#I-100

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED TENTATIVE RECOMMENDATION

Equal Rights Amendment

June 2025

The purpose of this revised tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines the content of the recommendation it will submit to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS REVISED TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **July 31, 2025**.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this revised tentative recommendation is not necessarily the report the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

In 2022, the Legislature adopted Senate Concurrent Resolution 92 (2022 Cal. Stat. ch. 150) directing the Commission to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]" The Legislature specifically requested the Commission to study, report on, and prepare recommended legislation to revise California law to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex. In doing so, the Legislature directed the Commission to consult with experts and interested parties, including, but not limited to, members of the academic community and research organizations.

The Commission commenced work on this topic in 2022 in two stages: first, the Commission examined the possibility of enacting a provision in state law to achieve the effect of the Equal Rights Amendment, and second, the Commission used the sex equality provision to evaluate existing California law, to identify and remedy defects.

Following this study, the Commission is tentatively proposing a sex equality provision for each California code section that clarifies the existing definitions of sex discrimination. The Commission tentatively concludes there are no existing laws with discriminatory language or disparate impacts appropriate for revision at this time.

EQUAL RIGHTS AMENDMENT

EQUAL RIGHTS AMENDMENT

BACKGROUND

LEGISLATIVE ASSIGNMENT

In 2022, the Legislature adopted Senate Concurrent Resolution (SCR) 92 (2022 Cal. Stat. ch. 150) directing the Commission to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]" 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….[1]

The study's underlying rationale was explained by the resolution's co-sponsors[2] in SCR 92's legislative policy committee analysis:

> Californians have advocated tirelessly for women's equal rights under the law. Indeed, California was among the earliest states to ratify the Equal Rights Amendment to the United States Constitution (ERA), doing so in the same year that Congress approved it—1972. The ERA states simply: "Equality of rights under the law shall not be denied or abridged, by the United States or any state on account of sex."
>
> Nationally, the fight for women's equality is ongoing. Upon Virginia's ratification of the ERA on January 27, 2020, the ERA satisfied the two requirements imposed by Article V of the U.S. Constitution to become an amendment: i) approval of two-thirds of each chamber of Congress and ii) ratification by three-fourths of the states. However, the U.S. Archivist, an appointed official, declined to certify and formally publish the ERA, citing a Department of Justice memo that advised a ratification timeline in the ERA's preamble was binding. The final three states to ratify the ERA filed suit to require that the Archivist perform his ministerial duties. That case is now pending in a federal appellate court, where 16 distinguished

1. 2022 Cal. Stat. res. ch. 150, SCR 92.
2. California Women's Law Center and the Feminist Majority Foundation.

> constitutional law scholars have submitted an amicus brief that argues the timeline in the preamble does not render subsequent ratifications invalid. In addition, both chambers of the U.S. Congress introduced joint resolutions in January 2021 to eliminate the ratification deadline noted in the preamble of the ERA; the House resolution passed in March 2021.
>
> This resolution seeks to ensure the principles of gender equality already enshrined in the California Constitution, and soon to be reflected in the U.S. Constitution, are not violated by the language or impact of California's laws. At a moment when these principles remain contested in national debate, this resolution clearly annunciates that the California legislature upholds the legal rights and equal dignity of its citizens regardless of sex.[3]

The Legislature's primary directive to the Commission was to ensure California's laws align with the ERA. In doing so, the Legislature directed the Commission propose legislation that effectuates the ERA's goals and suggest remedies for existing laws with discriminatory language or disparate impacts on the basis of sex. The Commission approached the study in two stages: first, the Commission examined the possibility of codifying a provision in state law to achieve the effect of the ERA ("the sex equality provision"), and second, the Commission would apply that codified provision to existing California law to remedy defects (i.e., provisions that have discriminatory language or disparate impacts).

DEFINING "SEX EQUALITY"

The Commission first determined the scope of the ERA's guarantee in considering how to codify its effects. Section 1 of 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."[4] Understanding the ERA's effect required close analysis of the meaning of "equality of rights" and "on account of sex."

3. Assembly Committee on Judiciary Analysis of SCR 92 (August 4, 2022), pp. 6-7.

4. H.J. Res. 208 (1972), 86 Stat. 1523. The remainder of the ERA provides:

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC. 3. This amendment shall take effect two years after the date of ratification. See also Congressional Research Service, The Proposed Equal Rights Amendment: Contemporary Ratification Issues pp. 14-15, R42979 (Updated Dec. 23, 2019) ("CRS Report"), (reproducing text of House Joint Resolution 208 from 92nd Congress, 1972).

EXPLORING "EQUALITY OF RIGHTS" THROUGH EQUAL PROTECTION LAW

The ERA's guarantee of "[e]quality of rights under the law"[5] is similar to the language in the state and federal constitutions' equal protection clauses, which also promise equal protection of the laws.[6]

In assessing whether there has been a denial of equal protection, courts have developed different tests depending on the particular right or classification at issue.

In general, equal protection case law assesses equal protection claims using one of the following levels of scrutiny, listed in order from most to least stringent:

- *Strict scrutiny.* Strict scrutiny is used when a fundamental right or suspect classification is at issue in the case. Strict scrutiny requires that the law be necessary to satisfy a "compelling state interest" and that the law be "narrowly tailored" to achieve that interest.[7]
- *Intermediate scrutiny*. Intermediate scrutiny is used for certain protected classes that are not deemed suspect (in some cases, referred to as quasi-suspect). Intermediate scrutiny requires an "important government interest" and that the law further that interest by means "substantially related" to the interest.[8]
- *Rational basis review*. Rational basis review is used when no fundamental rights, suspect classes, or protected classes are at issue. To satisfy this test, the law must further a "legitimate state interest" and there must be a "rational connection" between the law and the interest.[9]

These distinctions are helpful to understand how courts scrutinize equal protection claims, although not all equal protection case law fits cleanly within these tiers.[10]

THE U.S. CONSTITUTION'S EQUAL PROTECTION CLAUSE

The Fourteenth Amendment of the U.S. Constitution provides, in part:

> …[N]or shall any State … deny to any person within its jurisdiction the

5. See supra fn. 4.

6. U.S. Const. amend. XIV ("No State shall … deny to any person within its jurisdiction the equal protection of the laws."); Cal. Const. art. I § 7 ("A person may not be … denied equal protection of the laws….").

7. See generally Cornell Law School Legal Information Institute, "Strict scrutiny;" see also, e.g., *Adarand Constructors v. Peña* (1995) 515 U.S. 200.

8. See generally Cornell Law School Legal Information Institute, "Intermediate scrutiny;" see also, e.g., *Craig v. Boren* (1976) 429 U.S. 190; *United States v. Virginia* (1996) 518 U.S. 515.

9. See generally Cornell Law School Legal Information Institute, "Rational basis test."

10. See generally, e.g., J. Mitten et al., Equal Protection, 23 Geo. J. Gender & L. 267, 277–78 (2022) (describing a fourth tier of "active" rational basis or rational basis "with bite," as well as broad alternative understanding of the equal protection case law as involving a "fluid, fact-intensive standard").

equal protection of the laws.[11]

Under the U.S. Constitution equal protection case law, sex-based classifications are subject to intermediate scrutiny.[12] To satisfy intermediate scrutiny, the law must further an "important government interest" and do so by means that are "substantially related to that interest."[13]

The intermediate scrutiny test was described in the U.S. Supreme Court decision in *Craig v. Boren*.[14] That case involved a challenge to the different treatment of males and females under an Oklahoma law that prohibited the sale of 3.2% beer to males under 21 and females under 18.[15] In summarizing the previous case law, the decision set out an intermediate scrutiny standard:

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed*, the objectives of "reducing the workload on probate courts" and "avoiding intrafamily controversy" were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. And only two Terms ago, *Stanton v. Stanton*…, expressly stating that *Reed v. Reed* was "controlling" held that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds.
>
> *Reed v. Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations concerning the financial position of servicewomen and working women could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it

11. U.S. Const. amend. XIV, § 1.
12. See generally supra fn. 10.
13. See *Craig v. Boren* (1976) 429 U.S. 190, 191-92.
14. 429 U.S. 190.
15. Id. at 191-92.

> was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.[16]

More recently, in *United* States *v. Virginia* (1996), the U.S. Supreme Court considered a constitutional challenge to the Virginia Military Institute's male-only admissions policy.[17] In that case, the majority opinion (drafted by former Justice Ginsberg) applied what some have described as a more exacting level of intermediate scrutiny (focusing on the requirement of an "exceedingly persuasive" justification, from language in earlier Supreme Court case law[18]). Specifically, the decision states:

> Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.
>
> The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."
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> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and

16. Id. at 197-99 (citations omitted).

17. *United States v. Virginia* (1996) 518 U.S. 515.

18. See *Miss. Univ. for Women v. Hogan* (1982) 458 U.S. 718, 724 (citing *Kirchberg v. Feenstra* (1981) 450 U.S. 455 and *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256).

> capacities of our Nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.[19]

In specifying that any sex-based distinction "must not rely on overbroad generalizations about … males and females," the opinion suggests that distinctions based on sex stereotypes would also be subject to intermediate scrutiny. And, in noting situations where sex classifications would be permitted (e.g., to "compensate…for particular economic disabilities" suffered by women), the opinion implicitly rejects an anticlassification view of equal protection.

In a dissenting opinion in this case, former Justice Scalia suggested that this decision applied a higher level of scrutiny to sex-based equal protection claims than previous case law, and indicated that the better course would be to reduce the level of scrutiny for sex-based classifications to rational basis review.[20] In a later interview, Justice Scalia suggested that the U.S. Constitution does not prohibit sex discrimination at all.[21]

In short, under the U.S. Constitution, sex- and gender- based equal protection claims have been subject to an intermediate level of scrutiny, although the case law indicates some disagreement about the precise contours of the intermediate scrutiny test. While some on the Supreme Court have suggested that the level of scrutiny for these claims should be increased, others have suggested the opposite. Finally, it is worth noting that the U.S. Supreme Court, considering an equal protection claim around the time that Congress passed the ERA, discussed how the ERA should be understood to affect the level of scrutiny accorded to sex- and gender- based equal protection claims.[22] This decision came prior to the U.S. Supreme Court's application of the intermediate scrutiny test in *Craig v. Boren* (discussed above).

Limitations on the Application of Intermediate Scrutiny under the Equal Protection Clause

The Equal Protection Clause does not include the word "sex," and under equal protection case law, many characteristics typically associated as within the scope of

19. *United States v. Virginia* (1996) 518 U.S. 515, 532-34 (citations and footnotes omitted).

20. See *United States v. Virginia*, 518 U.S. at 574-75 (Scalia, J., dissenting) ("[I]f the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review.").

21. See Stephanie Condon, "Scalia: Constitution Doesn't Protect Women or Gays from Discrimination," CBS News (Jan. 4, 2011), (Scalia is quoted as saying, "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.").

22. See plurality and concurring opinions in *Frontiero v. Richardson* (1973) 411 U.S. 677.

"sex" have either been assessed using a lower level of scrutiny in the equal protection jurisprudence or the U.S. Supreme Court has either not considered or not clearly identified the level of scrutiny that would apply.

For example, pregnancy discrimination has been scrutinized at a lower level in equal protection case law. In the 1974 case *Geduldig v. Aiello*, the U.S. Supreme Court declined to apply intermediate scrutiny to a claim involving the exclusion of pregnancy-related disability from a disability insurance program, noting that:

> [T]his case is thus a far cry from cases like *Reed v. Reed* [challenging a law that gave preference to males to be named estate administrators] and *Frontiero v. Richardson* [involving different standards for male and female military spouses to be deemed dependents and receive benefits] involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[23]

It is worth noting, however, that the disability program at issue did not simply exclude all sex-specific conditions.[24] More recent case law cites to *Geduldig* for the proposition that equal protection claims involving pregnancy do not receive heightened scrutiny.[25]

Some Courts of Appeal have subjected equal protection claims related to sexual orientation and gender identity to intermediate scrutiny, or a similar heightened

23. *Geduldig v. Aiello* (1974) 417 U.S. 484, 496 n. 20 (citations omitted).

24. *Geduldig*, 417 U.S. at 499-501 (Brennan, J., dissenting).

25. See, e.g., *Dobbs v. Jackson Women's Health Org*. (2022) 597 U.S. 215, 236-237 (citing *Geduldig* for the proposition that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'").

scrutiny test.[26] The Supreme Court has yet to directly address the question of what level of scrutiny applies to such claims.[27]

One important effect of ERA ratification would be increasing the level of scrutiny accorded to sex-based equal protection claims under the U.S. Constitution — often noted in materials discussing the ERA's effects.[28] This effect was also acknowledged in the opinions in the U.S. Supreme Court's 1973 case, *Frontiero v. Richardson*.[29]

The ERA, however, is an entirely separate constitutional protection. While adjusting the treatment of sex-based equal protection claims may be a practical effect of the ERA, the ERA does not itself adjust the language of the U.S. Constitution's Equal Protection Clause, nor should its effects be understood only in the context of changing the treatment of sex-based equal protection claims.

OTHER U.S. CONSTITUTIONAL PROTECTIONS RELEVANT TO SEX EQUALITY

Under the U.S. Constitution, the Equal Protection Clause is not the only provision that extends protections related to sex equality.

In general, although the U.S. Constitution does not contain express language about privacy, the constitutional case law has recognized that the Constitution

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26. See, e.g., *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312; *Windsor v. United States* (2nd Cir. 2012) 699 F.3d 169, aff'd 570 U.S. 744; *SmithKline Beecham Corp. v. Abbott Laboratories* (9th Cir. 2014) 740 F.3d 471 (referring to the test as "heightened scrutiny"); see also J.P. Cole, Congressional Research Service, Transgender Students and School Bathroom Policies: Equal Protection Challenges Divide Appellate Courts, LSB10902 (Jan. 17, 2023).

27. See *Windsor v. United States* (2013) 570 U.S. 744, 769-70 (finding that the Defense of Marriage Act violated equal protection without identifying level of scrutiny applied); *Lawrence v. Texas* (2003) 539 U.S. 558, 580 (O'Connor, J., concurring) (noting that the Court, in striking down laws that exhibit "a desire to harm a politically unpopular group," has applied "a more searching form of rational basis review."); *Romer v. Evans* (1996) 517 U.S. 620, 632 (concluding that a Colorado constitutional provision seeking to prohibit state or local government action to extend protections on the basis of sexual orientation would fail "even th[e] conventional inquiry [of rational basis review]" as it "lacks a rational relationship to legitimate state interests").

28. See generally, e.g., R. Bleiweis, Center for American Progress, The Equal Rights Amendment: What You Need to Know (Jan. 29, 2020); K. Fossett, What Would the ERA Change? Politico (Feb. 4, 2022), J. Neuwirth, Equal Means Equal: Why the Time for an Equal Rights Amendment is Now (2015).

29. Compare *Frontiero v. Richardson* (1973) 411 U.S. 677, 688 (plurality opinion, citing to Congress' passage of the ERA and other legal protections for sex, states "[w]ith these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.") with id. at 692 (Powell, J., concurring) (opinion concurring in the judgment declines to apply strict scrutiny to the claim, noting "[t]here is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The [ERA], which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.").

provides some protection for autonomy privacy (i.e., the right of an individual to make decisions about important personal matters free from government interference).[30]

The exact contours of this right are difficult to define. The U.S. Supreme Court's assessment of the relevant constitutional language for the privacy right, as well as the scope of that right in practice, has changed over time. A decision in a 1965 case involving the right to contraceptives discussed "specific guarantees in the Bill of Rights hav[ing] penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[31] The constitutional privacy right is also discussed as an aspect of liberty protected by the Due Process Clauses[32] or a component of "substantive due process."[33]

Below is an excerpt from the 1973 U.S. Supreme Court decision in *Roe v. Wade*, summarizing the prior case law on the constitutional privacy right.

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [an 1891 case], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.[34]

The constitutional privacy right case law has addressed a variety of issues,

30. See generally Justia, "Privacy Rights and Personal Autonomy Legally Protected by the Constitution," last reviewed October 2024.

31. *Griswold v. Connecticut* (1965) 381 U.S. 479, 484.

32. See also U.S. Const. amends. 5, 14.

33. "Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation." E. Chemerinsky, Substantive Due Process, 15 Tuoro L. Rev. 1501, 1501 (1999).

34. *Roe v. Wade* (1973) 410 U.S. 113, 152-54, overruled by *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215, and holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey* (1992) 505 U.S. 833.

including access to contraception,[35] access to abortion,[36] sexual privacy rights,[37] and the right to marry.[38]

However, the U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* dramatically shifted the jurisprudence in this area, expressly overruling two cases involving abortion: *Roe v. Wade* and *Planned Parenthood v. Casey*.[39] In addition, a concurring opinion in that case called into question the constitutional privacy right protections more broadly. Specifically, the concurring opinion provided, in part:

> The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold v. Connecticut* (right of married persons to obtain contraceptives); *Lawrence v. Texas* (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges* (right to same-sex marriage), are not at issue. The Court's abortion cases are unique and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised[.]" Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."
>
> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.[40]

California Constitution's Equal Protection Clause

California's equal protection doctrine generally accords a higher level of scrutiny to sex-based equal protection claims.

California's Constitution specifies: "A person may not be … denied equal protection of the laws[.]"[41]

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35. See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479; *Eisenstadt v. Baird* (1972) 405 U.S. 438.

36. See, e.g., *Roe v. Wade* (1973) 410 U.S. 113; *Planned Parenthood of Se. Pennsylvania v. Casey* (1992) 505 U.S. 833; *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215.

37. See, e.g., *Bowers v. Hardwick* (1986) 478 U.S. 186; *Lawrence v. Texas* (2003) 539 U.S. 558.

38. See, e.g., *Loving v. Virginia* (1967) 388 U.S. 1; *Zablocki v. Redhail* (1978) 434 U.S. 374; *Obergefell v. Hodges* (2015) 576 U.S. 644.

39. (2022) 597 U.S. 215, 302. ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

40. Id. at 332-333 (Thomas, J., concurring) (citations and footnote omitted).

41. Cal. Const. art. I § 7(a).

When evaluating equal protection claims under the state Constitution, California courts have treated sex-based classifications as suspect classifications and subjected such classifications to strict scrutiny.[42]

In a 2008 California Supreme Court case involving the right to marry, the court applied strict scrutiny to equal protection claims involving sexual orientation, concluding that sexual orientation was itself a suspect classification for equal protection purposes.[43]

California Constitutional Protections Relevant to Sex Equality

The California Constitution has multiple provisions relevant to the issue of sex equality more broadly. Several such provisions are noted briefly below, presented in the order that they are found in the California Constitution.

Right to Privacy

California's Constitution includes an express right to privacy, enacted in 1972 (Proposition 11).[44] That provision provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring,

42. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 ("[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution…." (citations omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 ("In *Sail'er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that 'classifications based upon sex should be treated as suspect.' *Sail'er Inn* thus clearly established the principle that gender-based differentials are to be treated as 'suspect classifications' which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers' Comp. Appeals Bd*., the court stated that 'the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,' and in *Hardy v. Stumpf*, the court acknowledged that '(c)lassifications predicated on gender are deemed suspect in California.'" (citations omitted)); *Boren v. Dep't of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 ("According to California decisional law, a statute establishing 'suspect classifications' or trenching upon 'fundamental interests' is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect." (citations omitted)).

43. *In re Marriage Cases* (2008) 43 Cal.4th 757, 783-84 ("[W]e conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.").

44. See Cal. Const. art. I § 1.

> possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.[45]

It is particularly important to note that California's constitutional protection of privacy is separate and distinct from any protection of privacy derived from the federal constitution.[46] As one commentator described:

> The California constitutional right to privacy is distinct from the federal right. Like its federal counterpart, the state right to privacy extends to both [] informational and autonomy privacy.47 Yet the federal right is only implied, while the California right is codified in the state constitution. The California Supreme Court has taken this to suggest the state right should be broader than its federal counterpart. As a result, in theory Californians have privacy protections that extend beyond the "penumbral" protections under the federal charter, in both liberty and informational privacy.[48]

Reproductive Freedom

In the aftermath of the U.S. Supreme Court's decision in *Dobbs*, California enacted a constitutional provision in November 2022 to protect reproductive freedom. That provision provides:

> The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection. [49]

Protection for Employment and Professions

California's Constitution protects the right to pursue employment and enter professions. The provision expressly includes sex as a protected class:

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45. Id.

46. See Cal. Const. art. I § 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."); see also generally D.A. Carrillo et al., California Constitutional Law: Privacy, 59 San Diego L. Rev. 119 (2022).

47. Informational and autonomy privacy have been described as follows: Informational privacy involves "'interests in precluding the dissemination or misuse of sensitive and confidential information;" and 'autonomy privacy[]' … encompasses the 'interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.'" D.A. Carrillo et al., 59 San Diego L. Rev. at 136 (quoting Justice Lucas' opinion in *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1).

48. R.R. Aquino, California's constitutional privacy guarantee needs a reset, SCOCAblog (Apr. 9, 2021).

49. Cal. Const. art. I § 1.1; see also 2022 Cal. Stat. res. ch. 97 (SCA 10 (Atkins)).

> A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.[50]

This provision has been cited as an example of a state constitutional equal rights amendment.[51] However, it is important to note that the tailored scope of this provision, focusing specifically on employment and professions, is significantly different from the federal ERA, which addresses equal rights more generally.

Prohibition on Discrimination or Preferential Treatment for Public Employment, Public Education, and Public Contracting

In 1996, California enacted Proposition 209. This provision provides in part:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[52]

Proposition 209 effectively prohibits affirmative action programs in the areas specified.[53] However, the Legislative Analyst's Office noted that the measure provides exceptions to the ban on preferential treatment in the following situations:

- To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.[54]

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50. Cal. Const. art. I § 8.

51. See generally, e.g., Brennan Center for Justice, "State-Level Equal Rights Amendments," last updated December 6, 2022.

52. Cal. Const. art. I § 31(a).

53. See Legislative Analyst's Office Analysis of Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (Nov. 1996), (hereafter, "LAO Analysis of Prop 209") ("This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered 'preferential treatment' and (2) whether federal law requires the continuation of certain programs."); see also, e.g., T. Watanabe, "California banned affirmative action in 1996. Inside the UC struggle for diversity," L.A. Times (Oct. 31, 2022).

Regarding the effects of Proposition 209 in California, see generally materials discussed at https://www.ucop.edu/academic-affairs/prop-209/.

54. See LAO Analysis of Prop 209, supra fn. 73.

Admission to University of California

The California Constitution includes a provision related to the University of California that provides, in part, that: "[N]o person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex."[55]

EXPLORING "ON ACCOUNT OF SEX"

Section 1 of 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."[56] This portion of the report will explore the meaning of "on account of sex."

TERMINOLOGY

Terminology relating to "sex" includes gender, sexual orientation, and sex or gender stereotypes. While related, these terms are distinct concepts.

"Sex"

Traditionally in western cultures, "sex" has been understood as referring to biological sex, which was regarded as a binary characteristic whereby an individual would be classified as either male or female based on biological attributes.

The website for the U.S. Centers for Disease Control ("CDC") currently provides the following definition for "sex": "[a]n individual's biological status as male, female, or something else. Sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes."[57]

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55. Cal Const. art. IX § 9(f).

56. H.J. Res. 208 (1972), 86 Stat. 1523. The remainder of the ERA provides:

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC. 3. This amendment shall take effect two years after the date of ratification.

See also Congressional Research Service, The Proposed Equal Rights Amendment: Contemporary Ratification Issues, pp. 14-15, R42979 (Updated Dec. 23, 2019) ("CRS Report"), (reproducing text of House Joint Resolution 208 from 92nd Congress, 1972).

57. See CDC Adolescent and School Health. This webpage includes the following disclaimer:

Per a court order, HHS is required to restore this website as of 11:59PM ET, February 14, 2025. Any information on this page promoting gender ideology is extremely inaccurate and disconnected from the immutable biological reality that there are two sexes, male and female. The Trump Administration rejects gender ideology and condemns the harms it causes to children, by promoting their chemical and surgical mutilation, and to women, by depriving them of their dignity, safety, well-being, and opportunities. This page does not reflect biological reality and therefore the Administration and this Department rejects it.

The "something else" in the CDC's definition highlights the growing awareness about the incomplete nature of the sex binary and the wider biological variation of individuals, whose biological traits do not fully align with this binary.[58] "Intersex" is an "umbrella term for differences in sex traits or reproductive anatomy."[59]

"Gender"

Very generally, while "sex" involves biological traits, "gender" involves social or cultural characteristics or expectations, which can involve binary categories as discussed above.[60] For instance, the World Health Organization defines gender as "the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviors and roles associated with being a woman, man, girl or boy, as well as relationships with each other."[61]

Gender is also used in the context of gender identity and gender expression. Gender identity refers to "One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth."[62] This can include a wider range of options that may combine different masculine and feminine characteristics, reject the binary notion of gender, or encompasses multiple genders.[63] Gender expression is "[h]ow an individual chooses to present their gender to others through physical appearance and behaviors, such as style of hair or dress, voice, or movement."[64] Gender expression can also

58. See generally interACT, "What is intersex?" last updated Jan. 26, 2021; C. Ainsworth, Sex Redefined, Nature Magazine (Oct. 22, 2018) (article includes a spectrum with 9 categories of biological sex; the spectrum is bookended by the "typical male" and "typical female" categories); see also A.C. Edens Hurst, "Differences of sex development," Medline Plus, (defining "intersex" and identifying four intersex categories), reviewed March 12, 2024.

59. See interACT, "What is intersex?" last updated Jan. 26, 2021.

60. See, e.g., Becker T., Chin M., Bates N, ed., Measuring Sex, Gender Identity, and Sexual Orientation. National Academies Press (2022).

61. World Health Organization, Gender and health. This source also states:

> Gender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs. Gender and sex are related to but different from gender identity. Gender identity refers to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth.

62. See Human Rights Campaign, Resources, Sexual Orientation and Gender Identity Definitions.

63. See generally, e.g., Human Rights Campaign, Resources, Glossary of Terms; PFLAG, PFLAG National Glossary; It Gets Better, Glossary; see also Laurel Wamsley, A Guide to Gender Identity Terms, NPR (2021).

64. CDC, Adolescent and School Health, Terminology; see also fn. 59, supra.

relate to gender stereotypes (i.e., when an individual's gender expression is different from the stereotypical expectations associated with gender).[65]

"Cisgender" and "transgender" refer to the relationship between an individual's assigned sex and gender identity.[66] Different gender categories can recognize that a person's gender identity and gender expression may change over time and can include an explicit rejection of the idea of a binary assignment.[67] And, some gender identities are culture specific.[68]

"*Sexual Orientation"*

Sexual orientation is defined as "the desire one has for emotional, romantic, and/or sexual relationships with others based on their gender expression, gender identity, and/or sex."[69] "[S]exual orientation is usually discussed in terms of three categories: heterosexual (having emotional, romantic or sexual attractions to members of the other sex), gay/lesbian (having emotional, romantic or sexual attractions to members of one's own sex) and bisexual (having emotional, romantic or sexual attractions to both men and women)."[70] But, as in the cases above, the traditional (binary-focused) understanding of sexual orientation is expanding to encompass a more diverse set of identities that reflect our growing understanding of the

65. See, e.g., id. (defining gender nonconforming as "[t]he state of one's physical appearance or behaviors not aligning with societal expectations of their gender (a feminine boy, a masculine girl, etc.)"; see also supra, fn. 59.

66. See generally American Psychological Association (APA), APA Dictionary of Psychology, "cisgender," (defining "cisgender" as "having or relating to a gender identity that corresponds to the culturally determined gender roles for one's birth sex"); "transgender,"(defining "transgender" as "having or relating to a gender identity that differs from the culturally determined gender roles for one's birth sex.").

67. See, e.g., E. Matsuno et al., Am. Psychol. Ass'n Div. 44 (Soc'y for the Psychol. of Sexual Orientation and Gender Diversity), Nonbinary Fact Sheet, ("The term nonbinary is used both as an umbrella term and a gender identity label to refer to people whose gender does not fall within the binary categories of man and woman. … There are several different identity labels and experiences that fall under the nonbinary umbrella. For example, some people experience an absence of gender (e.g., agender, genderless), others experience a presence of multiple genders (e.g., bigender, pangender), others fluctuate between different genders (e.g., genderfluid, genderflux), or identify with third gender in-between or outside the gender binary (e.g., genderqueer, neutrois), and some partly identify with being a man or woman (e.g., demiboy, demigirl).").

68. See generally J.A. Clarke, They, Them, Theirs, 132 Harv. L. Rev. 894, 932 (Jan. 2019) ("Researchers highlight that nonbinary genders have existed 'across time and place' to challenge the view that humanity is naturally and inevitably divided into male and female categories. Historical and present-day examples include Indian Hijra, Thai Kathoey, Indonesian Waria, various Two-Spirit identities of First Nations tribes, and South American Machi identities, among others, each with a distinct meaning not reducible to man or woman."); A Map of Gender-Diverse Cultures, PBC Independent Lens, October 2023.

69. It Gets Better, Glossary.

70. APA, Understanding sexual orientation and homosexuality (2008).

complexities of sex, gender, and orientation.[71]

"Sex or Gender Stereotypes"

Sex or gender stereotypes are cultural and societal expectations about attire, behavior, and related matters that involve a person's perceived sex or gender. Much of the discussion of sex or gender stereotypes focuses on stereotypes connected to the male/female binary.

The website of the United Nations Office of the High Commissioner for Human Rights includes a discussion of gender stereotypes, which provides, in part:

> A gender stereotype is a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by, or performed by, women and men. A gender stereotype is harmful when it limits women's and men's capacity to develop their personal abilities, pursue their professional careers and/or make choices about their lives.
>
> Whether overtly hostile (such as "women are irrational") or seemingly benign ("women are nurturing"), harmful stereotypes perpetuate inequalities. For example, the traditional view of women as care givers means that child care responsibilities often fall exclusively on women.
>
> Further, gender stereotypes compounded and intersecting with other stereotypes have a disproportionate negative impact on certain groups of women, such as women from minority or indigenous groups, women with disabilities, women from lower caste groups or with lower economic status, migrant women, etc.
>
> …
>
> Wrongful gender stereotyping is a frequent cause of discrimination against women. It is a contributing factor in violations of a vast array of rights such as the right to health, adequate standard of living, education, marriage and family relations, work, freedom of expression, freedom of movement, political participation and representation, effective remedy, and freedom from gender-based violence.[72]

Gender stereotypes can involve broad expectations about an individual's societal role and responsibilities based on gender but can also involve specific expectations related to appearance and clothing choices.

FEDERAL STATUTES RELATED TO SEX DISCRIMINATION

Federal employment discrimination laws have a significant body of case law that address many key issues as to the scope of "sex."

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71. See Becker T., Chin M., Bates N., ed. Measuring Sex, Gender Identity, and Sexual Orientation, National Academies Press; APA style, Sexual Orientation (October 2024).

72. United Nations Human Rights, Office of the High Commissioner, Gender stereotyping.

The history and development of Title IX of the Education Amendments of 1972 ("Title IX"), the federal Equal Pay Act of 1963, and the federal Civil Rights Act of 1964 (and amendments of that Act by the Pregnancy Discrimination Act of 1978) provided a helpful context to inform the sex equality provision's development.

Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 ("Title IX") provides protections from discrimination based on sex "in education programs or activities that receive federal financial assistance."[73] On a national level, the law prohibits discrimination against students based on sex, while providing various exceptions, including for public educational institutions founded with a policy of admitting only students of one sex.[74]

Equal Pay Act of 1963

In 1963, Congress enacted the federal Equal Pay Act of 1963. Section 2 of the Act declares its purpose is to correct wage differentials based on sex.[75] The Act provides, in part,

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[76]

While this law was intended to be a sweeping remedy to address long-standing inequities in pay based on an "ancient, but outmoded belief" relating to male and female roles in society, the law's practical effect has been more limited in scope.[77]

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73. See generally U.S. Department of Education, Title IX and Sex Discrimination.

74. 20 U.S.C. 1681.

75. P.L. 88-38, 77 Stat. 56.

76. 29 U.S.C. § 206(d)(1).

77. See generally Nat'l Womens L. Center, Closing the "Factor Other than Sex" Loophole in the Equal Pay Act (Apr. 11, 2011); American Bar Association, The Paycheck Fairness Act.

One important way the Equal Pay Act's effect has been blunted is the broad interpretation that courts have accorded to the "factor other than sex" defense. Courts have found that employers may consider prior salaries as a "factor other than sex," thereby perpetuating existing sex-based salary inequities.[78] Some courts have even concluded that employers are not required to demonstrate that the "factor other than sex" offered to justify disparate treatment is related to a legitimate business purpose.[79]

Since 1997, federal legislation to address these issues, as well as others, has been introduced repeatedly, but has yet to become law.[80]

The Federal Civil Rights Act of 1964 (Title VII)

Title VII of the federal Civil Rights Act of 1964 ("Title VII") includes a provision that protects against sex discrimination in employment. That provision provides, in part:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…[81]

The scope of what constitutes "discriminat[ion] against any individual … because of … sex" has been heavily litigated, and the case law helps clarifies the definition.

Early on, courts and the Equal Employment Opportunity Commission ("EEOC"), the federal agency created to enforce Title VII,[82] considered the types of acts constituting discrimination because of sex. Initially, the courts and EEOC took a very narrow view, effectively finding that only rules treating the entire class of women differently than the entire class of men would constitute prohibited discrimination under the Act.

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78. See generally Nat'l Womens L. Center, Closing the "Factor Other than Sex" Loophole in the Equal Pay Act (Apr. 11, 2011).

79. Id.

80. See American Bar Association, The Paycheck Fairness Act; Text and summary of H.R. 7 (Paycheck Fairness Act) (2021-2022); H.R. 7, § 2(b)(4) ("The bona fide factor defense … shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue.").

81. 42 U.S.C. § 2000-e2(a).

82. See U.S. Equal Employment Opportunity Commission (EEOC), Timeline of Important EEOC events.

For instance, "the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory."[83]

And, initially, courts found that rules discriminating against married women or mothers did not constitute sex discrimination, as these classifications were purportedly based on marital status or being a parent.[84]

This narrow view of prohibited sex discrimination under Title VII was troubling to many and prompted organizing related to civil rights for women, including the founding of the National Organization for Women.[85]

2025 Executive Orders

On January 20, 2025, a new federal administration was sworn into office and issued a number of executive orders relevant to this study.[86] The staff concluded,

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83. See *Bostock v. Clayton County* (2020) 590 U.S. 644, 678 citing C. Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1340 (2012) (which, in turn, cites a Sept. 22, 1965 EEOC press release); see also National Organization for Women, Founding.

84. See generally C. Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 173-174. Compare, e.g., *Stroud v. Delta Air Lines, Inc.* (5th Cir. 1977) 544 F.2d 892, 893 (finding plaintiff suffered no sex discrimination being subject to a no marriage rule; "[C]ertain women stewardesses who are unmarried are favored over certain other women stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy.") with *Sprogis v. United Air Lines, Inc.* (7th Cir. 1971) 444 F.2d 1194, 1198, cert. denied 404 U.S. 991 ("It is irrelevant to this determination of discrimination that the no-marriage rule has been applied only to female employees falling into the single, narrowly drawn 'occupational category' of stewardess. Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position. Nor is the fact of discrimination negated by United's claim that the female employees occupy a unique position so that there is no distinction between members of opposite sexes within the job category."). See also Smithsonian National Air and Space Museum, Meet the Flight Attendants Who Fought for Equality During the Civil Rights Era, (2021).

85. See National Organization for Women, Founding.

86. Executive Order 14187, among other directives, defines "sex" as "an individual's immutable biological classification as either male or female." This executive order is subject to at least one legal challenge. See *Tirrell v. Edelbut* (U.S. D.N.H., 2025), Case No. 1:24-cv-00251.

Executive Order 14173, entitled Ending Illegal Discrimination and Restoring Merit-Based Opportunity, directs the Attorney General and the Secretary of Education to issue guidance to all institutions of higher learning, and state and local educational agencies receiving federal funds that they must comply with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) 600 U.S. 181. This order is subject to several legal challenges. See *National Association of Diversity Officers in Higher Education v. Trump*, No. 25-333 (D. Md.); *National Association of Diversity Officers in Higher Education v. Trump*, No. 25-1189 (4th Cir.); *National Urban League v. Trump*, No. 25-471 (D.D.C.); and *Chicago Women In Trades v. Trump*, No. 25-2005 (N. D. Ill.).

Executive Order 14187, entitled Protecting Children From Chemical and Surgical Mutilation, among other items, states "it is the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called 'transition' of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures." This order is subject to at two legal

however, these executive orders do not impact California law nor the staff's analysis of state law or staff recommendations.[87]

Sex-Plus Discrimination

In time, courts began to recognize that sex discrimination encompassed more than discrimination against the entire class of women and began to acknowledge nuances. For example, treating married women different from married men or mothers different from fathers could also constitute prohibited sex discrimination under Title VII. The shorthand term used to describe this type of discrimination against a distinct segment of women (e.g., mothers, married women) has been referred to as "sex-plus discrimination." Initially, the theory was that sex-plus discrimination was not "sex discrimination."[88]

In *Phillips v. Martin Marietta Corporation*, the U.S. Supreme Court considered a case in which an employer implemented different hiring policies for women and men who had pre-school age children. The *per curiam* opinion stated:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under s 703(e) of the Act. But that is a matter of evidence tending to show that the condition in question 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'[89]

While this decision acknowledged that a hiring policy that treated mothers differently from fathers could run afoul of the law, it also left open the possibility

challenges. See *Washington v. Trump*, (U.S. W.D. Wash., 2025) Case No. 2:25-cv-00244-LK (granting in part a preliminary injunction); *PFLAG Inc. v. Trump* (D. Md. 2025) Case No. 1:25-cv-00337-BAH.

Executive Order 14201, "Keeping Men Out of Women's Sports," declared it the policy of the United States to rescind funding for educational programs "that deprive women and girls of fair athletic opportunities…" But see Educ. Code § 221.5(f) which provides "A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records." This executive order is subject to at least one legal challenge. See *Tirrell v. Edelbut* (U.S. D.N.H., 2025), Case No. 1:24-cv-00251.

87. As a result of the Executive Orders, some, but not all, of the federal websites the previous memoranda for this study cited to have been changed, including removal of some content. When possible, the staff has found other sources for the information for this Tentative Recommendation.

88. See B. Friedan, Judge Carswell and the Sex Plus Doctrine, Testimony before the United States Senate Committee on the Judiciary (Jan. 29, 1970).

89. (1971) 400 U.S. 542, 544.

that the policy could be justified as a bona fide occupational qualification. Justice Marshall's concurring opinion addressed the bona fide occupational qualification exception and the need for the exception to be construed narrowly:

> …I cannot agree with the Court's indication that a 'bona fide occupational qualification reasonably necessary to the normal operation of' Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.
>
> But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.
>
> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.' Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a 'bona fide occupational qualification' was not intended to swallow the rule.
>
> That exception has been construed by the [EEOC], whose regulations are entitled to 'great deference,' to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex. Thus the exception would apply where necessary 'for the purpose of authenticity or genuineness' in the employment of actors or actresses, fashion models, and the like. If the exception is to be limited as Congress intended, the Commission has given it the only possible construction.
>
> When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.[90]

The *Phillips* case is generally recognized as the beginning of courts recognizing sex-plus discrimination as "sex discrimination" under Title VII.[91] In a 2009 legal journal article, the sex-plus doctrine under Title VII was summarized as follows:

90. Id. at 544-47 (Marshall, J., concurring) (citations omitted).

91. See, e.g., F. Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender,"and "Sexual Orientation" in Euro-American Law and Society, 83 Calif. L. Rev. 1, 148 (1995).

> Under Title VII, courts have recognized specific protections for some "sex-plus" plaintiffs, that is, employees who are classified on the basis of sex plus some ostensibly neutral characteristic. Minority women, married women, and women with young children receive special protection under the "sex-plus" doctrine but not all gender subclasses are protected. To prevail on a "sex-plus" claim, a plaintiff must demonstrate that individuals of the opposite sex who did not possess the plaintiff's additional characteristic were treated more favorably.[92]

The universe of characteristics constituting "plus" characteristics for the purposes of this doctrine remain unclear, however. Court decisions from the years following the *Phillips* decision declined to recognize certain "plus" considerations,[93] and a recent Supreme Court decision suggests a broad view of the types of characteristics that could be "plus" considerations.[94]

Pregnancy Discrimination

The legal history of Title VII's treatment of pregnancy has been more complicated, involving both litigation and legislation.

This complication seems to arise, at least in part, because pregnancy can only be experienced by certain workers.[95] As indicated below, courts seem to struggle to identify to whom a worker claiming pregnancy discrimination should be compared.[96] Viewed in one light, simply failing to address and accommodate pregnancy in the workplace could be, as in the material quoted below, described as facially nondiscriminatory, as the rule applies equally to everyone, but this ignores the very real practical consequences that such a rule will fall entirely on pregnant workers, a class that is necessarily circumscribed based on sex-based reproductive traits.

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92. L.C. Bornstein, Title VII of the Civil Rights Act of 1964, 10 Geo. J. Gender & L. 639, 643 (2009) (footnotes omitted). The example cited for a gender subclass that is not protected is men with long hair. Id. at n. 31 (citing *Willingham v. Macon Tel. Publ'g Co.* (5th Cir. 1975) 507 F.2d 1084, 1092).

93. See, e.g., *Smith v. Liberty Mut. Ins. Co.* (5th Cir. 1978) 569 F.2d 325, 327 (declining to find sex discrimination where "the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate'").

94. See, e.g., *Bostock v. Clayton County* (2020) 590 U.S. 644, 140 S.Ct. 1731, 1742 ("Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee.").

95. See generally C.M Cahill, The New Maternity, 133 Harv. L. Rev. 2221, 2284-88 (May 2020).

96. See generally W.W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. of L. & Social Change 325 (1984-85).

In 1976, the U.S. Supreme Court considered whether an employer's exclusion of pregnancy-related disabilities from its disability insurance "package" constituted sex discrimination under Title VII. The Court found, contrary to EEOC guidelines, that this exclusion was not sex discrimination:

> The "package" … is facially nondiscriminatory in the sense that "(t)here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." … For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.[97]

Not long after that decision, Congress amended Title VII by enacting the Pregnancy Discrimination Act of 1978.[98] That Act included a provision that expressly defined sex to include pregnancy. Specifically, the act added the following language to the law:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…..[99]

Although this law now makes clear that pregnancy discrimination is sex discrimination for the purposes of Title VII,[100] this law did not fully resolve the obligations of employers with respect to pregnant employees, as can be seen in later case law. In particular, courts were asked to consider the responsibility of an employer, under this law, to provide accommodations to pregnant workers in their workplace (e.g., a stool to avoid extended periods of standing) or assignments (e.g.,

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97. *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 138-39 (citations omitted).

98. See Pub. L. 95-555 (1978).

99. 42 U.S.C. § 2000e(k).

100. See J.C. Suk, Justice Ginsberg's Cautious Legacy for the Equal Rights Amendment, 110 Geo. L. J. 1391, 1410-11 (2022) ("In the years following the ERA's adoption by Congress, the number of women elected to Congress doubled, and they formed a bipartisan Congresswomen's Caucus in 1977, which organized efforts to advance legislation on women's issues, including pregnancy discrimination and the ERA deadline extension. Congress overruled Gilbert v. General Electric by adopting the Pregnancy Discrimination Act in 1978, in the same month that it voted to extend the ERA deadline. The statute provided that discrimination because of sex under Title VII encompassed discrimination because of pregnancy, childbirth, or related medical conditions. But the statutory intervention did not change the status of pregnancy discrimination under the Equal Protection Clause." (citations omitted)).

light duty assignment to avoid heavy lifting).

In 2015, the U.S. Supreme Court considered a pregnancy discrimination claim based on the employer's failure to offer an accommodation to a pregnant employee. In *Young v. United Parcel Service (UPS)*, the pregnant employee, a UPS driver, was directed by medical practitioners not to lift more than 20 pounds, due to pregnancy.[101] This limitation conflicted with a general requirement of UPS that drivers be able to lift 70 pounds.[102] Rather than offer an accommodation (e.g., a temporary light duty assignment), UPS simply told Young that she could not work while under a lifting restriction.[103] In assessing whether UPS's practice of granting accommodations to certain classes of workers (i.e., those injured on the job, those with a disability covered by the Americans with Disabilities Act,[104] those who lost their Department of Transportation certification), but not pregnant workers was discriminatory,[105] the court stated:

> In our view, the [Civil Rights] Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here — as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence — it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. Ultimately the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional

101. *Young v. United Parcel Serv*. (2015) 575 U.S. 206, 211.

102. Id.

103. Id.

104. The decision indicates that the Americans with Disabilities Act ("ADA") was amended in a manner that could affect the treatment of pregnancy-related disabilities. See id. at 218 (ADA "then protected only those with permanent disabilities"), 218-19 ("We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities. As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job." (citation omitted)).

Later commentary (and enactment of the Pregnant Workers Fairness Act) indicates that, in practice, these 2008 ADA changes did not sufficiently address the law governing pregnancy-related accommodation. See A Better Balance, The Pregnant Workers Fairness Act Legal Backgrounder (updated Jan. 12, 2023), ("[E]ven though Congress expanded the ADA in 2008 and in theory it should provide accommodations for workers with pregnancy-related disabilities, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.

As one court recently concluded in 2018, "Although the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions." (citation omitted)).

105. *Young*, 575 U.S. at 211-212.

discrimination.[106]

The decision indicates that the lower courts considered whether, as a pregnant worker, Young was similarly situated to the workers granted accommodation under UPS policy versus other injured workers who would not be granted accommodation.[107] While commentary indicates that the *Young v. UPS* decision was an important step forward for pregnant workers because the decision indicates that pregnancy accommodations may be required in some circumstances, the decision's multi-step balancing test for assessing when such accommodations must be extended to pregnant employees left many questions unanswered.[108]

The federal Pregnant Workers Fairness Act was enacted in 2022,[109] which provided more clarity as to when employers are obligated to provide accommodations to pregnant workers. Specifically, the Pregnant Workers Fairness Act provides an employer must "make reasonable accommodations to the known limitations [of an employee] related to the pregnancy, childbirth, or related medical conditions…unless…the accommodation would impose an undue hardship on the" employer's business operations.[110]

Harassment

In describing the legal history regarding Title VII sex discrimination claims based on harassment, Professor Reva B. Siegel wrote:

> At first, courts simply refused to acknowledge that sexual harassment

106. Id. at 210-11 (emphasis added and citation omitted).

107. Id. at 217-18 (summarizing the Fourth Circuit opinion and conclusions regarding to whom Young should be compared as follows:

> [I]t believed that Young was different from those workers who were "disabled under the ADA" (which then protected only those with permanent disabilities) because Young was "not disabled"; her lifting limitation was only "temporary and not a significant restriction on her ability to perform major life activities." Young was also different from those workers who had lost their DOT certifications because "no legal obstacle stands between her and her work" and because many with lost DOT certifications retained physical (i.e., lifting) capacity that Young lacked. And Young was different from those "injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury." Rather, Young more closely resembled "an employee who injured his back while picking up his infant child or ... an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter," neither of whom would have been eligible for accommodation under UPS' policies (citations omitted).

108. Nat'l Women's Law Center, The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job (Aug. 2021); see also Nat'l Partnership for Women and Families, The Pregnant Workers Fairness Act Factsheet (Mar. 2021) ; see also L. Prine, L. Morris, & G. deFiebre, Helping Pregnant Women Keep Their Jobs, 94 Am. Family Physician 494 (Sept. 15, 2016).

109. Pregnant Workers Fairness Act, enacted as part of H.R. 2617, 117th Cong. (2022), Pub. L. No. 117-328; see also J.L. Grossman, The Pregnant Workers Fairness Act: A Long-Awaited Victory for Pregnant Workers, Verdict from Justia (Jan. 6, 2023).

110. H.R. 2617, Division II § 103(1).

> had anything to do with employment discrimination on the basis of sex. Sexual harassment was rejected as a personal matter having nothing to do with work or a sexual assault that just happened to occur at work. Alternatively, judges reasoned that sexual harassment was natural and inevitable and nothing that law could reasonably expect to eradicate from work. But the central ground on which courts resisted recognizing the claim was simply that sexual harassment was not discrimination "on the basis of sex." It could happen to a man or woman or both; even if its harms were inflicted on women only, they were not inflicted on all women, only those who refused their supervisors' advances.[111]

This initial reluctance of courts to recognize harassment as sex discrimination is similar to the issues discussed above (and relies on similar objections to those for sex-plus discrimination claims, i.e., the harassment only affects a subclass of women).

In the mid-1980s, U.S. Supreme Court case law recognized that, consistent with EEOC guidelines, sexual harassment was a form of prohibited sex discrimination under Title VII.[112] The decision describes the history leading up to the court's determination:

> [I]n 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. … The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.
>
> In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic quid pro quo, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."
>
> In concluding that so-called "hostile environment" (i.e., non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. …
>
> Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that

111. R.B. Siegel, A Short History of Sexual Harassment, Introduction to C.A. MacKinnon & R.B. Siegel, eds., Directions in Sexual Harassment Law, at 11 (2003) (citations omitted).

112. See *Meritor Sav. Bank v. Vinson* (1986) 477 U.S. 57.

> discrimination based on sex has created a hostile or abusive work environment.[113]

In more recent cases, the U.S. Supreme Court provided more detail as to what harassment is actionable under Title VII, as well as addressing liability questions.[114]

In *Oncale v. Sundowner Offshore Services, Inc.*, the Court concluded that same-sex sexual harassment claims are covered by Title VII's sex discrimination prohibition.[115] The decision provides some additional explanation as to what forms of harassment could be sex discrimination:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] ... because of ... sex."[116]

Sex/Gender Stereotype Discrimination

Another important legal development in employment discrimination law was the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, a case involving a claim of sex discrimination based on the imposition of sex or gender stereotypes. As indicated below, these stereotypes can involve differentiated behavior expectations or dress and grooming standards for employees.

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113. Id. at 65-66 (citations omitted).

114. See, e.g., *Harris v. Forklift Sys., Inc.* (1993) 510 U.S. 17; *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742.

115. *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75.

116. Id. at 80-81.

In *Price Waterhouse v. Hopkins*, the Court found that Title VII's prohibition on sex discrimination covered discrimination due to failure to conform to sex stereotypes.[117]

In that case, the plaintiff, Ms. Hopkins, had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances for partnership.[118] The plurality opinion stated:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.
>
> …
>
> The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a woman manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.[119]

Later cases applying the reasoning in *Price Waterhouse* concluded Title VII's sex discrimination protection should be understood to encompass gender and sexual orientation discrimination, as these forms of discrimination involve a failure to conform to expectations and stereotypes based on sex.[120] In a more recent U.S.

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117. (1989) 490 U.S. 228.

118. Id. at 235.

119. Id. at 256-58.

120. See, e.g., *Schwenck v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1202 ("Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex — that is, the biological differences between men and women — and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312, 1317 ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination,

Supreme Court case, discussed below, the Court determined that sexual orientation and gender discrimination are "sex discrimination" for the purposes of Title VII.

Sexual Orientation and Gender Identity Discrimination

In 2020, the U.S. Supreme Court considered three consolidated cases involving claims of employment discrimination on the basis of sexual orientation and gender identity.[121] In *Bostock v. Clayton County*, the Court concluded that such discrimination was prohibited sex discrimination under Title VII.

> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally

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whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held. … These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*."); *Macy v. Holder* (April 20, 2012) EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7 ("Since *Price Waterhouse*, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in many scenarios involving individuals who act or appear in gender-nonconforming ways. And since *Price Waterhouse*, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in scenarios involving transgender individuals." (footnote omitted)); *Baldwin v. Foxx* (July 16, 2015) EEOC Appeal No. 0120133080, 2015 WL 4397641, at *7–8 ("Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. …. In the wake of *Price Waterhouse*, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed — based on their appearance, mannerisms, or conduct — as insufficiently 'masculine' or 'feminine.' But as the Commission and a number of federal courts have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

Sexual orientation discrimination and harassment '[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.'" (footnotes omitted)).

See also generally S. Buchert, Alliance for Justice Blog Post, *Price Waterhouse v. Hopkins* at Thirty (May 1, 2019).

121. *Bostock v. Clayton County* (2020) 590 U.S. 644.

> penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.[122]

Prior to and since the *Bostock* decision, there have been efforts to amend Title VII to expressly list sexual orientation and gender identity as prohibited grounds for discrimination.[123]

In early 2021, after the *Bostock* decision, former President Biden issued an executive order addressing SOGI discrimination. That order provided, in part:

> All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.
>
> These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended. In *Bostock v. Clayton County*, the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock*'s reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended, the Fair Housing Act, as amended, and section 412 of the Immigration and Nationality Act, as amended, along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.
>
> Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.
>
> It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.[124]

The order directed federal agencies to review agency actions (including regulations and policies) to "fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order [reproduced, in part,

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122. (2020) 590 U.S. 644 at 660.

123. See generally Federal Register, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, (Jan. 20, 2021).

124. Exec. Order No. 13988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021).

above].”[125]

California Statutes Related to Sex Discrimination

California broadly prohibits sex discrimination, and this is reflected through the passage of various bills that expressly protect “sex” and related categories. For instance, Assembly Bill 887 (Atkins 2011) made changes across several codes (Government, Civil, Labor, and Insurance Codes) regarding the scope of certain anti-discrimination protections to make clear that these protections covered gender identity and gender expression.

California law use inconsistent terms in identifying the scope of the protection, though. For instance, the Education Code includes provisions governing “sex-segregated” activities and “single gender” schools.

Despite various smaller differences across its anti-discrimination provisions, California law in general, broadly extends protections for sex and gender. California’s commitment can be seen across two decades of efforts expressly including and defining language to extend the widest level of protections.

Gender Nondiscrimination Act (AB 887 (Atkins 2011))

In 2011, the Legislature enacted Assembly Bill 887, the Gender Nondiscrimination Act.[126] This bill amended numerous provisions in the California Codes requiring equal rights and opportunities in various areas, including education, housing, and employment, regardless of gender and prohibit discrimination based on specified characteristics, including sex and gender.[127] The bill defined “gender” to mean a person’s gender identity and gender expression.[128] AB 887 also amended prohibitions on discrimination to expressly include gender, gender identity, and gender expression among the enumerated protected characteristics.[129]

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125. Id. § 2(b). For examples of agency actions consistent with this directive, see, e.g., U.S. Dep’t of Justice Memorandum from Principal Deputy Assistant Attorney General Pamela S. Karlan, re Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021); U.S. Dep’t of Food and Ag. Food and Nutrition Serv. Policy Memo CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022).

126. 2011 Cal. Stat. ch. 719; see also Senate Judiciary Committee Analysis of AB 887 (Jun. 13, 2011), p. 6 (quoting bill author).

127. 2011 Cal. Stat. ch. 719.

128. The bill also defined “gender expression” to mean “a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” See, e.g., 2011 Cal. Stat. ch. 719, § 1 (amending Civil Code Section 51).

129. Id.

For example, the Gender Nondiscrimination Act amended the Unruh Civil Rights Act[130] to clarify that "sex" includes "gender" and that "gender," in turn, includes a "person's gender identity and gender expression."[131]

The goal of the Gender Nondiscrimination Act, as described by the bill's author, then-Assembly Member Toni Atkins, was to reduce uncertainty and ambiguity about the scope of the protections of California's anti-discrimination laws by expressly protecting gender identity and gender expression.[132] An analysis of the bill noted that "[w]hile the Unruh Act and other similar anti-discrimination statutes protect non-enumerated classifications such as transgender[] Californians, this fact is not always known by those the law was intended to protect, or by employers, housing authorities, and others vested with the responsibility of ensuring that current anti-discrimination laws are enforced."[133]

Thus, this legislation clarifies that "gender identity" and "gender expression" are expressly protected categories under the Unruh Civil Rights Act and other anti-discrimination statutes in California,[134] some of which are discussed individually below.

Fair Employment and Housing Act

In general, California's Fair Employment and Housing Act ("FEHA") prohibits employment discrimination on the basis of "sex, gender, gender identity, gender expression…and sexual orientation."[135] The Act also prohibits the owner of any housing accommodation from discriminating or harassing any person based on

130. Civ. Code § 51.

131. Civ. Code § 51, as amended by 2011 Cal. Stat. ch. 719, § 1. "Gender expression" is also defined to mean "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." Id.

132. See Assembly Floor Analysis of AB 887 (Aug. 31, 2011), pp. 2-3 (quoting bill author).

133. Id. at p. 2.

134. See Lab. Code § 3600(c) in which the addition of AB 887 clarified that in the scope of conditions for workers' compensation liability "no personal connection can be deemed to exist between the employee and the third party based solely on the third party's personal belief relating to their perception of the employee's … sex, gender, gender identity, gender expression, or sexual orientation"; see also Ins. Code §§ 676.10, 10140, 10140.2, and 12693.28 in which AB 887 amended provisions that define "gender," including Section 10140 which states that "no admitted insurer, licensed to issue life or disability insurance, shall fail or refuse to accept an application for that insurance, to issue that insurance to an applicant therefor, or issue or cancel that insurance, under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, sex, gender, gender identity, gender expression, national origin, ancestry, or sexual orientation."

135. Gov't Code § 12940; see also id. § 12940(j)(1) (noting that in addition to prohibiting discrimination, the FEHA also prohibits harassment because of these characteristics); 42 U.S.C. § 2000e (describing similar protections under federal law).

those traits.[136]

General Protections under FEHA Relating to Scope of "Sex" and "Gender"

When the FEHA was enacted, it prohibited discrimination because of sex,[137] but did not define the term sex.[138] Subsequent amendments added a definition of sex that included pregnancy and related issues[139] and amended the protection against discrimination to expressly cover sexual orientation and added a definition of sexual orientation.[140]

In 2003, Assembly Bill 196 clarified that the scope of sex discrimination and harassment prohibited under the FEHA includes discrimination and harassment based on the person's gender. Specifically, AB 196 expanded "the prohibition on sexual discrimination and harassment by including gender, as defined, in the definition of sex."[141]

AB 196's author, Assembly Member Mark Leno, noted the importance of this bill given the effect that gender-based discrimination has on one's ability to obtain housing and employment. Assembly Member Leno also stated that the intention of this bill was to protect transgender individuals, as well as those who do not "possess traits or project conduct stereotypically associated with his or her sex."[142]

Importantly, AB 887, the Gender Nondiscrimination Act, also requires an employer to allow an employee to appear or dress "consistently with the employee's gender expression."[143] This contrasts with previous statutory language requiring "consisten[cy] with the employee's gender identity."[144]

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136. Gov't Code § 12955.

137. The law also prohibited discrimination because of "race, religious creed, color, national origin, ancestry, physical handicap, medical condition, [and] marital status." See, e.g., Gov't Code § 12940, as added by 1980 Cal. Stat. ch. 992, § 4.

138. See, e.g., Gov't Code §§ 12925-12928 (definitions); 12940 (governing employment discrimination); 12955 (governing housing discrimination), as added by 1980 Cal. Stat. ch. 992, § 4; see also Gov't Code § 12945 (providing employment protections for pregnancy, childbirth, and related medical conditions), as added by 1980 Cal. Stat. ch. 992, § 4.

139. 1990 Cal. Stat. ch. 15, § 1.

140. 1999 Cal. Stat. ch. 592, §§ 3.7, 7.5.

141. Legislative Counsel's Digest for AB 196, 2003 Cal. Stat. ch. 164; see also 2003 Cal. Stat. ch. 164, § 1.

142. Assembly Committee on Labor and Employment Analysis of AB 196 (Mar. 18, 2003), p. B (quoting bill author).

143. Legislative Counsel's Digest for AB 887, 2011 Cal. Stat. ch. 719.

144. Id.

Pregnancy-Related Protections

As indicated above, FEHA offers protections against discrimination for pregnancy and related conditions. Originally, some of these pregnancy protections used gender-specific language (e.g., referring to a pregnant "female employee").[145]

In 2017, FEHA was amended to use more inclusive language for the pregnancy-related provisions. Assembly Bill 1556 revised the FEHA provisions for pregnancy-related employment protections by deleting gender-specific personal pronouns and making these provisions gender neutral. More specifically, the bill deleted references to "female person" and "female employee," replacing them with "person" and "employee."[146]

The bill's author, Assembly Member Mark Stone, noted that AB 1556 was consistent with "previous legislative efforts to remove gender-specific terms from California's Codes, and is consistent with the FEHA's goals of ensuring that the Act is broadly construed."[147] The analysis also notes that, without AB 1556, the FEHA would be inconsistent with California's Unruh Civil Rights Act. Prior to AB 1556, the FEHA protected pregnant individuals through gender-specific language, despite the fact that the Unruh Act prohibits discrimination based on gender identity. Given the broader policy considerations supporting the use of gender-neutral terms in the FEHA generally, the bill analysis notes that "it makes sense to apply that change across the breadth of the Act, rather than merely limiting that change to a few provisions of the Act."[148] Thus, this bill replaced *all* gender-specific references in the FEHA with gender-neutral language.

Along these lines, a later bill analysis notes that "California is moving toward greater recognition that a rigid, fixed, and binary conception of gender neither describes reality well nor promotes the truest and fullest expressions of ourselves."[149] This changing understanding is reflected in California's civil rights laws that prohibit discrimination on the grounds of gender identity.[150] With these amendments, the FEHA would be consistent with this approach by ensuring the

145. See, e.g., Gov't Code § 12945, as amended by 2011 Cal. Stat. ch. 678, § 1.5.

146. 2017 Cal. Stat. ch. 799.

147. Assembly Floor Analysis of AB 1556 (Aug. 31, 2017), p. 1 (quoting bill author).

148. Senate Committee on Judiciary Analysis of AB 1556 (Jun. 12, 2017), p. 5 (noting how the bill author agreed to accept amendments in Committee that replaced all gender-specific references in FEHA with gender-neutral language).

149. Senate Floor Analysis of AB 1556 (Jun. 21, 2017), p. 2.

150. Id. (describing the importance of the bill in remedying previous inconsistency in California's civil rights laws that prohibited discrimination on the grounds of gender identity but only expressly extended workplace protection against discrimination to "female" employees who were pregnant).

statutory language does not "in and of itself exclude people who are not, or do not identity, as male or female," thereby producing "a more inclusive and respectful civil rights statute."[151]

Educational Equity

California protections against discrimination in education are found in the "Educational Equity" chapter of the Education Code.[152] Section 220 specifically provides:

> [n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression … or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code … in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid.[153]

Protection of Gender

As indicated above, the discrimination protections in Education Code Section 220 expressly apply to gender, which is defined to mean in part, sex. In the Education Code provisions, "gender" seems to be the more commonly used term, but different provisions may also refer to "sex."

Prior to 2007, Education Code Section 220 expressly prohibited discrimination on the basis of sex.[154]

In 2007, Senate Bill 777 (Kuehl) revised the list of prohibited bases of discrimination. Most notable for the Commission's work is that this legislation removed the term "sex" and added the term "gender."[155] The bill also added a

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151. Id.

152. Educ. Code §§ 220-270. Federal Title IX has protections that may also apply to California educational institutions if they receive federal funding. In addition, California law mandates school districts adopt policies prohibiting discrimination, harassment, intimidation and bullying based on the above categories at school or in any other school activity. See Educ. Code § 234.1.

153. Although the language of this provision does not include the term "sex," Educ. Code § 210.7 defines "gender" to mean "sex."

The referenced Penal Code provision includes actual or perceived gender and sexual orientation. See Pen. Code § 422.55(a)(2), (6).

Discrimination also includes harassment. See Educ. Code § 231.5 ("[P]ursuant to Section 200, that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies.").

154. Educ. Code § 220, as amended by 2004 Cal. Stat. ch. 700, § 3.

155. SB 777, 2007 Cal. Stat. ch. 569, § 11.

definition of the term "gender" to mean "sex, and include[] a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[156]

The bill analysis indicates that these changes were needed to provide "better guidance by creating consistency among the statutes prohibiting various forms of discrimination by revising the list of prohibited bases of discrimination" in the Education Code.[157] Another reason cited for the changes was to ensure consistency with the protected characteristics identified in the hate crimes statute.[158]

In addition to amending lists of protected characteristics to include "gender," SB 777 also expressly included "sexual orientation," which it defined as "heterosexuality, homosexuality, or bisexuality."[159] The inclusion of a definition for "sexual orientation" also made the language consistent with the hate crimes statute.[160]

In 2011, AB 887, the Gender Nondiscrimination Act, further amended Education Code Section 220 (and a number of other related provisions)[161] to expressly include gender identity and gender expression as protected categories.[162] This bill also amended the definition of "gender" in Education Code Section 210.7 to expressly include "gender expression" and to define "gender expression" as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[163]

Thus, within the Education Code, California has supported its goals of extending broad protections by amending statutory language to include "gender" and to expressly include gender identity, gender expression, and sexual orientation as protected characteristics.

The bill also made other terminology changes related to educational equity. For instance, the bill modified the terminology related to disabled individuals, replacing references to "handicapped pupils" with references to "pupils with disabilities." See Legislative Counsel's Digest for SB 777, 2007 Cal. Stat. ch. 569.

156. SB 777, 2007 Cal. Stat. ch. 569, § 4 (adding Educ. Code § 210.7).

157. Assembly Floor Analysis of SB 777 (Sept. 7, 2007), p. 2 (describing the effect of the bill).

158. Id.; see also Pen. Code § 422.55.

159. SB 777, 2007 Cal. Stat. ch. 569, §§ 9 (adding definition of "sexual orientation"), 11 (amending Educ. Code § 220 to include sexual orientation).

160. Id.; see also Id.; see also Pen. Code §§ 422.55(a)(6), 422.56(h).

161. See Educ. Code §§ 200, 210.2, 210.7, 220, 47605.6, 51007, 66260.6, 66260.7, and 66270; see also id. § 47605(e)(1) (prohibiting charter schools from discriminating on student's actual or perceived sex, gender, sexual orientation, and gender identity or expression).

162. AB 887, 2011 Cal. Stat. ch. 719.

163. AB 877, 2011 Cal. Stat. ch. 719, § 4. The pre-existing definition of "gender" from SB 777 (2007) expressly included gender identity. See Educ. Code § 210.7, as added by 2007 Cal. Stat. ch. 569, § 4.

Sex-Segregated and Single-Gender Schools

As noted above, different Education Code provisions vary in their use of the terms "sex" and "gender." For instance, the Education Code includes provisions on both sex-segregated and single-gender schools.

Education Code Section 221.5 notes that general state policy is that "elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses."[164]

Education Code Section 232.2, added by AB 23 in 2017, permits Los Angeles Unified School District[165] to maintain existing single-gender schools and classes for enrollment, consistent with Title IX rules.[166] AB 23 was sought by the Los Angeles Unified School District after the District was denied a waiver from the State Board of Education to operate an all-girl school focused on STEM classes (to address under-enrollment of girls in STEM).[167] However, the provisions authorizing single-gender schools and classes to continue are set to repeal January 1, 2031, by their own terms.[168]

As compared to other anti-discrimination laws, the Education Code provisions are somewhat unusual in that they more commonly use the term "gender," as a replacement for the term "sex."

Athletics and School Facilities

Concerns about sex and gender equity in schools extend include extracurricular activities, in particular, school athletics, and access to facilities (e.g., bathrooms and locker rooms). Although equity in athletics and facilities has been a concern for some time, especially involving opportunities for girls and young women to

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164. Educ. Code § 221.5(a).

165. By its terms, Educ. Code § 232.2 currently applies to "a school district with an average daily attendance of 250,000 or more pupils." The legislative history of this provision indicates that the only school district that would meet the specified attendance threshold is Los Angeles Unified. See Senate Judiciary Committee Analysis of AB 23 (Jul. 17, 2017), p. 6. (describing attendance threshold of 400,000 and presenting data that show that "this bill's provisions would only apply to the Los Angeles Unified School District for the foreseeable future."); Senate Floor Analysis of SB 913 (Aug. 22, 2022), p. 6 ("Los Angeles Unified School District (LAUSD) is the only school district in the state with an ADA of 250,000 or more. As mentioned in the author's statement, LAUSD's ADA has declined and has dropped below 400,000; therefore it is necessary to adjust the ADA threshold in certain statutes to maintain LAUSD's use of flexibility provided by those statutes."); see also 2022 Cal. Stat. ch. 920 (SB 913 (Hertzberg)).

166. AB 23, 2017 Cal. Stat. ch. 654.

167. See Assembly Committee on Education Analysis of AB 23 (Mar. 13, 2017), p. 2.

168. Educ. Code § 232.6.

participate in school sports,[169] much of the recent attention on school athletics and facilities has focused specifically on transgender students.

Education Code Section 221.5 requires a student be permitted to "participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, irrespective of the gender listed on the student's records."[170] This provision was added by Assembly Bill 1266 (Ammiano) in 2013.[171] Assembly Member Ammiano described the need for this legislation:

> Although current California law already protects students from discrimination in education based on sex and gender identity, many school districts do not understand and are not presently in compliance with their obligations to treat transgender students the same as all other students in the specific areas addressed by this bill. As a result, some school districts are excluding transgender students from sex-segregated programs, activities and facilities. Other school districts struggle to deal with these issues on an ad hoc basis. Current law is deficient in that it does not provide specific guidance about how to apply the mandate of non-discrimination in sex-segregated programs, activities and facilities.

The Education Code also includes several other provisions relating to equal access to athletics or facilities, but these provisions have been largely unchanged since the late 1970s or early 1980s.[172] The terminology used in these older provisions (i.e., using the terms "sex" or "male" and "female" students) is notably different from other Education Code provisions that expressly refer to "gender."

Pregnancy and Childbirth

Education Code Section 221.51 provides for the treatment of pregnant and parenting pupils:

> (a) A local educational agency shall not apply any rule concerning a

169. See generally U.S. Government Accountability Office, Report on K-12 Education: High School Sports Access and Participation, GAO-17-754R, p. 1 (Sept. 14, 2017), ("Organized sports have long been a part of the American high school experience for boys. However, the same has not been historically true for girls, who began playing high school sports in large numbers only after the passage of Title IX of the 1972 Education Amendments (Title IX)."); U.S. Government Accountability Office, Intercollegiate Athletics: Status of Efforts to Promote Gender Equity, GAO/HEHS-97-10, p. 1 (Oct. 1997) ("More than 100,000 American women now participate in intercollegiate athletics each year. This is a four-fold increase since enactment of title IX of the Education Amendments of 1972.").

170. Educ. Code § 221.5(f).

171. AB 1266, 2013 Cal. Stat. ch. 85, § 1.

172. See, e.g., Educ. Code § 231 (allowing separate bathroom, locker room, and living facilities for different sexes, so long as the facilities are comparable); see also id. §§ 221.7, 230.

> pupil's actual or potential parental, family, or marital status that treats pupils differently on the basis of sex.
>
> (b) A local educational agency shall not exclude nor deny any pupil from any educational program or activity, including class or extracurricular activity, solely on the basis of the pupil's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

Education Code Section 221.51 was added by Assembly Bill 2289 (Weber 2018). In addition to the provisions above related to equal treatment and access, the bill declares that "pregnant and parenting pupils are entitled to accommodations that provide them with the opportunity to succeed academically while protecting their health and the health of their children."[173] The bill's authors noted that this bill, consistent with the protections of Title IX and California's Sex Equity in Education Act, would help to ensure all students' rights to equal and educational opportunities, regardless of sex.[174] AB 2289 "codifies federal and state regulations that outline specific sex discrimination prohibitions in the context of pregnant and parenting students," thereby helping to provide more consistent protections for these students.[175]

Unruh Civil Rights Act

In addition to the protections for employment, housing, and education, California law also includes anti-discrimination provisions applicable to business establishments.

Civil Code Section 51, also known as the Unruh Civil Rights Act, provides, in part, that:

> [a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[176]

As indicated above, this provision expressly prohibits discrimination on the bases of both sex and sexual orientation. "Sex," under this Act, is defined as including, but not limited to, "pregnancy, childbirth, or medical conditions related to

173. Legislative Counsel's Digest for AB 2289, 2018 Cal. Stat. ch. 942.

174. Assembly Floor Analysis of AB 2289 (May 26, 2018), p. 3 (quoting bill author).

175. Senate Floor Analysis of AB 2289 (Aug. 27, 2018), p. 6 (noting the importance of this bill in how it creates more consistent protections for pregnant individuals across California).

176. Civ. Code § 51(b). Federal law has similar general protections. See 42 U.S.C. §2000a.

pregnancy or childbirth," as well as "a person's gender."[177] "Gender" is, in turn, defined to include "a person's gender identity and gender expression."[178] "Sexual orientation" is defined, by reference to the definition in the FEHA (discussed previously), to mean "heterosexuality, homosexuality, and bisexuality."[179]

For the purpose of the Act, the protections for the listed categories (e.g., sex and sexual orientation) include protections from different treatment due to a "perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories."[180]

Hate Crimes

Penal Code Section 422.55 defines "hate crime" for purposes of both the title of the Penal Code that contains it and "all other state law unless an explicit provision of law or the context clearly requires a different meaning."

Section 422.55 defines hate crimes to be criminal acts "committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim."[181] The listed characteristics include gender, sexual orientation and "association with a person or group with one or more of these actual or perceived characteristics."[182]

Consistent with the other reforms discussed above, AB 887, the Gender Nondiscrimination Act, amended Penal Code Section 422.56 to clarify the definition of "gender." As amended by AB 887, the definition of "gender" includes sex and includes a person's gender identity and gender expression.[183] "Gender expression" is defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[184]

AB 887 also amended other provisions of the Penal Code to include these same terms.[185] One such provision is Penal Code Section 186.21, which contains a legislative declaration "that it is the right of every person, regardless of … gender,

177. Civ. Code § 51(e)(5).

178. Id. This definition was added by AB 887 (2011), the Gender Nondiscrimination Act. 2011 Cal. Stat. ch. 719, § 1.5.

179. Civ. Code § 51(e)(7) (referencing the definition in Gov't Code § 12926(s)).

180. Id. § 51(e)(6).

181. Pen. Code § 422.55(a).

182. Id. § 422.55(a)(2), (6), (7).

183. Id. § 422.56(c).

184. Id.

185. See also, e.g., id. §§ 422.85, 3053.4, 11410.

gender identity, gender expression, … [or] sexual orientation … to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals."

PROPOSED SEX EQUITY PROVISION

SCR 92 directed the Commission to study California law to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]"[186]

Based on the foregoing review, California law generally appears to be aligned with the ERA. California's Constitution currently contains several provisions related to sex equality[187] and its equal protection doctrine subjects sex-based claims to strict scrutiny.[188]

Additionally, California's statutory anti-discrimination laws (related to employment, housing, education, and state action) expressly protect against discrimination based on pregnancy, sexual orientation, and gender identity.[189] Taken together, these provisions provide for significant sex equality protections.

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186. 2022 Cal. Stat. res. Ch. 150 (SCR 92).

187. See e.g., Cal. Const. art. I, §§ 1, 1.1, 7, 8, and 31. See also discussion of "Status of State Constitutional Amendments" in Memorandum 2023-40, p. 10 and discussion of "California Constitution" in Memorandum 2023-17, pp. 16-19.

188. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 ("[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution…." (citations omitted)); *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 564 (indicating that the Women's Contraceptive Equity Act "serves the compelling state interest of eliminating gender discrimination" and that gender discrimination "violates the equal protection clause of the California Constitution and triggers the highest level of scrutiny" (citation omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 ("*In Sail'er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that 'classifications based upon sex should be treated as suspect.' *Sail'er Inn* thus clearly established the principle that gender-based differentials are to be treated as 'suspect classifications' which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers' Comp. Appeals Bd*., the court stated that 'the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,' and in *Hardy v. Stumpf*, the court acknowledged that '[c]lassifications predicated on gender are deemed suspect in California.'"(citations omitted)); *Boren v. Dep't of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 ("According to California decisional law, a statute establishing 'suspect classifications' or trenching upon 'fundamental interests' is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect." (citations omitted)).

189. See Memorandum 2023-21; see also, e.g., Gov't Code §§ 11135(a) (No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification,

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.[190] 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.[191]

Because these similar, but not exact, definitions of sex discrimination could cause confusion, the Commission decided to propose a rule that clarified and united the scope of California's sex discrimination prohibitions to help ensure a uniform understanding of California laws governing sex discrimination.

The Commission considered a variety of options for integrating the rule into California law. The Commission first deliberated pursuing a state constitutional amendment but ultimately decided against it.[192] Left with placing a traditional statute, the Commission determined an uncodified provision would be too difficult to find and a single provision applying to all code sections was not only unprecedented, but would also be challenging to uncover.[193] Given these constraints, the Commission decided to place an identical statutory rule in each code section and cross reference to the major civil rights statutes.[194]

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age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."); 12926(r) (defining "sex" to include pregnancy, childbirth, breastfeeding, and gender, which, in turn, includes gender identity and gender expression).

190. See, e.g., Bus. & Prof. Code §§ 23425-23438 (related to alcohol licenses for various clubs and associations, many provisions contain an anti-discrimination rule); Health & 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).

191. See, e.g., Lab. Code § 1156.3(h)(1) (incorporating definitions and characteristics from the California Fair Employment and Housing Act by reference).

192. Memorandum 2023-44, pp. 18-19. The Commission does not have the capability of stewarding a constitutional amendment through the enactment process, nor is it likely the Legislature anticipated a constitutional amendment as the outcome when they assigned the study to the Commission.

193. Memorandum 2024-6, pp. 7-8.

194. The recommendation proposes to add a code section to the Educ. Code in the area relating to educational equity, and add a cross reference to the new code in Civ. Code § 51, the Unruh Civil Rights Act, and Gov't Code § 12926 related to the Civil Rights Department in deference to Cal. Const. art. IV, § 9, which establishes statutory amendment guidelines.

This "sex equity provision," is proposed to be codified in all codes. In each case, the provision would specify that the rule applies broadly to the entire code (i.e., the provision specifies that the rule is "for the purposes of [the] code"). However, the provision is not intended to exhaustively define the scope of sex discrimination. Rather, it is crafted to make clear that discrimination on certain grounds constitutes sex discrimination under the law, while not foreclosing the possibility that sex discrimination may also encompass characteristics that are not listed.

The draft of the proposed amendments to each code appears at the end of this draft Revised Tentative Recommendation. The draft comment language notes that there are identical sections in all other codes to provide consistency across all California laws governing sex discrimination.

IDENTIFYING AND REMEDYING SPECIFIC DEFECTS

SCR 92 further directs the Commission 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. For the second phase of the study, the Commission examined existing California laws to ensure they comply with the sex equality provision's nondiscrimination goals.

DISCRIMINATORY LANGUAGE

SCR 92 directs the Commission to address "defects … related to the inclusion of discriminatory language" in California law. The staff understands "discriminatory language" as words and phrases that foster stereotypes of individuals or groups of people, predominately in ways that demean or ignore them.[195] Gender biased language is a type of discriminatory language that "either implicitly or explicitly favors one gender over another."[196] Examples of gender biased language are terms such as "he" or "she" or "husband" and "wife."[197]

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195. See, e.g., European Institute for Gender Equality, Gender-sensitive communication.

196. Id.

197. See, e.g., Fam. Code § 11 ("A reference to 'husband' and 'wife,' 'spouses,' or 'married persons,' or a comparable term, includes persons who are lawfully married to each other and persons who were previously lawfully married to each other, as appropriate under the circumstances of the particular case.").

When proposing a new Family Code, the Commission recommended to the Legislature adding the terms "spouses" and "married persons" to this code section, but the terms "husband" and "wife" remain. 1994 Family Code, 23 Cal. L. Revision Comm'n Reports 1 (1993).

The Legislature is continually making efforts to remove gender biased language through specific legislation[198] and general bill drafting policies,[199] and the Commission determined no additional work was appropriate in this area at this time.[200] However, stakeholders presented an example of discriminatory language in the California Department of Corrections and Rehabilitation's (CDCR) Operation Manual that could be clarified, and the Commission notes it in this report for the Legislature's consideration.

CDCR'S OPERATIONS MANUAL

The ACLU of Southern California (ACLU) suggested that the California Department of Corrections and Rehabilitation's (CDCR) Operations Manual should be updated and clarified. Although current law acknowledges gender as female, male or nonbinary[201] and a person's gender may be different from an individual's sex assigned at birth,[202] CDCR's Operations Manual uses the term "biological sex" interchangeably with "gender" and does not include "nonbinary" in its definition of "gender identity."

For example, the Operations Manual's definitions include the following:

- Cross-Gender: Of the opposite biological sex. Example: Male Custody Staff patting down female inmates is cross-gender searching.
- Gender Identity: Distinct from sexual orientation and refers to a

198. See, e.g., 2016 Cal. Stat. ch. 50 (SB 1005 (Jackson 2016)) (replacing references to a "husband" or "wife" with references to a "spouse") and 2013 Cal. Stat. ch. 510 (AB 1403 (Committee on Judiciary 2013)), (updating statutory terms within the Uniform Parentage Act to replace "father" and "mother" with "parent," among other amendments).

The Legislature also placed Proposition 11, Miscellaneous Language Changes Regarding Gender, on the ballot in 1974. This proposition amended the California Constitution to recast masculine gendered terms to instead refer to the "person" or individual referred to. It passed successfully with 50.43% of the vote.

199. See Chapter 190, Statutes of 2019 (ACR 260 (Low 2018)), which encouraged the Legislature to engage in a coordinated effort to revise existing statutes and introduce new legislation with inclusive language by using gender-neutral pronouns or reusing nouns to avoid the use of gendered pronouns. Bills with content not otherwise related to sex and gender typically contain technical amendments to update terms such as "he or she." See e.g., Chapter 109, Statutes of 2024 (AB 2582 (Pellerin)), the Elections Omnibus Bill of 2024, which changes references to "he or she" with "the voter," among other amendments.

200. Minutes of Commission Meeting on May 2, 2024, p. 5 ("In light of the Office of Legislative Counsel efforts, consistent with 2018 Cal. Stat. ch. 190 (ACR 260 (Low 2018)), to revise existing statutes and introduce new legislation with inclusive language, the Commission did not direct staff to move forward with a proposal to remove and replace these terms in the codes.")

201. See, e.g., 2017 Cal. Stat. ch. 853 (SB 179) and Penal Code § 2605.

202. California Civil Rights Department, The Rights of Employees Who are Transgender or Gender Nonconforming: Fact Sheet p. 3, (November 2022). Gender identity is defined as "each person's internal understanding of their gender, such as being male, female, a combination of male and female, neither male nor female, and/or nonbinary. A person may have a gender identity different from the sex the person was assigned at birth." See also 2017 Cal. Stat. ch 853 (SB 179).

person's internal, deeply felt sense of being male or female. [203]

ACLU recommends the Operations Manual be updated to reflect current laws by adding a definition for "nonbinary,"[204] amending its definitions as follows, and conforming the manual's provisions accordingly:

- Cross-Gender: Of ~~the opposite biological sex~~ a different gender. Example: Male-identifying Custody Staff patting down female-identifying inmates is cross-gender searching.
- Gender Identity: Distinct from sexual orientation and refers to a person's internal, deeply felt sense of being male, ~~or~~ female, or nonbinary.

DISPARATE IMPACT

SCR 92 also directs the Commission to address "defects related to … disparate impacts" in California law.

Disparate impact theory is primarily used to challenge practices based on state and federal employment and housing discrimination laws. Generally, a "disparate impact" occurs when a facially neutral law disproportionately adversely affects members of a protected class. A law fails the disparate impact legal test when there is no legitimate business reason for the law or policy and no less discriminatory means are available to achieve the law's purpose.

State and Federal Employment Laws on Disparate Impact

California's Fair Employment and Housing Act ("FEHA")[205] declares it a civil right for an individual to seek, obtain, and hold employment without discrimination because of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive

203. State of California, California Department of Corrections and Rehabilitation, Adult Institutions, Programs, and Parole, Operations Manual, § 54040.3, p. 478, (updated through January 1, 2021).

204. Email from Amanda Goad, November 8. 2024. ACLU recommends using the definition of "nonbinary" from the Federal Racial and Identity Profiling Act of 2015 Regulations (11 CCR 999.226) which states: "a person with a gender identity that falls somewhere outside of the traditional conceptions of strictly either female or male. People with nonbinary gender identities may or may not identify as transgender, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as agender, genderqueer, gender fluid, Two Spirit, bigender, pangender, gender nonconforming, or gender variant."

205. Gov't Code §§ 12900 - 12999.

health decisionmaking, or veteran or military status."[206]

Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.[207]

FEHA regulations describe the process to prove unlawful employment discrimination based on disparate impact. First, the policy being challenged must be facially neutral.[208] Following an allegation of disparate impact based on that policy, an employer can provide an affirmative defense that the policy is necessary for the safe and efficient operation of the business and the policy effectively fulfills its intended business purpose.[209] This is known as the "business necessity" defense. However, the policy may still be impermissible if an alternative practice is shown to exist that would accomplish the business purpose equally well with a less discriminatory impact.[210] Both state and federal law follow similar disparate impact tests.

Disparate Impact Theory

Griggs v. Duke Power Company

Disparate impact theory was developed by the U.S. Supreme Court in *Griggs v. Duke Power Company*,[211] an employment discrimination case. This was a class action by Black individuals who alleged that Duke Power Company ("Duke") violated their civil rights by requiring irrelevant preconditions to employment. The requirements, completing high school and passing an aptitude test, disproportionately impeded Black individuals' employment opportunities.[212] The Court of Appeals considered Duke's subjective intent in establishing the requirements and found no discriminatory purpose. The Appeals Court thus determined that there was no civil rights violation.

In its decision, the Supreme Court noted that Duke did not study whether the requirements were positively related to job performance prior to imposing them. A company executive testified that the requirements were instituted with the idea that

206. Gov't Code § 12921(a). The characteristics noted above includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Id. § 12926(o).

207. 42 U.S.C.A. § 2000e-2.

208. 2 Cal. Code Regs. § 11010(b).

209. Id.

210. Id.

211. *Griggs v. Duke Power Company* (1971) 401 U.S. 424.

212. Id. at 425-426.

they "generally would improve the overall quality of the work force."[213] In fact, the education and testing requirements were shown to have no relation to successful job performance.[214] Individuals who lacked these credentials and held their jobs prior to the requirements continued to perform well. The Supreme Court acknowledged that Duke Power Company seemed to lack intent to discriminate but decided that their mindset was irrelevant. Instead, it was the impact of the requirements that mattered.

> … Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[215]

The Court found Duke in violation of the Civil Rights Act for imposing requirements that were unnecessary and did not fulfill their intended purpose, disproportionately harming a protected class. Disparate impact theory was born.

Mahler v. Judicial Council of California

Employment law cases under FEHA follow this approach. A recent disparate impact case, *Mahler v. Judicial Council of California*,[216] highlights the importance of providing evidence that the policy at issue caused a statistically significant adverse effect on a protected group. This case was brought by retired superior court judges alleging age discrimination in the Temporary Assigned Judges Program ("TAJP"). In their complaint, the plaintiffs claimed that changes to the case assignment policy based on numbers of days worked (the "1320 limit")[217] disproportionately impacted judges over age 70, resulting in fewer assigned cases. Although the policy allowed for exceptions, the plaintiffs alleged that younger, more recently retired judges would not have to get an exception to participate in the TAJP program and the assignments given to individuals granted an exception were less desirable.[218] However, the Appeals Court found the plaintiffs failed to present sufficient data to establish a prima facie case.

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213. Id. at 431.

214. Id.

215. Id. at 432.

216. *Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82.

217. Individuals with more than 1,320 days' experience in the TAJP will not get assignments unless they receive an exception to the policy. Id. at 114.

218. Id. at 113-114.

> [T]he complaint must allege facts or statistical evidence demonstrating a causal connection between the challenged policy and a significant disparate impact on the allegedly protected group…. There are, for example, no specifics as to the total number of participants in the TAJP, or the number of participants allegedly adversely impacted by the challenged changes to the program, or even the age "group" allegedly adversely impacted. Nor are there any "basic allegations" of statistical methods and comparison, or even any anecdotal information of a significant age-based disparity.[219]

The Appeals Court remanded the case and allowed the plaintiffs to amend their complaint.

The plaintiffs' amended claim presented an expert report to bolster their allegations. However, the Court found the report deficient in several ways. First, it failed to include the impact of another aspect of the case assignment policy that resulted in the plaintiffs rejecting offered assignments.

> The reallocation policy [also] changed the geography of the TAJP by reducing or halting assignments to counties with well-staffed courts, which formerly used a high share of the TAJP resources, and increased assignments to counties with a deficit of active judges…. Notably, when Plaintiffs were offered assignments in understaffed courts, including San Bernardino and Riverside, they declined to serve, reducing their days worked. [The expert report] did not control for the geographic assignment differences after 2019. Given this analytical gap, it cannot be said that but for the 1320 limit, participants over age 70 would necessarily have enjoyed more opportunities to serve and would have worked more days.[220]

Second, it failed to establish a case for the plaintiffs' age-discrimination claim. While the report showed the 1320 limit's impact on TAJP participants over 70 who met the limit, it did not show the limit's impact on participants under 70, or those over 70 who had not met the limit. The Court noted that the analysis "does not allow an inference of discrimination based on age, i.e., that Defendants' enforcement of the 1320 limit has a significate disparate impact on TAJP participants over 70 as compared to participating judges under 70."[221] When the Court analyzed the figures, it found "the 1320 limit had no effect on a supermajority of participants over age 70."[222]

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219. Id. at 115.

220. *Mahler v. Judicial Council of California* (2024) No. CGC-19-575842 (Super. Ct. San Francisco Cty., Cal.), at 5-6.

221. Id. at 6.

222. Id. at 7.

The Superior Court dismissed the case, granting summary judgment to the defendants.[223] Thus, although allegations may facially appear to present a disparate impact case, it is vital to assess the full picture.

State and Federal Housing Laws on Disparate Impact

FEHA[224] declares it a civil right for an individual to seek, obtain, and hold housing without discrimination because of race, religion, color, national origin, ancestry, disability, medical condition, genetic information, source of income, marital status, sex,[225] veteran or military status, primary language, citizenship, or immigration status.[226]

FEHA prohibits housing practices that have a discriminatory effect without a legally sufficient justification.[227] "Practices" are defined to include written and unwritten policies, acts, or failures to act.[228]

> A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of individuals, or creates, increases, reinforces, or perpetuates segregated housing patterns, based on membership in a protected class. A practice predictably results in a disparate impact when there is evidence that the practice will result in a disparate impact even through the practice has not yet been implemented.[229]

FEHA regulations establish the burdens of proof in disparate impact cases.[230] First, the complainant has the burden of proving a challenged practice caused or predictably will cause a discriminatory effect.[231] The burden then shifts to the defendant to show the practice is justified despite the discriminatory effect. This justification must show that the practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory business interests. Second, the

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223. Id.

224. Gov't Code §§ 12900 -12999.

225. For the purposes of this section, "sex" includes gender, gender identity, gender expression, sexual orientation, and reproductive decision making. Gov't Code § 12921(b).

226. Id. Any of the characteristics mentioned above also includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Gov't Code § 12955(m) and Civil Code § 51(e)(6).

227. 2 Cal. Code Regs. § 12060. "Discriminatory effect" has the same meaning as disparate impact and the codes use the terms interchangeably. California law permits exemptions for certain circumstances, such as an individual sharing living areas in a single dwelling unit expressing a sex preference for a roommate, or a person stating an age-based preference for senior housing. See 2 Cal. Code Regs. § 12051.

228. 2 Cal. Code Regs. § 12005(x).

229. 2 Cal. Code Regs. § 12060(b).

230. 2 Cal. Code Regs. §§ 12061 - 12062.

231. 2 Cal. Code Regs. § 12061.

defendant must show the practice effectively carries out the identified business interest. Finally, the defendant must prove there is no feasible alternative that would equally or better accomplish the identified purpose with less discriminatory effect.[232] This is similar to the structure of disparate impact in employment claims.

The federal Fair Housing Act ("FHA") prohibits housing providers from discriminating based on race, color, religion, sex, national origin, familial status, or disability,[233] similar to FEHA.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project

The U.S. Supreme Court affirmed that disparate impact claims may be brought under the federal FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[234] In this case, a Texas nonprofit that helps low-income individuals obtain housing sued the Texas Department of Housing and Community Affairs ("TDHCA") for perpetuating housing segregation by allocating a disproportionate number of federal housing credits in predominantly Black inner-city areas. Relying on *Griggs*, the Supreme Court held that disparate impact claims are cognizable under the FHA:

> Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a 'reasonable measure[ment] of job performance,' [citations omitted] so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the [Civil Rights Act] Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.[235]

On remand to the Northern District of Texas,[236] however, the Court found that Inclusive Communities Project ("ICP") failed to prove a prima facie case for disparate impact. Through a detailed analysis of the TDHCA's point system for awarding tax credits, the Court found that ICP was arguing that TDHCA was abusing its discretion in awarding the federal tax credits. However, exercising discretion is not a specific, facially neutral policy for purposes of a disparate impact

232. 2 Cal. Code Regs. § 12062.

233. 42 U.S.C. §§ 3601 - 3619.

234. *Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project* (2015) 576 U.S. 519.

235. Id. at 541.

236. *Inclusive Cmtys. Project v. Tex. Dep't of Hous. And Cmty. Affairs, et al.* (N.D. Tex. 2016) No. 3:2008cv00546 - Document 271.

claim.[237]

> …regardless of the label ICP places on its claim, it is actually complaining about disparate treatment, not disparate impact. The purpose of disparate impact liability is to root out a facially neutral policy that has an unintended discriminatory result. But a claim for intentional discrimination is evaluated under the disparate treatment framework, which requires a showing of targeted discrimination. Where the plaintiff establishes that a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown disparate treatment. …
>
> If ICP were challenging the existence of TDHCA's discretion rather than how the discretion is used, ICP would seek to enjoin that discretion and to mandate a points-only system or another wholly objective method of awarding tax credits. Instead, ICP maintains that TDHCA's exercise of discretion should be the means to achieve a specific end: to provide increased opportunities for desegregated low-income housing.[238]

The Court also determined that ICP failed to prove it was TDHCA's exercise of discretion, and not other factors such as local zoning rules, community preferences, or developers' choices, caused the statistical disparity.[239] The Court dismissed the case.

Martinez v. City of Clovis

A California appellate decision under FEHA, *Martinez v. City of Clovis,* provides an example of a successful case for disparate impact theory under FEHA.[240] In this case, a resident sued the City of Clovis for failing to zone for low-income housing, resulting in disparate impacts for people of color.[241] The Appeals Court noted that FEHA makes it unlawful for the city "to discriminate through public ... land use practices, decisions, and authorizations"[242] because of protected characteristics including race. The law further states that discrimination includes zoning laws "that make housing opportunities unavailable." Previously, the trial court determined that "[f]ailing to meet the [Regional Housing Needs Allocation] obligation for zoning does not make a housing opportunity 'unavailable' in any material sense."[243] The

237. Id. at 16.
238. Id. at 16-17 (citations omitted), 18.
239. Id. at 20.
240. *Martinez v. City of Clovis* (5th Dist. 2019) 90 Cal.App.5th 193.
241. Id. at 253.
242. Gov't Code § 12955(l).
243. 90 Cal.App.5th at 271.

Appeals Court disagreed and determined that the City's failure to zone for low-income housing did make housing opportunities unavailable for purposes of the law.[244] The Appeals Court remanded for further action and the parties eventually settled out of court.[245]

As noted in the cases above, the analysis for disparate impact is a heavily fact-based inquiry. The Commission reached out to stakeholders for assistance in identifying California laws with uneven burdens and did not find any appropriate for Commission action.

CONCLUSION

Based on the foregoing review, the Commission concluded that California law is aligned with the ERA. California's Constitution contains several provisions related to sex equality[246] and its equal protection doctrine subjects sex-based claims to strict scrutiny.[247] Further, its statutory laws provide extensive protections for individuals based on a broad array of sex characteristics.

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244. Id. at 271.

245. The City of Clovis and the plaintiff, Desiree Martinez, came to a settlement agreement on Feb. 20, 2024. The City agreed to comprehensively plan for affordable housing options and, among other items, would establish a Local Housing Trust Fund, dedicate city-owned lots for the development of affordable housing, and require that up to 10% of units in new housing projects will be affordable to low-income families.

246. See e.g., Cal. Const. art. I, §§ 1, 1.1, 7, 8, and 31. See also discussion of "Status of State Constitutional Amendments" in Memorandum 2023-40, p. 10 and discussion of "California Constitution" in Memorandum 2023-17, pp. 16-19.

247. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 ("[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution…." (citations omitted)); *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 564 (indicating that the Women's Contraceptive Equity Act "serves the compelling state interest of eliminating gender discrimination" and that gender discrimination "violates the equal protection clause of the California Constitution and triggers the highest level of scrutiny" (citation omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 ("*In Sail'er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that 'classifications based upon sex should be treated as suspect.' *Sail'er Inn* thus clearly established the principle that gender-based differentials are to be treated as 'suspect classifications' which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers' Comp. Appeals Bd*., the court stated that 'the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,' and in *Hardy v. Stumpf*, the court acknowledged that '[c]lassifications predicated on gender are deemed suspect in California.'"(citations omitted)); *Boren v. Dep't of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 ("According to California decisional law, a statute establishing 'suspect classifications' or trenching upon 'fundamental interests' is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect." (citations omitted)).

However, not all of California's anti-discrimination laws contain the same level of detail, so the Commission is proposing a sex quality provision that clarifies the scope of California's sex discrimination prohibitions to help ensure a uniform understanding of the scope of California laws governing sex discrimination across all code sections. The Commission also determined there were no laws ripe for revision due to discriminatory language or disparate impacts on the basis of sex.

Contents

PROPOSED LEGISLATION

PROPOSED LEGISLATION

BUSINESS AND PROFESSIONS CODE

Bus. & Prof. Code § 14.3 (added). Scope of sex discrimination

SEC. ___. Section 14.3 is added to the Business and Professions Code, to read:

14.3. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 14.3 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Business and Professions Code, there are sections identical to Section 14.3 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on

Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

CIVIL CODE

Civ. Code § 14.1 (added). Scope of sex discrimination

SEC. ___. Section 14.1 is added to the Civil Code, to read:

14.1. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 14.1 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Civil Code, there are sections identical to Section 14.1 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

CIVIL CODE

Civ. Code § 51 (amended). Personal Rights

SEC. ___. Section 51of the Civil Code is amended to read:

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2) (A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (i) of Section 12926 of the Government Code.

(4) "Race" is inclusive of traits associated with race, including, but not limited to, hair texture and protective hairstyles. "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locs, and twists.

(5) "Religion" includes all aspects of religious belief, observance, and practice.

(6) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, and any actual or perceived characteristic in Section 14.1(b)(3). "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.

(7) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" includes any of the following:

(A) Any combination of those characteristics.

(B) A perception that the person has any particular characteristic or characteristics within the listed categories or any combination of those characteristics.

(C) A perception that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics, or any combination of characteristics, within the listed categories.

(8) "Sexual orientation" has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

Comment. Paragraph (6) of subdivision (e) of Section 51 is amended to reflect California's commitment to the equality of rights under the law. This amendment conforms with Section 14.1, which is added to the Civil Code, and there are sections identical to Section 14.1 in each of the other California Codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in this section, the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 17.5 (added). Scope of sex discrimination

SEC. ___. Section 17.5 is added to the Code of Civil Procedure, to read:

17.5. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 17.5 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Code of Civil Procedure, there are sections identical to Section 17.5 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

COMMERCIAL CODE

Com. Code § 36.5 (added). Scope of sex discrimination

SEC. ___. Section 36.5 is added to the Commercial Code, to read:

36.5. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 36.5 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Commercial Code, there are sections identical to Section 36.5 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

CORPORATIONS CODE

Corp. Code § 12.4 (added). Scope of sex discrimination

SEC. ___. Section 12.4 is added to the Corporations Code, to read:

12.4. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 12.4 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Corporations Code, there are sections identical to Section 12.4 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

EDUCATION CODE

Educ. Code § 212.4 (added). Scope of sex discrimination

SEC. ___. Section 212.4 is added to the Education Code, to read:

212.4. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 212.4 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Education Code, there are sections identical to Section 212.4 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in this chapter, the Unruh Civil Rights Act (Section 51 of the Civil Code), and the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code).

ELECTIONS CODE

Elec. Code § 353.7 (added). Scope of sex discrimination

SEC. ___. Section 353.7 is added to the Elections Code, to read:

353.7. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 353.7 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Elections Code, there are sections identical to Section 353.7 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

EVIDENCE CODE

Evid. Code § 212 (added). Scope of sex discrimination

SEC. ___. Section 212 is added to the Evidence Code, to read:

212. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 212 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Evidence Code, there are sections identical to Section 212 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

FAMILY CODE

Fam. Code § 136 (added). Scope of sex discrimination

SEC. ___. Section 136 is added to the Family Code, to read:

136. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 136 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Family Code, there are sections identical to Section 136 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

FINANCIAL CODE

Fin. Code § 23 (added). Scope of sex discrimination

SEC. ___. Section 23 is added to the Financial Code, to read:

23. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 23 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Financial Code, there are sections identical to Section 23 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

FISH AND GAME CODE

Fish & Game Code § 9.4 (added). Scope of sex discrimination

SEC. ___. Section 9.4 is added to the Fish and Game Code, to read:

9.4. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 9.4 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Fish and Game Code, there are sections identical to Section 9.4 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

FOOD AND AGRICULTURE CODE

Food & Agric. Code § 52 (added). Scope of sex discrimination

SEC. ___. Section 52 is added to the Food and Agriculture Code to read:

51. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

s(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 52 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Food and Agriculture Code, there are sections identical to Section 52 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

GOVERNMENT CODE

Gov't Code § 27 (added). Scope of sex discrimination

SEC. ___. Section 27 is added to the Government Code, to read:

27. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 27 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Government Code, there are sections identical to Section 27 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

GOVERNMENT CODE

Gov't Code § 12926 (amended). Definitions

SEC. ___. Section 12926 in the Government Code is amended to read:

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) (1) "Genetic information" means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) "Genetic information" does not include information about the sex or age of any individual.

(h) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) "Medical condition" means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or that person's offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or that person's offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) "Mental disability" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) "Veteran or military status" means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(l) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of "disability" used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection

of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status" includes any of the following:

(1) Any combination of those characteristics.

(2) A perception that the person has any of those characteristics or any combination of those characteristics.

(3) A perception that the person is associated with a person who has, or is perceived to have, any of those characteristics or any combination of those characteristics.

(p) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.

(r) (1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "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.

(3) "Sex" also includes any actual or perceived characteristics listed in Section 27(b)(3).

(s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(t) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license or identification card granted under Section 12801.9 of the Vehicle Code.

(w) "Race" is inclusive of traits associated with race, including, but not limited to, hair texture and protective hairstyles.

(x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locs, and twists.

(y) "Reproductive health decisionmaking" includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health. This subdivision and other provisions in this part relating to "reproductive health decisionmaking" shall not be construed to mean that subdivision (r) of this section and other provisions in this part related to "sex" do not include reproductive health decisionmaking.

Comment. Paragraph (3) of subdivision (r) of Section 12926 is amended to reflect California's commitment to the equality of rights under the law. This amendment conforms with Section 27, which is added to the Government Code, and there are sections identical to Section 27 in each of the other California Codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

HARBORS AND NAVIGATION CODE

Harb. and Nav. Code § 26 (added). Scope of sex discrimination

SEC. ___. Section 26 is added to the Harbors and Navigation Code, to read:

26. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 26 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Harbors and Navigation, there are sections identical to Section 26 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

HEALTH AND SAFETY CODE

Health & Safety Code § 29 (added). Scope of sex discrimination

SEC. ___. Section 29 is added to the Health and Safety Code, to read:

29. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 29 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Health and Safety Code, there are sections identical to Section 29 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

INSURANCE CODE

Ins. Code § 49 (added). Scope of sex discrimination

SEC. ___. Section 49 is added to the Insurance Code, to read:

49. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 49 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Insurance Code, there are sections identical to Section 49 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

LABOR CODE

Lab. Code § 12.3 (added). Scope of sex discrimination

SEC. ___. Section 12.3 is added to the Labor Code, to read:

12.3. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 12.3 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Labor Code, there are sections identical to Section 12.3 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

MILITARY AND VETERANS CODE

Mil. & Vet. Code § 20 (added). Scope of sex discrimination

SEC. ___. Section 20 is added to the Military and Veterans Code, to read:

20. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 20 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Military and Veterans Code, there are sections identical to Section 20 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

PENAL CODE

Penal Code § 5.5 (added). Scope of sex discrimination

SEC. ___. Section 5.5 is added to the Penal Code, to read:

5.5. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 5.5 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Penal Code, there are sections identical to Section 5.5 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

PROBATE CODE

Prob. Code § 71 (added). Scope of sex discrimination

SEC. ___. Section 71 is added to the Probate Code, to read:

71. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 71 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Probate Code, there are sections identical to Section 71 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

PUBLIC CONTRACT CODE

Pub. Cont. Code § 1105 (added). Scope of sex discrimination

SEC. ___. Section 1105 is added to the Public Contract Code, to read:

1105. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 1105 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Public Contract Code, there are sections identical to Section 1105 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

PUBLIC RESOURCES CODE

Pub. Res. Code § 19 (added). Scope of sex discrimination

SEC. ___. Section 19 is added to the Public Resources Code, to read:

19. (a)(1) Any provisions that prohibit discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 19 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Public Resources Code, there are sections identical to Section 19 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

PUBLIC UTILITIES CODE

Pub. Util. Code § 23 (added). Scope of sex discrimination

SEC. ___. Section 23 is added to the Public Utilities Code, to read:

23. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 23 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Public Utilities Code, there are sections identical to Section 23 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

REVENUE AND TAXATION CODE

Rev. & Tax. Code § 12.3 (added). Scope of sex discrimination

SEC. ___. Section 12.3 is added to the Revenue and Taxation Code, to read:

12.3. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 12.3 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Revenue and Taxation Code, there are sections identical to Section 12.3 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

STREETS AND HIGHWAYS CODE

Sts. and Hy. Code § 37 (added). Scope of sex discrimination

SEC. ___. Section 37 is added to the Streets and Highways Code, to read:

37. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 37 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Streets and Highways Code, there are sections identical to Section 37 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

UNEMPLOYMENT INSURANCE CODE

Unemp. Ins. Code § 22 (added). Scope of sex discrimination

SEC. ___. Section 22 is added to the Unemployment Insurance Code, to read:

22. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 22 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Unemployment Insurance Code, there are sections identical to Section 22 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

VEHICLE CODE

Veh. Code § 552 (added). Scope of sex discrimination

SEC. ___. Section 552 is added to the Vehicle Code, to read:

552. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 552 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Vehicle Code, there are sections identical to Section 552 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

WATER CODE

Water. Code § 27 (added). Scope of sex discrimination

SEC. ___. Section 27 is added to the Water Code, to read:

27. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 27 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Water Code, there are sections identical to Section 27 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).

WELFARE AND INSTITUTIONS CODE

Welf. & Inst. Code § 28 (added). Scope of sex discrimination

SEC. ___. Section 28 is added to the Welfare and Institutions Code, to read:

28. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting "sex discrimination," as defined in paragraph (3) of subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of "sex discrimination," the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) "Discrimination" includes, but is not limited to, harassment.

(2) "Pregnancy or related medical conditions" includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) "Sex discrimination" includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual's reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 28 is added to reflect California's commitment to the equality of rights under the law. While this section applies specifically to the Welfare and Institutions Code, there are sections identical to Section 28 in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California's laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Section 51 of the Civil Code), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), California's laws on Educational Equity (Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code).
