

Concise Explanatory Statement

Washington State Human Rights Commission

Sexual Orientation and Gender Identity Rulemaking - WSR 15-11-104

WAC 162-12-100, 162-12-140, 162-16-200, 162-36-005, 162-36-010, 162-36-020 (amendatory sections);
and WAC 162-32-010, 162-32-020, 162-32-030, 162-32-040, 162-32-050, and 162-32-060 (new sections)

Reasons for Adopting Rules

Sexual Orientation and Gender Identity were added as protected classes to the Washington State Law Against Discrimination in 2006. Rules are needed in order to interpret that law to provide understanding to businesses, employers, and the public. Stakeholders have requested clarification and explanation of the law in the form of rules. A new chapter, 162-32, is added for Sexual Orientation and Gender Identity issues, and additional sections are amended to add sexual orientation and gender identity as protected classes.

Differences Between Proposed Rules and Adopted Rules

Sexual Orientation and Gender Expression or Gender Identity were specified in each section, instead of simply specifying Sexual Orientation as an umbrella term. (WAC 162-12-100, 162-12-140, 162-16-200, 162-32-010, 162-32-030, 162-32-040, 162-36-005, 162-36-010, 162-36-020.) Comments made during public the public comment period indicated that this change would be helpful in clarifying that the anti-discrimination protections indicated for these protected classes cover gender expression or identity as well as sexual orientation; using the umbrella term "sexual orientation" was not enough.

Additional clarification as to unfair practices in pre-employment inquiries were added in WAC 162-12-140. These were added to provide further examples and clarification to employers related to prohibited actions when making pre-employment inquiries; that employers cannot use an inquiry into names in order to ascertain gender identity or transgender status, and that inquiries related to sexual orientation also include inquires related to gender expression, gender identity, transgender status or sex assigned at birth. Comment received during the public comment period indicated that this area was of great concern to persons when applying for jobs, and that additional clarification was needed for employers to understand exactly what inquiries are prohibited by the law.

As a clerical correction, the word "transgendered" was changed to "transgender" throughout these final rules, as per suggestions received during the public comment period.

The protected class of Sexual Orientation was eliminated from sections related to medical leave and reasonable accommodation in WAC 162-32-020. It was pointed out during public comment that there are no medical conditions that relate to sexual orientation. Further examples of different treatment, as relating to the privacy of medical records and employer inquiries into the nature of the medical condition, were provided under the leave and reasonable accommodation provisions in WAC 162-32-020. During public comment, these were issues of concern to people, and the decision was made to provide further clarification to employers related to treating persons in these protected classes no differently than other persons requesting leave or reasonable accommodation.

The term "opposite sex" was changed to "opposite/different sex", and "paternity leave" was changed to "parental leave" in WAC 162-32-030, as suggested clerical corrections.

In WAC 162-32-040, under the subsection (2)(a) prohibited conduct, transgender status and sex assigned at birth were added as examples of the subject of unwelcome personal questions that could potentially be prohibited conduct. This was to further clarify the types of unwelcome personal questions that might fall under prohibited conduct, so that employers will have a further understanding of the conduct that could constitute harassment. The words "legally mandated" were added to subsection(2) (d) in order to provide a further example of the type of documentation that an employer would not need to change to a transgender individual's preferred name when the preferred name is not the legal name.

In WAC 162-32-060, the section related to gender segregated facilities, the words "or emergency" was added to "shelters" in response to a comment that not all shelters are for the homeless. In addition, separate standards for K-12 schools were eliminated, and all places of public accommodations have the same standards as outlined in the final rule. Several individuals provided comment in favor of this change, including a representative of a school district, and suggested eliminating this language pertaining only to school districts, in order to provide clear guidance to all places of public accommodations relating to gender segregated facilities. The language in the proposed rule was consistent with language in guidance on this issue provided by the Office of Superintendent of Public Instruction (OSPI). In deciding to eliminate the language pertaining to schools found in the proposed rule, the Human Rights Commission met with representatives of the OSPI Equity and Civil Rights Division, who were in favor of the change found in the final rule. They believed that school districts will welcome the clarity provided by the language of the final rule. The OSPI is planning to change its own guidance so that the final rule and the OSPI guidance will be consistent, and provide greater clarity to school districts.

Summary of Comments and Agency Response

Clerical/Wording Changes

Specify sexual orientation and gender identity as distinct protected classes, and mention both in each section throughout the rules, instead of using sexual orientation as an umbrella term. This was done in the final rule.

Use the term "transgender" rather than "transgendered" in the rules. This change was made.

Use the term "different sex couples" rather than "opposite sex couples". The Commission decided to use the term "opposite/different sex" in order to remain consistent with the language used by the U.S. Supreme Court (which used the term "opposite" in a recent decision), and also to be as inclusive as possible.

Use the term "domestic partnership" in WAC 162-12-140(h), related to unfair employment inquiries related to marital status, in WAC 162-12-140(j), related to name, in WAC 162-12-140(l), related to organizations, and in WAC 162-12-030, related to employee benefits. The Commission decided not to utilize this term; the term "married", in the final rule, now covers all legally recognized unions, and to use other wording could create confusion.

Add the term "transgender status or gender transition" to WAC 162-12-140(t). "Transgender status" was added to the language in the final rule, in addition to "sex assigned at birth" which adequately covers the concerns of the comment.

Change the term "paternity" leave to "parental" leave. This change was made.

Changes in the wording of WAC 162-32-060. This change was not made, as the language in the final rule more clearly relates to gender identity issues.

Pre-employment Inquiries

Add to fair pre-employment inquiries WAC 162-12-140, if the applicant has a preferred name or preferred pronoun. The Commission decided not to add this language, as these questions could potentially "out" someone regarding their transgender status, and "outing" was a big concern raised during public comment in relation to this particular section.

Eliminate the fair employment inquiry in WAC 162-12-140(j) related to former names, due to privacy concerns and the concern that a transgender individual will "out" themselves by responding to questions regarding previous names. The Commission, although sympathetic to

this concern, determined that it is important that employers be able to check the employment histories of applicants by knowing all names under which the prospective employee has worked, and that this is a legitimate interest. Protections related to names is adequately covered under the unfair pre-employment inquiries category of this sub-section.

Add language to WAC 162-12-140 that if an individual indicates a sex on an application that is inconsistent with the sex presumed or assigned at birth, or when an individual provides a name that they consistently use, but not a legal name, these actions shall not be grounds for an adverse action, and shall not be considered to be fraud or misrepresentation. The Commission considered these comments, and determined that the additional language was not necessary; if an adverse decision was made or an adverse action taken, and if transgender status was the reason underlying the employer's action, then it would be an illegal action under a different treatment theory of discrimination, and can be adequately addressed in that manner.

Leave and Reasonable Accommodation

There is no medical condition related to sexual orientation, so do not mention sexual orientation in the sections related to leave and reasonable accommodation. This was done in the final rule, WAC 162-32-020.

Personal medical information for disabilities related to transgender status should be protected to the same extent as personal medical information for all other disabilities. This was given as an example of treating transgender individuals with medical conditions the same as all other individuals with medical conditions in the final rule, WAC 162-32-020(2).

Transgender individuals should not have to state the reason for medical leave when the medical leave is related to transgender status (in other words, the transgender individuals should not have to "out" themselves when requesting medical leave). This was provided as an example of a prohibited question on the part of the employer in the final rule, WAC 162-32-020(1)(b).

Add language indicating that a gay or lesbian employee shall have the same opportunity to request and use shared leave as any other employee. This was not added, as it was determined per the suggestion of other comments, that there are no medical conditions specifically related to sexual orientation, and thus such language is not necessary.

Add language that employers shall provide reasonable accommodation to individuals undergoing gender transition. Additional language was not added, as the language in the final rule adequately covers this issue.

Add language that employers should provide pregnancy and maternity related leave to transgender individuals on the same basis as other employees. Additional language was not added, as the language in the final rule in WAC 162-32-120 and 162-32-130, adequately covers this issue.

Credit and Insurance

All health care related to transitioning from one gender to another should be mandatory coverage under health insurance, and information from the Office of Insurance Commissioner's bulletin regarding health coverage for transition related health issues should be included in the rules. The Commission was unable to adopt this suggestion, as RCW 49.60.178 limits protections to the following: It is an unfair practice for any person whether acting for himself, herself, or another 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. This law does not make unlawful any actions or inactions related to coverage for specific medical care, treatments or conditions.

Public Accommodations - Schools

There should be no separate or different standards for schools; schools should fall under the same standards as other places of public accommodation in the area of gender-segregated facilities. Separate standards for schools in the area of gender-segregated facilities was removed from the final rule, WAC 162-32-060. The language in the proposed rule was consistent with language in guidance on this issue provided by the Office of Superintendent of Public Instruction. In deciding to eliminate the language pertaining to schools found in the proposed rule, the Human Rights Commission met with representatives of the Office of Superintendent of Public Instruction (OSPI) Equity and Civil Rights Division, who were in favor of the change found in the final rule. They believe that school districts will welcome the clarity provided by the language of the final rule. The OSPI is planning to change its own guidance so that the final rule and the OSPI guidance will be consistent, and provide greater clarity to school districts.

Public Accommodation Issues - General

Voice discrimination should be covered in the rules. For example, when a person who has transitioned from male to female calls a bank's call center, and cannot access her account because her voice sounds masculine, this should be discrimination. The Commission was unable to act upon this comment, as a call center is not a place of public accommodation under the definition in RCW 49.60.040, and may not even be located in the state of Washington.

Gender-Segregated Facilities

Transgender individuals should not be required to provide proof of medical procedures or be subjected to a higher burden of proof than non-transgender individuals when utilizing gender-segregated facilities. This was not incorporated in the final rules, as this would be analyzed under the well-established different treatment theory of discrimination, and the Commission is unaware of any such instances occurring.

Add emergency shelter to the list of gender-segregated facilities. The final rule contains this language in WAC 162-32-060.

Language in WAC 162-32-060 related to facilities where undressing in the presence of others occurs is redundant. The final rule retains this language; it is clarifying rather than redundant.

Add language to WAC 162-32-060, providing more detail related to single-occupancy or gender-neutral facilities. This was not added to the final rule, as the language adequately provides guidance to covered entities.

Harassment

Delete the sections on harassment, as it places a higher burden for claims under public accommodation, and on the protected class of sexual orientation or gender identity, and does not cover situations in which the entity makes it clear that the person is unwelcome so that the person does not attempt entrance. The Commission retained the sections on harassment in the final rule, as it feels that it is important that covered entities have an understanding of what constitutes harassment in the context of these protected classes. The standard applied to harassment claims in public accommodation for the protected classes of sexual orientation and gender identity is the same as the standard applied to harassment claims in employment, and the same standard applied to other protected classes. The final rule does not set forth a different standard. The standard for harassment is not applicable in different treatment situations, as harassment and different treatment are two separate theories of discrimination. The different treatment theory is well-established and is not the topic of this section, but would be the appropriate theory to use when a person is treated in an unwelcome manner or refused entry at a place of public accommodation.

More examples of harassment should be provided in WAC 162-32-040(2), including harassment that occurs off the worksite, and harassment that is perpetrated by customers. The employer's response to harassment should be covered in the rules. The Commission decided against providing additional examples of harassment in the rules. Harassment is often determined on a case-by-case, fact specific basis. To attempt to capture and describe these types of specific

scenarios in the rules could be confusing and unhelpful, and there are too many scenarios to attempt to contemplate describing in the rules. This type of discrimination is often analyzed under case law, and the Commission determined that the best course of action would be to continue to analyze harassment situations in that manner. In addition, the Commission decided not to put any information in the rules regarding the employer's response to harassment. There is no legally mandated, specific way in which an employer must respond to a complaint of harassment, and an appropriate response would be based upon the specific facts of each situation. To place any such information in the rules could create confusion for employer and employee, and would create duties for an employer that may not be required under the law.

More examples of identifying information should be given in WAC 162-32-040(d), such as name tags, business cards, etc. The Commission determined to leave the rule as written. To try to provide a comprehensive list of identifying information would be impossible, and something would be invariably left off the list, creating uncertainty and confusion.

Add language to WAC 162-32-040 covering sex assigned at birth, transgender status, and related medical history in the subsection on prohibited conduct. The final rule includes sex assigned at birth and transgender status. Medical records are addressed in a different section.

Add a definition for harassment in an educational setting. This language was added in the final rule, WAC 162-32-040.

Dress and Grooming Standards

Add language that transgender or gender nonconforming individuals can comply with dress codes in a manner consistent with their gender identity or expression, and that gender specific dress codes cannot be used to prevent persons from dressing in a manner consistent with their gender identity. This language was not added, as the language in the final rule adequately covers this issue.

Definition

A definition section should be included in WAC 162-32. The definition should make clear that "perceived" sexual orientation is protected; in other words, if someone is perceived as being gay and is subjected to discrimination, even if that person is not actually gay, that person should still be protected under the law due to the perception. The Commission agreed with this, and determined that the final rule should reflect this addition. However, due to the constraints of RCW 34.05.335, Variance Between Proposed and Final Rule, the Commission was unable to add the section.

Consistency in Gender Presentation

Consider adding language that limits protections to persons who consistently present, or exclusively assert a full-time gender presentation.

For some individuals consistency in gender presentation is not a possibility.

No language related to consistency in gender presentation was added to the final rule. The Washington Law Against Discrimination is to be liberally construed, and such language would limit the protections of the law.

BFOQ

Eliminate the exception for a bona fide occupational qualifications for authenticity, genuineness, or maintaining sexual privacy. This Commission does not believe that these exceptions should be eliminated. In addition due to the constraints of RCW 34.05.335, Variance Between Proposed and Final Rule, the Commission was unable to add this language.

Add rules for bona fide occupational qualifications as related to gender identity or expression. Due to the constraints of RCW 34.05.335, Variance Between Proposed and Final Rule, the Commission was unable to add this language.

Additional Amendatory Sections Proposed

Additional sections of the WAC be amended to include protective language and remove the words "husband and wife", including WAC 162--04-010, 162-04-020, 162-28-030, 162-40-055, 162-40-065, 162-40-075, 162-40-171, 162-40-181, 162-40-191, 162-40-211, 162-40-251. Due to the constraints of RCW 34.05.335, Variance Between Proposed and Final Rule, the Commission was unable to make these changes at this time.