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A LITTLER MENDELSON TIME SENSITIVE NEWSLETTER

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AUGUST 2003

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CALIFORNIA'S NEW PROTECTION AGAINST "GENDER" BIAS PROHIBITS TRANSGENDER DISCRIMINATION, AIMS AT "SEX STEREOTYPES"

By Paul R. Lynd

Effective January 1, 2004, California has amended the state's Fair Employment and Housing Act ("FEHA") to prohibit discrimination based on "gender." The amendments, enacted through Assembly Bill 196 ("AB 196"), are primarily intended to prohibit discrimination against transgender employees. However, the definition of "gender" adopted by the Legislature goes farther than protecting against transgender discrimination. It also prohibits discrimination based on an individual's identity, appearance, or behavior as they relate to the individual's gender. In doing so, the Legislature expressed its intent to prohibit "sex stereotypes."

THE FEHA'S NEW PROTECTION AGAINST "GENDER" DISCRIMINATION

Federal law under Title VII of the Civil Rights Act of 1964 does not protect against transgender discrimination. Through AB 196, California is only the fourth state to prohibit employment discrimination based on transgender status or gender identity. It enters largely uncharted waters. Minnesota enacted its law in 1993, followed by Rhode Island in 2001 and New Mexico earlier this year. There is scant case authority interpreting these laws.

AB 196 expands the FEHA's definition of "sex" to include "a person's gender." For the definition of "gender," AB 196 incorporated the meaning of the term from California's hate crimes law. As incorporated into the FEHA, "gender" means "the employee's or applicant's actual sex or the employer's perception of the employee's or applicant's sex, and includes the employer's perception of the employee's or applicant's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee's or applicant's sex at birth." This long definition is not necessarily clear or easy to unpack. Its full meaning and implications likely will be determined in future court cases.

TRANSGENDER DISCRIMINATION AND HARASSMENT PROHIBITED

AB 196 protects applicants and employees from discrimination and harassment because they are transgender. An employer thus will not be able to deny or terminate employment, discriminate in compensation or the terms, conditions, or privileges of employment, or allow a hostile work environment because an individual is transgender. The legislation does not include the term "transgender." Yet it is clear that the new law prohibits transgender discrimination. AB 196 prohibits discrimination because an individual's gender identity or appearance is different from his or her sex at birth. These terms fit the proper definition of "transgender," which is living as a gender other than the individual's gender at birth, but without surgery. Also, the bill's primary purpose is clear from legislative committee materials. The Assembly Labor and Employment Committee analysis states, "This bill is intended to offer protection to transgender individuals."

BILL PROTECTS GENDER IDENTITY AND APPEARANCE, BARS "SEX STEREOTYPES"

Significantly, AB 196 prohibits more than transgender discrimination. It protects an

individual from discrimination based on "identity, appearance, or behavior" that is "different from that traditionally associated with" the individual's sex at birth. This language aims at discrimination based on "sex stereotypes" — that is, characteristics or attributes that are stereotypically different from an individual's biological sex. In a similar vein, federal courts have held that stereotypes about sex roles or behavior violate Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

What kinds of sex stereotypes are prohibited? These provisions in AB 196 are very broad, and are likely to raise questions that require clarifying litigation. The legislative materials afford some guidance. According to the Senate Judiciary Committee, AB 196 "will protect men who are seen as 'too feminine' and women perceived as 'too masculine.'" The Assembly Labor and Employment Committee analysis explains that AB 196 will "benefit any person who does not possess traits or project conduct stereotypically associated with his or her sex. These traits may include a person's personality, clothing, hairstyle, speech, mannerisms, or demeanor. They may also include secondary sex characteristics such as vocal pitch, facial hair, or the size or shape of a person's body. For example, this bill would protect a female employee from being told that she must dress in a more 'feminine' manner and a man from gender-based harassment on the job because he has a soft voice or a slight build."

IMPACT ON EMPLOYER'S DRESS AND APPEARANCE STANDARDS UNCLEAR

AB 196's gender identity protections raise the question of the extent to which an employer must allow an employee to dress as the opposite sex. Addressing dress and appearance standards that employers may impose, AB 196 adds new Government Code section 12949. It provides that no provision of the FEHA "relating to gender-based discrimination affects the ability to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity."

This provision still leaves uncertainty. First, it preserves an employer's ability to enforce reasonable and lawful appearance, grooming, and dress standards. But then it seems to take away that latitude by allowing an employee to "appear or dress consistently with the employee's gender identity." By focusing on the employee's identification of his or her gender, the section appears to require an employer to permit an employee to appear as the gender with which the employee identifies, as long as the employee is well-groomed and presentable.

Taken literally, this section could require an employer to allow an employee to appear as the gender that the employee chooses to present only on particular occasions. For instance, it might allow an employee to appear as a male on one day and a female the next day. However, the Senate Judiciary Committee dismissed such an objection. Its analysis states that "it would be most unlikely that day-to-day changes or changes in jest in gender identity would be covered by this bill." Nonetheless, uncertainty remains, and the Senate committee acknowledged that case-by-case assessments would be necessary. This provision, as well as the others in AB 196, may be clarified by implementing regulations adopted by the Fair Employment and Housing Commission.

RESTROOM ISSUES LIKELY TO ARISE, BUT NOT ADDRESSED

Among transgender issues in the workplace, questions commonly arise concerning employee restrooms. For example, may an employer require that an employee use only the restroom used by members of his or her biological sex? Or must an employee be permitted to use the restroom designated for members of the gender with which he or she identifies? AB 196 does not directly address these inevitable questions, and the legislative materials are silent.

One court has addressed these questions. In *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), the Minnesota Supreme Court held that, under Minnesota's law, an employer still may designate restroom use according to biological gender. There, an employee born a male had taken female hormones and "presented publicly" as female for several years. The employee identified as female, although biologically the employee was not. The employer refused to allow the employee to use the women's restroom. The court held that Minnesota law does not require an employer to allow access to a restroom based on the employee's "self-image of gender."

The Minnesota decision may be persuasive in interpreting California's new law, but California law may be interpreted differently. Pending any regulations or rulings, given the broad protection that AB 196 provides, employers should use caution before imposing any restrictions on the use of restrooms by transgender employees.

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