

**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**

DIRECTOR KEVIN KISH

FAIR EMPLOYMENT & HOUSING COUNCIL

2218 KAUSEN DRIVE, SUITE 100, ELK GROVE, CA 95758

(916) 478-7248 | www.dfeh.ca.gov | e-mail: fehcouncil@dfeh.ca.gov

FINDING OF EMERGENCY

Readoption of Emergency Regulations Regarding Gender-Neutral Facility Signage

The Fair Employment and Housing Council of the Department of Fair Employment and Housing (Council) finds that an emergency continues to exist and that this proposed readoption of the emergency regulations is necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare.

This emergency readoption is necessary to address the ongoing conflict between regulations promulgated by the Council related to gender-neutral signage on restroom facilities and regulations promulgated by the Department of Industrial Relations (Cal/OSHA) regarding provision of a certain number of non-flushing toilet facilities separately marked for men and women in certain industries. Because the conflict between these two regulations put employers in a legal bind, and because Cal/OSHA has asserted health (hygiene)-related reasons for its regulations, the necessary grounds for emergency rulemaking are still present here.

On July 1, 2017, Council regulations went into effect requiring that “[e]mployers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities such as ‘Restroom,’ ‘Unisex,’ ‘Gender Neutral,’ ‘All Gender Restroom,’ etc.” 2 CCR 11034(e)(2)(B). The regulatory language is consistent with AB 1732 (Ting, Chapter 818, Statutes of 2016), enacted as Health and Safety Code 118600, which states that “[a]ll single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency shall be identified as all-gender toilet facilities by signage that complies with Title 24 of the California Code of Regulations.”

During the comment process related to the July 1, 2017, regulations, it was brought to the Council’s attention that Cal/OSHA had regulations requiring that, in certain industries, separate toilet facilities be made available for men and women. The commenter noted that these regulations, coupled with the Council’s proposed regulations, would put employers in those industries in a bind regarding what law to comply with. During the Council meeting on March 30, 2017, however, that commenter appeared at the meeting. He stated that Cal/OSHA had informed him that it would not be enforcing the regulations in question, and that there was thus no conflict. The Council therefore proceeded with the rulemaking.

However, on June 27, 2017 and June 28, 2017, before the effective date of the Council’s regulations but after the Office of Administrative Law had approved the regulations, representatives from the Department of Fair Employment and Housing and representatives from the Department of Industrial Relations spoke after it was brought to their attention that there remained a lingering conflict between the two departments’ regulations. In short, it was revealed that although Cal/OSHA is applying Health and Safety Code section 118600 to flush toilets in all industries (and thus employers with flush toilets face no conflict between 2 CCR 11034(e)(2)(B)), it is not applying that law to non-flush toilets in those industries covered by California Code of Regulations, title 8, sections 1526 (construction), 3364 (general industry), 3457 (agricultural operations), and 5192 (hazardous waste operations and

emergency response). Thus, employers covered by those sections who do not have flush toilets are still required to maintain a certain number of separate toilet facilities for men and women or will face Cal/OSHA enforcement. However, those employers are also currently covered by the Department's conflicting regulations requiring that those same facilities be labeled with gender-neutral signage.

In conversations between the two departments, Cal/OSHA explained that in declining to apply the law to non-flushing toilets, Cal/OSHA is looking toward the technical definition of "single-user toilet facility" in Health and Safety Code section 118600. In the law, such a facility is defined as "a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user." As Cal/OSHA explained during conversations on June 27 and 28, 2017, a water closet has a specific meaning in the OSHA context, that being a toilet that is flushed with water. Other types of facilities – chemical toilets or combustion toilets – are known as nonwater carriage disposal facilities. Cal/OSHA also stated that there are important health-related reasons for not applying Health and Safety Code 118600 to non-flushing toilets. Specifically, Cal/OSHA stated that because there are many more men in the industries in question than there are women, and because non-flushing toilet facilities are generally not as clean as water carriage facilities, in Cal/OSHA's assessment, women would be exposed to health risks by being forced to share non-flushing toilets with men. (In a more recent conversation between the departments on January 19, 2018, Cal/OSHA clarified that it had been referring more specifically to hygienic concerns, rather than to the risk of disease transmission.)

Unfortunately, the Council was not aware of Cal/OSHA's interpretation before the approval of its facility-signage regulations. Although Cal/OSHA apparently tried to raise concerns by contacting personnel at the Office of Administrative Law, those concerns were never relayed to the Council or Department of Fair Employment and Housing. In any event, as stated above, employers are now placed in an untenable position: either they must comply with the Council's regulations – and label their single, locking, non-flush toilets with an all-gender sign, which will expose them to enforcement by Cal/OSHA for being in violation of the Cal/OSHA regulations – or they must comply with Cal/OSHA regulations and violate the Council's regulations.

The Council therefore took action at its subsequent meeting on July 17, 2017, and voted to approve the emergency regulations that would address this emergency. Those regulations, which the Council is now seeking to readopt, were approved on August 14, 2017, and were to remain effective until February 13, 2018. Since August 14, 2017, the circumstances surrounding the emergency have not changed. The Council has proceeded with diligence to address the emergency by continuing its dialogue with Cal/OSHA, who may act to amend its regulations, which would alleviate the emergency and allow the Council's emergency regulations to lapse. In the event that the Council must keep its emergency regulations, the Council and its staff have prepared the notice and initial statement of reasons for a regular rulemaking action and are prepared to make the emergency regulations permanent. The Council voted to readopt these regulation at its December 11, 2017, meeting.

AUTHORITY AND REFERENCE

Authority: Government Code section 12935(a) authorizes the Council to readopt these proposed regulations.

Reference: The proposed regulations implement, interpret, and make specific section 12900 et seq. of the Government Code.

INFORMATIVE DIGEST

Under the California Fair Employment and Housing Act, the Fair Employment and Housing Council is empowered to adopt, promulgate, amend, and rescind regulations that implement California's employment and housing anti-discrimination laws. These regulations are located at Title 2 of the California Code of Regulations, Division 4.1, Chapter 5 (2 CCR Section 11000 et seq.).

In part, these regulations relate to gender-neutral signage on restroom facilities that are inconsistent with regulations promulgated by the Department of Industrial Relations (Cal/OSHA) regarding provision of a certain number of non-flushing toilet facilities separately marked for men and women in certain industries.

The proposed re adoption will ensure that the Council's regulations can still be reconciled with Cal/OSHA's regulations.

The proposed re adoption will benefit the public by continuing to eliminate confusion and misunderstanding arising from two inconsistent regulations and continuing to eliminate health risks at non-flushing toilet facilities.

After an evaluation of current regulations, the Council has again determined that these proposed regulations are not inconsistent or incompatible with any existing regulations.

MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS

None.

LOCAL MANDATE

The Council has determined that this proposed regulatory action does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary cost or savings on local agencies.

COSTS OR SAVINGS TO STATE AGENCIES, REIMBURSABLE COSTS TO ANY LOCAL GOVERNMENT AGENCIES, NONDISCRETIONARY COSTS OR SAVINGS TO LOCAL GOVERNMENT AGENCIES, AND COSTS OR SAVINGS TO FEDERAL FUNDING

The proposal results in no additional costs or savings beyond those imposed by existing regulations.

DOCUMENTS RELIED UPON

None.