LGBTQ Anti-Discrimination Law in California
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AIDS Legal Referral Panel Training
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Agenda

I. Introduction
II. Sources of Anti-Discrimination Law
III. Forms of LGBTQ Discrimination
IV. Practice Tips for LGBTQ Clients
Sex and Gender in California

- Sex includes and means gender, and vice versa.
  
  Gov. Code § 12926(r)(2); 2 CCR § 11030(c)

- Includes a third party’s perceptions of one’s sex.
  
  2 CCR § 11030(c)
Protected Characteristics

Gender Identity
Gender Expression
Sexual Orientation
Sex Stereotype
Transgender
Transitioning

See Gov. Code § 12926; 2 CCR § 11030
LGBTQ People in California

- 1.62 million LGBTQ people in CA (5.3%)
- 26% transgender people surveyed report discrimination at work that year
- 17% LGBTQ Bay Area residents said their lawyers were not sensitive to their needs
Sources of Anti-Discrimination Law
California’s Anti-Discrimination Laws

- Gov. Code § 12940 (FEHA) (employment)
- Gov. Code § 12955 (FEHA) (housing)
- Ed. Code § 220 (education)
- Civ. Code § 51 (Unruh Act) (public accommodations)
- Civ. Code § 51.7 (Ralph Act) (hate crimes)
- Gov. Code § 11135 (public agencies)
How We Got Here

Gay Law Students Ass’n v. Pac. Tel. & Tel. Co. (1979)
Labor Code § 1102.1 (1992)

FEHA – Sexual orientation (2000)

FEHA – Gender identity/expression (2012)
At Work

• Refusal to hire, discharge, or discriminate in compensation, terms, conditions, or privileges of employment

• Expressly prohibits harassment

• Workplaces with 5+ employees
  • Harassment exception for >1 employee

• Private employers, unions, staffing agencies

FEHA Gov. Code § 12940
2 CCR §§ 11030-34 (Transgender Rights Regulations)
In Public Spaces

• Full and equal accommodations in all business establishments of every kind whatsoever
• Defines “sex” as including gender, gender identity/expression
• Includes perceived, associational discrimination
• Interpreted broadly

Other Sources of Law

• California Constitution
  • Heightened scrutiny? *In re Marriage Cases* (2008) 43 Cal.4th 757

• Federal Law – for now
  • *Schwenk v. Hartford* (9th Cir. 2000)
  • **Title VII**: *Bostock v. Clayton Cty.; Altitude Express v. Zarda; R.G. & G.R. Harris Funeral Homes v. E.E.O.C.*

• U.S. Constitution

• Local Non-Discrimination Ordinances
Forms of Unlawful Discrimination
What Does Discrimination Against LGBTQ Workers Look Like?

- “Traditional”
  - Harassment
  - Termination
  - Failure to hire, promote
- Outing
- Assault, workplace violence
- Misgendering
- Restroom access

- Dress code
- Unequal benefits (health insurance, disability, etc.)
- Health insurance denials
When Is Discrimination Actionable?

Adverse Action

• Failure to hire
• Failure to promote
• Denial of benefits

Harassment

• Quid Pro Quo
• Hostile Work Environment
Sexual Harassment

Quid pro quo

Hostile work environment

- Conduct unwelcome
- “Disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with or undermine the victim’s personal sense of well-being.”

*Gov. Code § 12923(a) (2019)*
SB 396: Sexual Harassment Trainings

• Transgender rights poster
• Trainings must cover gender identity, gender expression, sexual orientation
• Practical examples
• Trainers must have LGBTQ-related knowledge and expertise

Codified at Gov. Code §§ 12950; 12950.1
Names and Pronouns

• Right to use preferred name, gender, pronouns, including gender-neutral pronouns

• Legal name only to “meet a legally-mandated obligation”

• Misgendering potentially actionable if rises to unlawful harassment

2 CCR § 11034(h)
Restroom Access

- Facilities corresponding with gender identity/expression
- Gender-neutral, single occupancy preferred
- “Comparable, safe, adequate” without regard to sex
- Cannot require proof of medical treatment
- Employer may make reasonable, confidential inquiry of an employee

2 CCR § 11034(e)
Additional Transgender Protections

• Gender non-conforming / non-binary protections
• Prohibits mandatory gender question on job applications
• Employers may not inquire about sex, gender, gender identity as condition of employment
• Employee may initiate communications about gender identity
• Dress, grooming standards consistent with gender identity
People With HIV/AIDS

- ADA
- FEHA protections
- Confidentiality, disclosure issues
- Health insurance
- Disability benefits
Healthcare Access

• Insurance Gender Non-Discrimination Act

• Early cases: Gender-affirming surgery is medically necessary and must be covered by Medi-Cal

• Unruh Act provides protections against religious refusals
Registered Domestic Partners

- RDP’s have same rights and benefits as spouses
- Equal healthcare coverage for RDP’s as spouses.
- Businesses may not deny benefits to RDP’s that they extend to spouses (Unruh Act).
- SB 30 (2019): RDP’s not just for same-sex couples anymore

Fam. Code § 297.5(a); Ins. Code §§ 381.5(a), 10121.7(a); H&S Code § 1374.58(a)
Rule of Prof’l Conduct 8.4.1

Lawyers may not discriminate or retaliate against, harass, or refuse/terminate representation of a client because of her gender identity, gender expression, or sexual orientation.
Special Considerations for LGBTQ People

- Facts?
- Appropriate Language?
- LGBTQ at issue?
- Out?
- Generational Differences?
- Pronouns?
- Hostile court?
Creating a Welcoming Environment

• Post visible LGBTQ-related images in your office and provide inclusive materials.
• Post “gender-neutral” signage for public restrooms.
• Ask clients for preferred name and pronouns in initial intake, then use them.
• Respect client confidentiality.
• Identify and eliminate all homophobic and transphobic language.
• Include all staff in training and discussions about inclusive office culture.
• Model an affirming and respectful attitude!
Ask for Help!
Thank You!

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