

## 2019 Top Labor & Employment Lawyers

# The rights of transgender and non-binary employees

By Camille Hamilton Pating

Studies show that transgender and gender non-conforming (non-binary) people face significant challenges in the workplace, including discrimination in hiring, promotion and retention (70%) and harassment and mistreatment at work (48%). Recent California laws and regulations provide protections for transgender and non-binary employees, ranging from expanding the Fair Employment and Housing Act to prohibit discrimination on the basis of gender, gender identity, and gender expression, to specific regulatory codes that address restroom access, the option for a non-binary gender marker on state identification documents, and preferred names and pronouns.

California employers must review gender reporting programs for compliance under new rules, update harassment prevention training to include gender identity and expression, modify human resources policies and programs to be applicable and accessible to transgender and non-binary employees, and allow employees to use restroom facilities that correspond to their gender identity or expression. However, instead of focusing solely on technical check-the-box compliance with legal standards, employers would be well served to also focus on creating overall inclusive workplace cultures and environments that address the unique challenges and concerns experienced by transgender and non-binary employees.

### It Begins With Terminology

The Department of Fair Employment and Housing provides the following definitions of key terminology.

**Gender Identity:** “each person’s internal understanding of their gender, which 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”

**Gender Expression:** “a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s



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sex at birth” (e.g., the way an employee expresses gender identity, such as appearance, mannerisms, dress and behaviors)

**Transgender:** “a general term that refers to a person whose gender identity differs from the person’s sex at birth.”

**Gender Transition:** “Social transition” involves a process of socially aligning one’s gender with the internal sense of self (e.g., changes in name and pronoun, restroom facility usage, participation in sports activities). “Physical transition” refers to medical treatments to physically align the body with internal sense of self (e.g., hormone therapies or surgical procedures).

In addition, the term non-binary is an umbrella term that refers to persons who embrace gender identities that do not fit into male or female.

### California’s Laws and Regulatory Requirements

**Discrimination Prohibited:** California’s Fair Employment and Housing Act prohibits discrimination and retaliation based on “gender, gender identity, [and] gender expression.” Employers may not discriminate against prospective or current employees because they identify as transgender or gender non-conforming. The FEHA protects trans-

gender workers, persons who are perceived to be transgender or gender nonconforming as well as persons undergoing gender transition.

The DFEH guidelines provide some assistance for employers. For example, (1) employers must enforce dress codes in a non-discriminatory manner and may not deny employees the right to dress in a way that reflects their gender identity (e.g., a transgender woman may comply with the same dress code as a non-transgender woman and may not be held to a more restrictive standard), (2) employers cannot require documentation as proof of sex, gender, gender identity or expression as a condition of employment, and (3) employers may not ask interview questions designed to detect a person’s sexual orientation or gender identity, such as inquiring about an applicant’s marital status, spouse’s name, or relation to household members.

**Restroom Access:** For employees who have a gender identity that does not fit into the binary of male or female, figuring out which restroom to use can be challenging. Using a women’s or men’s restroom might feel unsafe because of the risk of being confronted, questioned, harassed or assaulted. The DFEH requires that all employees have the right to use a restroom that corresponds to the employee’s gender identity, regardless of assigned sex at

# Transgender and non-binary rights in the workplace

birth. Unless exempted by other provisions of state law, single-user restrooms must be identified as all-gender facilities.

**Preferred Names, Pronouns and Gender Markers:** Some transgender or non-binary employees make or want to make legal changes to their names. For example, they might change their pronouns, their name on paychecks and other identity documents, and/or their gender marker on identity documents. Under the Gender Identity bill (SB-179) people in California can change gender on state identification and birth certificates, including choosing a non-binary gender marker. Employers must abide by an employee's request to be identified by a certain name or gender identity, unless there is a legally-mandated obligation to use the employee's legal name or gender. Employers should not question the employee about what their prior name was. If the employer is not sure what pronouns an employee uses, ask. Different non-binary people may use different pronouns.

## Transgender and Non-Binary Employee Issues vs. Freedom of Speech/ Religious Expression

In October of 2019, the U.S. Supreme Court will review a 6th U.S. Circuit Court of Appeals ruling regarding discrimination against transgender people in the workplace, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (884 F.3d 560 (6th Cir. 2018)). The central issue is whether Title VII of the Civil Rights Act of 1964 prohibits discrimination against transgender people based on (1)

their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*. In this case, Aimee Stephens, a transgender woman, worked as a funeral director/ embalmer at R.G. & G.R. Harris Funeral Homes from April of 2008 until she was terminated in August of 2013. Prior to her termination, Stephens, who was living and presenting as a man, notified Thomas Rost, her employer, that she had "decided to become the person that [her] mind already is" and "intend[ed] to have sex reassignment surgery." Soon thereafter, Rost informed Stephens that "this is not going to work out" and offered her a severance agreement if she "agreed not to say anything or do anything." Stephens refused. Later, Rost asserted that he believed he would be "violating God's commands if [he] were to permit one of [the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization." Stephens filed a sex-discrimination charge with the EEOC, citing the sole reason management provided for her termination was "the public would [not] be accepting of [her] transition."

The 6th Circuit held that Rost's decision to terminate Stephens was based on gender stereotyping in violation of Title VII. Moreover, the court determined that requiring Rost to comply with Title VII did not substantially burden his religious practice of operating funeral homes, thereby precluding the Religious Freedom Restoration Act defense to Title VII claims. While decisions and determinations

that employers make during the process of navigating issues impacting employees that identify as transgender or non-binary are fact-specific, the Supreme Court's review of this case is anticipated to provide useful guidance to employers.

## Confidentiality and Transitioning Employees

An individual's decision to transition and live in a manner consistent with their gender identity is a personal one and disclosing an individual's plan to transition belongs to that individual alone. Some transitioning employees may choose to notify employers due to potential medical leave or to establish a transitioning plan to assist the employee in managing the workplace transition. Creating a confidential transition plan may be helpful in outlining guidelines for senior management, human resource professionals, and fellow employees, depending upon the comfort level of the transitioning employee.

The transition plan also may help outline expectations from others in the workplace and provide education on gender non-conforming issues, such as proper terminology and the use of correct pronouns. Workplace transition plans must be tailored to each specific individual's needs and preferences while emphasizing confidentiality, respect, and strict policies against discrimination or harassment. An employee's medical information and gender identity records must always be kept confidential.

## Takeaways for Employers

For many transgender and non-binary employees, inclusive workplaces means having the right and feeling comfortable and safe to bring their authentic selves to work, express themselves without fear of harassment or discrimination, be addressed by their preferred pronouns and names, and have access to gender neutral restrooms. As the law continues to evolve, employers should utilize new compliance standards as a platform from which to develop respectful and inclusive workplaces that result in fewer claims for discrimination and harassment, reduce liability, and are ultimately more productive.

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