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Labor and Employment Alert: New California Regulations Expand Protection for the Transgendered

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California has long prohibited discrimination on the basis of sexual orientation, gender identity and gender expression (such as appearance and behavior). The state's Fair Employment and Housing Authority recently adopted regulations that significantly expand protections against discrimination for the transgendered. The new regulations become effective on July 1, 2017.

Expanded definitions

The regulations expand the meaning of "gender identity" to include a person's "internal understanding of their gender," or "the perception of a person's gender identity," and this may include "male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth or transgender." The regulations further expand the definition of sex stereotyping to include an assumption about a person's appearance or behavior, gender roles, gender expression or gender identity. Finally, a new definition of "transitioning" is included to mean "the 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."

Working conditions

The regulations make clear that it is unlawful to deny employment to an individual based wholly or in part on the individual's sex, gender, gender identity or gender expression. It is also unlawful to discriminate against an individual who is transitioning, has transitioned or is perceived to be transitioning. Once employed, employers must permit employees to perform jobs or duties that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth. And an employer may not condition the availability of fringe benefits upon an employee's gender identity or gender expression.

Restrooms, locker rooms and dress codes

Employers must permit employees to use facilities that correspond to the employee's gender identity or expression, regardless of the employee's assigned sex at birth. An employer is prohibited from requiring an employee to use any particular facility and is not required to show proof of any medical procedure or particular identity to use facilities designated for use by a particular gender. Single-occupancy restrooms must use gender-neutral signage, and employers must provide feasible alternatives to ensure the privacy interests of all employees in other facilities, such as by locking toilet stalls, staggered schedules for showering or shower curtains. An employer may make a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe and adequate multi-user facilities.

An employer may not impose upon an applicant or employee any physical appearance, grooming or dress standard that is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity.

Prohibited inquiries

An employer is generally prohibited from making inquiries that directly or indirectly identify an individual on the basis of sex, gender, gender identity or gender expression, unless the employer establishes a permissible legal defense such as establishing that such is a bona fide occupational qualification. However, the regulations prohibit that defense from being based on the fact that an individual is transgender or gender non-conforming, or that the individual's sex assigned at birth is different from the sex required for the job.

An employer may not discriminate against an applicant because the applicant failed to designate male or female on an application form. It is further unlawful for employers to inquire about or require documentation or proof of an individual's sex, gender, gender identity or gender expression as a condition of employment. For recordkeeping purposes, an employer may request an applicant to provide this information solely on a voluntary basis.

If an employee asks to be identified with a preferred gender, name and/or pronoun, including gender-neutral pronouns, an employer who fails to abide by the employee's stated preference may be liable for discrimination. The employer may use an employee's gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally-mandated obligation, but otherwise must identify the employee in accordance with the employee's gender identity and preferred name.

Employers with operations in California should review their policies and procedures to ensure that they comply with these new regulations. Employers also should be aware of similar protections in other jurisdictions, such as those enacted last year in [New York City](#). Contact your Vorys lawyer if you have questions about discrimination in the workplace.