



# Transgender Law Center

*Making Authentic Lives Possible*

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WORKFORCE IN TRANSITION:

***CREATING WORKPLACES FREE FROM GENDER IDENTITY BIAS***

AIDS Legal Referral Panel (ALRP) Elimination of Bias CLE  
January 7th, 2014

AGENDA

- Welcome
- Commonly Used Terms
- Review of Relevant State and Federal Law
- Working with Transgender Clients & Coworkers
- Questions & Answers

# Commonly Used Terms

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## **Sex**

A term used to denote whether an individual is male or female, as determined by a physician or other medical professional at the time of birth. This designation is often made solely based upon an examination of an infant's genitals.

## **Gender Identity**

A person's internal, deeply-felt sense of being male, female, something other or in-between.

## **Gender Expression**

An individual's characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine.

# Commonly Used Terms

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## **Transgender**

An umbrella term that can be used to describe people whose gender expression is nonconforming and/or whose gender identity is different from their sex assigned at birth.

## **Sexual Orientation**

A person's emotional and sexual attraction to other people based on the gender of the other person. Examples include lesbian, gay, heterosexual, bisexual.

# Commonly Used Terms

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## Gender Transition

The process of changing genders from one's birth assigned gender to one's gender identity. For some people, it involves social and medical aspects. For some, transition is complex process that takes place over a long period of time, while for others it happens more quickly.

**“Social Transition”** may include coming out; telling family, friends, and/or co-workers; changing one's name and/or sex on legal documents.

# Commonly Used Terms

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## **“Medical Transition”**

- Transition related health care can include a variety of treatments such as:
  - ✦ Hormone therapy
  - ✦ Gender identity-related mental health services
  - ✦ Electrolysis and laser hair removal
  - ✦ Surgeries
- Contrary to popular belief, there is no one “surgery” for transgender people.
  - Many if not most transgender people never have any kind of gender reassignment surgery

# State of the Law

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## **Survey of Federal and State Law**

# Federal Law

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A variety of federal laws and policies prohibit discrimination based upon gender identity and expression:

- Title IX – education
- Title VII – employment
- Housing & Urban Development Regulations
- Affordable Care Act – health & insurance
- Hate Crimes
- Identity Documents – Passport, VA, SS Card

# Federal Employment Law

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## Circuit Court Decisions

Federal judges are increasingly holding that transgender and gender non-conforming people are protected by prohibitions on discrimination based on sex. Recent employment decisions include:

- Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C 2008)
- Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011)
- “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”

# Federal Employment Law

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## **E.E.O.C.**

Macy v. Department of Justice (ATF)

EEOC DOC 0120120821 (E.E.O.C.), 2012 WL 1435995 (E.E.O.C.)

“[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on...sex’ and such discrimination therefore violates Title VII.”

# California Law

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California prohibits discrimination based upon gender identity and expression in virtually every area of public life:

- Employment
  - Public Accommodations
  - Education
  - Housing
  - Insurance
  - Hate Crimes
  - Marriage & Child Custody
- \* Many cities and counties have additional nondiscrimination laws including Los Angeles, Oakland, San Diego, San Francisco, Santa Cruz, West Hollywood

# California Employment Law

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## California Employment Nondiscrimination Law

### The Fair Employment and Housing Act (FEHA)

“It is unlawful for an employer to refuse to hire or employ a person or to discharge a person from employment or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of the person’s...gender identity or gender expression[.]”

Cal. Gov’t. Code Section 12940(a)

# California Employment Law

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## Dress Codes

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. Cal. Gov't. Code §12949

# California Employment Law

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## **What employment practices are prohibited by FEHA?**

- Discrimination
- Harassment
- Based on gender identity or gender expression

## **When does FEHA take effect?**

- At the time a person suffers an adverse employment action based on gender identity or expression

# California Employment Law

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## Examples of Transgender Employment Discrimination

Intentional adverse employment actions based on gender identity or gender expression:

- Termination, demotion, reduction of hours because of gender identity or expression
- Prohibiting interaction with customers
- Requiring transgender employees to dress as sex they don't identify as
- Denying restroom access, or requiring gender neutral restroom access
- Otherwise treating trans employees differently than other male and female employees

# Identity Documents

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- **Federal Documents (removed surgery requirement)**
  - Passport Agency (2011)
  - Veteran's Administration (2011)
  - Social Security Administration (2013)
- **California**
  - Removed surgery requirement (2011)
  - AB 1121 (2013)
    - ✦ Court order requirement for gender changes removed (effective January, 2014)
    - ✦ Publication requirement for name changes removed (effective July, 2014)

# Transgender Youth

- Title IX
  - Arcadia Settlement (July 2013): Confirms that federal law prohibits discrimination on the basis of sex in education programs and activities operated by schools that receive federal funds. *"All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX and Title IV."*
- AB 1266 (School Success & Opportunity Act)
  - Allows transgender youth to fully participate in school activities, sports teams, programs and facilities that is consistent with their gender identity.

# Health Care Access

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## Insurance regulations:

- California
    - ✦ Department of Managed Health Care (DMHC)
    - ✦ Department of Insurance
  - Colorado
  - Oregon
  - Washington DC
  - Vermont
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- **Affordable Care Act: § 1557**

# Working with Transgender Clients & Coworkers

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## **Best Practices for Eliminating Bias in the Legal Profession**

# California RPC and Transgender Clients

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## CRPC Rule 3-100 – Confidential Information of Client

- “(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client”
  - ✦ Never disclose a person’s transgender status to anyone without the transgender person’s permission
  - ✦ Some clients want to be “stealth”
  - ✦ Help client understand when revelation of transgender status is necessary, and when potentially harmful
  - ✦ Are there other less-public remedies available? (administrative)
  - ✦ Seek a protective order for medical records when appropriate
    - Caveat - Emotional Distress damages

# California RPC and Transgender Clients

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## Rule 3-110 – Failing to Act Competently

- “(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
- (B) For purposes of this rule, ‘competence’ in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (C) If a member does not have sufficient learning and skill...the member may nonetheless perform such services competently by 1) associating with or...professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.”

# California RPC and Transgender Clients

## How to increase competency:

- Educate yourself about the law as it applies to TG clients
- Educate yourself about issues facing the transgender community
- Transgender Law Center's *State of Transgender California* available online at <http://www.transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf>
- The Task Force and NCTE's *Injustice at Every Turn: The State of Transgender America* available online at [http://www.thetaskforce.org/reports\\_and\\_research/ntds](http://www.thetaskforce.org/reports_and_research/ntds)
- Consult experts if potentially precedential

# Tips for Working with Transgender Clients

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1. Use correct pronouns and name on all intakes, narratives, timelines, letters to clients, pleadings, and court documents, even if the client has not had a legal name/gender change.

See: Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)\*

\*FN 1: “In using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to-female transsexuals which refer to the transsexual individual by the female pronoun. See, e.g., Murray v. United States Bureau of Prisons, 106 F.3d 401, 401 n.1 (6th Cir.1997) (unpublished disposition); Meriwether v. Faulkner, 821 F.2d 408, 408 n. 1 (7th Cir.1987).

# Tips for Working with Transgender Clients

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2. Always refer to transgender persons by the name and pronoun that corresponds with their gender identity

- Use “she” for transgender women and “he” for transgender men, even if you are not in the client’s presence.
- If you are unsure about a person’s gender identity or how they wish to be addressed, ask politely and privately for clarification.
- If you are not sure which pronoun to use, and you cannot ask the person privately, avoid using pronouns all together.

# Tips for Working with Transgender Clients

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3. It generally is inappropriate to ask a transgender person about whether they have had medical treatments in furtherance of their gender transition.
  - Whether or not a person has accessed medical treatment in furtherance of their gender transition does not affect their legal rights.
4. Educate Colleagues and Opposing Counsel
  - Use correct name and pronouns in pleadings
  - Object & Educate
  - Ask to approach the Bench if counsel insists on misgendering your client
  - Report harassment to State Bar or Commission on Judicial Performance

# Tips for Working with Transgender Coworkers

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## Transition Your Workplace:

- Add gender identity and expression to non-discrimination policies
- Create policies and procedures addressing common issues faced by transgender people in the workplace
- Train all levels of organizations on policies and procedures
- Transition intake forms to include “preferred name”
- Ensure health insurance policies are transgender-inclusive

# Tips for Working with Transgender Coworkers

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## Create Policies and Procedures to Address Gender Change and Nondiscrimination in the Workplace:

Policies & procedures should cover...

- Name changes and identification
- Employee privacy
- Restroom access
- Dress codes
- Sex-segregated job assignments
- Guidelines for employees transitioning on the job
- Health insurance access
- Identify and remove barriers in hiring

# Working with Transgender Clients & Coworkers

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## Use Common Sense:

- It's easy to show respect
- Recognize the difference between your personal values and the community values of your workplace
- Respect your coworkers' confidentiality and privacy
- Help co-workers who are having trouble with another employee's transition
- Don't assume your transgender coworkers know everything about transgender issues
- Become knowledgeable about transgender issues. Treat transgender people with respect.

# Working with Transgender Clients & Coworkers

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- Questions?
- There are no dumb questions!

# Contact Info

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## Transgender Law Center

*Making Authentic Lives Possible*

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