

## MEMORANDUM 2024-6

### **Equal Rights Amendment: Discussion of Issues**

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In 2022, the Legislature adopted a resolution assigning the Commission<sup>1</sup> to “undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]”<sup>2</sup> More specifically:

[The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission’s report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination....<sup>3</sup>

The Commission commenced work on this topic in 2022, considering a proposed approach for the study.<sup>4</sup> The proposed approach has two stages: first, the Commission will examine the possibility of enacting a provision in state law to achieve the effect of the Equal Rights Amendment (“ERA”) (such a provision is referred to hereafter as a “sex equality provision”); and second, the Commission will use the sex equality provision to evaluate existing California law, to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).<sup>5</sup> The Commission is currently working on the first stage of this study.

After some updates on case law in this area, this memorandum provides additional background information and further discussion of the possible next steps in this study.

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<sup>1</sup> Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

<sup>2</sup> 2022 Cal. Stat. res. ch. 150.

<sup>3</sup> *Id.*

<sup>4</sup> Memorandum 2022-51; see also Minutes (Nov. 2022), pp. 3-4.

<sup>5</sup> See Memorandum 2022-51, p. 2.

## EFFECT OF THE EQUAL RIGHTS AMENDMENT

The ERA provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”<sup>6</sup>

To codify a sex equality provision to achieve the effect of this language, the Commission has considered the scope of the ERA’s sex equality guarantee.<sup>7</sup>

### UPDATE ON RELATED CASES

Below are brief updates on two notable cases related to sex discrimination law and constitutional sex equality protections. The first update discusses a pending U.S Supreme Court case regarding the standard for what constitutes prohibited sex discrimination under the federal employment discrimination law. The second update describes a decision from the Pennsylvania Supreme Court about the scope of their state constitution’s Equal Rights Amendment.

The staff notes that there are many pending cases in the California, federal, and other state court systems that relate to sex equality broadly.<sup>8</sup> The staff is not monitoring such case law exhaustively, nor does the staff intend to provide updates on all such developments. Absent Commission direction otherwise, the staff will continue to provide updates of selected related case law, focusing primarily on cases at the U.S. and California Supreme Courts that address laws and doctrines covered in prior memoranda. The staff will also provide updates on decisions from other states’ high courts, particularly those focused on interpretation of state constitutional Equal Rights Amendments (as with the Pennsylvania decision below), as we become aware of those decisions.

#### **Sex Discrimination – Pending U.S. Supreme Court Case**

Late last year, the U.S. Supreme Court heard argument in *Muldrow v. City of St. Louis*.<sup>9</sup> This case involves an employment sex discrimination claim under Title VII of the federal Civil Rights Act of 1964.<sup>10</sup> The Petitioner’s brief summarizes the claim (and the appellate court’s treatment of that claim) as follows:

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<sup>6</sup> H.J. Res. 208 (1972), 86 Stat. 1523.

<sup>7</sup> Memoranda 2023-10, 2023-17.

For this study, the Commission concluded that the term “sex” should be understood broadly, consistent with federal anti-discrimination law, to include issues related to pregnancy, sexual harassment, sexual orientation, and gender identity. See Minutes (Feb. 2023), p. 3; see also generally Memorandum 2023-10.

<sup>8</sup> See, e.g., *Food & Drug Admin. v. All. for Hippocratic Med.* (2023) 78 F.4th 210, *cert. granted* 2023 WL 8605744 (Dec. 13, 2023).

<sup>9</sup> See <https://www.supremecourt.gov/docket/docketfiles/html/public/22-193.html>.

<sup>10</sup> See 42 U.S.C. § 2000e-2; see also Memorandum 2023-10, pp. 11-26.

Petitioner Jatonya Clayborn Muldrow maintains that her employer, the City of St. Louis Police Department, discriminated against her in the terms, conditions, or privileges of her employment when, because of her sex, it transferred her out of the Department’s Intelligence Division to an entirely different job, and again when it denied her request to transfer to a different position. The Eighth Circuit rejected her suit because, it believed, she could not show that these transfer decisions imposed a “significant disadvantage” sufficient to qualify as an “adverse employment action.”<sup>11</sup>

At the Supreme Court, the question presented is:

Does Title VII prohibit discrimination as to all “terms, conditions, or privileges of employment,” or is its reach limited to discriminatory employer conduct that courts determine causes materially significant disadvantages for employees?<sup>12</sup>

The Supreme Court’s decision is yet to be released. The staff will provide an update on the Court’s decision after it is released.

### **State Equal Rights Amendment – Pennsylvania Supreme Court Decision**

The Pennsylvania Supreme Court recently issued a decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*.<sup>13</sup> That decision concluded that a statutory prohibition on the use of state Medicaid funds to cover abortion was unconstitutional (under the state constitution’s Equal Rights Amendment).

The text of Pennsylvania’s Equal Rights Amendment is largely similar to that of the federal Equal Rights Amendment.<sup>14</sup>

In its decision, the Court described how a claim that a statute violates the state’s Equal Rights Amendment would be assessed:

[A] challenge to a law as violative of [Pennsylvania’s Equal Rights Amendment] begins with the premise that a sex-based distinction is presumptively unconstitutional. It is the government’s burden to rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy. The judicial inquiry will be searching, and no deference will be given to legislative policy reasons for creating sex-based classifications. Given these parameters, we acknowledge that few, if any, sex-based conferrals of benefits or burdens will be sustainable.

This approach we adopt is aligned with the overwhelming precedent of this

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<sup>11</sup> Brief of Petitioner at 2, *Muldrow v. City of St. Louis*, No. 22-193 (U.S. Aug. 28, 2023), available at [https://www.supremecourt.gov/DocketPDF/22/22-193/278337/20230828212608509\\_Petitioner%20opening%20merits%20brief%20-%208.28.2023.pdf](https://www.supremecourt.gov/DocketPDF/22/22-193/278337/20230828212608509_Petitioner%20opening%20merits%20brief%20-%208.28.2023.pdf).

<sup>12</sup> See <https://www.supremecourt.gov/docket/docketfiles/html/qp/22-00193qp.pdf>.

<sup>13</sup> (2024) \_\_ A.3d \_\_, 2024 WL 318389. Decision is also available online at: <https://www.pacourts.us/Storage/media/pdfs/20240129/141953-jan.29,2024-opinion.pdf>.

<sup>14</sup> Pa. Const. art. I, § 28 (“Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”).

Court that strictly enforces the Equal Rights Amendment against laws benefitting or burdening rights based on whether the individual was a man or woman. It also takes into account that there may be classifications within laws that are based on a characteristic that is unique to one sex that may not violate the Equal Rights Amendment. As with all laws making classifications based on sex, such an enactment will be presumed unconstitutional and the government will have the high burden of rebutting the presumption.<sup>15</sup>

The Pennsylvania Supreme Court concluded that the prohibition on Medicaid funding for abortion is sex discrimination requiring review under the state’s Equal Rights Amendment. The Court remanded to the lower court to determine whether the ban violates the state’s ERA.<sup>16</sup>

## SCOPE OF STATUTORY DISCRIMINATION PROHIBITIONS

Previously in this study, the Commission has considered statutory prohibitions against sex discrimination in both federal and state law.<sup>17</sup> Discrimination prohibitions serve an important function in preventing mistreatment and exclusion of individuals based on protected characteristics. They are necessary, but not sufficient to address societal inequities and achieving equality more broadly.<sup>18</sup>

### **Clarify the Scope of Sex Discrimination Prohibitions in California Law**

Memorandum 2023-21 discussed California’s statutory discrimination prohibitions (and associated laws) in the areas of employment, housing, education, and business establishments.<sup>19</sup> As indicated in that memorandum, these discrimination prohibitions include express language prohibiting discrimination on the following actual or perceived characteristics (all of which the Commission concluded were within the scope of work for

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<sup>15</sup> 2024 WL 318389 at \*61.

<sup>16</sup> 2024 WL 318389 at \*62, n. 83.

<sup>17</sup> Memoranda 2023-10, 2023-21.

<sup>18</sup> See generally <https://www.ohchr.org/en/minorities/minority-rights-equality-and-anti-discrimination-law>.

The adoption of comprehensive anti-discrimination laws—laws which have the purpose and effect of prohibiting all forms of discrimination—is an essential step in the effort to realize the right to non-discrimination. Without the enactment of laws which prohibit all forms of discrimination on the basis of all grounds recognized in international law in all areas of life regulated by law, provide for the effective enforcement of the right, and mandate positive action measures to address historic or structural discrimination, states will be unable to give effect to the right to non-discrimination. It is only through ensuring the legal protection of the right to non-discrimination that states will realize their ambitions to combat inequality.

*Id.*

<sup>19</sup> See Civ. Code § 51 (business establishments), Educ. Code § 220 (education), Gov’t Code §§ 12940 (employment), and 12955 (housing).

this study):

- Sex.
- Gender (including gender identity and gender expression).
- Sexual orientation.
- Pregnancy (and related matters).<sup>20</sup>

In addition to prohibiting discrimination on these grounds, some of these statutes also expressly prohibit sexual harassment.<sup>21</sup>

The California Legislature has sought to clarify the scope of the prohibited discrimination in the statutory language to ensure that the scope of discrimination protections was express in the law.<sup>22</sup> This practice makes sense, as the case law shows that there have been many disputes about the scope of sex discrimination prohibitions. An earlier memorandum discussed the history of federal employment discrimination law and noted several cases that were decided by the U.S. Supreme Court, including the 2020 decision in *Bostock v. Clayton County* clarifying that sexual orientation and gender identity discrimination were both forms of sex discrimination prohibited by federal law.<sup>23</sup>

While California’s broad discrimination prohibitions contain significant detail as to the scope of those rules, not all of California’s anti-discrimination laws contain the same level of detail. California law includes a number of discrimination prohibitions that apply in other, often narrower and more specific, contexts.<sup>24</sup> These provisions often include less detail regarding the scope of protected characteristics encompassed by sex discrimination, although some may incorporate definitions and characteristics from California’s broader anti-discrimination laws by reference.<sup>25</sup> In the staff’s view, these differences were likely

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<sup>20</sup> See *supra* note 7; see also discussion of these provisions in Memorandum 2023-21

<sup>21</sup> See, e.g., Educ. Code § 231.5 (indicating that sexual harassment is prohibited “as a form of sexual discrimination”); Gov’t Code § 12940(j), (k) (prohibition of sexual harassment related to employment).

<sup>22</sup> See, e.g., Senate Judiciary Committee Analysis of AB 887 (Jun. 13, 2011), p. 6 (“[AB 887] will take existing protections based on gender identity and expression and specifically list them as protected categories in our non-discrimination laws. By making these protections explicit, people will more clearly understand California’s non-discrimination laws, which may increase the likelihood that employers, housing authorities, schools, etc. would work to prevent discrimination and/or respond more effectively and expeditiously at the first indications of discrimination.”) (quoting bill author); Senate Floor Analysis of AB 2289 (Aug. 27, 2018), p. 6 (“AB 2289 codifies federal and state regulations that outline specific sex discrimination prohibitions in the context of pregnant and parenting students.”).

<sup>23</sup> Memorandum 2023-10 (discussing case law arising under federal laws related to employment discrimination); *Bostock v. Clayton County* (2020) 590 U.S. \_\_\_, 140 S.Ct. 1731.

<sup>24</sup> E.g., Bus. & Prof. Code §§ 23425-23438 (related to alcohol licenses for various clubs and associations, many provisions contain an anti-discrimination rule); Health and Safety Code § 1586.7 (adult day health care centers), and Pub. Util. Code § 40121 (labor contracts for Orange County Transit District).

California law also includes provisions that describe a right to be free from discrimination on specified grounds. See, e.g., Health & Safety Code § 1562.01(h)(2)(C).

<sup>25</sup> E.g., Lab. Code § 1156.3(h)(2) (incorporating definitions and characteristics from the California Fair Employment and Housing Act by reference).

not intended as providing a lower level of discrimination protection. Instead, it seems likely that legislative efforts to clarify the scope of discrimination prohibitions focused on those prohibitions with the broadest impact (in the areas of housing, business establishments, education, and employment) and other provisions simply may not have been updated accordingly.

The Commission expressed interest in providing a statutory rule that clarifies the scope of California’s sex discrimination prohibitions. Such a rule could help ensure a uniform understanding of the scope of California laws governing sex discrimination. This discussion presents questions on how such a provision should be crafted.

#### *Character of Provision*

While the overall study has a broader sex equality focus, the staff is envisioning this initial reform as focused on laws related specifically to sex discrimination. This reform would be intended to clarify the scope of California’s sex discrimination prohibitions and protections against discrimination. In addition, this reform would be seeking to ensure that sex discrimination has a consistent and understood meaning throughout California law.

The staff considered the possibility of simply defining the term “sex” to have a broader scope.<sup>26</sup> However, in looking at the California laws that include the term “sex,” the staff found that this term is used in many different contexts throughout the codes and a broader definition (including gender identity, pregnancy, sexual orientation) appears to be inappropriate in numerous situations.<sup>27</sup>

While the rule would be akin to a definition, the rule would be focused on “sex discrimination” or “discrimination on the basis of sex” (e.g., specifying that sex discrimination includes, but is not limited to, discrimination on the following bases: gender, including gender identity and gender expression; sexual orientation; pregnancy and related conditions ...). The staff expects that the exact drafting of the rule could be drawn in part from California’s existing broad discrimination rules.

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<sup>26</sup> See, e.g., Civ. Code § 51(e)(5) (“‘Sex’ includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. ‘Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex, and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”).

<sup>27</sup> See, e.g., Civ. Code § 1669.5(a) (“Any contract for the payment of money or other consideration to a minor who has been alleged to be the victim of an unlawful sex act ... by the alleged perpetrator of that unlawful sex act ... entered into on or after the time of the alleged unlawful sex act, and providing for any payments to be made more than one year after the date of the execution of the contract, is void as contrary to public policy”); Elec. Code § 7603 (“Each delegate to the state convention shall appoint to membership on this committee one voter of the same sex as the delegate and two voters of the opposite sex. ...”); Fish & Game Code § 91 (“‘Discards’ means fish that are taken in a fishery but are not retained because they are of an undesirable species, size, sex, or quality, or because they are required by law not to be retained.”).

**Does the Commission agree with this proposed reform approach? Does the Commission have different or further direction to the staff on crafting this reform?**

*Location of Backstop Provision*

The staff has considered possible locations for codifying a statutory rule of this type. Given the intended ongoing effect of this rule, the staff would recommend that the Commission propose statutory codification of the rule (as opposed to including the rule in an uncodified provision).

The staff did further research to identify where in the California codes statutory provisions prohibiting sex discrimination are located. In addition to the Civil Code (business establishments), the Education Code, and the Government Code (housing and employment), discrimination prohibitions (or protections against discrimination) were found in several of the California codes including the Business and Professions Code, Health and Safety Code, Insurance Code, Labor Code, Public Contract Code, and the Welfare and Institutions Code.

The staff sees a few options for where a statutory rule could be codified:

- Enact a single provision that applies across all California codes. (Such a provision might be located in the Civil Code or Government Code, perhaps in proximity to one of California's existing anti-discrimination laws).
- Enact identical provisions in each code.
- Enact identical provisions in each code that currently contains a discrimination prohibition.
- Enact functionally identical provisions that apply more narrowly where discrimination protections are found in the codes (e.g., the rule might apply to a chapter of the Business and Professions Code, a single section in Public Utilities Code, etc.). (These provisions may need to be adjusted somewhat based on their application and to conform to existing statutory language).

Overall, the staff understands the concept of a statutory backstop as a provision having broad scope. For this reason, the staff believes that the rule should have broad application and should not simply be incorporated into the individual, existing discrimination prohibitions. Nor does the staff believe it would be wise to focus the Commission's efforts only on the codes that have existing discrimination protections (i.e., future enactments in other codes should also be subject to the rule).

While the staff sees value in a single statutory provision that applies to all California codes (to promote uniformity and limit possible future discrepancies in the rules applicable in different codes), the staff has yet to find an example of a statutory provision with such broad application. In addition, the staff recognizes the practical, usability concerns of

codifying a single rule that applies across multiple codes (i.e., places a burden on users to find an applicable rule that located in a different code). Given those considerations, the staff has reservations about the practicality of this approach. If the Commission is potentially interested in pursuing this option, the staff will conduct further research and speak to the Office of Legislative Counsel about whether and how such an approach could be implemented. **Does the Commission want the staff to look further into the possibility of crafting a single statutory provision that would apply across multiple codes?**

Based on the information the staff has gathered to date, the staff would recommend enacting identical provisions in each code, possibly in initial “General Provisions” or “Preliminary Provisions” often found at the beginning of the codes.

*Expressly Nonexclusive*

Based on prior Commission discussions, the staff intends to craft the rule as expressly nonexclusive (i.e., sex discrimination “includes, but is not limited to” discrimination on the following grounds...). This language could help ensure that the rule would serve as a floor for identifying sex discrimination but would not preclude a finding of sex discrimination on grounds that are not expressly identified in the rule.

*Declarative of Existing Law*

The Commission should consider whether to include language in its proposed reform specifying that the rule is understood to be declarative of existing law.<sup>28</sup> A statement to this effect could help ensure that the enactment of this provision is not understood as changing the law (i.e., to avoid a possible implication that sex discrimination was narrower before the enactment of the rule).

As indicated above and discussed in more detail earlier in this study, the scope of sex discrimination, under the federal employment discrimination law, has been litigated over the years. For the most part, the U.S. Supreme Court, in interpreting the federal statute, has concluded that the sex discrimination prohibition encompasses many of the characteristics that the Commission has concluded are within the scope of its work.<sup>29</sup> And, California’s broad anti-discrimination laws have been amended to provide express protection against

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<sup>28</sup> See, e.g., Gov’t Code § 12940(j)(2) (“The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.”).

<sup>29</sup> See generally Memorandum 2023-10.

For pregnancy, the federal statute was amended in 1978 to make clear that pregnancy discrimination was a form of sex discrimination (after a U.S. Supreme Court decision to the contrary). See *id.* at 16-19; see also Civ. Code § 51(e)(5) (defining sex for Unruh Civil Rights Act to include “pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.”); Gov’t Code § 12926(r)(1)(A)-(C) (similar for California Fair Employment and Housing Act).



discrimination based on these characteristics.<sup>30</sup>

**Would the Commission like to include language in the proposed reform specifying that the rule is declarative of existing law?**

### NEXT STEPS

The staff will work on drafting a tentative recommendation that proposes a statutory reform consistent with the Commission's directions.

Respectfully submitted,

Kristin Burford  
Chief Deputy Director

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<sup>30</sup> See Memorandum 2023-21.