

## Memorandum 2023-21

**Equal Rights Amendment: California Anti-Discrimination Statutes**

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

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

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

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

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

2. 2022 Cal. Stat. res. ch. 150.

3. *Id.*

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

This memorandum presents information about the scope of California’s existing anti-discrimination protections related to sex.<sup>5</sup>

#### SCOPE OF THIS MEMORANDUM

In support of the Commission’s effort to codify the effect of the ERA, this memorandum provides background on the recent history and current state of California’s anti-discrimination laws with respect to sex. This background offers a sense of the general policy direction California has taken on issues of sex discrimination.

This memorandum does not seek to identify ERA-compliance defects in California’s anti-discrimination provisions, but the material presented could be used in the future when the work to identify those defects is undertaken.

As discussed in this memorandum, different provisions of the California Code vary in their use of sex and gender terminology. The material in this memorandum will help the Commission understand the current scope of these protections.

#### CONSIDERATIONS FOR THE COMMISSION

For this study, the Commission previously discussed and considered the scope of the term “sex.”<sup>6</sup> The earlier memorandum described the court’s evolving understanding of the scope of sex under federal employment discrimination law. In discussing this issue, the earlier memorandum noted that California statutes generally provide broad protection against discrimination and expressly cover issues including sexual harassment, pregnancy, sexual orientation, and gender identity.<sup>7</sup>

While the federal employment discrimination case law concluded that these issues were encompassed by the protection against sex discrimination,<sup>8</sup> these matters had to be litigated up to the Supreme Court to resolve the question. And, in the meantime, the uncertainty around the scope of the discrimination protections likely had real consequences for people who faced discrimination that

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

6. See *supra* note 5.

7. See Memorandum 2023-10, pp. 26-27.

8. See generally issues and cases discussed in Memorandum 2023-10.

the Supreme Court had not definitively concluded was prohibited as sex discrimination.

The Commission has previously discussed concerns about terminology and scope of the term “sex.” The importance of continuing attention to the issue of terminology and expressly clarifying the scope of protections is highlighted in the Supreme Court opinions in *Bostock v. Clayton County*.<sup>9</sup> In that case, the majority opinion discusses an argument raised by the employers and in the dissenting opinions that:

[b]ecause homosexuality and transgender status can’t be found on th[e] list [of protected characteristics in Title VII] and because they are conceptually distinct from sex, the employer’s reason, they are implicitly excluded from Title VII’s reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.<sup>10</sup>

The terminology issue highlighted above emphasizes the importance of specific language used for conferring certain protections. As discussed in more detail below, California has passed various legislation to clarify any ambiguities regarding the scope of protections and to expressly identify protected categories in its laws. Such legislation includes AB 887, known as the Gender Nondiscrimination Act, discussed more in detail below.

#### PROTECTIONS FOR SEX AND GENDER IN ANTI-DISCRIMINATION PROVISIONS IN CALIFORNIA

In general, California has crafted broad, express protections for sex and gender within its various anti-discrimination laws. This policy 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 Code, Civil Code, Labor Code, and Insurance Code) regarding the scope of certain anti-discrimination protections to make clear that these protections covered gender identity and gender expression.

Different provisions of California law use different terms in identifying the scope of the protection. For instance, the Education Code, discussed in more detail

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9. (2020) 590 U.S. \_\_\_, 140 S.Ct. 1731.

10. 140 S.Ct. at 1746; see also *id.* at 1757-58 (Alito, J., dissenting) and *id.* at 1828-30 (Kavanaugh, J., dissenting).

below, 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 to this can be seen across efforts throughout the last two decades to expressly include and define language to ensure the broadest level of protections are extended.

After a discussion of California’s Gender Nondiscrimination Act, this memorandum presents specific California statutory anti-discrimination protections. For each protection, the memorandum presents an initial description of the current scope of the provision and discusses recent amendments related to sex discrimination.

### **Gender Nondiscrimination Act (AB 887 (Atkins 2011))**

In 2011, the Legislature enacted Assembly Bill 887, the Gender Nondiscrimination Act.<sup>11</sup> This bill amended numerous provisions in the California Codes that require 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.<sup>12</sup> The bill made clear that the term “gender” means a person’s gender identity and gender expression.<sup>13</sup> AB 887 also amended prohibitions on discrimination to expressly include gender, gender identity, and gender expression among the enumerated protected characteristics.<sup>14</sup>

For example, the Gender Nondiscrimination Act amended the Unruh Civil Rights Act<sup>15</sup> to clarify that “sex” includes “gender” and that “gender,” in turn, includes a “person’s gender identity and gender expression.”<sup>16</sup>

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

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11. 2011 Cal. Stat. ch. 719; see also Senate Judiciary Committee Analysis of AB 887 (Jun. 13, 2011), p. 6 (quoting bill author).

12. See 2011 Cal. Stat. ch. 719.

13. 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).

14. *Id.*

15. Civ. Code § 51.

16. See 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.*

about the scope of the protections of California’s anti-discrimination laws by expressly protecting gender identity and gender expression.<sup>17</sup> An analysis for 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.”<sup>18</sup>

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,<sup>19</sup> some of which are discussed individually below.

### **Employment and Housing**

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.”<sup>20</sup> The Act also prohibits the owner of any housing accommodation from discriminating or harassing any person based on those same traits.<sup>21</sup>

The discussion below describes the enactment of the FEHA and more recent amendments related to the scope of its protections with respect to sex.

#### *History of FEHA*

The Fair Employment and Housing Act was consolidated from two separate statutory frameworks: the Fair Employment Practices Act (“FEPA”) of 1959 and the Rumford Act of 1963 (focused on discrimination in the sale or rental of housing

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

18. *Id.* at p. 2.

19. 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.”

20. 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).

21. Gov’t Code § 12955.

accommodations). In 1980, Governor Edmund G. (“Jerry”) Brown, Jr. reorganized the state’s civil rights enforcement by consolidating these statutes into a single statutory framework to protect Californians from both employment and housing discrimination.<sup>22</sup> This change was part of a reorganization plan, prepared by Governor Brown and enacted by the Legislature.<sup>23</sup> Through that change, the FEPA and the Rumford Act were combined and renamed the Fair Employment and Housing Act.

*General Protections under FEHA Relating to Scope of “Sex” and “Gender”*

Originally, when the FEHA was enacted, it prohibited discrimination because of sex,<sup>24</sup> but did not define the term sex.<sup>25</sup> Subsequent amendments added a definition of sex (that included pregnancy and related issues)<sup>26</sup> and amended the protection against discrimination to expressly cover sexual orientation (and added a definition of sexual orientation).<sup>27</sup>

More recently, 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.”<sup>28</sup>

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

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22. See, e.g., Gov’t Code §§ 12904, 12905, 12930, 12932, 12940, 12940.1, 12942, 12943, 12945, 12945.2, 12956.2, 12960, 12965, 12980, 12986.

23. 1980 Cal. Stat. ch. 992, § 4; see generally K. Baker, *Fair Employment and Housing 50 Years after FEHA*, Background Paper for Joint Oversight Hearing of the Senate and Assembly Judiciary Committees (Feb. 23, 2010), available at <https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/2010%20FEHA%20background%20paper.pdf>.

24. 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.

25. See, e.g., Gov’t Code §§ 12925-12927 (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.

26. See 1990 Cal. Stat. ch. 15, § 1.

27. See 1999 Cal. Stat. ch. 592, §§ 3.7, 7.5.

28. See Legislative Counsel’s Digest for AB 196, 2003 Cal. Stat. ch. 164; see also 2003 Cal. Stat. ch. 164, § 1.

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.”<sup>29</sup>

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.”<sup>30</sup> This contrasts with previous statutory language requiring “consisten[cy] with the employee’s gender identity.”<sup>31</sup>

#### *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”).<sup>32</sup>

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.”<sup>33</sup>

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 FEHA’s goals of ensuring that the Act is broadly construed.”<sup>34</sup> The analysis also notes that, without AB 1556, FEHA would be inconsistent with California’s Unruh Civil Rights Act (discussed later in this memorandum). Prior to AB 1556, 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.”<sup>35</sup> Thus, this bill replaced *all* gender-specific references in the FEHA with gender-neutral language.

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

30. Legislative Counsel’s Digest for AB 887, 2011 Cal. Stat. ch. 719.

31. *Id.*

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

33. See 2017 Cal. Stat. ch. 799.

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

35. See 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).

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.”<sup>36</sup> This changing understanding is reflected in California’s civil rights laws that prohibit discrimination on the grounds of gender identity.<sup>37</sup> With these amendments, the FEHA would be consistent with this approach by ensuring the statutory language does not “in and of itself exclude people who are not, or do not identify, as male or female,” thereby producing “a more inclusive and respectful civil rights statute.”<sup>38</sup>

#### *California Civil Rights Department*

The central importance that California places on addressing the harms of discrimination is also reflected in the name change of the agency charged with enforcing the FEHA, formerly, the Department of Fair Employment and Housing (DFEH). The DFEH’s work was focused on enforcing “civil rights laws with respect to housing and employment” and protecting and “the right of obtain and hold employment without discrimination based on specified characteristics or status.”<sup>39</sup>

In July 2022, Assembly Bill 2662 changed the DFEH’s name to the Civil Rights Department to more accurately reflect the Department’s powers and duties.<sup>40</sup> These duties include enforcement of laws prohibiting hate violence, discrimination in business establishments, and discrimination in government-funded programs and activities.<sup>41</sup> In provisions of the Government Code related to the Civil Rights Department, the law declares that it is the public policy of the state to protect and safeguard the right and opportunity to obtain employment “without discrimination based on sex, gender, gender identity [and] gender expression ....”<sup>42</sup> Similarly, the law declares that housing discrimination based on the discussed traits is against public policy.<sup>43</sup>

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

37. See *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).

38. *Id.*

39. See Legislative Counsel’s Digest for AB 2662 (Kalra 2022), 2022 Cal. Stat. ch. 35.

40. 2022 Cal. Stat. ch. 35.

41. See generally <https://calcivilrights.ca.gov/>.

42. Gov’t Code § 12920.

43. *Id.*



This name change is consistent with California’s broader policy goals across its state agencies to promote equality and combat discrimination. Within the Government Code, the legislature has expressly declared that California’s “robust nondiscrimination laws include protections on the basis of sexual orientation, gender identity, and gender expression, among other characteristics.”<sup>44</sup> Along these lines, state agencies and other specified government entities are forbidden from requiring or funding employee travel to a state that, after June 26, 2015, has enacted a law that either (1) voids or repeals existing state protections “against discrimination on the basis of sexual orientation, gender identity, or gender expression” or (2) “authorizes discrimination ... on the basis of sexual orientation, gender identity, or gender expression.”<sup>45</sup>

In this legislative session, Senate President pro Tempore Atkins has proposed a bill that would end these travel prohibitions.<sup>46</sup> This bill would also establish the “Building and Reinforcing Inclusive, Diverse, Gender-Supportive Equity Project (BRIDGE Project)” with the purpose of “rais[ing] public awareness and promot[ing] civil rights and antidiscrimination through education, advertising, and marketing activities.”<sup>47</sup> This proposed change reflects an increased push for California to serve as a model for inclusivity and “ambassadors of acceptance” through travel to states who are considering, and have passed, anti-LGBTQ+ bills.<sup>48</sup>

## Education

Both federal and state law prohibit certain forms of discrimination in education. In both cases, the prohibition applies to schools and programs that receive funding or financial assistance from the government.<sup>49</sup>

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44. *Id.* § 11139.8(a)(2).

45. *Id.* § 11139.8(b); see also <https://oag.ca.gov/ab1887>.

46. Senate Bill 447 (Atkins 2023); see also Gov’t Code § 11139.8(b).

47. See proposed Gov’t Code §§ 12100.170, 12100.171(a), (b) in SB 447 (as amended Mar. 29, 2023), § 3.

48. See A. Sheeler, *Democratic lawmaker proposes ending California’s travel ban to anti-LGBTQ states*, Sacramento Bee (Mar. 29, 2023), available at <https://news.yahoo.com/democratic-lawmaker-proposes-ending-california-223347050.html>.

The article cites Senator Atkins for raising the concern that through the travel ban “California has insulated itself and that has led to further political polarization.” *Id.* The article also notes that Senator Atkins acknowledged that the ban has had “unintended consequences, including barring researchers, student athletes and even state lawmakers from visiting the banned states.” *Id.*

See also <https://sd39.senate.ca.gov/news/20230329-senate-leader-atkins-announces-bridge-project-lift-travel-ban-create-marketing-program>.

49. See, e.g., 20 U.S.C. 1681 (protection against discrimination in “any education program or activity receiving Federal financial assistance”); Educ. Code § 220 (protection against discrimination “in any program or activity conducted by an educational institution that receives,

### *Discrimination Prohibition*

Federally, 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.”<sup>50</sup> On a national level, the law prohibits discrimination against students based on sex, while providing various exceptions that include, for example, public educational institutions that since its founding has had a policy of admitting only students of one sex.<sup>51</sup>

In California law, the discrimination protections are found in the Education Code in a chapter entitled “Educational Equity.”<sup>52</sup> Section 220 specifically provides that:

[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.<sup>53</sup>

This discussion focuses on California law, but it is important to be aware of the federal Title IX protections that may also apply to California educational institutions if they receive federal funding.<sup>54</sup>

### *Protection of Gender*

As indicated above, the discrimination protection in Education Code Section 220 expressly applies to gender (which is defined to mean, in part, sex). In the Education Code provisions, “gender” seems to be the more commonly-used term,

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or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid”).

50. See generally [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

51. 20 U.S.C. 1681.

52. Educ. Code §§ 220-262.4.

53. Although the language of this provision does not include the term “sex,” Education Code Section 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.”).

54. California law also mandates 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.

but different provisions may also refer to “sex” (as discussed more in the following section).

Prior to 2007, Education Code Section 220 expressly prohibited discrimination on the basis of sex.<sup>55</sup>

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.”<sup>56</sup> The bill also added a 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.”<sup>57</sup>

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.<sup>58</sup> Another reason cited for the changes was to ensure consistency with the protected characteristics identified in the hate crimes statute.<sup>59</sup>

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.”<sup>60</sup> The inclusion of a definition for “sexual orientation” also made the language consistent with the hate crimes statute.<sup>61</sup>

In 2011, AB 887, the Gender Nondiscrimination Act, further amended Education Code Section 220 (and a number of other related provisions)<sup>62</sup> to expressly include gender identity and gender expression as protected categories.<sup>63</sup> 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

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

56. See 2007 Cal. Stat. ch. 569, § 11.

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.

57. 2007 Cal. Stat. ch. 569, § 4 (adding Educ. Code § 210.7).

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

59. *Id.*; see also Pen. Code § 422.55.

60. 2007 Cal. Stat. ch. 569, §§ 9 (adding definition of “sexual orientation”), 11 (amending Educ. Code § 220 to include sexual orientation).

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

62. See Educ. Code §§ 200, 210.2, 210.7, 220, 32228, 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).

63. 2011 Cal. Stat. ch. 719.

person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”<sup>64</sup>

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.

#### *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.”<sup>65</sup>

Education Code Section 232.2, added by AB 23 in 2017, permits Los Angeles Unified School District<sup>66</sup> to maintain existing single-gender schools and classes for enrollment, consistent with Title IX rules.<sup>67</sup> 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).<sup>68</sup> However, the provisions authorizing single-gender schools and classes to continue are set to repeal January 1, 2025, by their own terms.<sup>69</sup>

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64. See 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.

65. Educ. Code § 221.5(a).

66. By its terms, Education Code Section 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)).

67. See 2017 Cal. Stat. ch. 654.

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

69. Educ. Code § 232.6.

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 beyond the classroom and academic programs to include extracurricular activities (in particular, school athletics) and access to facilities (e.g., bathrooms and locker rooms). Although equity in athletics and facilities have been a concern for some time (especially involving opportunities for girls and young women to participate in school sports),<sup>70</sup> much of the recent attention on school athletics and facilities has focused specifically on students who are transgender.

Education Code Section 221.5 requires that 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.”<sup>71</sup> This provision was added by Assembly Bill 1266 (Ammiano) in 2013.<sup>72</sup> 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.

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70. 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), available at <https://www.gao.gov/assets/gao-17-754r.pdf> (“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-91-10, 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.”).

71. Educ. Code § 221.5(f).

72. 2013 Cal. Stat. ch. 85, § 1.

The Education Code also includes several other provisions that relate to equal access to athletics or facilities, but these provisions have been largely unchanged since the late 1970s or early 1980s.<sup>73</sup> 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 rules for the treatment of pregnant and parenting pupils. That section provides in part:

(a) A local educational agency shall not apply any rule concerning a 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.”<sup>74</sup> In the bill analysis for AB 2289, 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.<sup>75</sup> 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.<sup>76</sup>

### **Business Establishments**

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

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73. 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.

74. See Legislative Counsel’s Digest for AB 2289, 2018 Cal. Stat. ch. 942.

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

76. See 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).

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.<sup>77</sup>

As indicated above, this provision, importantly, expressly protects from 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 pregnancy or childbirth,” as well as “a person’s gender.”<sup>78</sup> “Gender” is, in turn, defined to include “a person’s gender identity and gender expression.”<sup>79</sup> “Sexual orientation” is defined, by reference to the definition in the FEHA (discussed previously), to mean “heterosexuality, homosexuality, and bisexuality.”<sup>80</sup>

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.”<sup>81</sup>

### **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.”<sup>82</sup> The listed characteristics include gender, sexual orientation and

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

78. Civ. Code § 51(e)(5).

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

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

81. *Id.* § 51(e)(6).

82. Pen. Code § 422.55(a).

“association with a person or group with one or more of these actual or perceived characteristics.”<sup>83</sup>

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.<sup>84</sup> “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.”<sup>85</sup>

AB 887 also amended other provisions of the Penal Code to include these same terms.<sup>86</sup> 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, 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.”

## CONCLUSION

In general, California has shown its commitment to fighting sex discrimination and expressly clarifying the scope of protections in provisions across the California Code. Over the past two decades, the Legislature has continued to make strides to address areas where the lack of express definitions and explicit protections have left uncertainty or ambiguities about the extent of protections against discrimination on the basis of sex.

And, the Legislature is continuing to consider legislation to address discrimination and promote equality.<sup>87</sup>

This memorandum sought to identify the relevant California anti-discrimination statutes, discuss key definitions related to sex in those provisions, and highlight the policy direction that California is generally taking in its anti-discrimination laws. While this memorandum does not exhaustively address California laws related to sex and the overall legal landscape on this topic may continue to change, this general background of California’s current anti-

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83. *Id.* § 422.55(a)(2), (6), (7).

84. *Id.* § 422.56(c).

85. *Id.*

86. See also, e.g., *id.* §§ 422.85, 3053.4, and 11410.

87. See, e.g., AB 549 (Wilson 2023), AB 1079 (Jackson 2023).



discrimination protections presented can help the Commission to ensure that its work is consistent with California's efforts to extend broad protections to sex and establish clearer, more express language across its anti-discrimination statutes.

In future work, the staff will address potential limitations that California may face in terms of the sex-based protections its law can provide. In particular, the staff will be focusing on federal constitutional protections related to religion and religious expression.

Respectfully submitted,

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