

U.S. Transgender Population Statistics are New and Evolving

- Transgender vs. Gender Identity / Expression
- There are an estimate 1.4 million transgender people in the U.S. and the numbers of gender non-conforming individuals are increasing
- Discrimination, violence, and harassment are all areas of concern for employers
- Protected status- when does it apply?

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California Protections Relating To Gender



The Fair Employment and Housing Act ("FEHA")

- It is an unlawful employment practice...for an employer to discriminate against an employee based on ..., sex, gender, gender identity, gender expression, or sexual orientation, (Gov. Code § 12940.)

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California Fair Employment and Housing Council Guidelines



- Fair Employment and Housing Council (FEHC) implemented regulations effective April 1, 2016
- Require employers to have a written policy prohibiting harassment, discrimination, and retaliation. Under Government Code §12940(k)

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Written Policy Prohibiting Harassment

- List all protected categories
- Specify – law prohibits all harassment by anyone
- Establish Complaint Procedures
- Investigation and due process
- Confidentiality to extent possible
- Remedial measures if misconduct found
- No retaliation
- Document and track process of complaint
- Complaint may be filed with other than supervisor

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FEHC Guidelines to Avoid Discrimination

- Avoid inappropriate interview questions.
- Implement dress codes or grooming standards that allow an employee the right to dress in a manner suitable for that employee's gender identity.
- Allow employees to use restrooms and locker rooms that correspond with the employee's gender identity, regardless of the employee's assigned sex at birth.

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Other Discrimination Laws

- Unruh Civil Rights Act (Civil Code § 51)
 - Protections applicable to "sex" include gender identity and expression
- State Government Contracts (Pub. Contract Code §10295.35)
 - Applies to State Entities contracting for over \$100,000
- Health and Safety Code § 118600
 - Regulates single user restrooms

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Federal Protections Relating to Gender



- Title VII of the Civil Rights Act of 1964
 - Title VII prohibits employers with 15 or more employees from engaging in conduct that is discriminatory or harassing based on race, color, religion, sex, national origin

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Federal Protections Relating to Gender



- The Equal Employment Opportunity Commission ("EEOC")
 - EEOC prohibition against sex discrimination extends to sexual orientation and gender identity
 - Title VII's protections apply to lesbian, gay, bisexual, and transgender ("LGBT") regardless of contrary state or local laws

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EEOC's Strategic Enforcement Plan (2013 – 2016)

EEOC v. R.G. & G.R. Harris Funeral Homes Inc. (E.D. Mich. 2016, 100 F.Supp.3d 594.)

Baldwin v. Department of Transportation, 1990 WL 134993 EEOC Appeal No. 0120133080 (July 15, 2015).

Lusardi v. Department of the Army, EEOC Appeal No. 0120133395 (April 1, 2015).

The EEOC filed numerous lawsuits and amicus curiae briefs addressing LGBT discrimination and obtained approximately \$6.4 million for LGBT discrimination charges under Title VII since 2013.

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EEOC – Discrimination Includes...

- Failing to hire due to transgender status.
- Termination due to transition or planned transition.
- Denying employee access to common restroom corresponding to gender identity.
- Harassing an employee based on sexual orientation or gender transition.
- Failing to use preferred name or pronoun.
- Denying a promotion because of preference / identity.

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Federal Enforcement

*Roberts v. Clark
County School
District* (Nevada)
2016 WL 5843046.

United States Supreme Court accepted
*G.G. ex rel. Grimm v. Gloucester County
School Board*
(4th Cir. 2016) 822 F.3d 709
Oral argument on March 28, 2017.

The Supreme Court has since remanded the case back
down to the Fourth Circuit Court of Appeal.

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OSHA Mandates



- Federal OSHA Guidance for Employers
- The core principal of OSHA's model restroom policy is that "all employees, including transgender employees, should have access to restrooms that correspond to their gender identity."

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Best Practices

- 1 Be cognizant of recruiting and hiring practices
- 2 Implement a written anti-discrimination, harassment, and retaliation policy.
- 3 Establish an open door policy.
- 4 Implement reasonable dress and uniform requirements.
- 5 Allow employees to use restrooms and lockers that conform to their gender identity.

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Best Practices

- 6 Use gender pronouns that correspond to an employee's gender identity
- 7 Accommodate name changes.
- 8 Train managers and supervisors.
- 9 Investigate all complaints promptly and thoroughly.
- 10 Communicate with gender non-conforming employees and all other employees regarding their comfort level

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Thank You

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