

June 8, 2015

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative regarding the use of restroom, shower, dressing room, and locker room facilities (A.G. File No. 15-0019).

Background

Documentation of Sex. An individual's sex is generally documented on a birth certificate within a year of birth. Under state law, an individual may file a request with the state trial courts or the California Department of Public Health for a new birth certificate that reflects a change of sex. This request must be accompanied by an affidavit from a physician that the individual has undergone clinically appropriate treatment for the purpose of changing his or her sex.

Gender Identity and Gender Expression. Gender identity generally refers to an individual's internal sense of being male, female, or transgender. Transgender refers to individuals whose gender identity differs from the sex assigned to them at birth. Transgender individuals may transition from one sex to another by seeking various forms of medical treatment such as hormone therapy or sex reassignment surgery. The manner in which an individual expresses their gender identity—such as through appearance or behavior—is generally known as gender expression.

Federal Law. Current federal law prohibits federal contractors and subcontractors from discriminating against individuals based on their sex. A July 2014 executive order clarifies that such contractors and subcontractors are also prohibited from discriminating based on gender identity. The U.S. Department of Labor's Office of Federal Contract Compliance Program has also issued guidance that federal contractors are required to allow employees and applicants for employment to use restrooms consistent with their gender identity. In federal fiscal year 2014-15, California governmental entities received a total of about \$1.2 billion in federal contract funds (such as for the Lawrence Berkeley National Laboratory). In addition, some federal grants also include provisions prohibiting discrimination based on sex and gender

identity. In total, state and local governments receive billions of dollars annually in federal grant funds, some of which include such provisions.

State Law. The California Constitution guarantees individuals the right to pursue and obtain privacy and prohibits discrimination or preferential treatment based on various factors (such as sex). In addition, state law includes provisions prohibiting discrimination based on sex, gender, gender identity, and gender expression. For example, existing state law requires that students in public schools be permitted to use facilities consistent with their gender identity regardless of what sex is listed on the student's record.

Proposal

Under the measure, individuals would be required to use the restroom, shower, dressing room, and locker room facilities in government buildings that correspond to their sex as determined (1) at or near the time of birth (such as the sex documented on their birth certificates), (2) based on a new birth certificate resulting from a sex change, or (3) through medical examination. The measure defines government buildings as those owned, rented, or occupied by state or local government, such as a city, school district, community college district, or a public university. The above requirement would not apply to facilities designed for use by a single individual, restrooms for families, or facilities in which a child or individual with a medical condition requires assistance from another person.

The measure also states that individuals could file a civil claim for a violation of privacy against a government entity or person "for willful violation" of the measure if (1) their "privacy was actually violated" while using facilities or (2) they declined to use a facility because of a violation of the measure. In addition to attorney fees, such individuals could seek up to three times their actual damages or a minimum of \$4,000. Finally, the measure states that any commercial or noncommercial entity open to and serving the public that requires individuals to use facilities that correspond to their sex would not be subject to criminal, civil, administrative, or other sanctions.

Fiscal Effects

The magnitude of the fiscal effects of this measure would depend upon (1) how it is interpreted by the courts, (2) how state and local governments implement the measure, and (3) how the federal government responds to the measure's implementation. Thus, the potential impacts described below are subject to considerable uncertainty.

State Court Costs. The measure would result in state court costs related to processing civil claims authorized under the measure. The actual increase in costs would depend on the number of individuals who choose to file such claims and how long such claims take to process. Thus, the increase in state court costs is unknown, but is not likely to exceed a few tens of millions of dollars annually.

Other Government Costs. State and local governments could incur costs related to actions taken to avoid, litigate, or remedy civil claims filed for violating the measure. However, the actual cost would depend on how the measure is interpreted by the courts and implemented by state and local governments. For example, state and local governments could simply revise their

administrative manuals and inform employees and members of the public on the requirements of the measure. Alternatively, they could take much more costly actions, such as renovating existing facilities into facilities designed for use by a single individual in order to exempt them from the measure. Accordingly, the total increase in these costs to state and local governments is unknown.

Potential Loss of Federal Funds. To the extent that the enforcement of this measure is determined to be in conflict with federal laws and regulations related to discrimination based on sex or gender identity, state and local government entities could lose an unknown, but potentially significant, amount of federal funds.

Summary of Fiscal Effects. We estimate that this measure would have the following major fiscal effects, which could vary considerably depending on (1) how it is interpreted by the courts, (2) how state and local governments implement the measure, and (3) how the federal government responds to the measure's implementation.

- Increase in state court costs related to civil claims, not likely to exceed a few tens of millions of dollars annually.
- Unknown increase in state and local government costs related to actions taken to avoid, litigate, or remedy civil claims filed for violating the measure.
- Potential significant loss of federal funds.

Sincerely,

Mac Taylor
Legislative Analyst

Michael Cohen
Director of Finance