

TOOLKITS

Preventing Unlawful Workplace Discrimination in California

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Overview

A complex web of federal and California equal employment opportunity (EEO) laws prohibits employment discrimination on the basis of race, sex, pregnancy, childbirth, medical conditions related to pregnancy and childbirth, age (40 and over), ancestry, color, religious creed (including religious dress and grooming practices), denial of Family and Medical Care Leave Act (FMLA) leave, disability, marital status, medical condition (cancer and genetic characteristics), genetic information, national origin, gender, gender identity, gender expression, sexual orientation or any other characteristic protected by state, federal or local law. This toolkit discusses California fair employment laws, focusing mainly on the ways in which they are more expansive than the federal law in the following areas:

- Fair employment.
- Protected classes and anti-discrimination laws.
- Theories of employment discrimination.
- Preventing violations and managing risk.
- Enforcement.
- Remedies.

To fully understand the realm of fair employment practices in California, it is necessary to be familiar with both federal and state law. Where applicable, this toolkit directs readers to other relevant toolkits to support broad understanding.

California fair employment laws are applicable to numerous employer actions, and HR professionals should be fully aware of their broad reach.

The toolkit focuses mainly on the ways in which California law differs from federal law. For a discussion of federal EEO laws, see *Managing Equal Employment Opportunity*. (www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/managingequalemploymentopportunity.aspx)

Prohibited Discrimination

California fair employment laws prohibit discrimination on the basis of race (including hair texture/style), sex, pregnancy, childbirth, and medical conditions related to pregnancy and childbirth, age (40 and over), ancestry, color, religious creed (including religious dress and grooming practices), denial of FMLA leave, disability, marital status, medical condition (cancer and genetic characteristics), genetic information, national origin, gender, gender identity, gender expression, sexual orientation, military or veteran status, or any other characteristic protected by state, federal or local law in terms and conditions of employment. As such, the risk of engaging in prohibited discriminatory treatment exists in numerous employment contexts, including:

- Internal and external recruiting.
- Application for employment and interviewing/selecting candidates for employment. See *What questions are employers in California prohibited from asking applicants?* (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/california-applicantquestions.aspx)
- Pre-employment testing.
- Background investigation. See *What are the California rules regarding employer use of an outside agency to perform background checks, and how do they differ from federal law?* (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/californiaexternalagencies.aspx)
- Hiring. See *Managing the Hiring Process in California*. (www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/californiamanagingthehiringprocessin.aspx)
- Compensation.
- Benefits.
- Perquisites (also known as perks) or employee services.
- Working conditions.
- Dress and appearance.
- Leave management.
- Disciplinary actions or other adverse employment actions.
- Promotion, transfer or demotion.
- Exercise of legal rights.
- Downsizing, layoff or reduction in force.
- Termination and post-termination actions of the employer.

Protected Classes and Anti-Discrimination Laws

The California Fair Employment and Housing Act (FEHA) is the primary law protecting employees from discrimination in employment. All employment provisions of the FEHA apply to employers with five or more full- or part-time employees. Most comparable federal laws cover only employers with at least 15 employees. Consequently, many more employers in California are subject to California anti-discrimination law than are subject to federal law. (Note: FEHA anti-harassment law applies to employers of one or more employees.) See Federal Labor Laws by Number of Employees (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/AdditionalFederalLawGuidance.aspx).

Although many of the same nondiscrimination principles of the federal laws apply under the California FEHA, California state laws overall protect more categories from discrimination in terms and conditions of employment. Generally, California law applies to employers when it is more protective of employees than a comparable federal law.

The following categories are covered by *both* California and federal law:

- Age (40 years and older).
- Disability (mental and physical).
- Genetic information. The federal Genetic Information Nondiscrimination Act of 2008 (<http://www.eeoc.gov/laws/types/genetic.cfm>) prohibits the use of genetic information in making employment decisions; restricts employers and other entities covered by Title II of the act (employment agencies, labor organizations and joint labor-management training and apprenticeship programs) from requesting, requiring or purchasing genetic information; and strictly limits the disclosure of genetic information.
- Ethnicity/national origin (including language use restrictions).
- Pregnancy (including childbirth and medical conditions related to pregnancy and childbirth).
- Color.
- Race.
- Religion (including religious beliefs, practices and observances).
- Sex (including gender identity or expression and sexual orientation).
- Military or veteran status.

The following categories either are covered under California law, but *not* federal law, or are more broadly defined under California law:

- Ancestry.
- Religious creed and religious observance. (California state law provides an additional protection for religious creed that includes religious dress and grooming practices not currently covered by federal EEO laws.) See What are the California rules regarding religious accommodation, and how do they differ from federal law? (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/californiareligiousaccommodation.aspx)
- Marital status.
- Medical condition (cancer and genetic characteristics).
- Pregnancy. (Under California law, pregnancy is defined to include breastfeeding and medical conditions related to breastfeeding, which are currently not part of the federal definition.)
- Reproductive health decision-making.
- Traits historically associated with race, including but not limited to, hair texture and protective hairstyles. See California Lawmakers Ban Workplace Discrimination Based on Hairstyle (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-law-will-ban-workplace-discrimination-based-on-hairstyle.aspx).

Theories of Employment Discrimination

DISPARATE TREATMENT

Disparate treatment discrimination occurs when an employer takes an employee's protected status into consideration when taking an adverse employment action, such as a termination or layoff decision. An example of intentional discrimination is an employer that learns of an employee's pregnancy and, based at least in part on that knowledge, selects the pregnant employee for layoff rather than a less-qualified employee who is not pregnant.

DISPARATE IMPACT

Disparate impact discrimination, also known as adverse impact discrimination, occurs when an employer adopts a policy or practice that seems neutral and nondiscriminatory on its surface but has a disproportionately negative effect on members of a protected class. Practices that have been found to have a disparate impact on protected groups include:

- **Minimum height requirements.** These have been found to disproportionately affect women, Hispanics and Asians.
- **Physical agility tests.** These can have a disparate impact on women.
- **Clean-shaven requirements.** These have been found to adversely affect African-American men who are disproportionately affected by a skin condition that is aggravated by shaving. Shaving and other grooming requirements may also violate the employer's duty to reasonably accommodate religious grooming practices.

In a court proceeding, once disparate impact is established, the employer has the burden of demonstrating that the challenged requirement is job related for the position in question and consistent with business necessity. If the employee can point to a less discriminatory way to satisfy the business needs, the employer may be obligated to adopt that alternative.

RETALIATION

The California FEHA also prohibits retaliation against an employee because the employee has exercised, may exercise or is perceived to have exercised rights under the statute at issue.

Lawsuits based on retaliation can be even more difficult for employers to defeat than lawsuits based on direct discrimination. Employers must exercise caution not to attempt, or appear to attempt, to "get even" when conducting disciplinary terminations or layoffs in which the affected employees have participated in protected activities. See Preventing Unlawful Workplace Retaliation in California. (www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/preventing-workplace-retaliation-california.aspx)

Preventing Violations and Managing Risk

Just as violations of fair employment laws can be systemic, adherence to fair employment requirements can also be woven into the cultural fabric.

Employers can take many actions to prevent fair employment violations and charges of discrimination, including:

- Adopting an organizational philosophy that treats employees as individuals entitled to respect and fair treatment, not as commodities.
- Establishing clear written policies and practices that genuinely reflect the employer's equal opportunity values, and then sticking to them and creating thorough documentation of human resource decisions.
- Emphasizing the employer's equal employment values, policies and procedures in new-employee onboarding and training.
- Providing ongoing training at all levels about the employer's equal employment values, policies and procedures. Creating an equal employment conflict resolution process that is truly open-door.
- Designating and empowering a responsible individual to address equal employment issues: an ethics officer, EEO officer, affirmative action officer, diversity officer, ombudsman or director of human resources.
- Investigating employee complaints thoroughly and consistently.

In addition to the steps described above, employers also manage their equal employment risk through:

- Internal dispute resolution programs, such as grievance procedures, mediation and arbitration.
- Employer practices liability insurance. See Avoiding Individual Liability for the HR Professional. (www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/avoidingindividualliability.aspx)
- Using releases of claims as part of a severance pay plan or ad-hoc settlement of fair employment claims.
- Ongoing management of fair employment issues.

Enforcement

Most state governments have one or more civil rights enforcement counterparts to the federal Equal Employment Opportunity Commission (EEOC), known as Fair Employment Practice Agencies. In California, the Civil Rights Department (CRD) enforces laws that protect employees from illegal discrimination and harassment in employment.

Employees or other persons who believe their rights to EEO have been violated may file a Charge of Discrimination form with the CRD. A Charge of Discrimination filed with the CRD is a sworn statement outlining in very general terms why the charging party believes his or her EEO rights have been violated. The CRD will assist the charging party in the preparation of this form based on an interview with the charging party. The Charge of Discrimination is often accompanied by a more detailed sworn statement, or affidavit, especially if the charging party has legal counsel.

The CRD will notify the employer or other party being charged—the respondent—of the allegations made by the charging party and request that the respondent provide a written response to the allegations and copies of pertinent documents such as policies, performance evaluations and documentation of any disciplinary actions. In some instances, the investigating agency will also request information about workforce demographics.

An employer's obligations in the face of an FEHA complaint are to conduct an investigation that is prompt, fair and thorough and to take appropriate remedial measures.

Before or after the respondent submits its response to the charge of discrimination and agency request for information, the agency typically offers to assist the parties in reaching a negotiated resolution. Sometimes the agency investigator facilitates conciliation; sometimes the agency provides an experienced mediator and facilities for the parties to meet and to attempt to negotiate a resolution satisfactory to both sides.

If the parties do not agree to a negotiated resolution, the agency will determine if there is probable cause to believe the respondent violated the charging party's FEHA rights after a thorough investigation.

THE RIGHT TO SUE

Typically, the CRD must be given the first opportunity to address the issue (i.e., a charging party cannot bypass the agency and immediately file a lawsuit). On conclusion of its investigation and issuance of its charge determination, the agency will notify the charging party in a so-called right-to-sue letter that the individual may now proceed to file a lawsuit, if desired. The letter also states how much time the charging party has to do so, typically 90 days.

Under the laws administered by the CRD, the issuance of the right-to-sue letter starts the clock running for an aggrieved person to file a complaint with an appropriate court of law. Ordinarily, this process requires engaging an attorney on a contingent fee basis. In certain circumstances, however, the agency itself files suit on the charging party's behalf, thereby providing the employee with expert government-paid legal counsel. Factors in the council's decision to file suit on an employee's behalf include:

- The number of employees affected (especially if a class action).
- The type of violation alleged.
- The agency's desire to flesh out unanswered questions under the law or to further the public interest in targeting certain high-priority fields or industries.

LEGAL REMEDIES

California FEHA law provides for remedies for individuals who experience prohibited discrimination or harassment in the workplace. These remedies include:

- Hiring, front pay.
- Back pay.
- Promotion.
- Reinstatement.
- Cease-and-desist orders.
- Expert witness fees.
- Reasonable attorney's fees and costs.
- Punitive damages.
- Emotional distress damages.

Additional Resources

TOOLKITS

Preventing Unlawful Workplace Harassment in California (www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/preventing-workplace-harassment-california.aspx#sthash.OzqUPTax.dpuf)

Preventing Unlawful Workplace Retaliation in California (www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/preventing-workplace-retaliation-california.aspx)

AGENCIES AND ORGANIZATIONS

California Civil Rights Department (<https://civildrights.ca.gov/>)

EEOC: Fair Employment Practices Agencies (<https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing>)

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