

CLARIFYING THE FLORIDA DHSMV'S NEW POSITION ON GENDER MARKERS

*Memo by Simone Chriss, Esq.
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The Florida DHSMV ("FLHSMV") put out a memorandum with the subject line "Driver License Operation Manual-Issuance requirements-IR08-Gender requirements (Recission)" (**Ex. 1, below**) and a Technical Advisory amending their policy on "Gender Requirements" (**Ex. 2, below**). These documents explain that the FLHSMV will no longer be amending gender markers on Florida driver's licenses and ID's to reflect an individuals' gender identity.

This document is intended to clarify the scope and impact of the FLHSMV's new "policy" and to address fears that have been shared with me by myriad community members in response to the language related to "misrepresenting one's gender" constituting "fraud" and subjecting trans folks in Florida to potential "criminal and civil penalties."

[Comprehensive analysis directly below, bullet point summary at end of document]

Ex. 1, FLHSMV Memo (1.26.24)



January 26, 2024

TO: County Tax Collectors
FROM: Robert Kynoch, Deputy Executive Director-HSMV
SUBJECT: Driver License Operation Manual-Issuance requirements-IR08-Gender requirements (Recission)

The Department has undertaken a review of current practices, policies, and directives to better align the services provided by the Department and its partners to our stakeholders. As part of this review, the Department is reviewing practices, policies, and directives to ensure all guidance provided by the Department is consistent with Florida Law.

The Department hereby rescinds the Driver License Operations Manual, Issuance Requirements, IR08-Gender Requirements (Revised 05.16.22). This guidance directed personnel to issue a new license in the event that a licensee wished to alter the gender marker on his or her license. The provisions of IR08-Gender Requirements (Revised 05.16.22) are not supported by statutory authority. Under s. 322.17 F.S., the Department can issue a replacement license only when a license or permit is lost or stolen, or when there is a subsequent change in the licensee's name, address, or restrictions.

Furthermore, the term "gender" in s. 322.08, F.S., does not refer to a person's internal sense of his or her gender role or identification, but has historically and commonly been understood as a synonym for "sex," which is determined by innate and immutable biological and genetic characteristics. Additionally, a driver license is an identification document and, as such, serves a critical role in assisting public and private entities in correctly establishing the identity of a person presenting the license. Permitting an individual to alter his or her license to reflect an internal sense of gender role or identity, which is neither immutable nor objectively verifiable, undermines the purpose of an identification record and can frustrate the state's ability to enforce its laws.

Establishing gender on a newly issued Florida Driver License is based on the supporting documents provided with an application. These documents must be sufficient to establish the identity of the applicant under s. 322.08, F.S. Furthermore, misrepresenting one's gender, understood as sex, on a driver license constitutes fraud under s. 322.212, F.S., and subjects an offender to criminal and civil penalties, including cancellation, suspension, or revocation of his or her driver license, e.g., s. 322.22. and 322.27, F.S.

Ex. 2, FLHSMV Technical Advisory (1.26.24)



DATE: 01/26/24

Technical Advisory (TA)
DL 24-001

SUBJECT: Updates to IR08 Gender Requirements

Overview:

The Department is amending IR08 relating to gender requirements.

Details:

The customer's gender as displayed on the driver license or identification card must be taken from a primary identification document.

IR08.4 regarding gender change is rescinded.


Please review the attached memorandum for further details.

Conclusion:

If you need additional information, please contact your next level of management.

Previously, the FLHSMV had a policy in place that permitted amendments to gender markers on Florida licenses and IDs, as long as the requested amendment was supported by a letter from a medical provider attesting to the person receiving appropriate clinical treatment for gender transition (**Ex. 3, below**).

Ex. 3, DL21-010 “Gender Change Procedure” (2021)

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| DIVISION OF MOTORIST SERVICES | |
| DATE: 06/16/2021 | Technical Advisory (TA) Number DL21-010 |
| SUBJECT: Gender Change Procedure | |
| Overview: Currently department procedures require a person changing his/her gender marker on a Florida driver license to present an out of state (OOS) credential with the desired gender marker, present a signed statement from a physician, or present a court order documenting the gender change. | |

The new policy, as set forth in the Technical Advisory (see **Ex. 2, above on p.1**), states:

“The customer’s gender as displayed on the driver license or identification card must be taken from a primary identification document.

IR08.4 regarding gender change is rescinded.

Please review the attached memorandum for further details.”

“Primary Identification” is defined by the FLHSMV to include the following original documents (including birth certificate and U.S. Passport – which many folks have already amended to reflect their gender identity):

1. Primary Identification

*An original of **one** of the following documents with complete name:*

- U.S. birth certificate, including some U.S. territories and District of Columbia (birth certificates from Puerto Rico must have an issue date after July 1, 2010); **or**
- Valid U.S. passport or passport card; **or**
- Consular Report of Birth Abroad; **or**
- Certificate of Naturalization, form N-550 or form N-570; **or**
- Certificate of Citizenship, form N-560 or form N-561.

The memorandum goes on to explain that the guidance that previously directed DMV personnel to issue a new license to trans folks seeking to amend their gender marker on their license (Driver License Operations Manual, Issuance Requirements, IR08-Gender Requirements”) was not supported by statutory authority because the DMV is only able to issue a replacement license if the original is “lost or stolen” or there is a change to the licensee’s “name, address, or restrictions.”

It then goes on to redefine “gender” in a way that is not supported by any of the laws that control the FLHSMV, including the very statute they cite in the memo (322.08, F.S.). They seek to redefine “gender” to mean sex assigned at birth (which they refer to as “sex”, and which they assert is “determined by innate and immutable biological and genetic characteristics”).

Finally, after discussing how to establish gender on a newly issued Florida Driver License (relying on primary identification documents to prove identity, which include birth certificate and U.S. Passport), the memorandum goes on to provide the following fear-mongering language intended to scare transgender individuals who have updated their licenses to reflect their gender identity:

“Furthermore, misrepresenting one’s gender, understood as sex, on a driver license constitutes fraud under s. **322.212, F.S.**, and subjects an offender to criminal and civil penalties, including cancellation, suspension, or revocation of his or her driver license, e.g., s. **322.22.** and **322.27, F.S.**”

[Note: colors correspond to analyses of enforcement/penalty statutes below]

Florida Statute 322.212 (“Unauthorized possession of, and other unlawful acts in relation to, driver license or identification card”) states that: “(5)(a) “it is unlawful for any person to use a false or fictitious name in any application for a driver license or identification card or knowingly to make a false statement, knowingly conceal a material fact, or otherwise commit a fraud in any such application.”

Any transgender individual in the state of Florida who has a valid ID or driver license reflecting their affirmed gender (gender identity, as opposed to their sex assigned at birth) **obtained that license in accordance with the FLHSMV’s own policy that was in effect at that time**, a policy which explicitly permitted the issuance of driver licenses reflecting a person’s gender identity. **As such, no transgender person who has a valid Florida ID or driver’s license could be subject to this statute** (they did not knowingly make a false statement, did not knowingly conceal a material fact, and did not otherwise commit a fraud; rather **they complied with the FLHSMV policy and requirements that were in effect at that time**).

Further, if the FLHSMV did attempt to enforce this provision against a transgender individual who has a license reflecting their gender identity, **they would also need to**

penalize the DMV employee who issued that license, as Florida Statute 322.212(3) states: “It is unlawful for any employee of the department to allow or permit the issuance of a driver license or identification card when he or she knows that the applicant has not lawfully fulfilled the requirements of this chapter for the issuance of such license or identification card.”

Florida Statute 322.22 (“Authority of department to cancel or refuse to issue or renew license”) states: “(1) The department may cancel or withhold issuance or renewal of any driver license, upon determining that the licensee was not entitled to the issuance thereof, or that the licensee failed to give the required or correct information in his or her application or committed any fraud in making such application, or that the licensee has two or more licenses on file with the department, each in a different name but bearing the photograph of the licensee, unless the licensee has complied with the requirements of this chapter in obtaining the licenses.”

Again, as stated above, any transgender individual in the state of Florida who has a valid ID or driver license reflecting their affirmed gender (gender identity, as opposed to their sex assigned at birth) obtained that license in accordance with the FLHSMV’s own policy that was in effect at that time, a policy which explicitly permitted the issuance of driver licenses reflecting a person’s gender identity. **As such, no transgender person who has a valid Florida ID or driver’s license could be subject to this statute** (they were entitled to the issuance of the license, they did not fail to give the required or correct information, and they did not commit any fraud in applying for the license or amendment; rather **they complied with the FLHSMV policy and requirements that were in effect** at that time).

Florida Statute 322.27 (“Authority of department to suspend or revoke driver license or identification card”) states that the only ways by which the FLHSMV can suspend or revoke a license or ID is if they have sufficient evidence showing the person: “(d) has permitted an unlawful or fraudulent use of the license or identification card or has knowingly been a party to the obtaining of a license or identification card by fraud or misrepresentation or to the display, or representation as one’s own, of a driver license or identification card not issued to him or her.”

Again, as stated in both sections above, any transgender individual in the state of Florida who has a valid ID or driver license reflecting their affirmed gender (gender identity, as opposed to their sex assigned at birth) **obtained that license in accordance with the FLHSMV’s own policy that was in effect at that time**, a policy which explicitly permitted the issuance of driver licenses reflecting a person’s gender identity. **As such, no transgender person who has a valid Florida ID or driver’s license could be subject to this statute** (they did not knowingly engage in obtaining a license or ID card by fraud or misrepresentations; rather **they complied with the FLHSMV policy and requirements that were in effect** at that time).

Bullet Point Summary:

- (1) The Florida Department of Highway Safety and Motor Vehicle (FLHSMV) **rescinded the guidance that directed DMV staff to amend gender markers on Florida licenses and IDs** when a person presented a gender marker letter from their medical provider.
- (2) The new guidance states that **a person's "gender as displayed on the driver license or identification card must be taken from a primary identification document"** (note: U.S. Passport and birth certificate are both primary identification documents under the FLHSMV's own definition, and any transgender person can amend the gender marker on their U.S. Passport at this time).
- (3) According to the FLHSMV, this policy change regarding gender markers **only applies to replacement licenses, not newly issued licenses** (i.e. first time licenses). This is because they say Florida law only permits them to issue replacement licenses "when a license or permit is lost or stolen, or when there is a subsequent change in the licensee's name, address, or restrictions" (as such, gender marker change does not qualify).
- (4) Based on the statutes that the memorandum relied upon for penalties and enforcement authority (see above), **there is no reason to believe that any transgender person in Florida who has a lawfully issued, valid (non-expired) Florida driver license or ID will have their document suspended, revoked, or will face any criminal penalties.** Rather, this will likely **prevent individuals with Florida driver licenses and IDs that reflect their sex assigned at birth from amending their document to reflect their gender identity.** This may also create an issue for folks who need to renew or replace their licenses (i.e. when they expire or are lost/stolen).
- (5) There is much ambiguity in the current information we have (the memorandum and technical advisory), so we will hopefully get clarification as more information is provided about this new "policy." I will continue to update the folks who seek guidance and clarity on this as I learn more and obtain additional information about the FLHSMV's intended application and enforcement of their new policy. Stay tuned.

This analysis is not intended to minimize or downplay the horrible nature of the FLHSMV's recent actions, which are unambiguously and unquestionably intended to target the rights of transgender individuals in Florida and to stoke fear and panic. This is part of an ongoing attack on the rights of trans Floridians that we have seen escalating over the past two years. What I intend to convey with this analysis is accurate information that informs folks of their rights and provides important context for the new FLHSMV policy. There have been folks reaching out to me all day who are afraid to drive to work, afraid to attend doctors' appointments, afraid to leave the house, etc. due to a fear of civil or criminal penalties under this new policy, and my hope is to ensure that folks understand how this can and cannot be enforced.

There is much that we still don't know, and I will continue to update folks as we learn more information about this new policy and its intended enforcement and application. But in the meantime, know that you are not alone, that we are working on how to address this, and - as always - I will fight for your right to legal identification documents that reflect who you truly are.

**Sincerely,
Simone Chriss**