

# RULES AND REGULATIONS

## Title 16—COMMUNITY AFFAIRS

### HUMAN RELATIONS COMMISSION

[ 16 PA. CODE CH. 41 ]

#### Protected Classes under the PHRA and PFEOA

The Human Relations Commission (Commission) promulgates this final-form rulemaking by adding Subchapter D (relating to protected classes). The Commission adds §§ 41.201—41.207 under the authority of sections 7(d) and 9(g) of the Pennsylvania Human Relations Act (PHRA) (43 P.S. §§ 957(d) and 959(g)), as amended by the act of June 25, 1997 (P.L. 326, No. 34) and sections 6(6) and 7 of the Pennsylvania Fair Educational Opportunities Act (PFEOA) (24 P.S. §§ 5006(6) and 5007), as amended by the act of December 22, 1992 (P.L. 1688, No. 187). This final-form rulemaking adds Subchapter D to read as set forth in Annex A.

#### *Purpose of the Regulation*

The Commission is tasked to deal comprehensively with the basic and fundamental problem of discrimination. The PHRA specifically grants authority to the Commission to adopt, promulgate, amend and delete rules and regulations to effectuate the policies and provisions of the PHRA and to formulate policies to effectuate the purposes of the PHRA. 43 P.S. § 957(d) and (e). The Pennsylvania Supreme Court, in *PHRC v. Uniontown Area Sch. Dist.*, 313 A.2d 156 (Pa. 1973), explained that sections 957(d) and (e) of the PHRA indicate the Legislature's intent to grant the Commission the authority issue legislative rules that define terms and interpret the provisions of the PHRA. The Supreme Court noted that the power of an agency to promulgate legislative rules is so great that these rules can only be reversed by courts when "[w]hat has been ordered. . . appear[s] to be 'so entirely at odds with fundamental principles. . . as to be the expression of a whim rather than an exercise of judgment.'" Id. at 169 quoting *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236-37 (1936). This final-form rulemaking adds Subchapter D to define the terms "sex," "race" and "religious creed," as used in the PHRA and the PFEOA. The PHRA, the PFEOA and the Commission's existing regulations provide no definition and no guidance for these terms.

Subchapter D contains seven sections. Section 41.201 (relating to purpose) enumerates the purpose of the regulations. This final-form rulemaking ensures that all unlawful discriminatory practices and all unfair educational practices proscribed by the PHRA and the PFEOA are interpreted and applied consistently. Section 41.202 (relating to construction) provides that this final-form rulemaking is to be liberally construed to accomplish the purposes of the PHRA and the PFEOA. Section 41.203 (relating to enforcement) provides that this final-form rulemaking will be enforced in accordance with the PHRA, the PFEOA and the existing regulations of the Commission. This final-form rulemaking ensures that all unlawful discriminatory practices and all unfair educational practices proscribed by the PHRA and the PFEOA are interpreted and applied consistently. It is essential that all investigations of discrimination conducted by the Commission are investigated consistently with this final-form rulemaking. Section 41.204 (relating to definitions) provides definitions for terms used in Subchapter D. Section 41.205 (relating to religious creed discrimination)

provides the manner in which the term "religious creed," as used in the PHRA and the PFEOA, should be interpreted. Section 41.206 (relating to sex discrimination) provides the manner in which the term "sex," as used in the PHRA and the PFEOA, should be interpreted. Section 41.207 (relating to race discrimination) provides the manner in which the term "race," as used in the PHRA and the PFEOA, should be interpreted.

#### *Religious Creed Discrimination*

This final-form rulemaking provides clarity to ensure that the term "religious creed" as used throughout the PHRA and the PFEOA—including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations and educational institutions—is interpreted consistently. The PHRA prohibits discrimination on the basis of religious creed in employment, housing, commercial property, public accommodations and educational institutions. The PFEOA prohibits discrimination on the basis of religious creed in certain educational institutions.

In interpreting the PHRA, courts in this Commonwealth have recognized that claims of religious creed discrimination may be brought under the PHRA as claims of disparate treatment, failure to accommodate a religious creed and harassment. *Brown Transport Corp. v. PHRC*, 578 A.2d 555 (Pa. Commw. Ct. 1990) (overruled on other grounds in *Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745) (Pa. 1998); see also *Winn v. Trans World Airlines, Inc.*, 484 A.2d 392, 400 n.9 (Pa. 1984). However, there is minimal case law in this Commonwealth which explains the manner in which the term "religious creed," as used in the PHRA and the PFEOA, should be interpreted. Similar to the PHRA's protections regarding religious creed discrimination in employment, Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. §§ 2000e—2000e17) declares that it is "an unlawful employment practice for an employer to. . . otherwise discriminate against any individual. . . because of such individual's. . . religion." 42 U.S.C. § 2000e-2(a)(1). In *Knepp v. Colonial Metals Co.*, 2005 Pa. Dist. & Cnty. Dec. LEXIS 3, \*15—17 (Court of Common Pleas of Lancaster County, PA July 6, 2005), the Court relied upon Federal court decisions interpreting Title VII to determine whether the plaintiff's asserted religious beliefs were sufficient to allege a claim of religious creed discrimination under the PHRA. Likewise, courts in this Commonwealth have explained that although they are not bound by Federal court decisions interpreting Federal statutes similar to the PHRA, in interpreting the PHRA where no applicable State law exists, "it is appropriate to look to federal decisions involving similar federal statutes for guidance." *McGlaw v. PHRC*, 891 A.2d 757, 768 (Pa. Commw. Ct. 2006) quoting *City of Pittsburgh Commission on Human Relations v. DeFelice*, 782 A.2d 586, 592. n.8 (Pa. Commw. Ct. 2001); see also *General Electric Corp. v. PHRC*, 469 Pa. 292, 303, 365 A.2d 649, 654-655 (Pa. 1976).

Thus, the Commission turned to Title VII for guidance regarding the definition of "religious creed," as courts in this Commonwealth often do when interpreting the PHRA and the PFEOA. Title VII explains that "[t]he term 'religion' includes all aspects of religious observance and practice as well as belief. . . ." 42 U.S.C. § 2000e(i). The regulations adopted by the Equal Employment Opportunity Commission (EEOC) explain that "religious practices include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of

traditional religious views.” 29 CFR 1605.1 (relating to “religious” nature of a practice or belief). The EEOC regulations further provide that “the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” 29 CFR 1605.1. The EEOC regulations also provide that “the phrase ‘religious practice’ as used in these Guidelines includes both religious observances and practices.” 29 CFR 1605.1. Due to the lack of judicial interpretation of religious creed under the PHRA, the Commission promulgated the provisions in § 41.205. The Commission recognizes the “de minimis” standard regarding religious creed accommodations without undue hardship to an employer. This standard is consistent with the standard under Title VII.<sup>1</sup>

The Commission also recognizes that persons who are covered by the provisions of the PHRA and the PFEEOA may believe that enforcement of the PHRA or the PFEEOA against them would violate their free exercise of religion. Thus, if a person covered by the provisions of the PHRA or the PFEEOA believes that enforcement of the PHRA or the PFEEOA against them would violate their free exercise of religion, those persons may avail themselves of the protections in the Pennsylvania’s Religious Freedom Protection Act (RFPA) (71 P.S. §§ 2401—2407), by following the procedures outlined in the RFPA. The RFPA provides the mechanism for asserting these claims.

#### *Sex Discrimination*

This final-form rulemaking provides clarity to ensure that the term “sex” as used throughout the PHRA and the PFEEOA—including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations and educational institutions—is interpreted consistently. The PHRA prohibits discrimination on the basis of sex in employment, housing, commercial property, public accommodations and educational institutions. The PFEEOA prohibits discrimination on the basis of sex in certain educational institutions.

Similar to the PHRA’s protections regarding sex discrimination in employment, Title VII declares that it is “an unlawful employment practice for an employer to . . . otherwise discriminate against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1). Additionally, similar to the protections regarding sex discrimination in educational institutions provided by the PHRA and the PFEEOA, section 901 of Title IX of the Civil Rights Act of 1972 (Title IX) (20 U.S.C. § 1681) prohibits discrimination on the basis of sex in educational programs receiving Federal financial assistance. Thus, while the PHRA and the PFEEOA do not define the term “sex,” the Commission’s final-form rulemaking provides clarity regarding the definition of “sex” which is consistent with the manner in which the term “sex,” as used in Title VII and Title IX, has been interpreted by Federal courts. The Commission’s final-form rulemaking is also consistent with the manner in which the term “sex” has been interpreted by State courts. The Commission previously issued guidance regarding the manner in which the term “sex” should be interpreted and the Commission is incorporating that guidance into this final-form rulemaking.

Title VII states that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical

conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes.” 42 U.S.C. § 2000e(k). This final-form rulemaking is also consistent with this Federal definition. The regulation is also consistent with the manner in which the term “sex” has been interpreted by courts in this Commonwealth. Courts in this Commonwealth have explained that “pregnancy based discrimination constitutes sex discrimination proscribed by section 5(a) of the PHRA.” *Anderson v. Upper Bucks County Area Vocational Technical School*, 373 A.2d 126, 130 (Pa. Commw. Ct. 1976).

The Commission’s final-form rulemaking explains that the term “sex” includes sex assigned at birth, gender identity or expression, differences in sex development and affectional or sexual orientation. This portion of this final-form rulemaking is consistent with the manner in which the term “sex,” as used in Title VII and Title IX, have been interpreted by Federal courts, including the United States Supreme Court. Courts are now broadly defining the term “sex” under Title IX, with respect to claims of sex discrimination in educational programs. Courts are also broadly defining the term “sex” under the PHRA, with respect to claims of sex discrimination in employment. Courts are also broadly defining the term “sex” with respect to claims of employment discrimination brought under the Equal Protection Clause (U.S. Const. Art. XIV, § 1). This final-form rulemaking ensures that the term “sex,” as used in the PHRA and the PFEEOA, is interpreted consistently with the manner in which the term “sex” has been interpreted by Federal and State courts. The Commission’s final-form rulemaking also ensures that the term “sex” as used throughout the PHRA and the PFEEOA—including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations and educational institutions—is interpreted consistently.

#### *Race Discrimination*

This final-form rulemaking provides clarity to ensure that the term “race” as used throughout the PHRA and the PFEEOA—including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations and educational institutions—is interpreted consistently. The PHRA prohibits discrimination on the basis of race in employment, housing, commercial property, public accommodations and educational institutions. The PFEEOA prohibits discrimination on the basis of race in certain educational institutions. Similar to the PHRA’s protections regarding race discrimination in employment, Title VII declares that it is “an unlawful employment practice for an employer to . . . otherwise discriminate against any individual because of such individual’s race.” 42 U.S.C. § 2000e-2(a)(1).

Although courts in this Commonwealth have addressed claims of race discrimination under the PHRA, they have not yet had an opportunity to address the manner in which the term “race” as used in the PHRA and the PFEEOA should be interpreted. Thus, the Commission turned to Title VII for guidance regarding the definition of race, as courts in this Commonwealth often do when interpreting the PHRA and the PFEEOA. The Commission’s final-form rulemaking explains that the term “race” includes ancestry, national origin and ethnic characteristics. This final-form rulemaking also explains that the term “race” includes interracial marriage or association. This explanation for race discrimination is consistent with the manner in which the term “race” has been interpreted by Federal courts interpreting similar Federal

<sup>1</sup> 29 CFR 1605.2 (relating to reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964).

statutes. Additionally, this final-form rulemaking specifies that race includes persons of Hispanic national origin or ancestry, including persons of Mexican, Puerto Rican, Central or South American or other Spanish origin or culture. This explanation is consistent with Federal regulations relating to the term “race.” See 29 CFR 1607.4(B) (relating to information on impact) (explaining Hispanic includes persons of Mexican, Puerto Rican, Central or South American or other Spanish origin or culture). Thus, the Commission’s final-form rulemaking provides clarity that the term “race,” as used in the PHRA and the PFEOA, should be interpreted consistent with the interpretation of the term race by Federal courts interpreting similar Federal statutes. The Commission’s final-form rulemaking also ensures that the term “race” as used throughout the PHRA and the PFEOA—including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations and educational institutions—is interpreted consistently.

The PHRA and the PFEOA, passed by the Legislature, explicitly authorize the Commission to “adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of the” PHRA and the PFEOA. 43 P.S. § 957(d) and (e); 24 P.S. § 5006(6). The PHRA and the PFEOA also require the Commission to “establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.” 43 P.S. § 959(g); 24 P.S. § 5007. The PHRA and the PFEOA specifically prohibit discrimination on the basis of religious creed, sex and race. However, neither statute provides a definition for those terms nor do the Commission’s existing regulations provide a definition for those terms. The Commission promulgates this final-form rulemaking consistent with its authority in section 7(d) of the PHRA and section 6(6) of the PFEOA to explain the manner in which the terms “sex,” “race” and “religious creed” as used in the PHRA and the PFEOA should be interpreted.

The Commission’s final-form rulemaking provides clarity and consistency regarding how the terms “religious creed,” “sex” and “race” as used throughout the PHRA and the PFEOA—including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations and educational institutions—should be interpreted. The Commission recognizes that the PHRA has different provisions prohibiting discrimination in employment, housing accommodations and commercial property, and public accommodations, including educational institutions. The Commission also recognizes that the PFEOA has its own provisions prohibiting discrimination in certain educational institutions. However, every provision regarding discrimination in employment, housing accommodations and commercial property, and public accommodations, including educational institutions, prohibit discrimination because of religious creed, sex and race. The terms “religious creed,” “sex” and “race” should not have different interpretations between the acts or among differing sections of each act. Given that the Commission enforces two statutes which prohibit discrimination in employment, housing accommodations and commercial property, and public accommodations, including educational institutions, because of religious creed, sex and race, the Commission’s final-form rulemaking provides the guidance necessary to ensure that the terms “religious creed,” “sex” and “race” are interpreted consistently throughout the PHRA and the PFEOA.

#### *Fiscal Impact*

There is no fiscal impact.

#### *Effective Date*

This final-form rulemaking will be effective 60 days after publication in the *Pennsylvania Bulletin*.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 23, 2022, the Commission submitted a copy of the notice of proposed rulemaking, published at 52 Pa.B. 2122 (April 9, 2022), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House State Government Committee and Senate Labor and Industry Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, the Commission is required to submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Commission has considered all comments from IRRC, the House and Senate Committees and the public.

On October 18, 2022, under section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)), the Commission submitted copies of the final-form rulemaking, with a Regulatory Analysis Form and required materials, to IRRC, the House State Government Committee and the Senate Labor and Industry Committee. On October 25, 2022, the Commission received the Senate Labor and Industry Committee’s and the House State Government Committee’s notices of intent to review the final-form rulemaking under section 5.1(j.2) of the Regulatory Review Act. On December 8, 2022, IRRC approved the final-form rulemaking. On March 14, 2023, in accordance with section 5.1(j.3) of the Regulatory Review Act, the Commission provided the final-form rulemaking and required material to House State Government Committee and the Senate Labor and Industry Committee in response to the notices of intent to review. Also, the Commission coordinated with IRRC to determine that IRRC delivered its order approving the final-form rulemaking to each respective standing committee with the last standing committee receiving the approval order on March 29, 2023. The Commission allowed 14 calendar days to elapse from March 29, 2023, for the House and Senate Committees to complete their respective reviews. Under section 5.1(j.2) of the Regulatory Review Act, the final-form rulemaking was deemed approved by the House and Senate Committees. On April 17, 2023, the Commission submitted the final-form rulemaking to the Office of the Attorney General (OAG) for review. On May 30, 2023, the OAG approved the final-form rulemaking.

#### *Order*

The Commission, acting under the authorizing statute, orders that:

(a) The regulations of the Commission, 16 Pa. Code Chapter 41, are amended by adding §§ 41.201—41.207 to read as set forth in Annex A.

(b) The Director shall submit this order and Annex A to the Office of the Attorney General for approval as to form and legality as required by law.

(c) The Director shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The regulations shall take effect 60 days after publication in the *Pennsylvania Bulletin*.

M. JOEL BOLSTEIN,  
Chairperson

(Editor’s Note: See 52 Pa.B. 8009 (December 24, 2022) for IRRC’s approval order.)

**Fiscal Note:** Fiscal Note 52-13 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 16. COMMUNITY AFFAIRS**

**PART II. GOVERNOR’S OFFICE**

**Subpart A. HUMAN RELATIONS COMMISSION**

**CHAPTER 41. PRELIMINARY PROVISIONS**

**Subchapter D. PROTECTED CLASSES**

Sec.	
41.201.	Purpose.
41.202.	Construction.
41.203.	Enforcement.
41.204.	Definitions.
41.205.	Religious creed discrimination.
41.206.	Sex discrimination.
41.207.	Race discrimination.

**§ 41.201. Purpose.**

This subchapter ensures that all unlawful discriminatory practices proscribed by the PHRA and all unfair educational practices proscribed by the PFEOA are interpreted and applied consistently. This subpart also ensures that all complaints filed with the PHRC are investigated consistent with the rules outlined in this subchapter.

**§ 41.202. Construction.**

This subchapter shall be construed liberally for the accomplishment of the purposes of the PHRA and the PFEOA.

**§ 41.203. Enforcement.**

This subchapter shall be subject to and enforced in accordance with the PHRA, the PFEOA, Chapter 42 (relating to Special Rules of Administrative Practice and Procedure) and 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure).

**§ 41.204. Definitions.**

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

*Affectional or sexual orientation*—Male, female or nonbinary heterosexuality, homosexuality, bisexuality or asexuality by inclination, practice, identity or expression, having a history thereof, or being perceived, presumed or identified by others as having such an orientation.

*Asexuality*—The lack of sexual attraction to others, or low or absent interest in or desire for sexual or romantic activity.

*Bisexuality*—Affectional, emotional, or physical attraction or behavior which is directed towards persons of either gender.

*Complainant*—A person, including the PHRC or the Attorney General, who files a complaint with the PHRC under the PHRA or the PFEOA.

*Complaint*—A complaint filed with the PHRC under the PHRA or the PFEOA.

*Core identity*—Attributes that make a person unique as an individual such as fundamental beliefs and values, personal characteristics, and physical or mental attributes.

*Ethnic characteristics*—Physical characteristics such as skin and hair color, body size and facial features typical of persons of a particular cultural or social background; linguistic characteristics such as language or dialect; behavioral or cultural characteristics such as religion or customs; and environmental characteristics such as living in the same area or region.

*Gender identity or expression*—Having or being perceived as having a gender-related identity, appearance, expression or behavior, which may or may not be stereotypically associated with the person’s sex assigned at birth. Gender identity or expression may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is part of a person’s core identity.

*Heterosexuality*—Affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the other gender.

*Homosexuality*—Affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the same gender.

*Intersex*—Describes a person born with sex characteristics that are not typical for male or female bodies. Sex characteristics are physical features relating to sex, including chromosomes, genitals, hormones and other reproductive anatomy.

*PFEOA*—The Pennsylvania Fair Educational Opportunities Act (24 P.S. §§ 5001—5010).

*PHRA*—The Pennsylvania Human Relations Act (43 P.S. §§ 951—963).

*PHRC*—The Pennsylvania Human Relations Commission.

*Person*—As defined in section 4(a) of the PHRA (43 P.S. § 954(a)).

*Pregnancy*—Includes all of the following:

- (1) The use of assisted reproductive technology.
- (2) The state of being in gestation.
- (3) Childbirth.
- (4) Breastfeeding.
- (5) The postpartum period after childbirth.
- (6) Medical conditions related to pregnancy.

*Religious beliefs*—Include the following:

- (1) Moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.
- (2) The beliefs a complainant professes without regard to whether a religious group espouses these beliefs.

*Respondent*—The person against whom a complaint was filed with the PHRC under the PHRA or the PFEOA.

*Sex assigned at birth*—The assignment and classification of individuals at birth, including but not limited to male, female or intersex.

*Traits associated with race*—Include, but are not limited to, hair texture and protective hairstyles, such as braids, locks and twists.

**§ 41.205. Religious creed discrimination.**

(a) The term “religious creed” as used in the PHRA and the PFEOA includes all aspects of religious observance, practice or belief.

(b) The term “religious creed” as used in the PHRA and the PFEOA includes the failure to provide a reasonable accommodation for a religious observance or practice.

(c) An employer, housing provider, public accommodation or person covered under the PHRA and the PFEOA may assert an undue hardship defense to the request for a reasonable accommodation.

**§ 41.206. Sex discrimination.**

The term “sex” as used in the PHRA and the PFEOA includes all of the following:

- (1) Pregnancy.
- (2) Sex assigned at birth.
- (3) Gender, including a person’s gender identity or gender expression.

(4) Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality and asexuality.

(5) Differences of sex development, variations of sex characteristics or other intersex characteristics.

**§ 41.207. Race discrimination.**

The term “race” as used in the PHRA and the PFEOA includes all of the following:

- (1) Ancestry, national origin or ethnic characteristics.
- (2) Interracial marriage or association.
- (3) Traits associated with race.
- (4) Hispanic ancestry, national origin or ethnic characteristics, including, but not limited to, persons of Mexican, Puerto Rican, Central or South American or other Spanish origin or culture.

(5) Persons of any other national origin or ancestry as specified by a complainant in a complaint.

[Pa.B. Doc. No. 23-788. Filed for public inspection June 16, 2023, 9:00 a.m.]

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