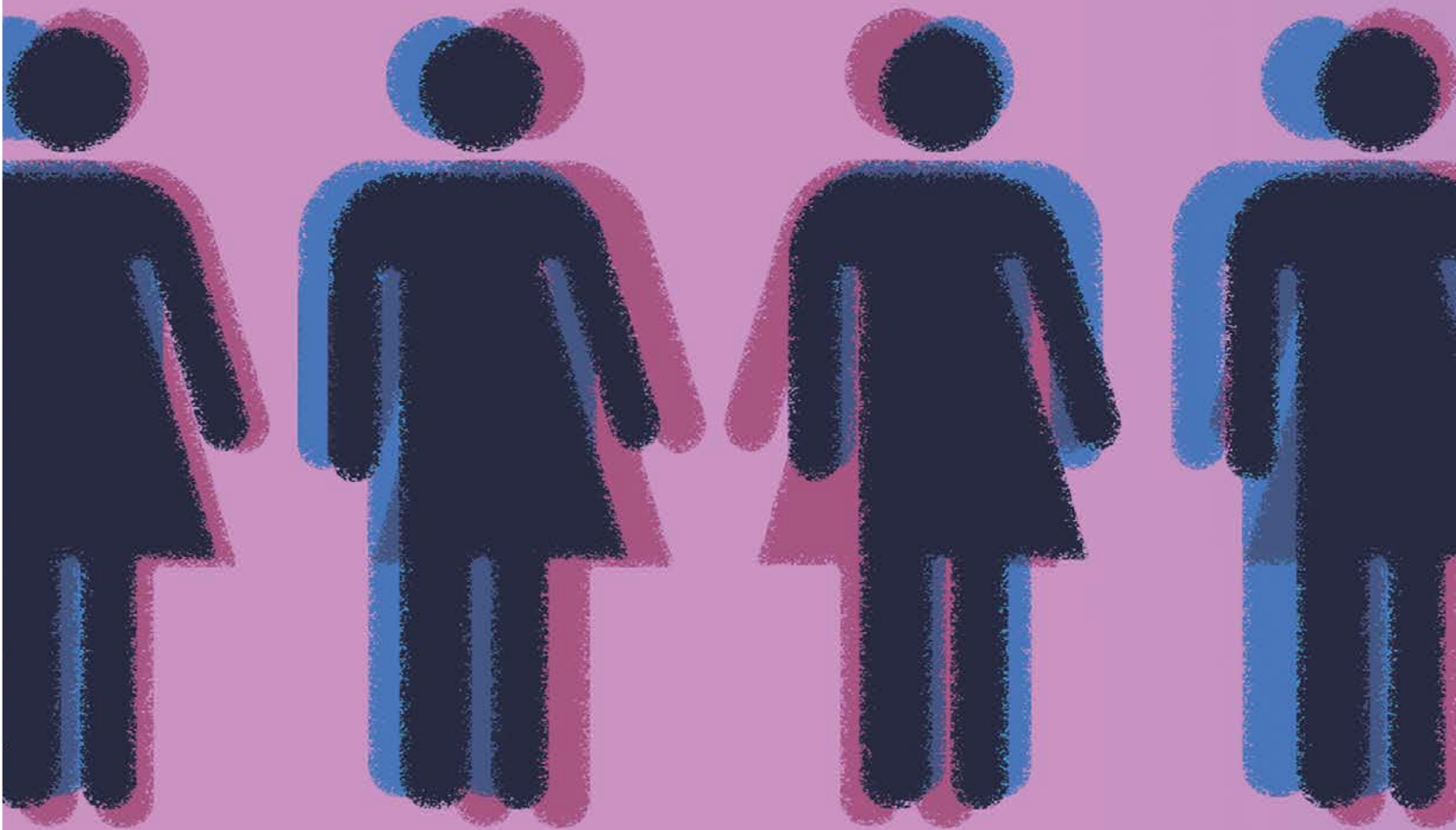


Transformation of Transgender Rights in the Workplace

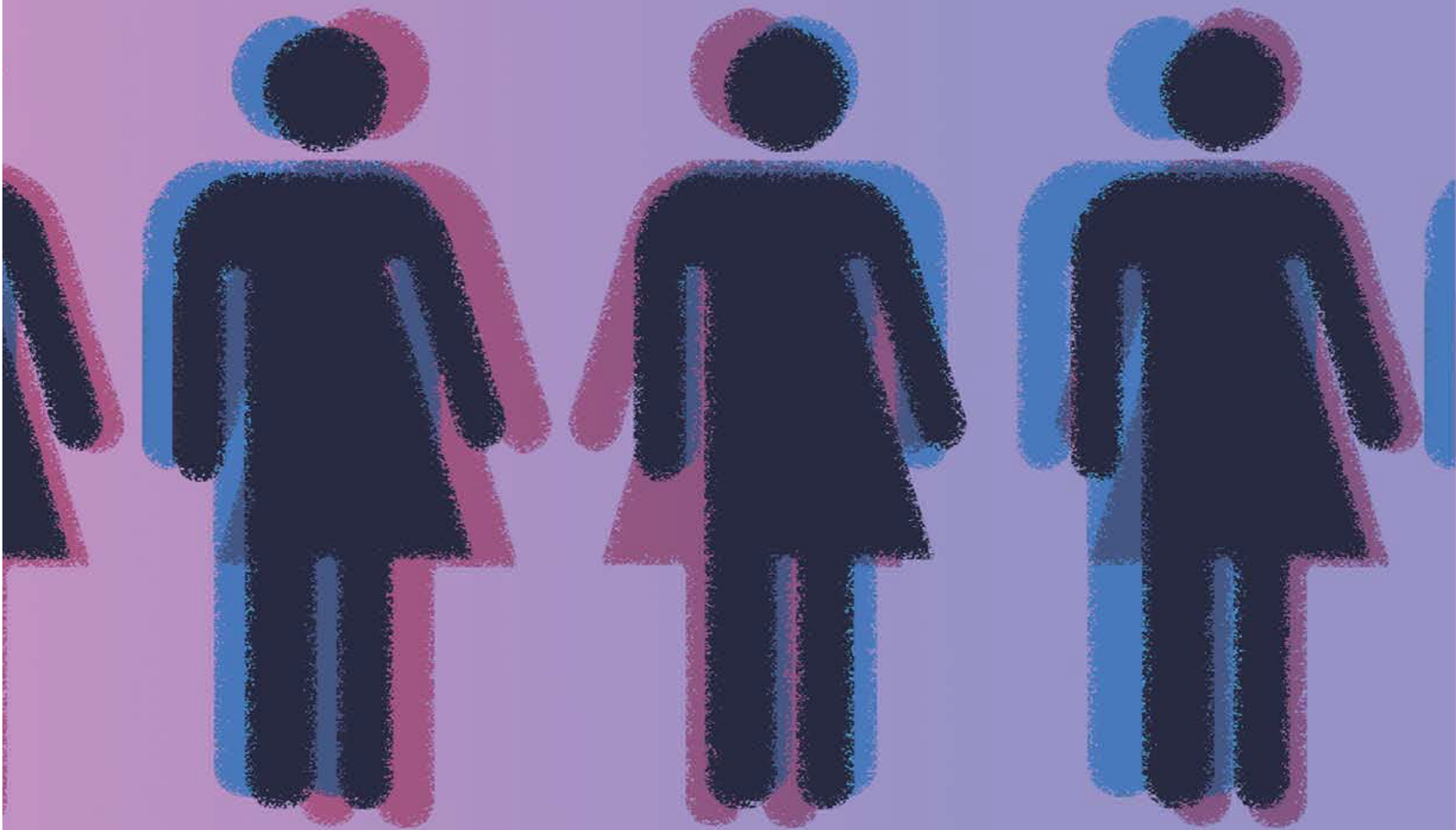
By Hannah Sweiss





By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 24.

Protections for transgender employees have expanded in recent years. Attorneys should familiarize themselves with the latest developments to better advise clients. Increased awareness and proper training can significantly reduce the risk of violations while improving the conditions for transgender employees.



GENDER TRANSITION AND TRANSGENDER identity has taken center stage in the media recently. However, out of the spotlight, the rights of transgender persons may be unclear to many. Transgender persons struggle with difficult issues, particularly in the workplace. In recent years, there have been increasing efforts to broaden federal and state protections for transgender persons in the workplace, but many employers may be unaware of these protections and rights. As transgender rights awareness continues to gain momentum and protections broaden, employers with even one employee need to be prepared to deal with pertinent issues such as gender identity, gender stereotyping, and gender transitioning.

Terminology: Getting it Right

In keeping with both political correctness as well as raising awareness in the workplace, mindfulness of terminology is important. To start, the term “transgender” is defined as “a person who identifies with or expresses a gender identity that differs from the one which corresponds to the person’s sex at birth.”¹ The term arose in the 1970’s and has become an umbrella term for people whose gender identity and/or gender expression differs from what is stereotypically associated with their birth-assigned sex.²

The term “transsexual” is often confused with the term transgender.³ Unlike transgender, transsexual is not an umbrella term.⁴ Some people who have permanently changed or seek to change their bodies through medical interventions prefer the term transsexual, but many transgender people do not identify as transsexual and prefer to be referred to as transgender.⁵

There are multiple terms that are key when discussing transgender identity. Terms such as sex, gender identity, gender expression, and sexual orientation are particularly important in understanding transgender identity.

The term “sex” refers to the classification of male or female.⁶ At birth, a sex is assigned to each person (girl or boy), based on the appearance of external anatomy.⁷ However, a person’s sex is not just external anatomy, but rather a multitude of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.⁸

Distinct from sex, “gender identity” is not a visible identity, but an individual’s internal sense of being male or female.⁹ For transgender people, internal gender identity

does not match the sex assigned at birth (girl or boy). For some, their gender identity does not neatly conform within either sex.¹⁰

In contrast to gender identity, “gender expression” is a person’s outward manifestation of gender.¹¹ Gender identity is expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, or body characteristics.¹² Transgender people typically seek to make their gender expression align with their gender identity, rather than the sex they were assigned at birth.¹³

“Sexual orientation” is a person’s physical, romantic, and/or emotional attraction to another person.¹⁴ Transgender people may be straight, lesbian, gay, or bisexual. As an example, a person who transitions from female to male and is attracted solely to women would identify as a straight male. “Transition” refers to the complex process of gender transition that may occur over a long period of time and is preferred over the term sex change.¹⁵ Transition is more than surgery or hormone therapy. It includes telling family, friends, and co-workers; using a different name and new pronouns; dressing differently; and changing a person’s name and/or sex on legal documents.¹⁶ Transition is different and unique to each individual.

Those are just some of the basic terms that surround the transgender discussion; however, there are other terms that may lend to a better understanding of transgender status such as gender dysphoria, cisgender, gender-nonconforming, etc.

The Legal Landscape Impacting Transgender Persons in the Workplace

Though it may seem obvious to some that transgender persons would be protected from employment discrimination for being transgender or transitioning, federal and state courts have not always been sympathetic to transgender persons. In fact, until recently, there were essentially very few protections for transgender persons both under federal and state law. In addition to understanding the terminology surrounding the transgender discussion, it is important to understand the federal and state legal landscape protecting and impacting transgender persons in the workplace.

Federal Protections against Employment Discrimination

Title VII of the Civil Rights Act of 1964 (Title VII)¹⁷ is the federal law that protects individuals against employment



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discrimination on the basis of protected categories, including, but not limited to sex.¹⁸ There is currently no express federal law protecting individuals from job discrimination based on actual or perceived sexual orientation or gender identity.¹⁹ Sexual orientation and gender identity are not expressly protected categories under Title VII and until 1989, Title VII did not protect transgender people.

In 1989, the United States Supreme Court held in *Price Waterhouse v. Hopkins*²⁰ that sex discrimination under Title VII includes discrimination based on “sex stereotyping,” or a person’s perceived nonconformity with gender stereotype. Since the *Price Waterhouse* decision, there have been federal courts that have explicitly ruled that discrimination based on transgender status is a prohibited form of sex discrimination under Title VII and/or the Equal Protection Clause.²¹

In 2012, the Equal Employment Opportunity Commission (EEOC) issued a landmark decision in *Macy v. Holder*,²² which held that discrimination based on transgender status constituted unlawful sex discrimination under Title VII. In extending protection to transgender persons, the EEOC noted:

If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman or vice versa. But the statute’s protections sweep far broader than that, in part because the term “gender” encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.²³

Though the protection afforded transgender persons under federal law has progressed, there are continuing efforts to broaden and implement consistent protections for the lesbian, gay, bisexual and transgender (LGBT) community as a whole since currently there is no federal law that consistently protects LGBT individuals from employment discrimination.²⁴

Recent Federal Developments Broadening Transgender Protections in the Workplace

On December 15, 2014, Eric Holder issued a memorandum on behalf of the Department of Justice entitled “Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964,” formally

recognizing for the first time that Title VII “extends to claims of discrimination based on an individual’s gender identity, including transgender status.”²⁵

A few months later, on March 16, 2015, the United States Commission on Civil Rights held its first ever hearing on workplace discrimination against those in the LGBT community.²⁶

In another landmark ruling issued on April 1, 2015, the EEOC found that the Department of the Army had engaged in discrimination against a transgender employee who transitioned from male to female, by barring her from using the same restroom as other female employees, and by her supervisors’ continued intentional use of male names and pronouns in referring to the employee after her transition.²⁷ The employee was not only refused access to a restroom consistent with her gender identity, her supervisors repeatedly used male pronouns and her old name in front of her co-workers and others, intentionally mocking her

and “outing” her as transgender.²⁸ The EEOC held that “[w]hile inadvertent and isolated slips of the tongue would be a different story, it was clear the use of a male name and pronouns to refer to the employee was not accidental, but rather intended to humiliate and ridicule her.”²⁹

That same month, on April 8, 2015, the Obama administration announced it had opened a gender-neutral bathroom within the White House complex, which is a symbolic step for the President to protect the rights of members of the LGBT community in the workplace.³⁰

In line with these recent developments, the EEOC recently adopted a strategic enforcement plan for Fiscal Years 2013-16, which specifically addresses “Emerging and Developing Issues,” such as protections for LGBT individuals under Title VII.³¹ The plan includes an LGBT work group to advise EEOC litigators, coordinate internal policies and comment on pending legislation.³² Another initiative has EEOC litigators filing amicus curiae briefs in lawsuits around the country.³³

California Protections for Transgender Individuals

California’s employment discrimination protections are found primarily in the Fair Employment and Housing Act (FEHA).³⁴ FEHA prohibits harassment and discrimination in employment based on sex, gender, gender identity, gender expression, sexual orientation and perceived sexual orientation.³⁵ It also prohibits retaliation for protesting illegal discrimination related to one of these categories.³⁶

Additionally, FEHA makes it unlawful for an employer to refuse to hire or employ a person; to discharge someone



Title VII ‘extends to claims of discrimination based on an individual’s gender identity, including transgender status.’”^[1]

from employment; or to discriminate in compensation, in terms, conditions, or privileges of employment, because of the person's gender identity.³⁷

Despite these broad protections under FEHA, the law explicitly allows an employer to enforce reasonable workplace appearance, grooming, and dress standards, as long as employees are allowed to dress in a manner consistent with their gender identity or gender expression.³⁸ This means that if an employer enforces dress codes, the dress code should be enforced in a way that comports with standards appropriate to align with a person's gender identity or gender expression.

More progressive than federal law, FEHA broadly protects not only gender identity, but also gender expression (regardless of whether an employee self-identifies as a transgender individual).

In addition to FEHA, California Labor Code §§1101 and 1102 prohibit employers from preventing or punishing an employee's political activity, which includes "coming out."³⁹ So if an employee is discriminated against after disclosing his or her gender identity or openly transitioning from one gender to another, an employee may bring a lawsuit under these sections, arguing that such actions are protected political acts.

Other relevant California laws that may extend protection to transgender persons include California's Disabled Persons Act,⁴⁰ Unruh Civil Rights Act,⁴¹ and Ralph Civil Rights Act.⁴²

California employers and employment law attorneys must remain cognizant of the expanding gender-identity protections that safeguard employees' rights to dress like, act like and use the restroom of the gender they identify with, even if they never undergo surgery to alter their appearance.

Recent California Developments Expanding Transgender Protections in the Workplace

Last year, the California Department of Fair Employment and Housing (DFEH), which is the agency that enforces FEHA, brought a lawsuit against a California employer alleging it was sex, gender, gender identity and gender expression discrimination to require a transgender employee to use the female locker room and restroom facilities until the employee's gender transition to male was "complete" after sex reassignment surgery.⁴³ The DFEH further alleged the employer not only engaged in discrimination but the employer failed to prevent such discrimination.⁴⁴

The employer demurred, arguing that DFEH failed to state a cause of action because FEHA does not prohibit employers from requiring restroom and changing room use based on gender at birth.⁴⁵ The employer expressed concern about the discomfort of other employees in regard to the prospective employee's use of the men's facilities.⁴⁶ In response, the court aptly noted:

...hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation.⁴⁷

The Superior Court overruled the employer's demurrer on all grounds.⁴⁸ The court ruled it would be unlawful for an employer to require a transgender employee to use the bathroom and locker room of his or her birth-assigned sex.⁴⁹ As guidance to employers, the court clarified that "individuals who claim a different gender from day to day, or who do so simply to be disruptive or to sexually harass other employees, do not meet the definition of transgender."⁵⁰


As noted earlier, cases invoking issues of gender identity and expression are increasing in frequency. The EEOC, interpreting the sex discrimination provisions of Title VII to forbid discrimination against transgender individuals, and DFEH's expanded role as an enforcer of FEHA, makes it more important than ever for employers and the attorneys that advise them to remain up to date on developments in regard to workplace issues pertaining to gender identity and expression.

Takeaway for Client Employers

Failing to properly deal with issues of gender identity and gender expression may lead to employee claims. Below are tips and suggested best practices to help ensure a workplace free from discrimination and harassment for all employees.

- **Establish Policies.** Make tolerance part of the workplace culture by having strong anti-discrimination provisions in personnel policies.
- **Establish Standards for All.** Implement reasonable workplace appearance, grooming, and dress standards that allow employees to appear or dress consistently with their gender identity and gender expression.
- **Communicate.** Ensure employees know harassment and discrimination based on sex, gender, sexual orientation, gender identity and/or gender expression will not be tolerated.
- **Establish Procedures.** Implement procedures for gender transitions that clearly delineate responsibilities and expectations of transitioning employees, their supervisors, colleagues and other staff.
- **Maintain Privacy.** Ensure the privacy of gender-transitioning employees.
- **Implement Changes.** Address employees by their preferred name and/or preferred title and pronoun by all persons in the workplace.

- **Update Personnel Records.** If state and federal legal requirements are met,⁵¹ employee documents should reflect the employee's name, title and pronoun preference.
- **Restrooms.** Allow employees to use the restroom that corresponds with the employee's gender identity and consider assigning a gender-neutral restroom or locker room to accommodate all employees, whether male, female or transitioning.
- **Problem Solving.** If an employee requests help as he or she undergoes a gender transition, engage in a dialogue and ask the employee to share any concerns. Then, figure out what accommodations are best and/or possible. A change in wardrobe could occur overnight, but a transition involving hormones and surgery might take several years to complete.
- **Train Employees.** Larger employers that are required to provide sexual harassment training⁵² and employers of all sizes should consider providing diversity training to employees.

Although employers and HR staff may be aware employees are afforded protection against discrimination based on gender identity and gender expression, transgender discrimination or harassment claims may arise from others employed in the workplace. To help prevent such claims, employers should educate their workforce not only through policies and procedures, but also through training. If this means having employees participate in diversity training, then employers should consider making that investment. 

¹ "Transgender," Merriam-Webster Online Dictionary, 2015, <http://www.merriam-webster.com/dictionary/transgender> (last visited May 11, 2015).

² Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, Berkeley Journal of Employment and Labor Law Volume 22, Issue 2, Article 5 (April 2014).

³ GLAAD Media Reference Guide—Transgender Issues, GLAAD, 2015, <http://www.glaad.org/reference/transgender>, (last visited May 10, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management, <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance> (last visited May 11, 2015).

¹⁰ See GLAAD Media Reference Guide—Transgender Issues, *supra*.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 42 U.S.C. §2000e-2(a).

¹⁸ Title VII applies to employers with 15 or more employees. See 42 U.S.C. §2000e(b) ("the term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...").

¹⁹ *Employment Non-Discrimination Act*, The Leadership Conference, <http://www.civilrights.org/lgbt/enda/> (last visited May 10, 2015).

²⁰ *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228.

²¹ *Schroer v. Billington* (2008) 577 F.Supp.2d 293; *Glenn v. Brumby* (2011) 664 F.3d 1312.

²² *Macy v. Holder* (EEOC April 20, 2012) Appeal No. 012010821, available at <http://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf>.

²³ *Id.*

²⁴ Senate Bill 815-113th Congress (2013-2014), Employment Non-Discrimination Act of 2013, available at <https://www.congress.gov/bill/113th-congress/senate-bill/815> (introduced in 2013, the Employment Non-Discrimination Act (ENDA) sought to prohibit covered employers (employment agencies, labor organizations, or joint labor-management committees) from engaging in employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity).

²⁵ U.S. Department of Justice Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (December 15, 2015, available at <http://www.justice.gov/file/188671/download>).

²⁶ Transgender Law Center, TLC Testifies at Historic Hearing on LGBT Workplace Discrimination, <http://transgenderlawcenter.org/archives/11465> (last visited May 11, 2015); LGBT Employees and Workplace Discrimination, CSPAN (March 16, 2015), <http://www.c-span.org/video/?324836-1/lgbt-employees-workplace-discrimination-forum> (last visited May 11, 2015).

²⁷ *Lusardi v. Department of the Army* (EEOC April 1, 2015) Appeal No. 0120133395; see also Transgender Law Center, "Groundbreaking EEOC ruling finds the Army discriminated against transgender employee by denying bathroom access, pronouns," <http://transgenderlawcenter.org/archives/11521> (last visited May 11, 2015).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Kevin Liptack and Sunlen Surfaty, "The White House complex now has a gender-neutral bathroom," CNN (April 9, 2015 10:54 a.m.), <http://www.cnn.com/2015/04/09/politics/white-house-all-gender-bathroom>.

³¹ See U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan Fiscal Years 2012-2016*, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.

³² *Id.*

³³ *Id.*

³⁴ California Government Code §§12900–12996.

³⁵ California Government Code §§12940, 12945, 12945.2.

³⁶ *Id.*

³⁷ California Government Code §§12940(a) and 12926(p).

³⁸ California Government Code §12949.

³⁹ *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979) (the California Supreme Court interpreted "coming out" by lesbian, gay and bisexual employees to constitute protected political activity).

⁴⁰ *Cal. Civ. Code* §54 *et seq.*

⁴¹ *Cal. Civ. Code* §51 *et seq.*

⁴² *Cal. Civ. Code* §51.7, subd. (a) (prohibits violence, or intimidation by threat of violence, committed against their persons or property on account of any characteristic including gender identity and gender expression, or because another person perceives them to have one or more of those characteristics).

⁴³ *Department of Fair Employment and Housing vs. American Pacific Corporation* (March 13, 2014) Case No. 34-2013-00151153-CU-CR, available at <http://www.dfeh.ca.gov/res/docs/Announcements/Lozano%20final%20order.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* The court made this clarification in response to the employer's argument that under the DFEH's interpretation of FEHA "a male employee need only claim a female gender identity and the employer must permit him to shower, disrobe, and perform bodily functions with female coworkers."

⁵¹ Transgender Law Center, *A Practitioner's Guide to California Transgender Law: A Reference Guide for California Lawyers and Advocates* (March 2010), available at <http://transgenderlawcenter.org/issues/a-practitioners-guide-to-california-transgender-law-a-reference-guide-for-california-lawyers-and-advocates>.

⁵² See California Government Code Section 12950.1 ("An employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California within six months of their assumption of a supervisory position. An employer covered by this section shall provide sexual harassment training and education to each supervisory employee in California once every two years.")

M CLE Test No. 80

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Title VII of the Civil Rights Act of 1964 (Title VII) is the federal law that protects individuals against employment discrimination on the basis of protected categories. True False
2. The term "gender identity" refers to the classification of male or female. True False
3. Sexual orientation and gender identity are not expressly protected categories under Title VII. True False
4. The U.S. Department of Justice has never recognized that Title VII "extends to claims of discrimination based on an individual's gender identity, including transgender status." True False
5. California employers are not allowed to enforce reasonable workplace appearance, grooming, and dress standards under the Fair Employment and Housing Act (FEHA). True False
6. The Equal Employment Opportunity Commission (EEOC) interprets the sex discrimination provisions of Title VII to forbid discrimination against transgender individuals. True False
7. The Department of Fair Employment and Housing enforces the FEHA. True False
8. Sexual orientation is a person's physical, romantic, and/or emotional attraction to another person. True False
9. The term "transsexual" is an umbrella term to identify persons who identify with or expresses a gender identity that differs from the one that corresponds to the person's sex at birth. True False
10. Gender expression is a person's outward manifestation of gender that may be expressed through a person's name, pronouns, clothing, haircut, behavior, voice, or body characteristics. True False
11. In 1989, the United States Supreme Court held in *Price Waterhouse v. Hopkins* that sex discrimination under Title VII includes discrimination based on "sex stereotyping," or a person's perceived nonconformity with gender stereotype. True False
12. The term "transgender" arose in the 1970's and has become an umbrella term for people whose gender identity and/or gender expression differs from what is stereotypically associated with their birth-assigned sex. True False
13. The United States Commission on Civil Rights has never held a hearing on workplace discrimination against those in the lesbian, gay, bisexual and transgender (LGBT) community. True False
14. The FEHA prohibits harassment and discrimination in employment based on express categories including sex, gender, gender identity, gender expression, sexual orientation and perceived sexual orientation. True False
15. The FEHA does not prohibit retaliation for protesting illegal discrimination related to gender identity, gender expression, sexual orientation and perceived sexual orientation. True False
16. The White House does not have a gender-neutral bathroom. True False
17. Last year, a California court analogized claims of emotional discomfort about sharing facilities with transgender individuals to claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation. True False
18. No California court has ever ruled that it would be unlawful for an employer to require a transgender employee to use the bathroom and locker room of his or her birth-assigned sex. True False
19. The FEHA is the only California law that protects transgender persons. True False
20. It is a suggested practice that if an employee requests help as he or she undergoes a gender transition, the employer should engage in a dialogue and ask the employee to share any concerns to figure out what accommodations are best and/or possible. True False

MCLE Answer Sheet No. 80

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$20 testing fee for SFVBA members (or \$30 for non-SFVBA members) to:

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5. Make a copy of this completed form for your records.
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State/Zip _____
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ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

- | | | |
|-----|-------------------------------|--------------------------------|
| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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