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FEHA – Protection for Transsexuals

On August 2, 2003, California Governor Gray Davis signed legislation amending the Fair Employment and Housing Act (FEHA) to prohibit housing and workplace discrimination based on gender. On January 1, 2004, when the legislation takes effect, California will join Minnesota, Rhode Island, and New Mexico as the only states that have enacted laws prohibiting discrimination on the basis of gender identity and expression.

The amendments to Section 12940 of the Government Code, enacted through Assembly Bill 196 (AB 196) authored by Assemblyman Mark Leno (D – San Francisco), were intended to expand the definition of sex discrimination to include discrimination based on a person’s “gender.” However, AB 196 in defining “sex,” identifies Penal Code Section 422.76 for the purpose of defining “gender,” reads as follows:

AB 196

“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 422.76 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.¹

The pertinent part of Penal Code Section 422.76 reads:

“ . . . ‘gender’ means the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim’s sex at birth.”²

The definition of gender, set forth above, will very likely be further determined in future litigation. Nevertheless, it extends FEHA protection to transsexuals and

transgendered individuals and generally prohibits bias based on perceptions of an individual's identity.

Transgender Protection

Although the new law does not include the term “transgender,” it is clear that transgender discrimination is prohibited. Transgender discrimination is generally defined as “exhibiting the appearance and behavioral characteristics of the opposite sex.”³ Transgender is further described by OutProud, an organization that provides support, advocacy and resources for gay, lesbian, bi-sexual, and transgender individuals, as follows:

Originally, this word meant (1) what are also known as full-time cross-dressers or nonsurgical transsexuals, people who live and work in the [other] (of their physical anatomical) [sex], continuously and for always. Now it also means (2) the group of all people who are inclined to cross the gender line, including transsexuals, cross-dressers, and gender benders together. This is the main way the word is used today, and is referred to as the “umbrella” definition as it covers everyone. A few (people) use the word transgender as (3) a synonym for transsexual.⁴

Gender, as defined by AB 196, prohibits discrimination based on a person's “. . . identity, appearance, or behavior . . .”⁵ It is clear that the terms are consistent with the definition of transgender.

Workplace Appearance and Dress Standards

The new legislation adds Section 12949 to the Government Code which reads as follows:

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.

Although the new law provides that employers may establish appropriate appearance and dress standards, “. . . an employer shall allow an employee to appear or dress consistently with the employee's gender identity.”⁶ Focusing on gender related standards, as long as an employee satisfies the workplace standards consistent with the individual's gender identification, the individual would not be subject to any employer imposed sanctions.

Protection Against Unlawful Employment Practices

The AB 196 amendment expands California's protection against unlawful employment practices. Race, color, religion, sex, national origin, age, and disability are covered by federal law. California is one of the few states that also include medical condition, marital status, and sexual orientation, among others.⁷ On January 1, 2004, discrimination based on gender will join the listing of prohibited housing and workplace discrimination causes in California.

¹ California Assembly Bill 196.

² California Penal Code Section 422.76.

³ Merriam-Webster Dictionary (1979).

⁴ *OutProud*, Warren J. Blumenfeld.

⁵ California Penal Code Section 422.76.

⁶ California Government Code Section 12949.

⁷ California Government Code Section 12940 *et seq.*