STATE OF CALIFORNIA | Business, Consumer Services, and Housing Agency GOVERNOR EDMUND G. BROWN JR.

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FAIR EMPLOYMENT AND HOUSING COUNCIL

NOTICE OF PROPOSED EMERGENCY REGULATIONS

July 25, 2017

The Fair Employment and Housing Council of the Department of Fair Employment and Housing (Council) is proposing to adopt emergency regulations to address a conflict between its recently promulgated regulations related to gender-neutral signage on restroom facilities and regulations promulgated by the Department of Industrial Relations (Cal/OSHA) regarding provision of a certain number of non-flushing toilet facilities separately marked for men and women in certain industries. The emergency regulations are proposed for adoption into Title 2 of the California Code of Regulations, Division 4.1, Chapter 5 (2 CCR section 11034).

Government Code Section 11346.1(a)(2) requires that State of California agencies give a five working day advance notice of intent to file emergency regulations with the Office of Administrative Law (OAL) to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days in which to review and make a decision on the proposed emergency rule. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one hundred and eighty (180) days. Within the 180-day effective period, the Council will proceed with a regular rulemaking action, including a public comment period. The emergency regulations will remain in effect during this rulemaking action.

As required by subdivisions (a)(2) and (b)(2) of Government Code Section 11346.1, this notice appends the following: (1) the specific language of the proposed regulations and (2) the Finding of Emergency, including specific facts demonstrating the need for immediate action, authority and reference citations, an informative digest, and required determinations.

If you would like to make comments on the proposed regulations or Finding of Emergency, they must be received by both the Council and OAL within five calendar days of the Council filing at OAL. Responding to these comments is strictly at the Council's discretion.

Comments should be sent simultaneously to:

Fair Employment and Housing Council
c/o Brian Sperber, Legislative & Regulatory Counsel
Department of Fair Employment and Housing
320 West 4th Street, 10th Floor
Los Angeles, CA 90013
FEHCouncil@dfeh.ca.gov

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Please note that this notice and comment period is not intended to replace the public's ability to comment once the emergency regulations are approved. The Council will observe a 45-day comment period and may hold a public hearing within the 180-day certification period following the effective date of the emergency regulations.

Please contact Brian Sperber at brian.sperber@dfeh.ca.gov if you have any questions concerning this notice. Materials regarding this proposal can be found at http://www.dfeh.ca.gov/fehcouncil/.

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FINDING OF EMERGENCY

The Fair Employment and Housing Council of the Department of Fair Employment and Housing (Council) finds that an emergency exists and that this proposed emergency regulation is necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare.

This emergency rulemaking is necessary to address a conflict between regulations promulgated by the Council related to gender-neutral signage on restroom facilities and regulations promulgated by the Department of Industrial Relations (Cal/OSHA) regarding provision of a certain number of non-flushing toilet facilities separately marked for men and women in certain industries. Because the conflict between these two regulations put employers in a legal bind, and because Cal/OSHA has asserted health-related reasons for its regulations, the necessary grounds for emergency rulemaking are present here.

On July 1, 2017, Council regulations went into effect requiring that "[e]mployers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities such as 'Restroom,' 'Unisex,' 'Gender Neutral,' 'All Gender Restroom,' etc." 2 CCR 11034(e)(2)(B). The language of this regulation is consistent with AB 1732 (Ting, Chapter 818, Statutes of 2016), enacted as Health and Safety Code 118600, which states that "[a]ll single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency shall be identified as all-gender toilet facilities by signage that complies with Title 24 of the California Code of Regulations."

During the comment process related to the July 1, 2017, regulations, it was brought to the Council's attention that Cal/OSHA had regulations requiring that, in certain industries, separate toilet facilities be made available for men and women. The commenter noted that these regulations, coupled with the Council's proposed regulations, would put employers in those industries in a bind regarding what law to comply with. During the Council meeting on March 30, 2017, however, that commenter appeared at the meeting. He stated that Cal/OSHA had informed him that it would not be enforcing the regulations in question, and that there was thus no conflict. The Council therefore proceeded with the rulemaking.

However, on June 27, 2017 and June 28, 2017, before the effective date of the Council's regulations but after the Office of Administrative Law had approved the regulations, representatives from the Department of Fair Employment and Housing and representatives from the Department of Industrial Relations spoke after it was brought to their attention that there remained a lingering conflict between the two departments' regulations. In short, it was revealed that although Cal/OSHA is applying Health and Safety Code section 118600 to flush toilets in all industries (and thus employers with flush toilets face no conflict between 2 CCR 11034(e)(2)(B)), it is not applying that law to non-flush toilets in those industries covered by California Code of Regulations, title 8, sections 1526 (construction), 3364 (general industry), 3457 (agricultural operations), and 5192 (hazardous waste operations and emergency response). Thus, employers covered by those sections who do not have flush toilets are still required to maintain a certain number of separate toilet facilities for men and women or will face

Cal/OSHA enforcement. However, those employers are also currently covered by the Department's conflicting regulation requiring that those same facilities be labeled with gender-neutral signage.

In conversations between the two departments, Cal/OSHA explained that in declining to apply the law to non-flushing toilets, Cal/OSHA is looking toward the technical definition of "single-user toilet facility" in Health and Safety Code section 118600. In the law, such a facility is defined as "a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user." As Cal/OSHA explained during conversations on June 27 and 28, a water closet has a specific meaning in the OSHA context, that being a toilet that is flushed with water. Other types of facilities – chemical toilets or combustion toilets – are known as nonwater carriage disposal facilities. Cal/OSHA also stated that there are important health-related reasons for not applying Health and Safety Code 118600 to non-flushing toilets. Specifically, Cal/OSHA stated that because there are many more men in the industries in question than there are women, and because non-flushing toilet facilities are generally not as clean as water carriage facilities, in Cal/OSHA's assessment, women would be exposed to health risks by being forced to share non-flushing toilets with men.

Unfortunately, the Council was not aware of Cal/OSHA's interpretation before the approval of its facility-signage regulations. Although Cal/OSHA apparently tried to raise concerns by contacting personnel at the Office of Administrative Law, those concerns were never relayed to the Council or Department of Fair Employment and Housing. In any event, as stated above, employers are now placed in an untenable position: either they must comply with the Council's regulation – and label their single, locking, non-flush toilets with an all-gender sign, which will expose them to enforcement by Cal/OSHA for being in violation of the Cal/OSHA regulation – or they must comply with Cal/OSHA regulations and violate the Council's regulation. Moreover, Cal/OSHA's view is that female workers in these industries, if employers comply with the Council's rule, will be exposed to health risks by being forced to share facilities with men.

The Council therefore took action at its subsequent meeting on July 17, 2017, and seeks approval of the emergency regulation that would eliminate this emergency in advance of noticing a regular rulemaking action on this subject.

AUTHORITY AND REFERENCE

Authority: Government Code section 12935(a) authorizes the Council to adopt these proposed regulations.

Reference: The proposed regulations implement, interpret, and make specific section 12900 et seq. of the Government Code.

INFORMATIVE DIGEST

Under the California Fair Employment and Housing Act, the Fair Employment and Housing Council is empowered to adopt, promulgate, amend, and rescind regulations that implement California's employment and housing anti-discrimination laws. These regulations are located at Title 2 of the California Code of Regulations, Division 4.1, Chapter 5 (2 CCR Section 11000 et seq.).

In part, these regulations relate to gender-neutral signage on restroom facilities that are inconsistent with regulations promulgated by the Department of Industrial Relations (Cal/OSHA) regarding provision of a certain number of non-flushing toilet facilities separately marked for men and women in certain industries.

The proposed regulations will amend the Council's regulation to reconcile it with Cal/OSHA's regulation.

These proposed regulations will benefit the public by eliminating confusion and misunderstanding arising from two inconsistent regulations and eliminate health risks at non-flushing toilet facilities.

After an evaluation of current regulations, the Council has determined that these proposed regulations are not inconsistent or incompatible with any existing regulations.

MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS

None.

LOCAL MANDATE

The Council has determined that this proposed regulatory action does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary cost or savings on local agencies.

COSTS OR SAVINGS TO STATE AGENCIES, REIMBURSABLE COSTS TO ANY LOCAL GOVERNMENT AGENCIES, NONDISCRETIONARY COSTS OR SAVINGS TO LOCAL GOVERNMENT AGENCIES, AND COSTS OR SAVINGS TO FEDERAL FUNDING

The proposal results in no additional costs or savings beyond those imposed by existing regulations.

DOCUMENTS RELIED UPON

None.

Fair Employment & Housing Council
Emergency Regulations Regarding Gender-Neutral Facility Signage

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 5. Sex Discrimination

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§ 11034. Terms, Conditions, and Privileges of Employment.

(a) Compensation.

(1) Except as otherwise required or permitted by regulation, an employer or other covered entity shall not base the amount of compensation paid to an employee, in whole or in part, on the employee's sex.

(2) Equal Compensation for Comparable Work. (Reserved.)

(b) Fringe Benefits.

(1) It is unlawful for an employer to condition the availability of fringe benefits upon an employee's sex, including gender identity and gender expression.

(2) Insofar as an employment practice discriminates against one sex, an employer or other covered entity shall not condition the availability of fringe benefits upon whether an employee is a head of household, principal wage earner, secondary wage earner, or of other similar status.

(3) Except as otherwise required by state law, an employer or other covered entity shall not require unequal employee contributions by similarly situated employees to fringe benefit plans based on the sex of the employee, nor shall different amounts of basic benefits be established under fringe benefit plans for similarly situated employees.

(4) It shall be unlawful for an employer or other covered entity to have a pension or retirement plan that establishes different optional or compulsory retirement ages based on the sex of the employee.

(c) Lines of Progression.

(1) It is unlawful for an employer or other covered entity to designate a job exclusively for one sex or to maintain separate lines of progression or separate seniority lists based on sex unless it is justified by a permissible defense. For example, a line of progression or seniority system is unlawful that:

(A) Prohibits an individual from applying for a job labeled "male" or "female," or for a job in a "male" or "female" line of progression; or

(B) Prohibits an employee scheduled for layoff from displacing a less senior employee on a "male" or "female" seniority list.

(2) An employer or other covered entity shall provide equal opportunities to all employees for upward mobility, promotion, and entrance into all jobs for which they are qualified. However, nothing herein shall prevent an employer or other covered entity from implementing mobility programs to accelerate the promotion of underrepresented groups.

(d) Dangers to Health, Safety, or Reproductive Functions.

(1) If working conditions pose a greater danger to the health, safety, or reproductive functions of applicants or employees of one sex than to individuals of another sex working under the same conditions, the employer or other covered entity shall make reasonable accommodation to:

(A) Alter the working conditions so as to eliminate the greater danger, unless it can be demonstrated that the modification would impose an undue hardship on the employer. Alteration of working conditions includes, but is not limited to, acquisition or modification of equipment or devices and extension of training or education; or

(B) Upon the request of an employee of the more endangered sex, transfer the employee to a less hazardous or strenuous position for the duration of the greater danger, unless it can be demonstrated that the transfer would impose an undue hardship on the employer.

(2) An employer or other covered entity may require an applicant or employee to provide a physician's certification that the individual is endangered by the working conditions.

(3) The existence of a greater risk for employees of one sex than another sex shall not justify a BFOQ defense.

(4) An employer may not discriminate against members based on sex because of the prospective application of this subsection.

(5) With regard to protections due on account of pregnancy, childbirth, or related medical conditions, see section 11035.

(6) Nothing in this subsection shall be construed to limit the rights or obligations set forth in Labor Code section 6300 et seq.

(e) Working Conditions.

(1) Where rest periods are provided, equal rest periods must be provided to employees without regard to the sex of the employee.

(2) Equal access to comparable, safe, and adequate facilities shall be provided to employees without regard to the sex of the employee. This requirement shall not be used to justify any discriminatory employment decision.

(A) Employers shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.

(B) Employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as "Restroom," "Unisex," "Gender Neutral," "All Gender Restroom," etc. This subsection does not apply to nonwater carriage disposal facilities in those workplaces covered by California Code of Regulations, title 8, sections 1526 (construction), 3364 (general industry), 3457 (agricultural operations), and 5192 (hazardous waste operations and emergency response). However, all other subsections of this section apply to such employers.

(C) To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.

(D) Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender.

(E) Notwithstanding subsection (i)(1)(B) of this section, nothing shall preclude an employer from making a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.

(3) Support services and facilities, such as clerical assistance and office space, shall be provided to employees without regard to the employee's sex.

(4) Job duties shall not be assigned according to sex stereotypes.

(5) It is unlawful for an employer or other covered entity to refuse to hire, employ or promote, or to transfer, discharge, dismiss, reduce, suspend, or demote an individual on the grounds that the individual is not sterilized or refuses to undergo sterilization.

(6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services of a custodial nature for its employees or members who are responsible for the care of their minor children.

(f) Sexual Harassment. Sexual harassment is unlawful as defined in section 11019(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. An employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment. Sexually harassing conduct may be either "quid pro quo" or "hostile work environment" sexual harassment:

(1) "Quid pro quo" (Latin for "this for that") sexual harassment is characterized by explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.

(2) Hostile work environment sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee's work performance or create an intimidating, hostile, or offensive work environment.

(A) The harassment must be severe or pervasive such that it alters the conditions of the victim's employment and creates an abusive working environment. A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. To be unlawful, the harassment must be both subjectively and objectively offensive.

(B) An employer or other covered entity may be liable for sexual harassment even though the offensive conduct has not been directed at the person alleging sexual harassment, regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.

(C) An employer or other covered entity may be liable for sexual harassment committed by a supervisor, coworker, or third party.

1. An employer or other covered entity is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or other covered entity knew or should have known of the harassment.

2. An employer or other covered entity is liable for harassment of an employee, applicant, or independent contractor, perpetrated by an employee other than an agent or supervisor, if the entity or its agents or supervisors knows or should have known of the harassment and fails to take immediate and appropriate corrective action.

3. An employer or other covered entity is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

4. An employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

(g) Physical Appearance, Grooming, and Dress Standards. It is unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity (section 11010).

(h) Recording of Gender and Name. As provided in sections 11016(b)(1) and 11032(b)(2) of these regulations, inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense (section 11010). For recordkeeping purposes in accordance with section 11013(b), an employer may request an applicant to provide this information solely on a voluntary basis.

(1) An applicant's designation on an application form of a gender that is inconsistent with the applicant's assigned sex at birth or presumed gender may be considered fraudulent or a misrepresentation for the purpose of an adverse employment action based on the applicant's designation only if the employer establishes a permissible defense (section 11010).

(2) An employer shall not discriminate against an applicant based on the applicant's failure to designate male or female on an application form.

(3) If an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer or other covered entity who fails to abide by the employee's stated preference may be liable under the Act, except as noted in subsection (4) below.

(4) An employer is permitted to use an employee's gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally-mandated obligation, but otherwise must identify the employee in accordance with the employee's gender identity and preferred name.

~~(i) Additional Rights.~~

(1) It is unlawful for employers and other covered entities to inquire about or require documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment:

(A) Nothing in this subsection shall preclude an employer from asserting a BFOQ defense, as defined above.

(B) Nothing in this subsection shall preclude an employer and employee from communicating about the employee's sex, gender, gender identity, or gender expression when the employee initiates communication with the employer regarding the employee's working conditions.

(2) It is unlawful to deny employment to an individual based wholly or in part on the individual's sex, gender, gender identity, or gender expression.

(3) Nothing in these regulations shall prevent an applicant or employee from asserting rights under other provisions of the Act, including leave under the California Family Rights Act and rights afforded to individuals with mental or physical disabilities.

(4) It is unlawful to discriminate against an individual who is transitioning, has transitioned, or is perceived to be transitioning.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code; *Meritor Savings Bank v. Vinson* (1986) 477 US 57, 67-68; *Harris v. Forklift Systems* (1993) 510 US 17, 23; *Lyle v. Warner Bros.* (2006) 38 Cal.4th 264, 273; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608; *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446.