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**SENATE COMMITTEE ON  
BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT**  
Senator Richard Roth, Chair  
2021 - 2022 Regular

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**Bill No:** AB 1084 **Hearing Date:** June 30, 2021  
**Author:** Low, C. Garcia  
**Version:** June 21, 2021  
**Urgency:** No **Fiscal:** Yes  
**Consultant:** Dana Shaker

**Subject:** Gender neutral retail departments

**NOTE:** *Double-referral to the Senate Committee on Judiciary, Second*

**SUMMARY:** Requires a retail department store with 500 or more employees that sells childcare items or toys to maintain a gender neutral section or area, and subjects a retail department store that fails to comply with this section to a civil penalty, as specified, beginning on January 1, 2024.

**Existing law:**

- 1) Entitles all Californians to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, thus prohibiting discrimination on any arbitrary basis, including but not limited to sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. (Civil Code (Civ. Code) § 51.)
- 2) Provides that any person who denies, aids or incites a denial, or makes any discrimination or distinction contrary to the Unruh Civil Rights Act or to the Gender Tax Repeal Act, is liable for each and every offense for the actual damages and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage, but in no case less than \$4,000, and any attorney's fees that may be determined by the court. (Civ. Code § 52(a).)
- 3) Establishes it is unlawful for a person, at the time of sale of commodity, to do any of the following:
  - a) Charge an amount greater than the price, or to compute an amount greater than a true extension of a price per unit, that is then advertised, posted, marked, displayed, or quoted for that commodity.
  - b) Charge an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity, notwithstanding any limitation of the time period for which the posted price is in effect. (Business and Professions Code (BPC) § 12024.2)

- 4) Prohibits a person, firm, corporation, or association from advertising, soliciting, or representing by any means, a product for sale or purchase if it is intended to entice a consumer into a transaction different from that originally represented. (BPC § 12024.6)

**This bill:**

- 1) Requires a retail department store with 500 or more employees that sells childcare items or toys to maintain a gender neutral section or area.
- 2) Makes a retail department store that fails to comply with this section liable for a civil penalty, not to exceed two hundred fifty dollars (\$250) for a first violation or five hundred dollars (\$500) for a subsequent violation, as specified, beginning on January 1, 2024.

**FISCAL EFFECT:** According to the Assembly Committee on Appropriations, this bill will result in costs, likely greater than \$150,000 annually, to the Department of Justice to bring enforcement actions and cost pressures in the mid-hundreds of thousands of dollars annually to the courts in additional workload attorney, or a city attorney to file injunctive relief. The estimated workload cost of one hour of court time is \$956. If 20 cases are filed statewide resulting 20 hours of court time for each case, costs would be approximately \$382,400. Although courts are not funded on the basis of workload, increased pressure on the courts and staff may create a need for increased funding for courts to perform existing duties. This is particularly true, given that courts have delayed hundreds of trials and civil motions during the COVID-19 pandemic resulting in a serious backlog that must be resolved. The Governor's 2021-22 budget proposes \$72.2 million dollars in ongoing GF revenue for trial courts to continue addressing the backlog of cases in order to provide timely access.

**COMMENTS:**

1. **Purpose.** This bill is sponsored by The Phluid Project. According to the Author, "Unjustified differences in similar products that are traditionally marketed either for girls or for boys can be more easily identified by the consumer if similar items are not separated by gender. Combining boy's and girl's departments at retail stores with 500 or more employee's into a "kids" department or creating a gender neutral section will most definitely make all kids feel welcomed."
2. **Background.** The Unruh Civil Rights Act (the Act) specifies that all persons within the jurisdiction of the state are free and equal, and no matter their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind, including housing and public accommodations. The Assembly Judiciary Committee describes how the California Supreme Court took a broad interpretative approach to the Act:

"The California Supreme Court noted in *Koire v. Metro Car Wash* that the Unruh Act is "clear and unambiguous," and that it prohibits a business establishment from denying a person "full and equal accommodations, advantages, facilities,

privileges, or services” on the basis of sex. (*Koire v. Metro Car Wash* (1985) 40 Cal. 3d 24, 28.) The Court took a broad approach to its interpretation of the statute, ultimately saying that the Act not only guarantees access but, once there, “full and equal advantages, facilities, privileges, or services.” (*Id.* at 30.) The Legislature’s choice of words, the Court reasoned, shows concern “not only with access to business establishments, but also with equal treatment of patrons in all aspects of the business.” (*Id.* at 29.) The Court added that price discrimination based on sex not only harmed the male plaintiff, it was “generally detrimental to both men and women because it reinforces harmful stereotypes.” (*Id.* at 34.)

However, the Unruh Act does not prohibit a department store from offering or displaying children’s goods in sections of the store in a manner that indicates they are intended for just one gender. Nor does it explicitly prohibit charging different prices for products that are *substantially* the same but marketed towards customers of different genders. (See Analysis of Assembly Bill 1287 (2021-22, Bauer-Kahan) by this Committee, April 20, 2021.) The Unruh Act *would*, however, prohibit a retailer from charging different prices to customers for the same product based upon the gender or gender identity of the customer. (See *Koire v. Metro Car Wash, supra.*)”

This bill requires a retail department store with 500 or more employees that sells childcare items or toys to maintain a gender-neutral section or area, labeled at the discretion of the retailer, where a reasonable selection of items will be displayed regardless of whether they are traditionally marked for either girls or boys.

3. **Related Legislation.** AB 1287 (Bauer-Kahan, 2021) would prohibit the charging of different prices for any two goods that are substantially similar, if those goods are priced differently based on the gender of the individuals for whom the goods are marketed and intended. (Status: *The measure is pending in the Assembly Committee on Appropriations.*)

AB 2826 (Low, 2020) is substantially similar to this bill, and would have required a retail department store with 500 or more employees to maintain undivided areas of its sales floor where, if it sells childcare articles, children’s clothing, or toys, all childcare items, all clothing for children, or all toys, regardless of whether a particular item has traditionally been marketed for either girls or for boys, to be displayed. It also would have made a retail department store that fails to correct a violation of these provisions within 30 days of receiving written notice of the violation from the Attorney General liable for a civil penalty of \$1,000, as provided, beginning on January 1, 2023. (Status: *The measure did not advance due to impacts on the legislative session from the COVID-19 pandemic.*)

AB 1732 (Ting, Chapter 818, Statutes of 2016) requires businesses, places of public accommodation, or state or local government agencies that offer a single-user toilet facility to be designated as an all-gender toilet facility, as specified, and authorizes an inspector, as specified to inspect for compliance.

4. **Arguments in Support.** The California Consumer Federation writes in support: “The Consumer Federation of California believes strongly in policies that empower consumers and foster informed consumer choice. This bill will allow consumers to

easily identify similar children's items which will be displayed closer to one another in one, undivided area of the retail sales floor. Keeping similar items that are traditionally marketed either for girls or for boys separated makes it more difficult for the consumer to compare the products and incorrectly implies that their use by one gender is inappropriate.

Separating products by gender also helps to disguise the unfortunate fact that female products are often priced higher than male products. California did take on this kind of price discrimination through the 1995 Gender Tax Repeal Act, which prohibited businesses from charging women higher prices than men for similar services. While this act was a big step towards economic equality, it did not address price discrimination when it comes to goods. AB 1084 will help people more easily identify gender price discrimination among children's products, shining a light on this unpalatable business practice."

Equality California writes in support: "The California Legislature has an important legacy of leading the nation in breaking down barriers people experience when trying to live authentically, regardless of sexual orientation, gender identity, or gender expression. AB 1084 is in line with previous bills in this vein, such as AB 179 (Atkins 2017), which made California the first state in the nation to create a nonbinary gender marker on state-issued identity documents, thereby reducing emotional distress for nonbinary, transgender, and intersex Californians and reducing discrimination they face because of their gender identity and expression.

Implying or stating that certain children's products are only appropriate for certain genders stifles the ability of California's youth to grow as their authentic selves, reinforces harmful gender stereotypes in the minds of people of all ages, and has measurable mental health implications. A 2021 national survey confirmed that LGBTQ+ youth attempt suicide less often when they have access to inclusive spaces that affirm who they are."

The Phluid Project writes in support and sponsorship: "The Phluid Project supports policies that empower consumers while creating safe and affirming spaces. This bill will allow consumers, both parents and children more freedom of self-expression. Keeping similar items that are traditionally marketed either for girls or for boys separated makes it more difficult for the consumer to compare the products and incorrectly implies that their use by one gender is inappropriate. This limitation has the potential to cause emotional anxiety and gender dysphoria.

California, leading this issue, will have a profound impact on individuals and society as a whole that is rooted in gender stereotypes, limiting growth and potential. AB 1084 will not only help create a more inclusive space for non-binary and transgender youth but will have a profound impact on gender stereotypes."

5. **Arguments in Opposition.** The Capitol Resource Institute writes in opposition and notes, "...it is not the business of the government to instruct retail stores how they should display and market their merchandise. Retail stores are very attuned to the supply and demand of their merchandise, and they are very aware of the clientele they serve. We do not believe it is the role of the California Legislature to overstep the natural process of the free market. The government should not tell stores how

they should be displaying their merchandise. Large retail stores cater to the needs and desires of their customers by carrying merchandise they think the customers will purchase. If a community does not like the merchandise or the marketing strategies or the display of merchandise, they can choose to stop shopping at that establishment. If a large enough group of people follow suit, the retailer will adjust their strategies to try to attract the customers they desperately need to stay in business. Businesses should be able to choose how they market and display their merchandise, and if that particular way brings failure, they will either change their methods or risk losing their business. This is the natural process of the free market system.”

California Family Council writes in opposition: “A bill like this opens the door to a never-ending number of complaints from activist groups who don’t like the way stores are marketing their products to one sex or another. Retail stores have a right to be left alone to decide how to best market their products to their customers based on what market research tells them consumers want. It will not be perfect. They will get it wrong sometimes. But when they get it wrong, that product will not sell. The market will do a better job of meeting public needs than your law will.”

Eagle Forum of California writes in opposition: “It is not the business of the state to parent their constituent’s children nor to dictate to businesses how to organize or display their merchandise. The proponents of this bill have not supplied any documentation for their assertions that retail stores are displaying their merchandise in such a way to demean or disrespect individual’s gender references. Persons can still express themselves and feel good about who they are without dictating to the rest of society and the retail business on how to display their merchandise. They can shop all department for toys or clothing. Stores do not monitor or restrict shoppers as to which department they shop in; this is called personal freedom and the free market.”

Pacific Justice Institute writes in opposition: “The author appears to have belatedly recognized that the legislation as introduced was facially unconstitutional with its signage mandates. But the legislation as amended fares little better, since it remains abundantly clear that the author’s intent is to impose a de-gendered ideology and viewpoint on retailers. This approach is both paternalistic and also communicates to Californians a disconnect with the real-world challenges of parenting in an increasingly dangerous and less free society...”

The Siskiyou Conservative Republicans write in opposition: “What’s next...putting women’s plus size clothing in with women’s petites so as not to give the appearance of “fat shaming”! This is social engineering by our representatives and a poor use of government resources in a time when we have so many more real and urgent problems in CA. such as child trafficking and sexual molestation.”

The Southwest California Legislative Council writes in opposition: “While we agree with the author that children should not be stigmatized if ‘a little girl wants to be a scientist or engineer, or a little boy wants to be artistic and creative’, the layout of a retail store has very little impact on what the author portrays as ‘cyberbullying’. Further, as the author points out, many large retailers are already maintaining undivided areas including Target, Old Navy and others. In fact it would be more

difficult to find a large retailer today that segregates toys by gender. Games, footballs, model cars, dolls, bicycles, and more are customarily marketed in the 'toy aisle', and not separated by 'girl's toys' or 'boy's toys'. Similarly, children clothing is customarily marketed in a single area even though often separated into aisles for girls and boys just as men's and women's clothing is separated for ease of access. Yet if a woman wants to buy a men's shirt, it is as easily accessible as a man wanting to buy Superman pajamas for his little girl. It's not hard to find and there is no stigma attached.

6. **Compliance Questions.** At its heart, this bill is about adding another option for gender identification to the marketplace—something that will no doubt mean the world to a child who does not feel like they conform within the typical boy/girl gender binary. While there is a strong policy interest in ensuring that the same toy is not priced differently based on whether it is marketed for girls or boys—something the Supreme Court of California has already ruled on—there is a question as to whether the state should take these steps listed to regulate business in this way.

First, what will happen to stores that might do their best to market toys or clothing as just that—toys or other child care items—without associating a particular gender identification? How will these stores ensure compliance with the law—by having a gender neutral section, or by demonstrating that their selection of items is already gender neutral?

Second, as currently written, retailers must “maintain a gender neutral section or area, labeled at the discretion of the retailer, where a reasonable selection of items will be displayed regardless of whether they are traditionally marked for either girls or boys.” What does “labeled at the discretion of the retailer” mean? Is it enough for retailers to label a table, shelf, or other section “gender neutral”? What if an item's packaging is specifically marketed to boys or girls? Will the retailer have to modify the packaging of these items? How will the retailer know if they have complied with the law?

While at its core this bill is about promoting a policy that is gender inclusive for all children so that they can see their true gender identifications reflected in the external world around them, it also raises the question of how much the state is willing to regulate business on this topic in the open marketplace.

7. **Suggested Clarifying Amendments.** The measure refers to various terms in proposing requirements, but does not provide specificity for what those terms mean. For example, the bill only applies to “retail department stores with 500 or more employees.” However, it is not clear what constitutes a retail department store, as there is no state definition for that type of business. It is also unclear what 500 or more employees means. For corporate entities with physical locations throughout the nation, some could read that the bill would only apply to entities with 500 or more employees, rather than 500 or more employees at any given site in this state. In order to provide clarity and allow for implementation by the required businesses, the bill should be amended to state that the provisions only apply to retail department stores that are physically located in California with a total of 500 or more employees across any and all California store locations. It shall not apply to any retail department stores physically located outside of the state of California.

**SUPPORT AND OPPOSITION:**

Support:

The Phluid Project (Sponsor)  
Consumer Federation of California  
Equality California

Opposition:

California Family Council  
Capitol Resource Institute  
Eagle Forum of California  
Pacific Justice Institute  
Siskiyou Conservative Republicans  
Southwest California Legislative Council

**-- END --**