

Final Rule

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Chapter 162-32 WAC

SEXUAL ORIENTATION AND GENDER IDENTITY

NEW SECTION

WAC 162-32-010 General purpose and scope. This chapter interprets and implements the sexual orientation and gender expression and gender identity discrimination protections of RCW 49.60.030, 49.60.180, and 49.60.215 and provides guidance regarding certain specific forms of sexual orientation and gender expression and gender identity discrimination.

NEW SECTION

WAC 162-32-020 Leave policies and reasonable accommodation. (1) **Leave.** When an employer grants leave or time off of work to employees for medical or health reasons, the employer shall treat leave requests to address medical or health care needs related to an individual's gender expression or gender identity in the same manner as requests for all other medical conditions. For example:

(a) If an employer provides paid sick leave for periods of disability that require medical leave, the employer must provide paid sick leave for periods of disability related to an individual's gender expression or gender identity that require medical leave;

(b) If the employer's policy requires a medical provider's statement to verify the leave period as a reasonable accommodation, a medical provider's statement may be required to verify the leave period as a reasonable accommodation when the disabling condition is related to the individual's gender expression or gender identity, however, an employer may not inquire if the leave is related to gender expression or gender identity or gender transition, nor can the employer require that the note specify if the leave is related to gender expression or gender identity or gender transition;

(c) If the employer's policy permits the retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period for other disabilities, the policy must also permit such accrual of benefits during leave for disabling conditions related to an individual's gender expression or gender identity;

(d) If an employer allows an employee to use shared leave for disabling conditions, the employer must apply the same policies and procedures for disabling conditions related to an individual's gender expression or gender identity.

(2) **Reasonable accommodation.** An employer shall provide reasonable accommodation for a disability when the disability is related to the individual's gender expression or gender identity, absent undue hardship to the employer. Such reasonable accommodation includes, but is not limited to, medical leave for medical and counseling appointments, surgery, and recovery from surgery that are related to gender reassignment procedures and treatments. An undue hardship as a reason for denying an accommodation in situations involving disabilities related to gender expression or gender identity shall be analyzed in the same manner as with accommodations for any other disability. To the extent consistent with personal medical information connected to other disabilities, personal medical information connected to disabilities related to a person's gender expression or gender identity must be kept confidential.

(3) Nothing in this section is intended to suggest that a person's sexual orientation or gender expression or gender identity itself is a disabling condition.

NEW SECTION

WAC 162-32-030 Employee benefits and privileges. (1) **Consistent and equal basis.** Employee benefits provided in whole or in part by an employer must be consistent between all employees and equal for all employees, regardless of the employee's sexual orientation or gender expression or gender identity. For example, it is an unfair practice to:

(a) Provide health insurance coverage to an employee's opposite/different sex spouse but to fail to provide health insurance cov-

erage to an employee's same sex spouse (except in situations where such a rule is prohibited or pre-empted by federal law.)

(b) Provide parental leave or bonding time for the father of a child newly born or adopted into a heterosexual relationship, but fail to provide the same parental leave or bonding time to the parent of a child newly born or adopted into a same-sex relationship.

(2) **Other benefits and privileges of employment.** All other employee benefits, provided formally or informally including, but not limited to, health club memberships, discount programs, training, staff retreats, company gatherings and parties, and use of company vehicles or other company services, shall be provided on an equal basis to all employees regardless of the employee's sexual orientation or gender expression or gender identity. If the benefit or privilege is extended to the employee's opposite/different sex spouse, it must be extended to an employee's same sex spouse as well.

NEW SECTION

WAC 162-32-040 Harassment. (1) **Harassment.** Harassment based on an individual's sexual orientation or gender expression or gender identity is prohibited. Sexual orientation or gender expression or gender identity harassment in employment is offensive and unwelcome behavior serious enough to affect the terms and conditions of employment and which occurred because of an individual's sexual orientation or gender expression or gender identity, and can be imputed to the employer.

(2) **Prohibited conduct.** Prohibited conduct may include, but is not limited to, the following:

(a) Asking unwelcome personal questions about an individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth;

(b) Intentionally causing distress to an individual by disclosing the individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth against his or her wishes;

(c) Using offensive names, slurs, jokes, or terminology regarding an individual's sexual orientation or gender expression or gender identity;

(d) The deliberate misuse of an individual's preferred name, form of address, or gender-related pronoun (except on legally mandated documentation, if the individual has not officially obtained a name change);

(e) Posting offensive pictures or sending offensive electronic or other communications;

(f) Unwelcome physical conduct.

(3) **Harassment in a place of public accommodation.** Sexual orientation harassment or harassment based on gender expression or gender identity in a place of public accommodation is offensive and unwelcome behavior serious enough to alter the individual's experience at the place of public accommodation, or severe enough that the individual has no choice but to leave the place of public accommodation, which occurred because of the individual's sexual orientation or gender expression or gender identity, and can be imputed to the place of public accommodation. In schools, such harassment is offensive and unwelcome behavior serious enough to interfere with a child's access to educational opportunities, which occurred because of the child's sexual orientation or gender expression or gender identity, and can be imputed to the school.

NEW SECTION

WAC 162-32-050 Dress and grooming standards. (1) **Standards allowed.** Covered entities may require standards of dress or grooming that serve a reasonable business or institutional purpose, such as promoting safety, developing a company identity, or projecting a professional, positive public image.

(2) **Prohibited standards.** Covered entities cannot require an individual to dress or groom in a manner that is not consistent with that individual's gender expression or gender identity.

NEW SECTION

WAC 162-32-060 Gender-segregated facilities. (1) **Facility use.** All covered entities shall allow individuals the use of gender-segregated facilities, such as restrooms, locker rooms, dressing

rooms, and homeless or emergency shelters, that are consistent with that individual's gender expression or gender identity.

In such facilities where undressing in the presence of others occurs, covered entities shall allow access to and use of a facility consistent with that individual's gender expression or gender identity.

(2) Cannot require use inconsistent with gender expression or gender identity. A covered entity shall not request or require an individual to use a gender-segregated facility that is inconsistent with that individual's gender expression or gender identity, or request or require an individual to use a separate or gender-neutral facility.

(a) If another person expresses concern or discomfort about a person who uses a facility that is consistent with the person's gender expression or gender identity, the person expressing discomfort should be directed to a separate or gender-neutral facility, if available.

(b) Any action taken against a person who is using a restroom or other gender-segregated facility, such as removing a person, should be taken due to that person's actions or behavior while in the facility, and must be unrelated to gender expression or gender identity. The same standards of conduct and behavior must be consistently applied to all facility users, regardless of gender expression or gender identity.

(4) Provision of options encouraged. Whenever feasible, covered entities are encouraged to provide options for privacy, such as single-use gender-neutral bathrooms or private changing areas, that are available to any individual desiring privacy.

AMENDATORY SECTION (Amending WSR 99-15-025, filed 7/12/99, effective 8/12/99)

WAC 162-16-200 General purpose and definitions. The law against discrimination protects persons from discrimination in employment (RCW 49.60.180, 49.60.190, and 49.60.200). Persons are also protected from discrimination as provided in RCW 49.60.172 (unfair practices with respect to HIV infection), RCW 49.60.174 (actual or perceived HIV infection), and RCW 49.60.210 (unfair to discriminate against person opposing unfair practice).

(1) The commission's first objective in writing the rules in this chapter and in making future decisions on questions not addressed in this chapter is to eliminate and prevent discrimination. This is the overall purpose of the law against discrimination.

(2) Other objectives in writing these rules are:

(a) To be consistent with interpretations of federal antidiscrimination law and the antidiscrimination laws of other states, where these are comparable to Washington law, and where the commission does not find that a different rule would better serve the state of Washington.

(b) To avoid the uncritical adoption of definitions from areas of law other than antidiscrimination law. It is appropriate to define employment differently in different areas of the law to carry out the separate purpose of each area of law.

(c) To give effect to the purposes of the exemption of employers of less than eight from public enforcement of the law against discrimination, as identified in RCW 49.60.040.

(d) The public and commission staff need standards that are certain and that are easy to understand and apply. Therefore we must sometimes simply draw a line, although reasonable persons could differ as to where the line should be drawn.

(3) The state law against discrimination covers employers with eight or more employees. Persons should also educate themselves on relevant local or federal antidiscrimination laws.

(4) Definition:

In this chapter, the following words are used in the meaning given, unless the context clearly indicates another meaning.

"Protected status" is short for the phrase, "age, sex, sexual orientation, gender expression or gender identity, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person," and means the full phrase (see RCW 49.60.180).

AMENDATORY SECTION (Amending WSR 98-08-035, filed 3/23/98, effective 4/23/98)

WAC 162-36-005 Discrimination. (1) It is an unfair practice for any person, whether acting for himself, herself, or another, because of sex, sexual orientation, gender expression or gender identity, marital status, race, creed, color, national origin, families with children status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person:

(a) To refuse to engage in a real estate transaction with a person;

(b) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(c) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

(d) To refuse to negotiate for a real estate transaction with a person;

(e) To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his or her attention, or to refuse to permit the person to inspect real property;

(f) To discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling, to any person; or to a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or to any person associated with the person buying or renting;

(g) To make, print, publish, circulate, post, mail, or cause to be so made or published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;

(h) To offer, solicit, accept, use, or retain listing of real property with the understanding that a person may be discriminated

against in a real estate transaction or in the furnishing of facilities or services in connection therewith;

(i) To expel a person from occupancy of real property;

(j) To discriminate in the course of negotiating, executing, or financing a real estate transaction whether by mortgage, deed of trust, contract, or other instrument imposing a lien or other security in real property, or in negotiating or executing any item or service related thereto including issuance of title insurance, mortgage insurance, loan guarantee, or other aspect of the transaction. Nothing in this section shall limit the effect of RCW 49.60.176 relating to unfair practices in credit transactions;

(k) To attempt to do any of the unfair practices defined in this chapter or chapter 49.60 RCW.

(2) It is an unfair practice for any person, for profit, to induce or attempt to induce any person to sell or rent any real property by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, creed, color, sex, sexual orientation, gender expression or gender identity, national origin, families with children status, or with any sensory, mental or physical disability and/or the use of a trained dog guide or service animal by a disabled person.

(3) It is an unfair practice to insert in a written instrument relating to real property a provision that is void under RCW 49.60.224(1) or to honor or attempt to honor such a provision in the chain of title.

(4) Nothing in this chapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, creed, national origin, sex, sexual orientation, gender expression or gender identity, disability, the use of a trained dog guide or service animal by a disabled person, or families with children status.

(5) Nothing in this chapter limits the applicability of any reasonable federal, state or local restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

(6) Nothing in this chapter prohibiting discrimination based on families with children status applies to housing for older persons as defined by the federal Fair Housing Amendments Act of 1988, 42 U.S.C. ((see)) Sec. 3607 (b)(1) through (3), as amended by the Housing for

Older Persons Act of 1995, P.L. 104-76, as enacted on December 28, 1995.

AMENDATORY SECTION (Amending WSR 98-08-035, filed 3/23/98, effective 4/23/98)

WAC 162-36-010 Soliciting buyers from neighbors of listed house.

Some real estate firms have a practice of sending letters, post cards or printed circulars to residents of a neighborhood where they have a home listed for sale in order to obtain referrals of prospective buyers of the home. Such a practice does not necessarily discriminate against persons on the basis of race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability or the use of a trained dog guide or service animal by a disabled person. However, the practice can have a discriminatory effect, and thereby constitute an unfair practice in a real estate transaction within the meaning of this chapter, where:

(1) It is used only in neighborhoods occupied entirely or predominantly by persons of a single race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, have the presence of a sensory, mental or physical disability, or who use a trained dog guide or service animal as a disabled person, or

(2) Persons of a particular race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, have the presence of a sensory, mental or physical disability, or use a trained dog guide or service animal as a disabled person living in the same neighborhood are not sent solicitations, or

(3) The content or language of the solicitation invites, promotes or perpetuates residential segregation or discrimination on the basis of race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability, or the use of a trained dog guide or service animal by a disabled person.

AMENDATORY SECTION (Amending WSR 98-08-035, filed 3/23/98, effective 4/23/98)

WAC 162-36-020 Content and language of solicitation. Residential segregation on the basis of race, creed, national origin or other ethnic classification is rooted in the history of this country and fixed in the patterns of thought of many people. The content and language of a solicitation of names of prospective purchasers directed to neighbors of a house listed for sale, must be examined in this context in assessing whether the solicitation constitutes an unfair practice within the meaning of RCW 49.60.222 and WAC 162-36-010. A solicitation which indicates that the recipient of the solicitation can control the type of persons who will move into the neighborhood by referring appropriate prospective buyers, is likely to be understood as an invitation to discriminate on the basis of race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability, or the use of a trained dog guide or service animal by a disabled person. Phrases such as "uphold the standards of the community" (when the "standards" are unspecified) are likely to be understood the same way. Accordingly, it is an unfair practice under RCW 49.60.222 and WAC 162-36-010 for the content or language of a neighborhood solicitation to:

(1) Suggest in any way that the solicitor, buyer or seller has the power to control the type or character of the person or persons to whom the property involved may be sold;

(2) Invite or provoke discriminatory feelings, actions, or responses from the person or persons being solicited;

(3) Make reference to an assumed standard of the community which the solicitor, buyer or seller must or will uphold, unless the particular community standard is identified specifically, and the standard does not have the effect of excluding persons of a particular race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability, or the use of a trained dog guide or service animal by a disabled person.

AMENDATORY SECTION (Amending WSR 00-01-177, filed 12/21/99, effective 1/21/00)

WAC 162-12-100 Purpose. (1) These regulations carry out the law against discrimination as stated generally in RCW 49.60.010 and 49.60.030, and interpret RCW 49.60.180 and 49.60.200 which declare certain preemployment inquiries to be unfair practices.

(2) The commission generally follows chapter 49.60 RCW and federal court decisions that interpret comparable statutes and rules. The commission will not follow federal precedents when a different interpretation of state statutes and rules will better carry out the purposes of chapter 49.60 RCW.

(3) This regulation cannot cover every question that might arise in connection with inquiries prior to employment. The commission expects that in most cases these rules, either directly or by analogy, will guide those who are covered by the law.

(4) Definition: In this chapter, the following words are used in the meaning given, unless the context clearly indicates another meaning.

"Protected status" is short for the phrase, "age, sex, sexual orientation, gender expression or gender identity, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person," and means the full phrase (see RCW 49.60.180).

AMENDATORY SECTION (Amending WSR 00-01-177, filed 12/21/99, effective 1/21/00)

WAC 162-12-140 Preemployment inquiries. (1) The following examples of fair and unfair inquiries apply when made in reference to job application forms, preemployment interviews, or any other type of inquiry made of job applicants. The rules also apply to inquiries made to persons other than an applicant and to inquiries made by third parties such as a credit reporting service. The rules do not apply after a person is employed. See WAC 162-12-180.

(2) Employers and employment agencies shall comply with these rules except where one or more of the following conditions exist:

(a) When there is a "bona fide occupational qualification."

(b) A voluntary affirmative action plan that is in compliance with the requirements of a government agency or other competent authority such as a court, and if made in a manner provided in WAC 162-12-160 and 162-12-170.

(c) A requirement of federal law or regulation, as explained in WAC 162-12-150.

If one or more of the above conditions apply, the inquiries of employers and employment agencies must be accompanied by a written explanation of their purpose. See WAC 162-12-135, 162-12-160 and 162-12-170.

(3) The following examples of fair and unfair preemployment inquiries define what is an unfair practice under RCW 49.60.180(4) and 49.60.200. These examples, however, are not all inclusive. All preemployment inquiries that unnecessarily elicit the protected status of a job applicant are prohibited by these statutes irrespective of whether or not the particular inquiry is covered in this regulation.

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
a. Age	Inquiries as to birth date and proof of true age are permitted by RCW 49.44.090.	Any inquiry not in compliance with RCW 49.44.090 that implies a preference for persons under 40 years of age.

(For age discrimination, RCW 49.44.090 must be read in conjunction with RCW 49.60.180 and 49.60.200. RCW 49.44.090 limits age discrimination coverage to persons 40 years of age and older, and makes other limitations and exceptions to the age discrimination law.)

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
b. Arrests (see also Convictions)	<p>Because statistical studies regarding arrests have shown a disparate impact on some racial and ethnic minorities, and an arrest by itself is not a reliable indication of criminal behavior, inquiries concerning arrests must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely affect job performance, and the arrest occurred within the last ten years. Exempt from this rule are law enforcement agencies and state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults. See RCW 43.20A.710; 43.43.830 through 43.43.842; and RCW 72.23.035.</p>	<p>Any inquiry that does not meet the requirements for fair preemployment inquiries.</p>
c. Citizenship	<p>Whether applicant is prevented from lawfully becoming employed in this country because of visa or immigration status. Whether applicant can provide proof of a legal right to work in the United States after hire.</p>	<p>Whether applicant is citizen. Requirement before job offer that applicant present birth certificate, naturalization or baptismal divulge applicant's lineage, ancestry, national origin, descent, or birth place.</p>

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
d. Convictions (see also Arrests)	<p>Statistical studies on convictions and imprisonment have shown a disparate impact on some racial and ethnic minority groups. Inquiries concerning convictions (or imprisonment) will be considered to be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions (or release from prison) occurred within the last ten years. Law enforcement agencies, state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults are exempt from this rule. See RCW 43.20A.710; 43.43.830 through 43.43.842; and RCW 72.23.035.</p>	<p>Inquiries concerning convictions and imprisonment which either do not relate reasonably to job duties or did not occur within the last ten years will not be considered justified by business necessity.</p>
e. Family	<p>Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may prevent him or her from meeting work attendance requirements.</p>	<p>Specific inquiries concerning spouse, <u>spouse's gender</u>, spouse's employment or salary, children, child care arrangements, or dependents.</p>

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
f. Disability	<p>Whether applicant is able to perform the essential functions of the job for which the applicant is applying, with or without reasonable accommodation.</p> <p>Inquiries as to how the applicant could demonstrate or describe the performance of these specific job functions with or without reasonable accommodation. Note: Employers are encouraged to include a statement on the application form apprising applicants that if they require accommodation to complete the application, testing or interview process, to please contact the employment office, personnel or human resources department or other office as may be able to assist them.</p>	<p>Inquiries about the nature, severity or extent of a disability or whether the applicant requires reasonable accommodation prior to a conditional job offer. Whether applicant has applied for or received worker's compensation. Also any inquiry that is not job related or consistent with business necessity.</p>
g. Height and Weight	<p>Being of a certain height or weight will not be considered to be a job requirement unless the employer can show that all or substantially all employees who fail to meet the requirement would be unable to perform the job in question with reasonable safety and efficiency.</p>	<p>Any inquiry which is not based on actual job requirements and not consistent with business necessity.</p>
h. Marital Status (see also Name and Family)	None.	<p>() Mr. () Mrs. () Miss () Ms. Whether the applicant is married, single, divorced, separated, engaged, widowed, <u>has a same sex spouse</u>, etc.</p>
i. Military	<p>Inquiries concerning education, training, or work experience in the armed forces of the United States.</p>	<p>Type or condition of military discharge. Applicant's experience in military other than U.S. armed forces. Request for discharge papers.</p>

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
j. Name	Whether applicant has worked for this company or another employer under a different name and, if so, what name. Name under which applicant is known to references if different from present name.	Inquiry into original name where it has been changed by court order or marriage. Inquiries about a name that would divulge marital status, <u>sexual orientation, gender expression or gender identity, transgender status or sex assigned at birth</u> , lineage, ancestry, national origin or descent.
k. National Origin	Inquiries into applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements.	Inquiries into applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of applicant's parents or spouse.
l. Organizations	Inquiry into organization memberships, excluding any organization the name or character of which indicates the race, color, creed, sex, <u>sexual orientation, gender expression or gender identity</u> , marital status, religion, or national origin or ancestry of its members.	Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs.
m. Photographs	May be requested <i>after</i> hiring for identification purposes.	Request that applicant submit a photograph, mandatorily or optionally, at any time before hiring.
n. Pregnancy (see also Disability)	Inquiries as to a duration of stay on job or anticipated absences which are made to males and females alike.	All questions as to pregnancy, and medical history concerning pregnancy and related matters.
o. Race or Color	None. See WAC 162-12-150, 162-12-160, and 162-12-170.	Any inquiry concerning race or color of skin, hair, eyes, etc., not specifically permitted by WAC 162-12-150, 162-12-160, and 162-12-170.
p. Relatives	Name of applicant's relatives already employed by this company or by any competitor.	Any other inquiry regarding marital status, identity of one's spouse, or spouse's occupation are considered unfair practices in accordance with WAC 162-12-150.

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
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(While the law does not prohibit company policies governing the employment of relatives, any policy that has the effect of disadvantaging minorities, women, married couples, or other protected classes, would be in violation of the law unless it is shown to serve a necessary business purpose.) See WAC 162-12-150, 162-12-160, and 162-12-170.

q. Religion or Creed	None.	Inquiries concerning applicant's religious preference, denomination, religious affiliations, church, parish, pastor, or religious holidays observed.
r. Residence	Inquiries about address to the extent needed to facilitate contacting the applicant.	Names or relationship of persons with whom applicant resides. Whether applicant owns or rents own home.
s. Sex	None.	Any inquiry concerning gender is prohibited.
<u>t. Sexual Orientation, Gender Expression or Gender Identity</u>	<u>None.</u>	<u>Any inquiry concerning sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth is prohibited.</u>

AMENDATORY SECTION (Amending WSR 99-15-025, filed 7/12/99, effective 8/12/99)

WAC 162-16-200 General purpose and definitions. The law against discrimination protects persons from discrimination in employment (RCW 49.60.180, 49.60.190, and 49.60.200). Persons are also protected from discrimination as provided in RCW 49.60.172 (unfair practices with respect to HIV infection), RCW 49.60.174 (actual or perceived HIV infection), and RCW 49.60.210 (unfair to discriminate against person opposing unfair practice).

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(2) Other objectives in writing these rules are:

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(d) The public and commission staff need standards that are certain and that are easy to understand and apply. Therefore we must sometimes simply draw a line, although reasonable persons could differ as to where the line should be drawn.

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(a) If an employer provides paid sick leave for periods of disability that require medical leave, the employer must provide paid sick leave for periods of disability related to an individual's gender expression or gender identity that require medical leave;

(b) If the employer's policy requires a medical provider's statement to verify the leave period as a reasonable accommodation, a medical provider's statement may be required to verify the leave period as a reasonable accommodation when the disabling condition is related to the individual's gender expression or gender identity, however, an employer may not inquire if the leave is related to gender expression or gender identity or gender transition, nor can the employer require that the note specify if the leave is related to gender expression or gender identity or gender transition;

(c) If the employer's policy permits the retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period for other disabilities, the policy must also permit such accrual of benefits during leave for disabling conditions related to an individual's gender expression or gender identity;

(d) If an employer allows an employee to use shared leave for disabling conditions, the employer must apply the same policies and procedures for disabling conditions related to an individual's gender expression or gender identity.

(2) **Reasonable accommodation.** An employer shall provide reasonable accommodation for a disability when the disability is related to the individual's gender expression or gender identity, absent undue hardship to the employer. Such reasonable accommodation includes, but is not limited to, medical leave for medical and counseling appointments, surgery, and recovery from surgery that are related to gender reassignment procedures and treatments. An undue hardship as a reason for denying an accommodation in situations involving disabilities related to gender expression or gender identity shall be analyzed in the same manner as with accommodations for any other disability. To the extent consistent with personal medical information connected to other disabilities, personal medical information connected to disabilities related to a person's gender expression or gender identity must be kept confidential.

(3) Nothing in this section is intended to suggest that a person's sexual orientation or gender expression or gender identity itself is a disabling condition.

NEW SECTION

WAC 162-32-030 Employee benefits and privileges. (1) **Consistent and equal basis.** Employee benefits provided in whole or in part by an employer must be consistent between all employees and equal for all employees, regardless of the employee's sexual orientation or gender expression or gender identity. For example, it is an unfair practice to:

(a) Provide health insurance coverage to an employee's opposite/different sex spouse but to fail to provide health insurance cov-

erage to an employee's same sex spouse (except in situations where such a rule is prohibited or pre-empted by federal law.)

(b) Provide parental leave or bonding time for the father of a child newly born or adopted into a heterosexual relationship, but fail to provide the same parental leave or bonding time to the parent of a child newly born or adopted into a same-sex relationship.

(2) **Other benefits and privileges of employment.** All other employee benefits, provided formally or informally including, but not limited to, health club memberships, discount programs, training, staff retreats, company gatherings and parties, and use of company vehicles or other company services, shall be provided on an equal basis to all employees regardless of the employee's sexual orientation or gender expression or gender identity. If the benefit or privilege is extended to the employee's opposite/different sex spouse, it must be extended to an employee's same sex spouse as well.

NEW SECTION

WAC 162-32-040 Harassment. (1) **Harassment.** Harassment based on an individual's sexual orientation or gender expression or gender identity is prohibited. Sexual orientation or gender expression or gender identity harassment in employment is offensive and unwelcome behavior serious enough to affect the terms and conditions of employment and which occurred because of an individual's sexual orientation or gender expression or gender identity, and can be imputed to the employer.

(2) **Prohibited conduct.** Prohibited conduct may include, but is not limited to, the following:

(a) Asking unwelcome personal questions about an individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth;

(b) Intentionally causing distress to an individual by disclosing the individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth against his or her wishes;

(c) Using offensive names, slurs, jokes, or terminology regarding an individual's sexual orientation or gender expression or gender identity;

(d) The deliberate misuse of an individual's preferred name, form of address, or gender-related pronoun (except on legally mandated documentation, if the individual has not officially obtained a name change);

(e) Posting offensive pictures or sending offensive electronic or other communications;

(f) Unwelcome physical conduct.

(3) **Harassment in a place of public accommodation.** Sexual orientation harassment or harassment based on gender expression or gender identity in a place of public accommodation is offensive and unwelcome behavior serious enough to alter the individual's experience at the place of public accommodation, or severe enough that the individual has no choice but to leave the place of public accommodation, which occurred because of the individual's sexual orientation or gender expression or gender identity, and can be imputed to the place of public accommodation. In schools, such harassment is offensive and unwelcome behavior serious enough to interfere with a child's access to educational opportunities, which occurred because of the child's sexual orientation or gender expression or gender identity, and can be imputed to the school.

NEW SECTION

WAC 162-32-050 Dress and grooming standards. (1) **Standards allowed.** Covered entities may require standards of dress or grooming that serve a reasonable business or institutional purpose, such as promoting safety, developing a company identity, or projecting a professional, positive public image.

(2) **Prohibited standards.** Covered entities cannot require an individual to dress or groom in a manner that is not consistent with that individual's gender expression or gender identity.

NEW SECTION

WAC 162-32-060 Gender-segregated facilities. (1) **Facility use.** All covered entities shall allow individuals the use of gender-segregated facilities, such as restrooms, locker rooms, dressing

rooms, and homeless or emergency shelters, that are consistent with that individual's gender expression or gender identity.

In such facilities where undressing in the presence of others occurs, covered entities shall allow access to and use of a facility consistent with that individual's gender expression or gender identity.

(2) Cannot require use inconsistent with gender expression or gender identity. A covered entity shall not request or require an individual to use a gender-segregated facility that is inconsistent with that individual's gender expression or gender identity, or request or require an individual to use a separate or gender-neutral facility.

(a) If another person expresses concern or discomfort about a person who uses a facility that is consistent with the person's gender expression or gender identity, the person expressing discomfort should be directed to a separate or gender-neutral facility, if available.

(b) Any action taken against a person who is using a restroom or other gender-segregated facility, such as removing a person, should be taken due to that person's actions or behavior while in the facility, and must be unrelated to gender expression or gender identity. The same standards of conduct and behavior must be consistently applied to all facility users, regardless of gender expression or gender identity.

(4) Provision of options encouraged. Whenever feasible, covered entities are encouraged to provide options for privacy, such as single-use gender-neutral bathrooms or private changing areas, that are available to any individual desiring privacy.

AMENDATORY SECTION (Amending WSR 98-08-035, filed 3/23/98, effective 4/23/98)

WAC 162-36-005 Discrimination. (1) It is an unfair practice for any person, whether acting for himself, herself, or another, because of sex, sexual orientation, gender expression or gender identity, marital status, race, creed, color, national origin, families with children status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person:

(a) To refuse to engage in a real estate transaction with a person;

(b) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(c) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

(d) To refuse to negotiate for a real estate transaction with a person;

(e) To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his or her attention, or to refuse to permit the person to inspect real property;

(f) To discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling, to any person; or to a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or to any person associated with the person buying or renting;

(g) To make, print, publish, circulate, post, mail, or cause to be so made or published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;

(h) To offer, solicit, accept, use, or retain listing of real property with the understanding that a person may be discriminated

against in a real estate transaction or in the furnishing of facilities or services in connection therewith;

(i) To expel a person from occupancy of real property;

(j) To discriminate in the course of negotiating, executing, or financing a real estate transaction whether by mortgage, deed of trust, contract, or other instrument imposing a lien or other security in real property, or in negotiating or executing any item or service related thereto including issuance of title insurance, mortgage insurance, loan guarantee, or other aspect of the transaction. Nothing in this section shall limit the effect of RCW 49.60.176 relating to unfair practices in credit transactions;

(k) To attempt to do any of the unfair practices defined in this chapter or chapter 49.60 RCW.

(2) It is an unfair practice for any person, for profit, to induce or attempt to induce any person to sell or rent any real property by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, creed, color, sex, sexual orientation, gender expression or gender identity, national origin, families with children status, or with any sensory, mental or physical disability and/or the use of a trained dog guide or service animal by a disabled person.

(3) It is an unfair practice to insert in a written instrument relating to real property a provision that is void under RCW 49.60.224(1) or to honor or attempt to honor such a provision in the chain of title.

(4) Nothing in this chapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, creed, national origin, sex, sexual orientation, gender expression or gender identity, disability, the use of a trained dog guide or service animal by a disabled person, or families with children status.

(5) Nothing in this chapter limits the applicability of any reasonable federal, state or local restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

(6) Nothing in this chapter prohibiting discrimination based on families with children status applies to housing for older persons as defined by the federal Fair Housing Amendments Act of 1988, 42 U.S.C. ((see)) Sec. 3607 (b) (1) through (3), as amended by the Housing for

Older Persons Act of 1995, P.L. 104-76, as enacted on December 28, 1995.

AMENDATORY SECTION (Amending WSR 98-08-035, filed 3/23/98, effective 4/23/98)

WAC 162-36-010 Soliciting buyers from neighbors of listed house.

Some real estate firms have a practice of sending letters, post cards or printed circulars to residents of a neighborhood where they have a home listed for sale in order to obtain referrals of prospective buyers of the home. Such a practice does not necessarily discriminate against persons on the basis of race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability or the use of a trained dog guide or service animal by a disabled person. However, the practice can have a discriminatory effect, and thereby constitute an unfair practice in a real estate transaction within the meaning of this chapter, where:

(1) It is used only in neighborhoods occupied entirely or predominantly by persons of a single race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, have the presence of a sensory, mental or physical disability, or who use a trained dog guide or service animal as a disabled person, or

(2) Persons of a particular race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, have the presence of a sensory, mental or physical disability, or use a trained dog guide or service animal as a disabled person living in the same neighborhood are not sent solicitations, or

(3) The content or language of the solicitation invites, promotes or perpetuates residential segregation or discrimination on the basis of race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability, or the use of a trained dog guide or service animal by a disabled person.

AMENDATORY SECTION (Amending WSR 98-08-035, filed 3/23/98, effective 4/23/98)

WAC 162-36-020 Content and language of solicitation. Residential segregation on the basis of race, creed, national origin or other ethnic classification is rooted in the history of this country and fixed in the patterns of thought of many people. The content and language of a solicitation of names of prospective purchasers directed to neighbors of a house listed for sale, must be examined in this context in assessing whether the solicitation constitutes an unfair practice within the meaning of RCW 49.60.222 and WAC 162-36-010. A solicitation which indicates that the recipient of the solicitation can control the type of persons who will move into the neighborhood by referring appropriate prospective buyers, is likely to be understood as an invitation to discriminate on the basis of race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability, or the use of a trained dog guide or service animal by a disabled person. Phrases such as "uphold the standards of the community" (when the "standards" are unspecified) are likely to be understood the same way. Accordingly, it is an unfair practice under RCW 49.60.222 and WAC 162-36-010 for the content or language of a neighborhood solicitation to:

(1) Suggest in any way that the solicitor, buyer or seller has the power to control the type or character of the person or persons to whom the property involved may be sold;

(2) Invite or provoke discriminatory feelings, actions, or responses from the person or persons being solicited;

(3) Make reference to an assumed standard of the community which the solicitor, buyer or seller must or will uphold, unless the particular community standard is identified specifically, and the standard does not have the effect of excluding persons of a particular race, creed, color, national origin, sex, sexual orientation, gender expression or gender identity, marital status, families with children status, the presence of a sensory, mental or physical disability, or the use of a trained dog guide or service animal by a disabled person.

Notes from 10/22/15 Commission meeting

Agenda Item: Rulemaking- Sexual Orientation and Gender Identity

Laura Lindstrand, Policy Analyst introduced self for record.

LL – I reviewed the comments made at the public hearing as well as the written comments submitted. I compiled the comments, and determined the issues that received the most comments, and those there were most in need of changes. There are two broad categories of changes, those two wording issues, and then more substantive changes.

Let's discuss the wording issues first.

Many comments suggested that instead of using the umbrella term "sexual orientation" in the rules, that the rules mention both sexual orientation and gender identity in every section, to ensure that the rules cover all protected categories.

[There was no discussion on this issue, and the Commissioners agreed that the change was appropriate.]

LL – Comments also suggested the use of the adjective "transgender" rather than "transgendered" in the rules.

[There was no discussion on this issue, and the Commissioners agreed that the change was appropriate.]

LL- Other comments suggested that the rules not use the wording "opposite sex couples" and instead use the term "different sex couples". It should be pointed out that the U.S. Supreme Court in Obergefell v. Hodges used the term "opposite sex" in the opinion.

[A member of the public interjected at this point asking if he could comment. He was informed by Stacia Hollar, AAG, that the time for public comment had passed, and that now was for Commissioners and staff only.]

[There was discussion on this issue, and at first the Commissioners determined that the same language used by the Supreme Court would be appropriate. Further discussion led to the decision then when appropriate, the language could state "opposite or different" to be inclusive.]

LL- Another suggestion was to change "paternity leave" to "parental leave".

[There was no discussion on this issue, and the Commissioners agreed that the change was appropriate.]

LL – Now we are moving into the more substantive issues that were brought up on the comments. The most comments were received regarding the language in the rules about schools and single sex facilities. The original idea had been for our rules to be consistent with the

guidance that OSPI had for schools in this area. OSPI guidance, and thus our rules, allowed for some flexibility of schools in the area of locker rooms and shower areas. The public comment received opposed this and suggested that schools should be the same as other places of public accommodation, that must allow a person to use the single sex facility of their choice. We had discussions with OSPI, and OSPI supports a change in the proposed rules, and is also changing its own guidance in this area, from a flexible policy, to a “must” policy.

[There was much discussion on this topic, with Comm. Strong pointing out that this is a very difficult and sensitive area, as it involves potential nudity and children. The consensus was to change the language in the proposed rules to have schools adhere to the same rules as other places of public accommodation and allow transgender individuals to use the single sex facility of their choice.]

LL – Another area that people commented on was the topic of harassment, and how it would be helpful to provide examples of unofficial documentation on which the person’s name and gender of choice would be, such as name tags, door plates. Official records, such as tax documents, would need to remain in the person’s legal name. Do we wish to provide examples in the rules?

[There was a lengthy discussion in this area. Sharon Ortiz suggested business card as another type of unofficial documentation. Comm. Strong suggested that if the person is in the name of the company, that the company name should reflect the person’s preferred name. Comm. Strong also wondered if there was a legal name change on security clearance documents, who would bear the cost of obtaining a new security clearance in the person’s new name, the company or the employee? LL suggested that if security clearance necessary for the job, that most likely the company would bear the cost. AAG Hollar reminded the group that this topic was under the heading of harassment, and we were getting off that topic. The decision was to not provide any examples in the rules as we could never provide all examples, and only providing some would be problematic.]

LL – The next topic is that of perceived sexual orientation. The definition in the law does not include perceived sexual orientation. A WA appeals court in *Davis v. Fred’s Appliance* determined that since the legislature did not specifically put perceived in the definition, then it did not mean for the law to protect individuals who were not gay but perceived as gay. The AGO had written comments in favor of clarifying in the rules that perceived sexual orientation does fall under the definition and is protected. On the one hand, the definition of disability specifically states that “perceived” is covered under the definition of disability, so the other protected class that includes perceived has it spelled out in the law. On the other hand, the law requires that protections be liberally construed.

SO – Pointed out that before this case, the WSHRC investigated cases involving perceived sexual orientation. Someone might not be gay but might be perceived as such because they are effeminate.

CS and CH – pointed out that it did not make sense that perceived would not be covered.

SR – wanted to know where in the law the disability definition states that perceived is covered. LL stated that it was in RCW 49.60.040, and AGO SH gave her a copy.

[Discussion]

LL – one of two things can happen if this issue makes it to the supreme court. The court could look to our rules and expand protection to include perceived, or the court could essentially overturn the rules.

[It was decided that the rules should make it clear that perceived sexual orientation is protected.]

LL – Comments also wanted more examples of harassment, such as when is off-site conduct harassment, or when is customer behavior harassment. These are complicated, case-by-case determinations, and probably too detailed to put in the rules. The answers to these questions are often found in analysis of court cases with similar fact patterns, borrowed from cases involving harassment and other protected classes.

SR stated that the examples already in the proposed rule were probably too detailed, but that she did not have a problem with them being there.

[After a short discussion that more examples would create more problems than clarity, the consensus was to not include further examples of harassment.]

LL – The next topic is that of consistency. There were some comments that we should include the term “full time gender presentation” in the rules. The city of San Francisco uses this terminology. This would provide clear guidance for business owners and employers about when persons are protected, and would ensure that persons were consistent in their presentation. The concern is persons who present as female one day, and male the next. The opposing view is that persons should not have to be consistent, because some persons are questioning, or do not identify as either sex.

[After discussion, it was decided that there would be no changes to reflect consistent presentation as a requirement.]

LL – There were comments involving concerns about previous names, and the view that job applicants should not have to disclosed previous names, because that would out the person. A similar situation is when a person discloses a maiden name – this infers that the person is now married. On the other hand, how does an employer make reference or credit checks if they do not have information on previous names?

All Commissioners pointed out that employers must be able to run checks on potential employees and to do so could ask for former names, even if that would indicate that the employee was transgender. SR pointed out that it was not different than when someone has to

reveal a maiden name, and discloses that they are now married, and run the risk of an assumption that they will have babies and quit. LL added that if someone was not hired due to revealing a name change, then it would be a failure to hire case based on protected class, and could be investigated. It was decided that an addition would be made to 162-12-140(j) to include prohibited inquires as those involving sexual orientation or gender identity.

LL – related were comments that requested language be added that disclosure of sex that is inconsistent with presumed sex shall not be considered misrepresentation or fraud, or use of a name that is used consistently but not a legal name shall not be grounds for adverse action.

CS – didn't we just discuss this?

LL – yes, which is why I said this was a related topic.

[The consensus was to not add this language. If someone was fired for these reasons, it would be pretext for discrimination and could be pursued as a wrongful termination theory.]