and biological, and that transitioning is often medically necessary to achieve healthy outcomes.

In the United States, transgender people experience high rates of poverty and discrimination. Nationally, 78% of transgender people have experienced harassment, mistreatment, or discrimination at work.² Here in California, more than a quarter of transgender people report being fired, denied a promotion, or not hired because of their gender identity.³ As a result, in 2015, 15% of transgender residents were unemployed (compared to 5% of the general population), and 33% lived at or below the poverty line (\$24,300 income for a family of four).

Federal antidiscrimination law, under Title VII, does not explicitly protect transgender (or lesbian, gay, and bisexual) workers from discrimination, though circuit courts around the country, including the Ninth Circuit, largely agree that discrimination because of one’s transgender status is illegal sex discrimination.⁴ The recently introduced federal Equality Act would write this interpretation into an array of federal civil rights statutes.⁵

California state law has been clear since 2002: discriminating against or harassing transgender workers is illegal. The Fair Employment and Housing Act (FEHA) explicitly prohibits discrimination on the basis of gender identity and gender expression.⁶ In 2017, the Department of Fair Employment and Housing issued regulations clarifying state law protecting transgender workers.⁷ The rules are some of the most comprehensive in the country—an invaluable guide

to employers and advocates for complying with state law and providing a transgender-inclusive workplace.

The FEHA regulations obligate employers to provide a safe and gender-affirming work environment for all employees, including those who are transgender and transitioning.⁸ Facilities like restrooms and locker rooms must be “comparable, safe, and adequate.”⁹ Transgender workers are entitled to use the facilities that correspond with their gender identity. Unisex and “all-gender” restrooms are preferable to sex-specific facilities, and employers should use gender-neutral signage to assure a fully inclusive work environment. The regulations do not mandate businesses to completely refashion their facilities if they are, for example, multi-stall and sex-specific; rather, employers must provide a safe, equivalent, and private alternative to transgender employees that corresponds to their identity.

Transgender workers are entitled to use the facilities that correspond with their gender identity.

The FEHA regulations confer other affirmative duties on employers. They may not condition benefits—such as private health insurance or long-term care insurance—on a worker’s sex, gender identity, or gender expression.¹⁰ Nor can they require prospective workers to report their gender or gender identity on job applications; although they may ask for the information on a voluntary basis.¹¹

Workers who come out as transgender or transition on the job are protected from workplace discrimination and harassment.¹² It is the worker’s decision to come out; the employer may not ask about it first.¹³ Transgender or transitioning workers may confidentially communicate their status to their employer to request accommodations, similar to the interactive process workers with disabilities engage in with employers.¹⁴ They do not need to supply documentation or proof of their transgender or transitioning status.¹⁵

Once a transgender or transitioning worker has communicated this status, the employer must take steps to provide a safe and respectful workplace. It must accommodate the worker’s request to use the facilities consistent with their gender identity. For example, if an employer has sex-specific restroom facilities, a transgender man must be allowed to use the men’s restroom. The employer may make a “reasonable and confidential inquiry” of the worker to assure that they provide access to the appropriate facility.¹⁶ Employers must also allow transgender workers to follow the grooming and dress code standards consistent with the workers’ gender identity.¹⁷

During the transition process, many transgender people adopt the name, gender status, and pronouns that correspond with their gender identity. Should a transgender worker

express their desire to use a different name, gender, or pronoun, employers must accommodate the request and update personnel records.¹⁸ For example, a transgender woman may request to use feminine pronouns (e.g., “she,” “her,” “her’s”). If her supervisors or coworkers accidentally misgender her or use the wrong pronouns, they should apologize and use the correct pronouns. Persistent, hostile, and offensive misgendering could become actionable sexual harassment.¹⁹ Misgendering can cause a transgender person severe emotional and psychological distress because it profoundly violates their identity.

California state law has been clear since 2002: discriminating against or harassing transgender workers is illegal.

In those rare cases where an employee must be of a specific sex to perform a job, a transgender employee must be evaluated based on their gender identity. A person’s status as a cisgender (i.e., non-transgender) individual cannot be considered a “bona fide occupational qualification” or used as an employer defense against charges of discrimination.²⁰

The FEHA regulations are extensive—advocates should become educated about their components. And for good reason! Providing a transgender-inclusive workplace helps create an equitable, respectful, and productive environment for all workers, in addition to complying with the law. It also signals to existing and potential workers, customers, and partners that a business is open and accepting of the diverse backgrounds and perspectives that make up today’s competitive workforce.



¹ The *GLAAD Media Reference Guide* provides a helpful resource for advocates to better understand and use LGBTQ-inclusive language: <https://www.glaad.org/reference/transgender>.

² Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being LGBT in America* 19 (2014), available at <http://www.lgbtmap.org/unfair-price-transgender>.

³ National Center for Transgender Equality, *2015 U.S. Transgender Survey: California State Report* (2017), available at <http://www.transequality.org/sites/default/files/docs/usts/USTSCASStateReport%281017%29.pdf>.

⁴ See *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); accord *Kastl v. Maricopa Cty. Comm. Coll. Dist.*, 325 Fed. App’x 492 (9th Cir. 2009).

⁵ For more information about the Equality Act, see David Nahmias, *Impact Fund and allies say “YES” to Equality Act*, *Impact Fund* (Mar. 14, 2019), available at <https://www.impactfund.org/social-justice-blog/equality-act>.

⁶ Gov’t Code § 12940(a).

⁷ See 2 Cal. Code Regs. §§ 11030-34. The full amended regulations are available here: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf>.

⁸ The regulations flesh out the definitions of these terms, including the transitioning process. See 2 Cal. Code Regs. § 11030.

⁹ *Id.* at § 11034(e)(2).

¹⁰ *Id.* at § 11034(b)(1).

¹¹ *Id.* at § 11034(h).

¹² *Id.* at § 11034(i)(4).

¹³ *Id.* at §§ 11034(h); (i)(1).

¹⁴ 2 Cal. Code Regs. § 11031(i)(1)(B).

¹⁵ *Id.* at § 11034(i)(1).

¹⁶ *Id.* at § 11034(e)(2)(E).



Representing public and private interests in litigation, business transactions, and state and federal appellate matters since 1965.

Civil litigation: complex business disputes, eminent domain, land-use, environmental litigation, corporate/partnership disputes, major personal injury litigation, and appellate proceedings. Transactional practice: commercial and real estate transactions, including buy/sell agreements, development agreements, acquisitions, and mergers.

Principals

Maxwell Freeman Lee Roy Pierce, Jr.
Michael L. Gurev Thomas H. Keeling
Arnold J. Wolf

Associates

Franklin J. Brummett Michael N. Morlan
John W. Viss Matthew P. Brown
209.474.1818 · info@freemanfirm.com