

TRANSGENDER EMPLOYEES AND TENANTS IN CALIFORNIA: Rights and Responsibilities as Clarified by the Gender Nondiscrimination Act of 2003 (AB 196)

A joint publication of:



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I. Background

Beginning January 1, 2004 California's Fair Employment and Housing Act (FEHA) will explicitly protect many transgender employees and tenants. FEHA was amended through the Gender Nondiscrimination Bill of 2003 (AB 196).

AB 196 was proposed in reaction to trends around the country recognizing that transgender people are protected by laws that prohibit discrimination on the basis of sex. Courts and administrative agencies in Connecticut,¹ Massachusetts,² New Jersey,³ and New York⁴ all found that transgender plaintiffs, who had been discriminated against

¹ *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on Price Waterhouse, Schwenk, Rosa, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

² *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. 2002) (holding that transsexual plaintiff had established a prima facie case of discrimination based on sex and disability under state law prohibiting employment discrimination).

³ *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 777 A.2d 365 (N.J. Super.), cert. denied, 170 N.J. 211, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination).

⁴ *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting "gender" discrimination protects transsexuals); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's claim that she had been

because of their gender identity, had a right of action under existing state and/or local anti-discrimination laws.

While no such cases had yet been decided in California, a Ninth Circuit decision from 2000 provided strong evidence that FEHA would have to be similarly interpreted.⁵ In *Schwenk v. Hartford*, a transgender prisoner sued for protection under the Gender Motivated Violence Act. In holding that the prisoner was covered under that Act, the Ninth Circuit went out of their way to also find that a transgender person would be similarly protected under Title VII's sex discrimination language.

Since California courts have long interpreted FEHA to be consistent with Title VII and similarly held that California sex discrimination law is at least as protective as federal law,⁶ FEHA has been understood to prohibit discrimination against transgender people at least since *Schwenk* was decided.

In 2002, the California Department of Fair Employment and Housing adopted this position as their policy and began to accept claims of discrimination based on gender identity as discrimination based on sex. In doing so, the agency made it possible for transgender people to seek administrative remedy to discrimination in employment, housing, and public accommodation without having to first prove that they were covered by state law.

However, with no clear California court cases and no explicit statutory language to cite, some people remained confused about the rights of transgender employees and tenants under California law. This confusion meant that some transgender people did not know that they were protected and some employers and landlords did not believe that they had a duty under law to create discrimination free environments. In order to alleviate this confusion and head off any protracted court fights about the state of California law, advocates and legislators worked together to clarify FEHA.

II. The Law

Introduced by Assemblymember Mark Leno, and co-authored by eight of his fellow Assemblymembers, AB 196 changed the California Government Code in two places. First, it amended California Government Code 12926(p) which defines sex to read:

(p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "*Sex*" also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal

discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law).

⁵ *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that Title VII prohibits "[d]iscrimination because one fails to act in the way expected of a man or woman").

⁶ See *Flait v. North Am. Watch Corp.*, 3 Cal.App.4th 467 (1992); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.App.3d 590 (1989); *Valdez v. Clayton*, 88 Cal. App. 4th 1162, 1172-1173 (2001). Moreover, California courts are required to interpret FEHA "liberally" and are not bound by federal cases that apply a more restricted view of protected rights. See *Johnson Controls, Inc. v. FEHC*, 218 Cal.App.3d 517 (1990).

Code. California Government Code 12926 (Italicized portion is the amended language)⁷

For the sake of statutory consistency, AB 196 did not create a new definition of gender to add to the statute. Instead it incorporated the definition from California's Hate Crimes Statute. That statute defines gender as:

"Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. **California Penal Code 422.56(c)**⁸

Second, AB 196 added new language to FEHA pertaining to dress codes. Again, in order to bring California in line with trends seen in other states and in local jurisdictions within the state, AB 196 clarified the effect of this new language on an employer's existing ability to set standards for workplace appearance:

Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity. **California Government Code 12949**

Section 12949 simply makes clear that in order to comply with state law, any such appearance or grooming policy must judge a transgender person's compliance by the standards appropriate for that person's gender identity.

III. Changing Workplace and Living Environments

While many employers and landlords have already been proactively creating workplaces and living environments that are free of gender identity discrimination, others need to take strong steps in order to do so. Gender identity discrimination is premised on the idea that the sex a person was assigned at birth is always accurate and/or unchangeable. However, as many transgender people can attest, it is not.

⁷ This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. The original AB 196 language was: "Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.76 of the Penal Code, except that, for purposes of this part, the reference in that definition to the "victim" shall mean the employee or applicant and the reference in that definition to the "defendant" shall mean the employer or other covered entity or person subject to applicable prohibitions under this part.

⁸ This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. Until that time, the definition in Penal Code section 422.76 is: "gender" means the [individual's] actual sex or the defendant's perception of the [individual's] sex, and includes the defendant's perception of the [individual's] identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the [individual's] sex at birth.

Therefore, employer and landlord policies and practices must incorporate the needs and experiences of transgender people in order to comply with state law. Aside from meeting the legal duties clarified by AB 196, updating such policies make for a better working or living environment, demonstrate respect for diversity, alleviate wasteful and counter-productive stress, and set clear standards for workplace and living environment behavior.

Following are examples of areas in which employers and/or landlords should make clear, understandable policies. As workplaces and living environments can vary widely, this publication only seeks to identify the most common changes employers and landlords need to make. And as the law in this area is particularly dynamic, employers and landlords should contact either the National Center for Lesbian Rights or the Transgender Law Center at the numbers or emails above to get answers to specific questions.

A. Employers

1. Anti-Discrimination Policies

Employers who have not already done so, should bring their employment policies in line with state law by clearly defining “sex” or “gender” to include gender identity or by adding the phrase “gender identity and expression” to their existing policy. Such modifications are important in order to put all employees on notice that transgender employees are respected and protected in the workplace.

Such policies obviously apply to hiring, promoting, training, and retaining employees. Managers and other decision makers should be explicitly trained about the employer’s duty to not allow gender identity bias to play a role in any of these areas.

2. Names and Pronouns

An employee who transitions on the job has the right to be addressed by the name and pronoun that corresponds to the employee’s gender identity. Employee records and identification documents should be changed accordingly. While state law does not likely prohibit other employees from making inadvertent slips or honest mistakes about a person’s name or gender, it does outlaw intentional or persistent refusal to respect a co-worker’s or employee’s gender identity. Intentionally addressing a co-worker or employee by the incorrect name or pronoun after having been informed of that person’s gender identity is an actionable form of discrimination.

While some employers believe that an employee must get a court order to legally change the employee’s name, this is not correct. California explicitly recognizes “common law” name changes for a majority of people in the state.⁹ Furthermore, an employee does not need to get court recognition of a change of gender prior to requesting that an employer change the employee’s gender marker in records and on identity documents. An employer also should not require such an order prior to effectuating such a request. To do

⁹ *see* California Code of Civil Procedure, section 1279.5 and affirmed in *In re Ritchie* 206 Cal.Rptr. 239 (Cal.App. 1 Dist.,1984) and *Lee v. Superior Court* 11 Cal.Rptr.2d 763 (Cal.App. 2 Dist.,1992).

so, would run counter to the policies of the majority of government agencies that keep records on a person's gender. For instance, a transgender person can get the gender marker changed on their state identification or drivers license without having first gotten a court order. The same is true of a person's gender marker in their social security records and on their passport.

3. Restroom accessibility

All employees have a right to safe and appropriate restroom facilities. This includes the right to use a restroom that corresponds to the employee's gender identity, regardless of the employee's sex assigned at birth. No other employee's privacy rights are compromised by such a policy. While no such case has been heard in California (likely because of the ridiculous nature of the arguments involved), the only known case anywhere in the nation of a non-transgender person seeking legal remedy to the presence of a transgender person in the same restroom was dismissed for lack of a cause of action.¹⁰

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. In fact, a private restroom of this type can be utilized by an employee who does not want to share a multi-restroom with a transgender co-worker or employee. Clearly, though, use of a unisex single stall restroom should always be a matter of choice for an employee. No employee should be compelled to use one either as a matter of policy or due to continuing harassment in a gender appropriate facility.

4. Dress Codes

As clarified above in section II, California state law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. While the most efficient way to avoid liability on this issue is to do away with all dress codes based on gender, any employer who does enforce gender based dress codes must do so in a non-discriminatory manner. This means not only allowing a transgender woman (for instance) to dress the same as other women, but that her compliance with such a dress code cannot be judged more harshly than the compliance of non-transgender women.

5. Sex segregated job assignments

AB 196 does not prohibit an employer from making job assignments based on sex so long as those assignments are otherwise in compliance with state law. However, in most cases, transgender employees must be classified and assigned in a manner consistent with their gender identity.

6. Training

¹⁰ *Cruzan v. Special School Dist., #1*, 294 F.3d 981 (8th Cir. 2002).

Training employees in transgender sensitivity is clearly one way to improve the work environment and reduce liability. While transgender people in the workplace are certainly not a new phenomenon, many non-transgender people have questions when they find out that a fellow employee is transgender. Creating a space for these employees to ask such questions in a controlled environment is an incredibly helpful way to prevent bias related incidents. More and more professionals and government agencies are acquiring the skills necessary to provide trainings of this sort and employers are strongly recommended to avail themselves of these services.

B. Landlords

1. Anti-Discrimination Policies

All employees and agents of a landlord should be aware that not only are they and their co-workers protected from discrimination, so are the landlord's tenants. Landlords who have not already done so, should bring their rental policies in line with state law by clearly defining "sex" or "gender" to include gender identity or by adding the phrase "gender identity and expression" to their existing policy. Such modifications are important in order to put all employees and tenants on notice that transgender tenants are to be respected and protected.

Such policies obviously apply to all aspects of renting and repairing a unit as well as extending a lease. Managers and other decision makers should be explicitly trained about the landlord's duty to not allow gender identity bias to play a role in any of these areas.

2. Names and Pronouns

A tenant who transitions has the right to be addressed by the name and pronoun that corresponds to the tenant's gender identity. Rental records and identification documents should be changed accordingly. While state law does not likely prohibit a landlord's employees or agents from making inadvertent slips or honest mistakes about a person's name or gender, it does outlaw intentional and persistent refusal to respect a tenant's gender identity. Intentionally addressing a tenant by the incorrect name or pronoun after having been informed of that person's gender identity is an actionable form of discrimination.

While some landlords believe that a tenant must get a court order to legally change the tenant's name, this is not correct. California explicitly recognizes "common law" name changes for a majority of people in the state.¹¹ Furthermore, a tenant does not need to get court recognition of a change of gender prior to requesting that a landlord change the tenant's gender marker in rental records and on identity documents. A landlord also should not require such an order prior to effectuating such a request. To do so, would run counter to the policies of the majority of government agencies that keep records on a person's gender. For instance, a transgender person can get the gender marker changed

¹¹ see California Code of Civil Procedure, section 1279.5 and affirmed in *In re Ritchie* 206 Cal.Rptr. 239 (Cal.App. 1 Dist.,1984) and *Lee v. Superior Court* 11 Cal.Rptr.2d 763 (Cal.App. 2 Dist.,1992).

on their state identification or drivers license without having first gotten a court order. The same is true of a person's gender marker in their social security records and on their passport.

3. Restroom accessibility

In those buildings that utilize restrooms shared by more than one tenant, all tenants have a right to safe and appropriate restroom facilities. This includes the right to use a restroom that corresponds to the tenant's gender identity, regardless of the tenant's sex assigned at birth. No other tenant's privacy rights are compromised by such a policy. While no such case has been heard in California (likely because of the ridiculous nature of the arguments involved), the only known case anywhere in the nation of a non-transgender person seeking legal remedy to the presence of a transgender person in the same restroom was dismissed for lack of a cause of action.¹²

In addition, where possible, the landlord of a building where multiple units share the same restrooms should provide an easily accessible unisex single stall bathroom for use by any tenant who desires increased privacy, regardless of the underlying reason. In fact, a private restroom of this type can be utilized by a tenant who does not want to share a multi-stall restroom with a transgender co-tenant. Clearly, though, use of a unisex single stall restroom should always be a matter of choice for a tenant. No tenant should be compelled to use one either as a matter of policy or due to continuing harassment in a gender appropriate facility.

4. Sex-segregated housing

In any housing facility where tenants are housed in a sex-segregated manner, a transgender tenant must be classified and housed according to that person's gender identity.

¹² *Cruzan v. Special School Dist., #1*, 294 F.3d 981 (8th Cir. 2002).