Gender Identity Discrimination: Employment Rights for Transgender Workers

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1. Are transgender employees protected from employment discrimination in California?

   As of January 1, 2004, California's Fair Employment and Housing Act, also known as the "FEHA," made it illegal for an employer with 5 or more employees to fire, fail to hire, or discriminate in any way against employees who are or are perceived to be transgender or gender non-conforming.

   The FEHA also prohibits "harassment" on the basis of gender identity or gender expression, regardless of the employer's size. Harassment occurs when a supervisor, co-worker, or non-employee in your workplace subjects you to hostile, offensive, or intimidating behavior because of your gender identity or gender expression. To be illegal, the harassment must be so "severe or pervasive" that it interferes with your ability to perform your job. For example, one joke or slur about your gender identity or gender expression, or an inadvertent failure to address you with the correct pronoun, might be rude and unfair, but is not enough to constitute illegal harassment. On the other hand, it is illegal if you are subjected to such comments on a regular basis, or if your employer intentionally or persistently fails to respect your gender identity or gender expression. Likewise, if one of your co-workers physically attacks you based on your gender identity, that is harassment because it is so severe, even if it only happens once.

   A. Names and pronouns

   If you transition while at your job, you have the right to be addressed by the name and pronoun that corresponds to your gender identity. Additionally, your employee records and identification documents should be changed to reflect that name and pronoun. Although it is unlikely that one co-worker's honest mistake in addressing you with the wrong pronoun constitutes harassment, if you are intentionally and persistently addressed with the incorrect name or pronoun, even after you have informed your employer of your gender identity, your employer may be engaging in unlawful harassment.

   B. Restroom accessibility

   You have the right to use the restroom in your workplace that corresponds with your gender identity. It is acceptable for your employer to provide a unisex restroom for transgender employees to use, as long as you are not denied the right to use the restroom that corresponds with your gender identity. Ideally, employers will always provide an easily accessible unisex restroom for use by any employee who chooses to use it. However, no employee should be compelled to use such a restroom if a gender appropriate restroom is available.

   C. Dress codes

   The FEHA explicitly allows an employer to enforce reasonable workplace appearance, grooming, and dress standards, as long as employees are allowed to dress in a manner consistent with their gender identity or gender expression. This means that if your employer enforces dress codes that are based on gender, the dress code must be enforced in a way that judges your compliance based on standards appropriate for your gender identity or gender expression.

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2. Do any other laws protect transgender employees from discrimination at work?

   Although the FEHA is the main source of protection for transgender employees, other laws also cover transgender employees:

   A. California political activity laws

   California Labor Code Sections 1101 and 1102 prohibit employers from preventing an employee's political activity, or punishing an employee due to that employee's political activity. The California Supreme Court has interpreted "coming out" by lesbian, gay, and bisexual employees to constitute such protected political activity. Likewise, if you disclose your gender identity or openly transition from one gender to another, you may argue that these actions are protected political acts. This law may be especially important for employees who work for employers with less than 5 employees, because those employers are not covered by the FEHA (except with respect to harassment as

described above).

B. Local laws

Some localities in California (such as San Francisco, Oakland, City and County of Santa Cruz, West Hollywood, and San Diego) also have laws that prohibit gender identity discrimination in employment. Usually, these ordinances cover only employers within the locality, although some (such as San Francisco) extend coverage to employers who do business with the municipality. San Francisco has an agency that regularly investigates complaints of gender identity discrimination. That agency, the San Francisco Human Rights Commission ("SFHRC"), can investigate your complaint of discrimination and mediate a settlement between you and your employer. Other localities may have human rights commissions, civil rights offices, or equal employment officers that may assist you with a complaint under the local ordinance—check with your City or County Clerk.

Local laws often are of limited value to employees, because California state law bars you from bringing a lawsuit under these local laws. Therefore, if investigation or mediation does not result in a satisfactory resolution, the human rights commission or similar agency can take no further action to enforce the law, and you have no other recourse under local law. You must therefore pursue your complaint with the appropriate state or federal agency (see below).

C. Federal law

Currently, federal law does not explicitly prohibit discrimination based on gender identity. Nonetheless, transgender employees seek protection from employment discrimination under existing laws barring discrimination on the basis of sex.

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex, and applies to employers with 15 or more employees. It is illegal for an employer to fire, fail to hire, or discriminate in any way against you with respect to your compensation or in the terms, conditions, or privileges of employment because you are a man or a woman. These prohibitions on discrimination also apply to sex-based "harassment." Harassment occurs when a supervisor or co-worker subjects you to hostile, offensive, or intimidating behavior because of your sex that is so severe or pervasive that it interferes with your ability to perform your job.

Sex discrimination includes situations where someone is treated unfairly for not looking or acting in the way expected of a man or a woman. Discrimination against someone for not conforming to gender stereotypes about the way people of a particular sex are supposed to look or act is sex discrimination. Likewise, if you are harassed or discriminated against for transitioning from one sex to another, that may be considered illegal sex discrimination, because the discrimination is because of your *new* sex. Title VII may be useful for federal government employees, because federal employers are not covered by the FEHA.

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3. What if I am discriminated against or harassed by my co-workers?

The anti-discrimination laws described above protect you from acts of discrimination committed by your employer or your employer's "agents," which includes other employees and third parties (such as customers). Therefore, discrimination or harassment by your supervisor or co-workers or third parties is prohibited under these laws.

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4. Which employers are covered by these laws?

The FEHA applies to all California employers with 5 or more employees (except in cases of harassment, in which case there is no minimum employer size), but provides no protections for federal government employees (such as United States Postal Service workers).

The California Labor Code sections apply to all employers, regardless of their size, but provide no protection to federal government employees.

Title VII of the Civil Rights Act of 1964 ("Title VII"), the federal law that prohibits sex discrimination, applies to all employers with 15 or more employees.

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5. What should I do if I am being discriminated against or harassed?

A. Speak to a supervisor or manager or to your employer's human resources or personnel department.

- For all cases, you should try to resolve the situation informally by first speaking with a supervisor, manager, or someone in your

employer's human resources or personnel office.
- In cases of harassment, promptly notify a manager or supervisor (unless that person is the harasser), or the person identified in your employer's non-harassment policy, if your employer has such a policy. Follow up with a written complaint, and keep a copy of it for yourself. If you do not complain, the employer may later try to avoid liability by saying that it did not know about the harassment.

B. Document the discrimination or harassment.

- Keep a journal (preferably at home) recording incidents of suspected discrimination or harassment. Write down dates, times, and witnesses to any such incidents.
- Keep copies of all important letters and documents that you send to your employer or that the employer sends to you.
- If in doubt, try to avoid signing anything without legal advice, especially documents that require you to agree to waive your right to bring a complaint, or require you to arbitrate disputes with your employer.

C. Filing a complaint

If you are not able to resolve your situation informally, you can:

- Follow your employer's grievance procedure, if your employer has one. If you belong to a union, talk with your union representative.
- You also can choose to file an employment discrimination complaint with the California Department of Fair Employment and Housing (DFEH) (gender identity or gender expression), the Labor Commissioner (political activity), or the federal Equal Employment Opportunity Commission (EEOC) (sex discrimination), which may investigate your complaint and try to resolve the problem. There is no charge to file a complaint, and you can do so without an attorney. You must file your complaint with the DFEH *within one year*, the Labor Commissioner *within 6 months*, or the EEOC *within 300 days*, of the last act of discrimination or harassment. If you do not file a complaint within these time limits, you may lose your right to legal protection from the discrimination or harassment.

Note to employees of the federal government: Since you are not covered under the FEHA, and Title VII does not give transgender people the option to complain about discrimination based on gender identity, the only protection you can seek is based on sex discrimination (under Title VII) and you must file with your federal employer's EEO office within 45 days.

For more information about how to pursue a complaint with the DFEH or EEOC, consult our fact sheet, Employment Discrimination.

If you file a complaint with the Labor Commissioner, and you do not settle the matter with your employer, the Labor Commissioner will make a determination about whether discrimination occurred. Before making a determination, the Labor Commissioner may hold a hearing about your complaint; you and your employer each have the right to bring an attorney or other representative with you to the hearing.

After the Labor Commissioner makes a determination, either you or your employer may appeal the decision within 10 days. You *also* have the right to file a complaint against your employer in court, either at the same time you file your complaint with the Labor Commissioner, *or* you may file in court after the investigation, if the Labor Commissioner dismisses your complaint.

- If you live in an area with a local anti-discrimination law, you can file a complaint with the local agency, such as the Human Rights Commission in San Francisco, which may investigate and mediate your complaint.

D. Where to file a complaint:

DFEH: To file a complaint with the DFEH, file online at dfeh.ca.gov or call the Communication Center at (800) 884-1684 to make an appointment.

Labor Commissioner (Department of Industrial Relations, Division of Labor Standards Enforcement): To file a complaint with the Labor Commissioner, contact the nearest district office. Consult the Labor Commissioner web site for district office locations.

EEOC: To file a complaint with the EEOC, contact the nearest Equal Employment Opportunity Commission field office. To be automatically connected with the nearest office, call (800) 669-4000.

Local: To file a complaint under a local anti-discrimination law, contact the local human rights commission or similar organization (if one exists—check with the City or County Clerk). In San Francisco, contact the Human Rights Commission at (415) 252-2500.

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6. What if I am fired, disciplined, or treated worse because I complained about discrimination or harassment?

Under the anti-discrimination laws described above, it is illegal for a person or company to retaliate against you if you complain about discrimination or harassment in the workplace. Retaliation may include actions such as terminating you, moving you to less favorable assignments or shifts, making undeserved negative evaluations, or intensifying the original harassment. If anyone (including a co-worker or supervisor) retaliates against you for complaining about unlawful discrimination at your workplace, you can file a retaliation complaint with

the DFEH, EEOC, or Labor Commissioner. That complaint is separate from the original discrimination complaint, if any, you made with the DFEH, EEOC, or Labor Commissioner.

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7. What kinds of questions may an employer ask about my gender?

The California Constitution protects you from intrusive and inappropriate questions from your employer that are not work-related. The only time an employer may ask questions about private issues is when he or she has a business reason for wanting to know the information that is greater than your interest in keeping the information private.

For example, your employer may not ask about your genitalia or biological sex simply because she is "curious." However, if your work requires the use of showers or changing rooms where nudity is unavoidable, your employer may be able to make inquiries in order to determine which room will be most appropriate for you to use.

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8. Can I get time off for my condition?

A. State and federal medical leave laws

If you are treated for gender identity disorder (GID), or have a serious medical condition related to your transgender status, you may be able to take up to 12 weeks of job-protected unpaid leave under the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). For example, if part of your treatment for GID includes sex reassignment surgery for which you will be hospitalized overnight, you would qualify for leave under FMLA and CRFA, provided you meet the other eligibility requirements. Similarly, if your condition causes you to miss work for more than three days in a row and you are seeking continuing treatment (including counseling or hormone therapy under the supervision of a health care provider), you likely would be eligible for leave under these laws. Note that a GID diagnosis is not required to qualify for leave under FMLA/CFRA; you must simply have a serious health condition that meets the criteria listed above.

For more information about medical leave laws, consult our publication, Family/Medical Leave: Your Own Health Condition.

B. Reasonable accommodation under the FEHA's disability provisions

Many people feel that transsexualism and transgenderism should not be considered psychiatric or medical conditions. However, California's disability law purposefully de-stigmatizes such conditions and provides protections that may be particularly useful for some transgender people in the workplace, such as reasonable accommodation.

Under the FEHA, if you are a qualified individual with a disability, and can do the basic duties of the job (with accommodations, if necessary), you may obtain "reasonable accommodation" of your disability to enable you to perform your job. Reasonable accommodations are adjustments or modifications made to a job or the workplace that enable you to successfully perform your basic job duties, without changing the essential job functions. Reasonable accommodations of transsexualism, gender identity disorder, and gender dysphoria are modifications that enable you to live according to your gender identity and enable you to perform your job. Such accommodations could include time off for health care appointments (including therapy) or leaves of absence for surgery.

For more information about reasonable accommodations, consult our fact sheet, Disabilities in the Workplace.

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For further information about your employment rights, contact the Workers' Rights Clinic.

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