

WASHINGTON STATE HUMAN RIGHTS COMMISSION

GUIDE TO SEXUAL ORIENTATION AND GENDER IDENTITY

AND

THE WASHINGTON STATE LAW AGAINST DISCRIMINATION



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Guide to Sexual Orientation and Gender Identity

General Issues

Does the Washington Law Against Discrimination include protections for people based on their sexual orientation or gender identity?

Yes, the Washington Law Against Discrimination prohibits discrimination on the basis of sexual orientation and gender identity in the areas of employment, housing, public accommodation, credit, and insurance. That prohibition became part of the Washington State Law Against Discrimination (RCW 49.60) on June 8, 2006.

What does sexual orientation mean?

As defined in the law, "sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity.

What does gender expression or identity mean?

As defined in the law, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

A common term is "transgender." This term covers a broad range of people who experience and/or express their gender differently from what most people expect. They may express themselves as the gender that does not match the sex listed on their original birth certificate, or they may physically change their sex through medical treatment. This is sometimes called transsexual. The term "transgender" also includes people who are cross-dressers or otherwise gender non-conforming. Gender identity and expression also includes males and females who do not express their gender in stereotypically masculine or feminine ways, such as through their appearance or mannerisms.

A person does not need to have had surgery or otherwise have undergone medical treatment in order to be considered transgendered, or to be protected under the Law Against Discrimination.

If a covered entity (such as an employer) believes or assumes a person's sexual orientation is different from what it really is, and acts in a discriminatory manner based on that perception, is the person protected?

No. A Washington Appeals Court decision, *Davis v. Fred's Appliance, Inc.*, 287 P.3d 51 (2012) determined that the definition of sexual orientation does not cover "perceived" sexual orientation. So, for example, if someone is not hired because an employer believes that they are gay, but they really are not gay, that person is not protected under the law.

Does the law just protect gay people?

The law protects all people, because everyone has a sexual orientation and a gender identity. Although persons who are gay, lesbian, or transgendered experience discrimination most frequently, heterosexual individuals may also be discriminated against based on sexual orientation. For example, if a heterosexual person who is not hired for a job because the business believes a gay person will better fit customers' expectations for the position, then that person may have a claim of sexual orientation discrimination.

How does gay marriage affect the rights people have under RCW 49.60?

In an employment situation, if benefits or privileges of employment are given to heterosexual persons who are married (insurance coverage for a spouse, for example, or an invitation for the family to join a company function), then the employer may be required under non-discrimination law to provide the same benefit or privilege to a person who is married to a same sex partner.

In places of public accommodation, same sex spouses must be treated equally to opposite sex spouses. For example, if a family membership to a business is offered to opposite sex spouses, the same family membership must be offered to same sex couples. This extends to visitation rights at hospitals; if a hospital allows an opposite sex spouse to visit an ill person, then the hospital must allow a same sex spouse to visit with the same terms.

Insurance

Can an insurer make decisions about issuing a policy or the terms of coverage based on a person's sexual orientation?

It is an unfair practice for any person in connection with an insurance transaction or transaction with a health maintenance organization to cancel or fail or refuse to issue or renew insurance or a health maintenance agreement to any person because of that person's sexual orientation.

May an insurer discriminate on the basis of sexual orientation where bona fide statistical differences in risk or exposure have been substantiated?

No. Although state law allows insurers to use actuarial distinctions in coverage on the basis of sex, marital status, or disability, no such exception exists for sexual orientation.

Employment

Who is considered an employer?

An employer is a person, business, or organization that employs eight or more employees. Employees do not include the owner or close relatives of the owner. The Human Rights Commission does not have jurisdiction over the federal government or Native American tribes.

Employment agencies and labor organizations are also subject to the Law Against Discrimination.

Can an employer fire or refuse to hire an individual because of that person's sexual orientation or gender identity or expression?

No. Employers may not consider sexual orientation or gender identity or expression when making hiring, firing or other employment related decisions. Employers are also prohibited from discrimination in compensation and other terms of employment based on sexual orientation or gender identity or expression.

Can an employer ask about a person's sexual orientation on an application or during a job interview?

No, employers are prohibited asking about a person's sexual orientation or any other protected class status during the hiring process. Employers should also refrain from asking about spouses or partners during the hiring process.

Is harassment based on sexual orientation by an employer or co-workers prohibited?

Harassment against an employee based on that employee's sexual orientation or gender identity is prohibited. Harassment is defined as unwelcome behavior, based on a protected class, that is severe or pervasive and affects the terms and conditions of employment. In other words, the behavior must be so bad or occur often enough that it impacts the ability of the person to do their job or function in the workplace. If an employer is aware of the harassment, or should be aware, then the employer has a duty to take prompt and remedial action to stop the harassment. The person who is being harassed should make a complaint of harassment, preferably in writing, to his or her manager or the human resources department.

Employers are encouraged to have a written non-discrimination policy and anti-harassment policy, and to include sexual orientation and gender identity in these policies.

How does a company's dress code apply to transgender employees?

Employers should permit employees to dress in a manner that is consistent with their gender identity or expression, while complying with dress codes and grooming standards.

Employers may ask transitioning employees who have continuing relationships with clients or customers to present consistently as a particular gender throughout the transition.

Generally, employers have a right to establish employee dress and grooming guidelines during work hours if they are reasonable and serve a legitimate business purpose. Such a purpose may include safety reasons or to maintain a particular identity or a certain image for customers. Certain professions, such as law enforcement, firefighters and emergency response personnel, require employees to wear uniforms and protective clothing so that they are clearly recognizable

to the public and stay safe. Employers can impose dress and grooming standards as long as the codes do not unduly burden one sex. If employers do wish to have a dress code, employers are encouraged to make that dress code gender neutral; men and women would be required to wear the same uniform, for example, or the dress code would not have any requirements such as skirts or high heels.

An employer should not require a person who has transitioned or is transitioning from male to female to dress and present as a male, and should not require a person who has transitioned or is transitioning from female to male to dress and present as female.

What restroom should a transitioning employee use?

If an employer maintains gender-specific restrooms, transgender employees should be permitted to use the restroom that is consistent with the individual's gender identity.

Where single occupancy restrooms are available, they may be designated as "gender neutral." All employers need to find solutions that are safe, convenient and respect the transgender employee's dignity. If someone is uncomfortable using a particular restroom for whatever reason, it is up to that person to find an alternative restroom.

Will a transgendered employee require specialized medical treatment?

In some situations, employees who are transitioning may require medical treatment for their transition. Surgery and recovery from surgery may be considered to be temporary disabilities under the Law Against Discrimination. Any request for a reasonable accommodation due to a medical procedure, such as a request for time off, must be addressed in the same manner as with any other employee who has a medical condition. Generally, employers are required to provide reasonable accommodation to persons with disabilities and temporary disabilities. Additional medical issues requiring medical leave could include therapist visits, doctor's office visits, and hormone therapy. An employee who seeks medical treatment due to transitioning also must be able to use sick leave, vacation leave, and shared leave in a manner that is consistent with how other employees are able to use such leave.

Is an employer required to change the name and/or sex of a transitioning employee in company records?

Records kept by the company for legal purposes (tax forms, payroll records, workers' compensation documents, etc) should reflect the employee's legal name. For all less formal forms of identification, employers should ask a transgender employee what name and sex-specific pronoun he or she prefers, and use them consistently. An employer should then make sure that all non-legal references to the employee's name and gender (such as e-mail, photo ID, organization charts and directories, business cards, and workplace signs) are consistent with the employee's gender identity and expression.

When an employee transitions, what are an employer's responsibilities with respect to informing other employees?

The privacy of the transitioning employee must be respected, but with some transgendered individuals, there may come a time when the transition will become obvious or the employee will wish that their co-workers become aware of the transition. The concept of a transgendered individual may be a new one to many people. They may have misconceptions about the need to transition or appropriate behavior towards transgender co-workers. Just like with sexual harassment, employers are responsible for non-discrimination, maintaining a non-hostile work environment, establishing clear policies and complaint procedures, and educating all employees as to the policies.

Co-workers may need guidance on appropriate use of names and pronouns; restroom use policy; discretion as to an employee's transgender status; and the prohibition of harassment and discrimination against their transgender co-worker. Bringing in a consultant to provide training on gender identity sensitivity and awareness has been helpful to many companies.

What should an employer do when conducting background or reference checks for transgender employees?

Transgender job candidates who have already transitioned and changed their name may have worked, gone to school, or established credit in their former name. A background check or reference may disclose this name. Employers should keep in mind that the law forbids discrimination based on gender identity and expression, and that the use of a different name occurs for many reasons. If it is unavoidable that an employer asks for previous names, the employer should be sure to treat the candidate exactly as any other candidate whose name has changed would be treated.

An employer may be asked to give a reference for a former employee who has transitioned or changed their name. The employee's former name may not match the new name expected by the person checking the reference. In this case, the person giving the reference should use the person's new name and preferred pronouns if known. If asked, the former name may be confirmed. Because gender identity and expression are unlawful considerations in employment the former employer may not disclose the employee's transgender status when giving a reference.

Can an employer ask employees or applicants to identify their sexual orientation or gender identity for statistical purposes?

There is no requirement under Washington law to keep statistical or equal employment opportunity data on sexual orientation. If a business has a diversity policy in place, and that policy covers sexual orientation, employees could be asked to identify their sexual orientation and gender identity under limited circumstances, such as to monitor the success of the diversity policy. If the information was gathered through voluntary participation, held confidential, not used in any employment decisions, and was treated the same as other demographic information

(such as race, age, sex), then the employer could ask employees to self-identify their sexual orientation and gender identity. However, when making a decision about whether or not to ask for such demographic information, an employer should also keep in mind that sometimes this information is sensitive or the employee would rather keep it private. If the employer decides to ask for such information, the non-discriminatory purposes of the questions should be very clear.

Should an employee be allowed leave time to take care of a same-sex spouse, or the parent or child of a same sex spouse?

The Family Medical Leave Act of 1993 (FMLA) allows legally married couples to obtain leave up to 12 weeks to care for a spouse or spouse's parent under certain circumstances, such as a serious illness. In certain circumstances, the employee may also be eligible under FMLA to take leave to care for their legally adopted child or foster child, or for a newly adopted child. The FMLA is a federal law, and since federal law is still evolving in this area, employers are encouraged to contact the U.S. Department of Labor for more specific information.

Washington State's Family Care Act allows workers with available paid sick leave or other paid time off to care for a sick child with a routine or serious illness; a spouse (including a same sex spouse), parent, parent-in-law (including the parent of a same sex spouse), or grandparent with a serious or emergency health condition; or an adult child with a disability. Contact the Washington State Department of Labor and Industries Protected Leave Unit for more information.

Any other type of leave, such as leave without pay or shared leave, must be applied consistently; if an employee can use such leave to care for an opposite sex spouse, then an employee with a same sex spouse must be allowed to utilize such leave in the same way.

Public Accommodation

What is considered to be a place of public accommodation?

Generally, any place that sells goods, offers food or drink for charge, is a place of entertainment, recreation or assembly, or is for the lodging of guests is included in the definition of place of public accommodation, as are schools, government buildings, libraries, museums, medical offices, public conveyances, and theatres.

Are there exclusions to what is considered to be a place of public accommodation?

Groups that are distinctly private are not included in the definition of place of public accommodation. Examples would be some fraternal organizations with limited outside activity and groups such as book clubs that meet in members' homes. In addition, a church or other religious entity in the activity of conducting worship services is not a place of public accommodation, and neither are religious educational institutions. However, other church-sponsored activities, such as a soup kitchen or public bake sale, might be considered a place of public accommodation.

Are businesses such as wedding planners and wedding photographers able to limit their services to heterosexual couples?

No, these are places of public accommodation and must provide their services on a non-discriminatory basis to all couples.

Can religious officiates refuse to marry same sex couples, and can churches refuse to rent equipment or space for weddings?

Yes, Referendum 74, the 2012 law related to marriage, allows clergy to refrain from marrying same sex couples, and allows churches to refrain from providing marriage related services to same sex couples. This would not be a violation of the Law Against Discrimination.

If you need additional information, have additional questions, or wish to have training for your organization, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at www.hum.wa.gov. **This document does not constitute legal advice;** if you have a particular situation about which you need legal advice, you should contact your attorney.