

Memorandum 2023-5

Equal Rights Amendment: Status Report

In 2022, the Legislature adopted a resolution that authorizes and requests the Commission¹ to “undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]”² More specifically:

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

The Commission commenced work on this topic in 2022, considering an introductory memorandum describing a proposed approach for the study.⁴ Specifically, the proposed approach included two stages: first, the Commission will examine the possibility of codifying a provision in state law to achieve the effect of the Equal Rights Amendment (“ERA”); and second, the Commission would apply that codified provision to existing California law to remedy defects (i.e., provisions that have discriminatory language or disparate impacts).

This memorandum presents a more detailed workplan for the first phase of the study (i.e., codifying a provision to achieve the effect of the ERA).

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

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

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

3. *Id.*

4. Memorandum 2022-51.

WORKPLAN FOR STUDYING CODIFICATION OF SEX EQUALITY PROVISION

As indicated above, the Commission decided to initially study possible codification of the effect of the ERA. For ease of reference, the staff will refer to a provision intended to achieve the effect of the ERA as a “sex equality provision” The staff also wants to acknowledge that the term “sex equality provision” is not necessarily limited to a single provision, but may include multiple provisions (and revisions of existing provisions). The exact contours of the sex equality provision will be assessed as the Commission’s work proceeds.

In general, the staff proposes that the Commission’s work on this topic address the following issues (in the following order):

- (1) What is the scope of a sex equality provision to codify the effects of the ERA?
- (2) How does the scope of a sex equality provision to codify the effects of the ERA differ from the scope of sex equality protections currently offered by California law?
- (3) How should a sex equality provision be implemented?

The discussion below addresses each of these steps in more detail. As the level of detail in the following discussions may suggest, the staff has made some progress on undertaking the legal research to address the first question (regarding scope). In the footnotes, the staff has identified some of the resources that we anticipate will inform the fuller presentation of these matters in subsequent memoranda.

The staff welcomes any questions or suggestions regarding the workplan presented.

Scope of Sex Equality Provision

To determine how to codify the effects of the ERA, the Commission will first need to consider the scope of the ERA’s guarantee. Section 1 of the ERA provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”⁵ Understanding the effect of the ERA will require close analysis of the meaning of this language, in particular

5. H.J. Res. 208 (1972), 86 Stat. 1523. The remainder of the ERA provides:
SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
SEC. 3. This amendment shall take effect two years after the date of ratification.
See also Congressional Research Service, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues 14-15*, R42979 (Updated Dec. 23, 2019) (“CRS Report”), available at <https://sgp.fas.org/crs/misc/R42979.pdf> (reproducing text of House Joint Resolution 208 from 92nd Congress, 1972).

“equality of rights” and “on account of sex.” The Commission’s work will begin here.

“On Account of Sex”

The staff proposes to first address the question of what “on account of sex” encompasses. Given that ERA just recently reached the state ratification threshold,⁶ the substantive limits of the ERA’s guarantee have not yet been addressed in the case law. In the absence of binding legal authority construing the language of the ERA itself, the Commission can look to the scope of state and federal anti-discrimination protections as a guide for evaluating how broadly the ERA’s guarantee might extend.

While “on account of sex” plainly seems to apply to issues involving biological sex, the Commission will also need to consider whether the ERA’s guarantee encompasses the following issues:

- A classification that includes sex and some other characteristic (e.g., marital status or parenthood).
- A sex-specific condition (e.g., pregnancy).
- Nonconformity to stereotypes or expected characteristics associated with an individual’s sex.
- Gender identity and gender expression.
- Sexual orientation.

As an initial matter, the staff anticipates that this analysis will be informed, at a minimum, by the following laws (and the associated case law, legal history, and current concerns):

- Federal Equal Pay Act of 1963.⁷
- Federal Civil Rights Act of 1964.⁸

6. See generally CRS Report cited in *supra* note 5 at 2 (“By the fall of 1977, 35 states had ratified the ERA, three fewer than the 38 needed for adoption. ... Virginia became the 38th state to ratify the ERA in 2020.”).

7. Federal Equal Pay Act of 1963, P.L. 88-38, 77 Stat. 56. The text of this act can be found at <https://www.eeoc.gov/statutes/laws-enforced-eeoc>; see also generally, e.g., Nat’l Women’s L. Center, Closing the “Factor Other than Sex” Loophole in the Equal Pay Act (Apr. 11, 2011), *available at* https://nwlc.org/wp-content/uploads/2015/08/4.11.11_factor_other_than_sex_fact_sheet_update.pdf; https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/.

8. Federal Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241. The text of this act can be found at <https://www.eeoc.gov/statutes/laws-enforced-eeoc>. In particular, Title VII of the Act contains key employment discrimination provisions. Title VII is codified at 42 U.S.C. § 2000e *et seq.*. See specifically 42 U.S.C. § 2000e2(a).

- Federal Pregnancy Discrimination Act of 1978.⁹

In addition to these federal laws, this analysis may also be informed by the scope of the anti-discrimination protections and related protections offered in California law.¹⁰

The staff welcomes additional suggestions for legal authorities that should be discussed to inform the Commission’s consideration of the meaning of “on account of sex.”

“Equality of Rights”

After addressing the scope of “on account of sex,” the staff proposes to then analyze how we should understand the ERA’s guarantee of “equality of rights.”

As an initial matter, the staff notes that the language of the Commission’s assignment may be instructive here (i.e., “inclusion of discriminatory language on the basis of sex, and ... disparate impacts on the basis of sex upon enforcement thereof.”).

The staff anticipates that this analysis will focus on the Equal Protection Clauses of the U.S. and California Constitutions (and the associated case law

See also, e.g., *Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542 (claim involves discrimination against mother of young children); *Sprogis v. United Air Lines, Inc.* (7th Cir. 1971) 444 F.2d 1194 (no marriage rule for female flight attendants); *General Electric Co. v. Gilbert* (1976) 429 U.S. 124 (claim involves exclusion of pregnancy conditions from employer disability plan); *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (claim involving sex stereotyping discrimination); *Faragher v. City of Boca Raton* (1998) 524 U.S. 775 (sexual harassment); *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75 (sexual harassment); *Bostock v. Clayton County* (2020) 140 S.Ct. 1731 (claims involve sexual orientation and gender discrimination).

See also generally Pres. Exec. Order Nos. 13988 (Jan. 20, 2021) and 14021 (Mar. 8, 2021). These text of these orders is available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/> and <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>.

9. Federal Pregnancy Discrimination Act of 1978, P.L. 95-555, 92 Stat. 2076. Text of this act can be found at <https://www.eeoc.gov/statutes/laws-enforced-eeoc>. See 42 U.S.C. § 2000e(k) (defining “on the basis of sex” to include pregnancy, childbirth, and related medical conditions). See also *Young v. United Parcel Serv.* (2015) 575 U.S. 206; Federal Pregnant Workers Fairness Act, enacted as part of H.R. 2617, P.L. 117-328, J.L. Grossman, *The Pregnant Workers Fairness Act: A Long-Awaited Victory for Pregnant Workers*, Verdict from Justia (Jan. 6, 2023) <https://verdict.justia.com/2023/01/06/the-pregnant-workers-fairness-act-a-long-awaited-victory-for-pregnant-workers>.

10. See, e.g., Civ. Code § 51 (Unruh Civil Rights Act); Educ. Code §§ 220, 221.5-221.61; Gov’t Code §§ 12900-12996 (Fair Employment and Housing Act). See also, e.g., <https://women.ca.gov/> (California Commission on the Status of Women and Girls website notes that “[a]ll references to ‘women and girls’ include gender-expansive individuals (cis women and girls, trans women and girls, nonbinary individuals, gender-nonconforming individuals, genderqueer individuals, and any women or girl identified individuals.”).

related to sex-based equal protection claims).¹¹ And, this analysis would highlight the ERA's effect on the treatment of sex-based equal protection claims, according to legal scholars and commentators.¹²

This analysis may also highlight other constitutional provisions (in the California Constitution in particular) that pertain to sex-based discrimination and equality of rights.¹³

As with the issue above, the staff welcomes additional suggestions for legal authorities and other resources that should be discussed to inform the Commission's consideration of the meaning of "equality of rights."

Difference in Scope of Sex Equality Provision and Current California Law Protections

Next, the Commission will need to consider whether and how the general sex-based protections in California's laws fall short of the guarantees of the ERA. It may be that the prior work in this study will address this issue to some extent (i.e., materials evaluating the scope of the ERA may also discuss the scope of related California laws). However, the Commission will need to consider the following questions:

- (1) Do any of the existing sex-based protections in California law need to be amended for consistency with the ERA's guarantee?
- (2) With amendments, will California's existing protections fully satisfy the ERA's guarantee? If not, where do the protections of California fall short of achieving the ERA's guarantee?

Implementation of Sex Equality Provision

Finally, the Commission will need to decide how to craft a sex equality provision. In making this decision, the Commission will need to determine the substantive scope and general character of the provision. The Commission will

11. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a).

See also, e.g., *United States v. Virginia* (1996) 518 U.S. 515; *Craig v. Boren* (1976) 429 U.S. 190; *In re Marriage Cases* (2008) 43 Cal.4th 757; *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1; *Boren v. Dep't of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250.

12. See generally, e.g., R. Bleiweis, Center for American Progress, *The Equal Rights Amendment: What You Need to Know* (Jan. 29, 2020), available at <https://www.americanprogress.org/article/equal-rights-amendment-need-know/>; K. Fossett, "What Would the ERA Change?," *Politico* (Feb. 4, 2022), available at <https://www.politico.com/newsletters/women-rule/2022/02/04/what-would-the-equal-rights-amendment-do-00005702>; J. Neuwirth, *Equal Means Equal: Why the Time for an Equal Rights Amendment is Now* (2015); <https://www.equalrightsamendment.org/why>.

13. See, e.g., Cal. Const. art. I, §§ 8, 31.

also need to consider the level of detail and precise language for the provision, and the appropriate location for such a provision (i.e., in the codes or Constitution? If in the codes, which code(s)?).

NOTE REGARDING RECENT LEGISLATIVE ATTENTION TO SEX AND GENDER ISSUES

As the Commission begins work in this area, it is important to note that this is a dynamic area of law. Sex and gender issues receive regular legislative attention in California. Towards the end of 2022, the Governor, the Legislative Women’s Caucus, and the California Commission on the Status of Women and Girls all highlighted relevant legislative changes.¹⁴

The staff plans to lightly monitor legislative developments on this topic. **The staff welcomes any suggestions for specific legislation to track.**

NEXT STEPS

As described in the workplan presented in this memorandum, the next issue to be addressed in this study will be the scope of the language “on account of sex.”

Respectfully submitted,

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14. See <https://www.gov.ca.gov/2022/12/21/historic-california-constitutional-amendment-reinforcing-protections-for-reproductive-freedom-goes-into-effect/>; <https://www.gov.ca.gov/2022/12/12/new-laws-taking-effect-next-year-and-why-they-matter/>; <https://womenscaucus.legislature.ca.gov/news/2022-09-27-gov-newsom-signs-legislation-supporting-california-legislative-women%E2%80%99s-caucus>; <https://women.ca.gov/policy/>.

For information about recent, pre-2022 relevant legislation, see also, e.g., <https://women.ca.gov/legislation-and-policy-priorities/>.