



# One Minute Memo®



## DFEH Issues Guidelines Regarding Transgender Employees

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On February 17, 2016, the California Department of Fair Employment and Housing ("DFEH") issued [guidelines](#) on transgender employee rights. These guidelines address what questions employers can ask transgender employees (during the application process and otherwise), address how employers can implement dress code and grooming standards, and make suggestions for maintaining employee restrooms, showers, and locker rooms.

These guidelines come in the wake of increased attention to transgender employee rights in California and throughout the United States. In California, in 2014, in a case of first impression, the Sacramento Superior Court [held](#) that a transgender employee could pursue a discrimination claim under the Fair Employment and Housing Act ("FEHA"). In that case, the employer had requested that the employee use restrooms and locker rooms designated for the employee's sex assigned at birth, as opposed to the employee's gender identity.

Suggestions from the new DFEH guidance are summarized here.

### Avoid Inappropriate Questions

While employers can ask employees about their employment history and other non-discriminatory questions, the DFEH recommends that employers avoid questions designed to determine a person's sexual orientation or gender identity, as well as questions about whether a person plans to have sex reassignment procedures or surgery.

### Apply Dress Codes Consistently

Dress codes and grooming standards must be enforced in a non-discriminatory manner. For example, a transgender man whose assigned sex at birth was female must be allowed to dress and groom himself in accordance with his gender identity (like the other persons who identify as men in the workplace). Further, the transgender man's compliance with the employer's dress code or grooming standards cannot be subject to additional scrutiny.

## Provide Appropriate Restrooms and Locker Rooms For All Employees

All employees, including transgender employees, have the right to use a locker room or restroom that corresponds with their gender identity—regardless of their assigned sex at birth. The DFEH suggests that employers, where possible, should provide unisex single stall bathrooms for any employee who would like increased privacy for any reason, also without regard to gender identity or expression. But use of unisex facilities should always be completely voluntary for all employees.

The DFEH's recommended best practices for restrooms deviate somewhat from the Sacramento Superior Court's 2014 decision (which is not binding on either the DFEH or other courts). While the Sacramento Superior Court noted that "hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis of decades of racial segregation," the DFEH guidelines explicitly state: "A private [unisex restroom] can also be used by an employee who does not want to share a restroom with a transgender co-worker."

## Takeaways for Employers

An individual need not have sex reassignment surgery or complete any particular step in transitioning to be considered transgender. And, more broadly, FEHA's gender identity and gender expression protections apply to all employees—whether or not those employees identify as transgender, or are simply gender non-conforming in the way that they present themselves. The FEHA thus protects both transgender employees and employees whose gender expression may not comport with traditional or stereotypical gender roles.

Employers should take care to ensure that they avoid questions that may be discriminatory or violate privacy rights, and employers should continue to implement dress codes uniformly as to all employees. Employees must be permitted to use restrooms and locker rooms that correspond to their gender identity. Also, if possible, employers should make single-stall restroom and shower facilities to all employees who desire to use them.

The DFEH guidelines are consistent with other federal agency and judicial interpretations of the law, including the Equal Employment Opportunity Commission's recent interpretation of Title VII as prohibiting discrimination based on gender identity.

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