Preventing Workplace Harassment, Discrimination, and Retaliation
With offices in Los Angeles, San Francisco, Fresno, San Diego and Sacramento, the law firm of Liebert Cassidy Whitmore represents public agency management in all aspects of labor and employment law, labor relations, and education law. The Firm's representation of cities, counties, special districts, transit authorities, school districts, and colleges throughout California, encompasses all phases of counseling and representational services in negotiations, arbitrations, fact findings, and administrative proceedings before local, state and federal boards and commissions, including the Public Employment Relations Board, Fair Employment and Housing Commission, Equal Employment Opportunity Commission, Department of Labor and the Office for Civil Rights. The Firm regularly handles a wide variety of labor and employment litigation, from the inception of complaints through trial and appeal, in state and federal courts.

The Firm places a unique emphasis on preventive measures to ensure compliance with the law and to avoid costly litigation. For more than forty years, the Firm has successfully developed and presented training workshops and speeches on all aspects of employment relations for numerous public agencies and state and federal public sector coalitions, including the National League of Cities, National Association of Counties, International Personnel Management Association, United States Government Finance Officers Association, National Employment Law Institute, National Public Employer Labor Relations Association, California Public Employer Labor Relations Association, County Counsels’ Association of California, League of California Cities, California State Association of Counties, Public Agency Risk Management Authority, the Association of California School Administrators, the California School Boards Association, and the California Association of Independent Schools.
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Section 1  **INTRODUCTION**

Discrimination, harassment, or retaliation against a public agency employee or job applicant impedes employment opportunities, morale, job performance, and the provision of public services. Such conduct: (1) deters quality applicants from applying to your agency; (2) creates a poor public image; and (3) can result in hundreds of thousands of public dollars being spent on attorneys’ fees and damage awards, rather than on public services.

This workbook and the accompanying seminar provide the training that California law requires on the prevention of harassment, discrimination, and retaliation.

Section 2  **LAWS PROHIBITING HARASSMENT, DISCRIMINATION, AND RETALIATION**

Title VII of the Civil Rights Act of 1964\(^1\) (Title VII) is the federal law that prohibits discrimination, harassment, and retaliation in the workplace. In addition, the Age Discrimination in Employment Act of 1967\(^2\) (ADEA) prohibits discrimination, harassment, and retaliation against employees or job applicants because of age. The Americans with Disabilities Act of 1990\(^3\) (ADA) prohibits employers from discriminating, harassing, or retaliating against employees or job applicants because of physical or mental disability. The Genetic Information Nondiscrimination Act of 2008\(^4\) (GINA), prohibits employers from discriminating, harassing, or retaliating against employees or job applicants because of their genetic information.

The California Fair Employment and Housing Act\(^5\) (FEHA) is the state law that prohibits discrimination, harassment, and retaliation based on a protected status. It is not just the state equivalent of Title VII; rather the FEHA provides employees and job applicants with far greater rights than those available through Title VII in terms of scope of coverage and available remedies.

**Note:** In 2022, the California Supreme Court addressed the issue of whether a public school district could be liable under the Unruh Civil Rights Act. The Court held that public school districts are not subject to the Act, concluding that as governmental entities that provide free and public education, public schools are not “business establishments” within the meaning of the Act. Although the case involved a public school district, the Court’s reasoning indicates that the Unruh Civil Rights Act does not apply to local government public entities either. The Court found that to be a “business establishment” subject to the Act, an entity must effectively operate as a business or a commercial enterprise or engage in behavior involving sufficient businesslike attributes.
Section 3  **PROTECTED STATUSES/CLASSIFICATIONS**

It is illegal to discriminate against or harass an employee or applicant because of or based on:

- Race or Color (including traits historically associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists);  
- National Origin or Ancestry;  
- Religious Creed;  
- Physical or Mental Disability;  
- Medical Condition (including cancer, a record of cancer, genetic characteristics, diseases, disorders, or other inherited characteristics);  
- Marital Status;  
- Sex (including pregnancy, childbirth, medical conditions related to pregnancy or childbirth, and breastfeeding or a medical condition related to breastfeeding);  
- Gender, Gender Identity, Gender Expression (including transgender and gender non-conforming);  
- Age (40 and above);  
- Sexual Orientation (including heterosexuality, homosexuality, and bisexuality);  
- Genetic Information;  
- Veteran or Military Status;  
- Opposition to Unlawful Harassment;  
- Association with a person who has one or more protected characteristic;  
- Perception that a person belongs to one or more protected categories;  
- Requesting accommodation of disability or religious beliefs, regardless of whether employer grants the request;  
- Reproductive Health Decisionmaking (including, but not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health).

**A. RACE AND NATIONAL ORIGIN**

Courts and administrative agencies responsible for interpreting and enforcing the laws have broadly defined what constitutes race or national origin for purposes of establishing a claim of harassment or discrimination. An employee is protected if the employee is from a certain place or is a member, or is perceived to be a member, of a group that is physically, culturally, or linguistically distinct. Being from a certain place means the employee or the employee’s ancestors are from a particular country, former country, or geographic region. Thus, a public
employee who is African American, Native American, or Filipino American would be a member of a protected class, as would a public employee who describes himself as East Indian, Cajun, or Persian. Effective January 1, 2020, California law also defines “race” to include “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.” Protective hairstyles is defined to include braids, locks, and twists.

The law also protects employees from harassment and discrimination based on an individual’s language or accent. California law prohibits English-only rules unless: (a) there is no alternative practice available that would meet the employer’s business need for the rule; and (b) the employer has notified its employees of the rule and the consequences of violating the rule.

B. RELIGIOUS CREED

Religious creed includes all aspects of religious belief, observance, and practice, including religious dress and grooming practices. More generally, it can include moral or ethical beliefs as to what is right and wrong, where the beliefs are sincerely held with the strength of traditional religious views.

Employers must reasonably accommodate the known religious creed of any applicant or employee. An employer may not simply segregate an employee from customers or the general public as an accommodation unless specifically requested by the employee. An accommodation is not reasonable if it creates an undue hardship. Factors in determining undue hardship include:

- The size of the agency or facility, including the number of employees and size of the budget
- The type of operations conducted by the agency or at the facility, including composition and structure of the workforce
- The nature and cost of the accommodation
- Reasonable notice to the employer regarding the need for the accommodation
- Any available reasonable alternatives for accommodation.

Case Study on Religious Discrimination

E.E.O.C. v. Abercrombie & Fitch Stores, Inc. Employer had a “Look Policy” that governed its employees’ dress. The Look Policy prohibited “caps” – a term that the Policy did not define – as too informal for its desired image. Elauf was a practicing Muslim who, consistent with her religious beliefs, wore a headscarf. Elauf applied for a position with Employer and was otherwise qualified except that Employer determined her headscarf, which it suspected she wore for religious reasons, violated its Look Policy and did not hire her on those grounds. Employer argued it did not have actual knowledge of Elauf’s religion and therefore did not discriminate against her by failing to accommodate her or refusing to hire her. The Court, however, found
that an employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.

C. PHYSICAL DISABILITY

Anti-discrimination laws broadly define what constitutes a physical disability. A physical disability is any physical condition that makes achievement of a major life activity more difficult. The condition includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects a major body system. The disability could be related to any body system including: neurological, immunological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. 

| Example: Obesity may be a physical disability, but only if it is caused by an underlying physiological, systemic disorder affecting one or more of the referenced body systems. Obesity itself, however, absent an underlying condition, has been found not to be a disability that is protected under the ADA. |

In California, to qualify as a physical disability, the physical condition need only limit the employee or applicant’s ability to participate in major life activities. Major life activities include: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Further, impairments that require special education or related services may also qualify as physical disabilities. In fact, even if a person does not actually have a physical disability, that person could still state a discrimination or harassment claim based on physical disability if an employer regards him or her as having a physical disability. In addition, while persons who are recovering drug abusers can claim a disability, those who are currently and unlawfully using controlled substances or illegal drugs cannot. Neither the ADA nor the FEHA protect sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or current, unlawful drug use.

D. MENTAL DISABILITY

The prohibition against discrimination also protects employees and job applicants with mental or psychological disorders, including intellectual disabilities, organic brain syndrome, emotional or mental illness, and learning disabilities. It does not, however, protect the unlawful use of drugs, compulsive gambling, sexual behavior disorders, kleptomania, or pyromania.

E. MEDICAL CONDITION

The FEHA also prohibits discrimination or harassment of an employee or job applicant because of the employee or applicant’s medical condition. To qualify as a medical condition, the health impairment must either (1) be related to or associated with cancer, or a record or history of
cancer; or (2) be caused by genetic characteristics which are known to cause a disease or disorder.\textsuperscript{27}

**F. SEX/GENDER**

Discrimination based on sex includes sexual harassment, as well as harassment based on gender or gender stereotypes. It also includes harassment based on pregnancy, childbirth, medical conditions related to pregnancy or childbirth, or breastfeeding, or a medical condition related to breastfeeding.\textsuperscript{28}

In 2012, the definition of “gender” was amended in several California anti-discrimination laws to expressly include a person’s gender identity and gender expression. The term “gender expression” is defined as “a person’s gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person’s sex assigned at birth.”\textsuperscript{29} “Gender identity” is defined as “a person’s internal understanding of their gender, or the perception of a person’s gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex at birth, or transgender.”\textsuperscript{30} “Transgender” is a general term that refers to “a person whose gender identity differs from the person’s sex assigned at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as ‘transsexual.’”\textsuperscript{31}

The Civil Rights Department (formerly the Department of Fair Employment and Housing (DFEH)) has issued guidelines on the rights of transgender employees in the workplace.\textsuperscript{32} The Civil Rights Department makes clear that a transgender person does not need to complete any particular step in the transition process to be protected by the law.

In 2017, the DFEH (now renamed as the Civil Rights Department) issued revised regulations regarding the issues of gender identity and gender expression. The regulations expanded the definition of gender identity to include employees who identify as neither male nor female or a combination of both.\textsuperscript{33} Employers must refer to employees by their preferred name and pronouns, even if it does not correspond to their birth gender. The employee’s legal name, however, must be used on any legal document, such as tax reporting or wage statements. Applicants also may not be penalized if they do not indicate their gender on an employment application.\textsuperscript{34} The revised regulations also clarify that with respect to bathroom or facilities use, employers may not require employees to provide any documentation regarding their gender. As of June 2020, federal law also protects employees from discrimination based on their transgender status.\textsuperscript{35} However, there are currently no corresponding regulatory or other sources interpreting the federal prohibition and no federal legal requirements regarding pronoun or bathroom use.

Employers may still require employees to adhere to reasonable workplace appearance, grooming, and dress standards as long as the employer allows them to appear or dress consistently with their gender identity or gender expression.\textsuperscript{36}
In addition, harassing conduct of a sexual nature, whether motivated by hostility or by sexual interest, is deemed based on sex, regardless of the gender of the victim or the sexual orientation of the harasser. Thus, same-sex harassment and harassment by a homosexual employee against an employee of the opposite sex are also unlawful. In other words, it is not a defense to say that the alleged harassing conduct was not motivated by sexual desire.

California also requires employers to provide reasonable accommodation for conditions related to pregnancy or childbirth if the employee so requests on the advice of her health care provider.

G. AGE

The prohibition against discrimination and harassment based on age protects employees who are age 40 and older. It also protects individuals age 40 and older from age-based stereotypes or generalizations about qualifications, job performance, health, work habits, or productivity of workers age 40 and older.

Case Studies on Age Discrimination

France v. Johnson

Employer, a government agency, created four new positions at a higher pay grade than France’s current position. Twenty-four applicants applied ranging in age from 28-54. At 54, France was the oldest applicant. The individuals eventually selected for the positions were aged 44, 45, 47, and 48. Employer argued that it had legitimate, nondiscriminatory reasons for denying France the promotion. However, the Court found that France had presented sufficient evidence to show Employer’s reasons were pretextual, including evidence that (1) France’s supervisor had stated a preference for hiring “young, dynamic agents” to staff the new positions, (2) France’s supervisor had asked France if he wanted to train agents after retiring and France responded that he did not want to retire; (3) France’s supervisor stated, a few months later, that if he were France he would retire as soon as possible, and (4) France’s other supervisor had expressed a preference for promoting younger, less experienced agents.

Reid v. Google, Inc. (affirmed by State legislative action, Jan. 1, 2019)

Employer terminated Reid, then age 52, by eliminating his position and advising him that there were no available positions for him in other departments. Reid claimed that Employer advised him he was not a “cultural fit” for Employer, and that Employer discriminated against him on the basis of his age. Specifically, he alleged that his supervisor (then 38) told him he was “too old to matter,” “slow,” “fuzzy,” “sluggish,” “lethargic,” did not “display a sense of urgency,” and “lack[ed] energy.” He further alleged that his coworkers called
him an “old man,” an “old guy,” and an “old fuddy-duddy,” among other age-related jokes. The Court held, in part, that evidence of these “stray remarks” should not be deemed irrelevant to employment discrimination claims. It determined that an age-based remark “not made directly in the context of an employment decision or uttered by a non-decision-maker” may still be “relevant, circumstantial evidence of discrimination.”

H. SEXUAL ORIENTATION

California law prohibits discrimination and harassment based on sexual orientation. This prohibition protects people who identify as homosexual, heterosexual, or bisexual. On June 15, 2020, the United States Supreme Court similarly determined that the federal Title VII statutes, which prohibit employment discrimination because of an individual’s “sex”, also incorporates an employee’s status as homosexual or transgender within the definition of “sex” under that statute. In doing so, the Court held that Title VII also protects against employment discrimination based on an employee’s status as a homosexual or transgendered individual.

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In 2015, same-sex marriage became legal nationwide. Nonetheless, California still recognizes domestic partnerships, which are available to same-sex couples or opposite-sex couples where one spouse is over the age of 62. Under California law, domestic partners must generally be treated as spouses. For employers, this means that domestic partners are protected from discrimination in employment under the FEHA. Public agencies, in particular, are prohibited from discriminating against any person or couple on the grounds that the person “is a registered domestic partner rather than a spouse.”

I. GENETIC INFORMATION

The Genetic Information Nondiscrimination Act of 2008 ("GINA") protects job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information. GINA applies to employers with 15 or more employees as well as employment agencies, labor organizations, and joint labor-management committees involved in training programs.

GINA imposes several different prohibitions on employers. First, GINA prohibits employers from discriminating against employees in terms of hiring, promotion, firing, or any other terms and conditions of employment because of genetic information with respect to that employee or their family members. Further, GINA prohibits retaliation against employees who oppose any act made unlawful by GINA, who file a charge of discrimination or assist another in doing so, or who provide testimony in connection with a charge. GINA also prohibits employers from negatively limiting, segregating, or classifying employees because of their or their family members’ genetic information. Finally, with limited exceptions, GINA also prohibits
employers from requesting, requiring, or purchasing genetic information about employees or employees’ family members.⁵⁶

Although GINA prohibits employers from requesting, requiring, or purchasing genetic information about employees or employees’ family members, the following is a list of the six statutory exceptions to this general rule:

- The employer inadvertently requests or requires family medical history of the employee or family member of the employee;
- The employer collects such genetic information as a result of its offers of health or genetic services to the employee, e.g., information obtained as part of a bona fide wellness program, provided that certain confidentiality measures are followed to protect disclosure of that information and the employee provides prior voluntary written authorization;
- The employer requests or requires family medical history from an employee to comply with the FMLA or the CFRA;
- The employer purchases commercially and publicly available documents that contain family medical histories of its employees;
- The employer seeks the information for genetic monitoring of the biological effects of toxic substances in the workplace; and
- The employer conducts DNA analysis for law enforcement purposes.⁵⁷

In addition to proscribing the practices set forth above, GINA also seeks to enhance the confidentiality of the genetic information of employees. Specifically, GINA requires an employee’s genetic information to be maintained on separate forms and in separate medical files.⁵⁸ GINA further requires employers to treat these documents as confidential medical records, disclosure of which is only permitted in a few specific instances.⁵⁹

Since 2012, the FEHA also prohibits discrimination based on genetic information.⁶⁰ “Genetic information” is defined as: (1) the individual’s genetic tests; (2) the genetic tests of family members of the individual; and (3) the manifestation of a disease or disorder in family members of the individual.⁶¹

Many genetic disorders are associated with particular racial, social, or ethnic groups. The law was amended to prevent the use of genetic information to stigmatize or unfairly discriminate against such groups. Although similar to GINA, the FEHA now offers broader protections by prohibiting discrimination based on genetic information in the additional areas of housing, business services, emergency medical services, licensing qualifications, life insurance coverage, mortgage lending, and participation in state-funded or state-administered programs.
J. **Veteran or Military Status**

Since 2014, “Veteran or Military Status” has been included as a protected category under California’s FEHA. The FEHA defines “Veteran or Military Status” to mean a member or veteran of the US Armed Forces, US Armed Forces Reserve, US National Guard, or California National Guard.  It also protects individuals who an employer perceives to be a veteran or member of the military and individuals who are associated with someone who is a veteran or member of the military. Employers may still, however, inquire about Military and Veteran status in order to determine eligibility for Veterans’ preference points in hiring.

K. **Opposition to Unlawful Conduct**

Discrimination, harassment, or retaliation based on opposition to such conduct is itself unlawful retaliation. For these protections to apply, an employee need not say the word “harassment” when reporting the conduct. Because it is difficult for a public employee to know if the complained-of conduct is “unlawful,” all that is legally required is a sincere, good faith and reasonable belief that the complained-of conduct is unlawful. Thus, even if no unlawful conduct occurred, a public employer may not retaliate against an employee for complaining about conduct which the employee sincerely and reasonably believes is unlawful.

It is also unlawful to harass or take any adverse action against an employee who supports or associates with a co-worker who has complained about unlawful harassment or discrimination.

<table>
<thead>
<tr>
<th>Examples of Protected Activity:</th>
</tr>
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<tbody>
<tr>
<td>• An employee complained about the sexually offensive conduct of an outside consultant whose seminar she had been required to attend. Although the employee might have been wrong as to whether the conduct was illegal, she had a good faith and reasonable belief that it was. As a result, her employer is prohibited from retaliating against her for complaining.</td>
</tr>
<tr>
<td>• An employee refused to follow the orders of her supervisor to fire a subordinate and replace the subordinate with “someone hot.”</td>
</tr>
</tbody>
</table>

L. **Association/Perception**

The anti-discrimination laws also prohibit discrimination and harassment of an employee or job applicant because of that individual’s association with a person of a protected class. An employer may also be liable for discrimination if it mistakenly perceives an employee to be a part of a protected class and makes a personnel decision based on that mistaken belief. An employer may be liable in such cases even if its belief was reasonable and even if its decision was not motivated by ill-will or animosity toward the protected category.
Case Study on Association Discrimination

_Castro-Ramirez v. Dependable Highway Express_\(^{71}\)

 Castro-Ramirez had a son who required daily dialysis and Castro-Ramirez was the only one trained to administer it to him. Castro-Ramirez was employed as a truck driver and for years, his employer accommodated his request to work earlier shifts so he could go home at night and administer the dialysis. Castro-Ramirez’s new supervisor, however, refused to assign him earlier shifts. The new supervisor assigned Castro-Ramirez to a late shift and a long route that would have made it difficult for Castro-Ramirez to return home to tend to his son. Castro-Ramirez refused to work it and Employer terminated him. In this case, the Court found there was sufficient evidence to create a triable issue of fact for a jury on the question of whether Employer discriminated against Castro-Ramirez based on his association with his son, who had a disability. However, the Court did not address whether the Employer was obligated to provide a reasonable accommodation to an employee based on the employee’s association with a disabled person under FEHA.

M. USE OF CANNABIS OFF THE JOB AND AWAY FROM THE WORKPLACE

Assembly Bill 2188, signed and approved on September 18, 2022, adds Government Code section 12954 to the FEHA, **but does not become operative until January 1, 2024**. This new statute will make it unlawful for a covered employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

1. The person’s use of cannabis off the job and away from the workplace (this section of the law does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites);

2. An employer-required drug-screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

Section 12954 does **not** apply to the following:

- An employee in the building and construction trades;
- Applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense pursuant to Part 117 of Title 32 of the Code of Federal Regulations, or equivalent regulations applicable to other agencies.

Section 12954 does not permit an employee to possess, be impaired by, or to use cannabis on the job. The statute also does not affect the rights and obligations of an employer to maintain a drug- and alcohol-free workplace. Finally, the statute does not preempt state or federal laws
requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the manner in which they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

Section 4 DISCRIMINATION

Unlawful discrimination means treating an employee, unpaid intern, or job applicant differently than others because of that person’s actual or perceived protected status. The different treatment must relate to the terms and conditions of employment, and be reasonably likely to negatively affect an employee’s job performance or prospects for advancement or promotion. An employee, unpaid intern, or job applicant can claim discrimination if the different treatment deprives or tends to deprive the employee, unpaid intern, or job applicant of employment opportunities or employment status. It is also discrimination to fail to provide reasonable accommodations to an employee or applicant with a disability.

A. DISPARATE TREATMENT

Intentional discrimination—or “disparate treatment”—occurs when an employer impermissibly considers characteristics such as race, religion, age, sex, etc., when making an employment decision that adversely affects an applicant, employee, or unpaid intern. In other words, an employer intentionally discriminates against an applicant, employee, or unpaid intern when the employer treats the person differently because of the person’s protected status.

In order to establish a prima facie case of intentional discrimination, the applicant, employee, or unpaid intern must establish the following four factors:

- The person is a member of a protected class;
- The person was qualified for the position for which they applied, or was performing the job in a manner consistent with the employer’s legitimate expectations;
- The person suffered an adverse employment action; and
- A discriminatory motive.
1. **Adverse Employment Action – Defined**

An “adverse employment action” encompasses far more than just a suspension, demotion, or termination. However, not all unwelcome employment actions constitute an adverse employment action. Generally, in order to constitute adverse employment action, the action must be reasonably likely to deter reasonable employees from engaging in protected activities. This is similar to the standard used in evaluating retaliation claims. Consequently, to be materially adverse, an employee’s working conditions must be disrupted, and not just inconvenienced.76 (See Section 7, part B for further discussion regarding adverse employment action.)

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Once an employee, unpaid intern, or applicant establishes a prima facie case of disparate treatment, the burden shifts to the employer who must articulate a legitimate, nondiscriminatory reason for the adverse employment action, i.e., give a business reason why it took or failed to take the action.

If the employer establishes a legitimate, nondiscriminatory reason, the burden shifts back to the applicant, employee, or unpaid intern who must prove that:

- The employer’s stated reason is not the real reason, i.e., it is pretextual and an excuse for actual discrimination;77
- The real reason for the employer’s action is discriminatory, (i.e., based on the employee or applicant’s protected status). Racist or sexist statements can constitute direct evidence of discriminatory intent.78

2. **Discriminatory Motives – “Mixed Motive”**

Unlawful discrimination also occurs when an employment decision is motivated, in part, by discriminatory considerations, even though other lawful and legitimate considerations may have also supported the employment decision.79 An applicant or employee may prevail in a discrimination lawsuit if the individual can prove that discrimination was a substantial motivating reason for the employer’s adverse employment action.80

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In discrimination and retaliation lawsuits, an employee must prove that a protected category was a substantial motivating reason for an adverse employment decision. However, in lawsuits alleging harassment, denial of reasonable accommodation, failure to engage in the interactive process, or failure to provide certain leaves of absence, the standard is
much lower. In these cases an employee need only prove that it was a motivating reason. While an employer may be liable in a mixed-motive discrimination case, the remedies for an applicant, employee, or unpaid intern are much more limited. For example, the court could award declaratory and/or injunctive relief, attorney’s fees, and costs directly attributable to the pursuit of the claim, but may not award monetary damages or reinstatement.

B. DISPARATE IMPACT

Disparate impact discrimination occurs when an employer’s facially neutral policy or practice results in a disproportionate adverse impact on a protected group of persons, such as a particular racial or ethnic group. To prevail on a disparate impact claim, the applicant, employee, or unpaid intern must prove either:

- That an employment policy or practice results in a disparate impact on a protected group of persons, and the employer cannot demonstrate that the policy or practice is job-related and consistent with business necessity; or
- That a less discriminatory alternative practice is available but the employer refuses to adopt it.

The two defenses available to an employer in a disparate impact discrimination claim are:

- Business necessity
- Bona fide occupational qualification

1. BUSINESS NECESSITY DEFENSE

An employer can defeat a claim of disparate impact by demonstrating that the challenged employment policy or practice is job-related and consistent with business necessity. To successfully demonstrate that an employment practice is job-related and a business necessity, the employer must show that the employment practice is necessary and bears a manifest relation to the employment at issue. However, the defense of business necessity is not a defense to a claim of disparate treatment.

2. BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

An employment policy or practice may also be justified if it qualifies as a bona fide occupational qualification (BFOQ). To qualify as a valid BFOQ, the employment policy or practice must affect an employee’s ability to perform the job and must relate to the essence or to the central mission of the employer’s business.

The BFOQ defense is a very narrowly drawn exception to discriminatory employment policies or practices. Courts have rejected BFOQ defenses based on sex where there is insufficient evidence that the excluded sex cannot adequately perform the work. For instance, a court held that being
male was not a BFOQ for the job of truck driver where there was no evidence that women could not perform the job.\textsuperscript{88}

Courts have also rejected the BFOQ defense based on third-party preference. For example, in \textit{Lam v. University of Hawaii}, the court held that alleged “Japanese cultural preferences” for male authority figures did not qualify as a BFOQ for the position of Director of Pacific Asian Legal Studies at a law school. The court expressly rejected such third-party preferences as justification for discriminatory hiring practices.\textsuperscript{89}

\textbf{Case Study on Bona Fide Occupational Qualification Defense}

\textit{Teamsters Local Union No. 117 v. Washington Department of Corrections}\textsuperscript{90}

Employer’s women’s prisons wrestled with problems of sexual abuse, guard misconduct, breaches of inmate privacy and other security concerns. After it commissioned a comprehensive study of these issues, it designated 110 guard positions as women-only. Male guards sued. The Court determined that Employer’s designation was appropriate and that gender, in this instance, is a valid BFOQ because there was objective evidence (the study) showing that gender would improve security, sexual abuse, and privacy problems and these issues were central to Employer’s business.

\section*{Section 5 \textbf{HARASSMENT}}

There are two types of harassment: Hostile work environment harassment and quid pro quo harassment.

\section*{A. HOSTILE WORK ENVIRONMENT HARASSMENT}

Anti-discrimination laws protect employees from discriminatory work environments.\textsuperscript{91} But whether a work environment rises to the level of being unlawfully hostile or abusive requires a case-by-case analysis of the following:

\begin{itemize}
  \item The frequency of the harassing conduct;
  \item The severity of the harassing conduct;
  \item Whether the harassing conduct is physically threatening or humiliating;
  \item Whether the harassing conduct is unwelcome;
  \item Whether the harassing conduct unreasonably interferes with an employee’s work performance or alters other conditions of employment so as to make it more difficult to do the job; and
  \item Whether a member of the protected class would consider the harassment hostile and offensive, i.e., the “reasonable victim” standard.\textsuperscript{92}
\end{itemize}
Conduct amounting to harassment may include:

- Speech, such as epithets, derogatory comments, slurs, jokes, or lewd propositions;\textsuperscript{93}
- Physical acts, such as staring, offensively touching another or one’s self, impeding or blocking movement, or any physical interference with normal movement;\textsuperscript{94}
- Visual insults, such as derogatory posters, cartoons, or drawings;
- Intimidation, ridicule, and insult;\textsuperscript{95}
- Unwanted sexual advances, requests for sexual favors, or other acts of a sexual nature where submission is made a term or condition of employment or where submission to or rejection of the conduct is used as a basis for employment decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual’s work performance or creates an intimidating, hostile, or offensive working environment;\textsuperscript{96} or
- Widespread supervisor favoritism toward select subordinates that communicates a message that the only way to advance is to have close friendships or sex with supervisors.\textsuperscript{97}

Up through 2018, to establish a hostile work environment harassment claim, an individual needed to show that: (1) the individual was subjected to verbal, visual, or physical conduct of a harassing nature because of a protected status;\textsuperscript{98} (2) the conduct was both subjectively and objectively unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the employee’s working environment so as to create an abusive working environment.\textsuperscript{99}

Effective January 1, 2019, the Government Code now provides that “harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being.”\textsuperscript{100} Under this provision, even one single incident of harassing conduct can be enough to create a hostile work environment if the conduct unreasonably interfered with the employee’s work performance or created an intimidating, hostile, or offensive working environment.\textsuperscript{101} This analysis depends on the totality of the circumstances, and a single discriminatory remark, even if not made directly in the context of an employment decision like termination or discipline, and even if uttered by a colleague who is not a decision-maker, may be relevant evidence of discrimination.\textsuperscript{102} This means that while the “severe or pervasive” standard will still apply to complaints under federal Title VII, complaints raised under FEHA may have a lower threshold to reach the issue of whether there was a hostile environment.
The law also states the legal standard for sexual harassment should not vary by workplace, and therefore employers cannot use as a defense that their particular industry or work-environment is more tolerant of certain behaviors. Employees will not need to show that their “tangible productivity” declined as a result of harassment in a workplace harassment suit, and may instead show a “reasonable person” subject to the alleged discriminatory conduct would find the harassment altered working conditions so as to make it more difficult to work. Finally, this new law makes clear that dismissing harassment claims at the early stages of litigation will become more difficult for employers under these new standards, as motions to dismiss claims pre-trial are now disfavored under the revised law.

In California, an employee does not have to be a direct victim of the harassment, or even personally observe the alleged harassment. Instead, employees need only show that they learned about the harassment from a third party. But if the alleged harassment is not directed at the employee and the employee has not demonstrated a loss of tangible job benefits, the employee must still be able to show that the harassing conduct permeated the employee’s direct work environment.

In sexual harassment cases, a work environment can be unlawfully hostile even if no sexual advances are made. For example, situations in which an employee and a supervisor are in a sexual relationship and the employee is receiving job benefits may create a hostile work environment for third party employees who are not involved in the sexual relationship. Of course, unwelcome sexual advances that alter the conditions of employment can also comprise a hostile work environment.

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The California Supreme Court held that the same conduct can be both harassment and discrimination. Although discrimination and harassment are separate wrongs, some official employment actions taken in furtherance of a supervisor’s managerial role can also have a secondary effect of communicating a hostile message.

**Case Study on Hostile Work Environment**

*Zetwick v. County of Yolo*

Zetwick worked as County correctional officer. She alleged that from approximately 2003 to 2011, Sheriff Prieto hugged her at least 200 times and on one occasion kissed her on, or partially on, the lips, ostensibly to congratulate her on her recent marriage. She also alleged that on numerous occasions she observed him hugging other female employees, but never saw him hug male employees. The Court held that she had put forth sufficient evidence of a sexually hostile environment to take the case to a jury. The Court found that she had put forth sufficient evidence showing that the hugs were a pattern of conduct, based on gender, and were subjectively and objectively offensive, and had affected her work. The Court also emphasized that as a supervisor and the
highest-ranking officer in the department, Sheriff Prieto’s actions had a potentially greater impact on subordinates which could be construed as abuse.

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A 2016 workplace survey found that dating others from work is widespread. Approximately 51% of employees reported that they dated a coworker at least once during the course of their career. Of the employees surveyed, 23% said that they dated a subordinate and 16% said they had dated a supervisor. Nearly a third of employees believed that a colleague had gained a professional advantage by dating a co-worker or supervisor. Employers can respond by maintaining appropriate standards of non-sexual conduct in the workplace. Employees should also train employees about the potential individual liability that can result from workplace romances.

Employers may be liable for harassment committed against their workers by clients, customers, vendors, and other third parties if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment. Thus, it is up to the agency and its supervisors to ensure that nobody in the work environment engages in harassing conduct, including customers and other non-employees.

**B. Quid Pro Quo**

“Quid pro quo” is the other type of harassment. “Quid pro quo” is Latin for “this for that.” In the context of sexual harassment, quid pro quo harassment occurs when submission to sexual conduct is explicitly or implicitly made a condition of a job, a job benefit, or the absence of a job detriment. Thus, the accused harasser must be in a position to affect the accuser’s employment (e.g., a supervisor). This form of harassment can include sexual propositions, unwarranted graphic discussion of sexual acts, or commentary on the employee’s body.

Implicit conditioning of job benefits on submission to sexual conduct is more common but harder to detect than explicit quid pro quo harassment. The factors to evaluate in determining whether quid pro quo harassment has occurred are:

- Whether the sexual conduct was unwelcome;
- Whether a reasonable person in the accuser’s position, who is the same gender as the accuser and has the same fundamental characteristics as the accuser, would have believed they were the subject of quid pro quo harassment;
- Whether the accused harasser intended to subject the accuser to quid pro quo harassment; and
- Whether there was a close connection between a discussion about job benefits and a request for sexual favors.
Case Study on Quid Pro Quo

Figueroa v. RSquared NY, Inc.\textsuperscript{118}
Figueroa was an RSquared employee who took a leave of absence after suffering a miscarriage. When she was ready to return to work, she contacted her supervisor who let her know that she could not return to her old position. Thereafter, Figueroa received a call from Ain who was not her supervisor, but was an RSquared Operations Manager and cousin to RSquared’s CEO. Ain allegedly told her that he could get Figueroa her old job back if she “hooked up” with him. She declined. Even though Ain was not her supervisor, the Court found that it could be reasonably inferred that he was a de facto supervisor because of his familial connection to the CEO and his position within the company and allowed Figueroa’s quid pro quo case to proceed.

Section 6 BULLYING AND ABUSIVE CONDUCT

A. INTRODUCTION
Workplace bullying has received media and legislative attention as a potentially growing area of concern in the workplace, state- and nationwide. Proponents of anti-bullying legislation and employee advocates for “healthy workplaces” point to the potential hidden costs to employers in low morale, higher rates of absenteeism, and lower productivity in the workplace.

Workplace bullying is not illegal, but since 2015, California law requires that mandatory harassment prevention training must also include a component on prevention of “abusive conduct.”\textsuperscript{119} “Abusive conduct” is defined as conduct of an employee or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.\textsuperscript{120} Statutorily listed examples of abusive conduct include: repeated verbal abuse, derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of another’s work performance.\textsuperscript{121} “A single act shall not constitute abusive conduct, unless especially severe and egregious.”\textsuperscript{122}

B. WHAT IS WORKPLACE BULLYING/ABUSIVE CONDUCT AND WHO IS AFFECTED?
Workplace bullying/abusive conduct may consist of repeated, unreasonable actions of one or more co-workers or supervisors directed towards a particular employee (or a group of employees). The conduct must be intended to intimidate, degrade, humiliate, or undermine the employee; or it creates a risk to the health or safety of the employee(s). Workplace bullying may
involve an abuse or misuse of power. Bullying behavior creates feelings of defenselessness and injustice in the employee and may undermine the employee’s sense of dignity at work. Bullying and abusive conduct usually involves repeated attacks against an employee, creating a continuing pattern of behavior.

Bullying situations may involve employee-on-employee bullying as well as a supervisor bullying a subordinate employee. “Mobbing” is another form of bullying, in which a group of co-workers target another worker or group of workers.

Importantly, a tough or demanding boss is not necessarily a bully. As long as the supervisor or manager is respectful, professional and fair, and the motivation behind the manager’s conduct is legitimate (e.g., the supervisor or manager is simply seeking to obtain the best performance by setting high performance and safety standards), such conduct is acceptable. It is only where the supervisor or manager engages in personal attacks or other unprofessional conduct does the supervisor or manager cross the line into bullying/abusive conduct.

C. BULLYING/ABUSIVE CONDUCT IS NOT ILLEGAL HARASSMENT

It is important to understand the distinction between bullying/abusive conduct and illegal harassment. In order for an act to be illegal and actionable harassment, the bullying conduct must be “because of” an employee’s protective status (i.e., the harassing behavior must be because of the employee’s age, gender, religion, marital status, medical condition, disability, sexual orientation, etc.).

Though California law now requires that mandatory harassment prevention training for supervisors include a component on “prevention of abusive conduct,” abusive conduct in the workplace is not in itself illegal under Title VII or FEHA. All the law requires is the added component of supervisor education and training on the prevention of abusive conduct. It does not impose liability on the abuser, or on the employer for failing to stop acts of abusive conduct.

Bullying and abusive conduct, as opposed to illegal harassment, are not directed at a protected classification. Rather, bullying/abusive behavior happens when the harassing conduct is done for the purposes described above, and may occur between people of like protected statuses. Bullying can occur between workers of the same race, national origin and gender.

Therefore, bullying and abusive conduct themselves are not illegal in terms of employees’ civil rights. However, once the conduct is identified, management should consider how to address it, because it can violate an agency’s personnel rules (e.g., rules prohibiting “discourteous” treatment), it disrupts the workplace, and it may nonetheless lead to claims and complaints of illegal harassment because the bully’s motivations are not always clear. Thus, in order to avoid costly investigations, administrative review and even litigation, an employer would be well served to make all reasonable efforts to eradicate bullying behavior in the workplace. Due to these and other negative consequences of failing to appropriately address workplace bullying, employers may want to consider adopting an Anti-Bullying Policy.
D. EXAMPLES OF BULLYING/ABUSIVE CONDUCT

Bullying and abusive conduct can take many forms. Examples include:

- Swearing or shouting;
- Repeated derogatory remarks, insults, or epithets;
- Exclusion or social isolation;
- Humiliation;
- Any form of physical threat or physical intimidation;
- Demeaning comments about a person’s appearance;
- The use of patronizing titles or nicknames;
- Persistent, unwelcome teasing;
- Gratuitous sabotaging or undermining a person’s work performance;
- Spreading malicious rumors or insulting someone; and
- Picking on someone or setting him or her up to fail.

E. HOW BULLYING/ABUSIVE CONDUCT IMPACTS THE WORKPLACE

Bullying and abusive conduct take a significant toll on an organization. It can lead to increased levels of stress among employees, high rates of absenteeism and increased turnover. Because supervisor-bullies can get results by getting more short-term production out of employees, they are often tolerated. However, employers should understand the long-term costs to these potential short-term benefits in productivity. Studies have shown that bullying has a long-term impact on staff performances, costs in excess of $200 billion per year and results in psychological and physical ailments similar to those found in soldiers returning from combat. Workers’ compensation and lost productivity are impacted by employees’ stress, depression, and physical health problems result in time away from work. The health problems experienced by victims of bullying result in a sense of helplessness and negative emotional states. Low self-esteem and a negative organizational climate negatively impact creativity and employees’ abilities to respond to difficult situations or challenging goals. The breakdown of trust in a bullying environment may mean that employees will fail to contribute their best work, do not give extra ideas for improvement, do not provide feedback on failures and may be less honest about performance. In addition to the costs of supervisor-bullying, bullying behavior perpetrated by a co-worker and ignored by management impacts productivity, morale and leads to increased workplace injuries and “stress” claims. Bullying behavior perpetrated by a supervisor or manager and either ignored or tolerated by upper management can be even more destructive to the effective work environment, which may affect greater numbers of workers than just the bully and the victim in the unit.
F. WHAT SHOULD YOUR AGENCY DO TO PREVENT OR ADDRESS WORKPLACE/ABUSIVE CONDUCT?

In order to curtail workplace bullying, the highest levels of management must make a commitment that it will not tolerate such conduct. That commitment is demonstrated by:

- Ensuring that mandatory harassment prevention training also includes a component on “prevention of abusive conduct;”
- Creating a comprehensive anti-bullying policy, or alternatively, a Code of Conduct that defines professional behaviors and unacceptable behaviors and includes policies and procedures for response;
- Communicating the anti-bullying policy throughout the organization;
- Establishing as a job expectation/performance standard respectful, non-bullying behavior;
- Establishing an awareness campaign so that employees understand what bullying is and what it may look like;
- Encouraging reporting;
- Encouraging open door policies;
- Addressing bullying behavior immediately after witnessing it or receiving a report of such behavior;
- Taking bullying complaints seriously and investigating them promptly;
- Reassigning the perpetrator when necessary;
- Disciplining employees who violate the agency’s anti-bullying policy or who otherwise engage in discourteous or destructive behavior toward coworkers;
- Following-up with a complainant or victim to determine if bullying behavior has abated; and
- Establishing an independent contact for employees to report the conduct (e.g., Human Resources contact).

G. WHAT CAN MANAGERS DO ABOUT BULLYING/ABUSIVE CONDUCT?

Managers should intervene if they observe abusive conduct or if they receive reports of such conduct. Managers can also help prevent such conduct by building a collaborative and safe workplace, emphasizing positive and professional communication, and creating contexts where people can speak up and problem solve together. Steps to accomplish this include:

- Publish and discuss the Agency’s anti-bullying policies;
- Make compliance with the Agency’s polices a job performance standard;
- Encourage reporting at all levels;
- Take reports of bullying behavior seriously and interface with Human Resources/Personnel to assure compliance with Agency investigative protocol;
- Discipline as appropriate when Agency policy has been violated;
- Follow-up with the Target for an extended period of time to determine if any other issues have arisen;
- Do not reward bullying behavior or accomplishments; and
- Be a good role model.

Section 7 RETALIATION

All of the anti-discrimination laws contain provisions that protect employees who report or oppose discrimination or harassment. But as described in more detail below, the anti-retaliation laws also protect employees who report, expose, or question employer misconduct, or otherwise engage in protected activity. Thus, an anti-retaliation law is any law that:

- Defines certain employer conduct as either mandated or prohibited; and
- Prohibits employers from retaliating against employees who try to invoke or enforce that law.

To protect against claims of retaliation, an employer should take a proactive and preventative approach that lets employees know that it will not tolerate retaliation and that it encourages employees to report perceived unlawful activity. By doing so, employers gain the opportunity to rectify problems before they turn into litigation.

To state a claim of unlawful retaliation under any of the anti-discrimination statutes, an individual must show that: (1) the individual engaged in a protected activity; (2) the employer subjected the employee to an adverse action; and (3) a causal connection exists between the protected activity and the adverse action.124

A. PROTECTED ACTIVITY

An employee engages in protected activities by:

- Refusing to obey an order reasonably believed to be discriminatory;
- Filing a complaint with a federal or state enforcement agency;
- Participating or cooperating with a federal or state enforcement agency conducting an investigation of the employer regarding an alleged unlawful activity, such as the EEOC, California Civil Rights Department (formerly known as the Department of Fair Employment and Housing), or Cal/OSHA;
• Testifying as a party or witness against the employer regarding an alleged unlawful activity;
• Filing an internal complaint with the employer regarding alleged unlawful activity; or
• Opposing an unlawful practice, including complaining to a harassing supervisor.\textsuperscript{125}

Further, because protected activity is generally viewed liberally, employers should treat employees as having engaged in a protected activity whenever the employer is made aware of informal, as well as formal, conduct that appears to question the legality of the employer’s conduct. Examples of protected activity include:

• Providing evidence in an internal investigation of alleged harassment or discriminatory practices;
• Serving as a witness in an EEO investigation or litigation;
• Requesting a reasonable accommodation based on religion or disability;
• Employee complaints (verbal or written) alleging unlawful activity to a supervisor;
• Rumors of an employee complaining of alleged unlawful activity to outside agencies or supervisors;
• Employee involvement in disputes with a former employer; and
• Employee association with another employee engaged in protected activity.

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To effectively and accurately identify protected activity in the workplace, employers should remember the following four points:

1. Protected activities are not limited to formal complaints and can take many forms.

2. A person can allege retaliation even if the person is not the target of the complained-about conduct. Employees who complain about discriminatory conduct are protected, whether or not they have been subjected to that conduct. An employee who, for example, acts as a witness in another employee’s sexual harassment lawsuit is engaging in a protected activity.

3. An employee’s allegations of employer misconduct need not be correct for the employee’s actions to constitute a protected activity.
So long as an employee has a reasonable, good faith belief that discrimination or harassment occurred, the employee’s attempts to expose or complain about that conduct will be protected. 126

4. An employee need not explicitly use the words discrimination or harassment to engage in protected activity. An employee engages in protected activity if the employee reasonably believes that the employee’s complaint concerns discrimination or harassment. But an employee may not simply make a vague complaint about personal grievances and expect that the employer will know that the employee is opposing discriminatory conduct.127

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Any opposition to an employment action—regardless of whether the employee specifically files a grievance or complaint—may be a protected activity for purposes of a retaliation claim. As a result, employers must be able to document legitimate, non-discriminatory business reasons for employment decisions.128

**B. **ADVERSE ACTION

An adverse action is one that materially affects the terms, conditions, or privileges of employment.129 The phrase “terms, conditions, or privileges” of employment must be interpreted liberally, and with a reasonable appreciation of the realities of the workplace.130
Adverse actions include employment actions like termination or demotion, but also those actions “reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in the employee’s career.”131

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An adverse employment action may be something less than a disciplinary action or unsatisfactory performance evaluation (e.g., criticizing an employee, soliciting negative information about an employee from others, or making threats of termination).132 However, the action must negatively affect the employee’s compensation, workplace conditions, or status.

The following examples identify types of conduct that courts have found constituted an adverse employment action:
- Verbal abuse, locks changed, and false accusations of incompetence;\textsuperscript{133}
- Daily criticism, increased supervision, and unfounded misconduct investigations;\textsuperscript{134}
- Denial of overtime;\textsuperscript{135}
- Relocation of office to basement and reduction in duties;\textsuperscript{136}
- Transfer to another facility;
- Denial of benefits;
- Failure to hire or rehire;
- Intimidation;
- Reassignment affecting prospects for promotion;
- Reducing pay or hours;
- Denial of employee’s administrative needs;
- Negative performance reviews; and
- Toleration of harassment by other employees;\textsuperscript{137}

In contrast, courts found the following actions, individually, did not constitute adverse employment actions:

- Counseling;\textsuperscript{138}
- Nitpicking;
- Oral or written criticism of an employee;
- Lateral transfer, unless there is some other materially adverse consequence; and
- Requiring an employee to develop new skills.\textsuperscript{139}

However, collectively or in combination with each other, such conduct could be sufficient to establish an adverse employment action.

**Case Study on Adverse Action**

*Outley v. Luke & Associates, Inc.*\textsuperscript{140}

Outley was an African American pharmacist for Employer and assigned to work at Kessler Air Force Base. After the Employer received complaints about Outley’s performance at Kessler, Employer decided to transfer her to another base. Her pay and her hours remained the same, but in the new position her schedule was not “as favorable,” there were no overtime opportunities, her workload increased and she was required to attend training. She sued Employer claiming her transfer was discriminatory. The court dismissed her claim finding
that her transfer was not an adverse employment action because her title, benefits, and responsibilities remained the same.

C. CAUSAL CONNECTION/NEXUS

Whether an employee can establish a causal connection between the protected activity and the employer action depends on whether the totality of the circumstances indicates a retaliatory motive. Those factors include, but are not limited to, the timing of the employer’s action in relation to the protected activity and whether the decision maker knew of the employee’s protected conduct.

1. TIMING

Courts tend to treat the timing of events differently, depending on how temporally close they are in relation to each other. Where there is a gap in time between the protected activity and the adverse employment action, courts will consider that fact, but not treat it as determinative. Thus, the passage of time between the protected activity and the adverse action is generally not enough by itself to defeat a retaliation claim. But in some situations when the adverse employment action follows immediately after the protected activity, courts have held that the timing alone is enough to find that the two events are causally connected.

2. EMPLOYER KNOWLEDGE

To bring a successful retaliation claim, an employee must also be able to demonstrate that the employer—and in particular the decision makers involved in the adverse employment action—knew of the employee’s protected activity. Employer awareness of the protected activity is an essential component of any retaliation claim. Thus, circumstantial evidence will be insufficient to infer a causal link if the employee cannot show the required employer knowledge. In Morgan v. Regents of the University of California, the California Court of Appeals rejected Plaintiff’s retaliation claim because there was no evidence that the decision makers who took the challenged adverse employment action knew of his prior discrimination complaint. Similarly, in Clark County School District v. Breeden, the United States Supreme Court rejected Plaintiff’s retaliation claim, in part because she produced no evidence that the decision maker who ordered the adverse employment action knew of her protected activity.

Case Studies on Employer Knowledge

Reeves v. Safeway Stores, Inc. Reeves alleged that a supervisor initiated disciplinary proceedings against him in retaliation for his previous discrimination complaint. Safeway argued there was no causal connection between the protected activity and subsequent discipline because cause for discipline was separately investigated and the decision to discharge was made by a manager with no knowledge of the employee’s protected activities. The Ninth Circuit reversed the lower court’s ruling in favor of Safeway on the grounds that Safeway failed to show that all...
material contributors to the decision acted with legitimate, nondiscriminatory motives, and Reeves presented sufficient proof to establish that retaliation by one or more decision makers was a substantial contributing factor in bringing about his dismissal. If a supervisor uses another employee as a tool for carrying out a discriminatory action, the original actor’s purpose will be imputed through the “tool” to their common employer.

**Poland v. Chertoff**

If in response to an employee’s protected activity a supervisor sets in motion a proceeding by an independent decision maker that results in an adverse employment action, the supervisor’s bias will be imputed to the employer if the employee can prove that the allegedly independent adverse employment decision was not actually independent because the biased supervisor influenced or was involved in the decision or decision-making process.

### D. Other Anti-Retaliation Laws

The prohibition against retaliation is not limited to the anti-discrimination provisions set forth in the FEHA, Title VII, the ADEA, or the ADA. In addition to the protections and prohibitions afforded by those statutes, anti-retaliation laws also cover prohibitions against employer conduct ranging from fraud to environmental violations. Accordingly, the scope of retaliation liability is quite broad, protecting employees who expose or complain about a wide range of employer misconduct, from mismanagement of funds to hazardous conditions. Some of these prohibitions are reviewed briefly below to provide employers with a general understanding of the wide array of factual scenarios that can give rise to a retaliation claim.

#### 1. Constitutional Free Speech Rights

While both the California and U.S. Constitution’s guarantee the right to free speech, the U.S. Supreme Court and subsequent cases have held that not all speech is protected. For example, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

On the other hand, if an employee speaks out against discrimination suffered by others, any use of state authority to retaliate against that employee can give rise to a cause of action under the First Amendment. This is because discrimination in employment is undoubtedly a matter of public concern, constituting protected speech.

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Employers may discipline employee speech if the speech is:

- Insubordinate;
- Unnecessarily disruptive;
- Delivered in a manner that is not designed to fix the perceived problem;
- Not a matter of public interest;
- Made pursuant to a public employee’s official duties; or
- Interferes with working relationships that are essential to the smooth functioning of the organization.

In determining whether or not the speech is protected, consider these questions:

- Is the employee speaking on a matter of public concern, which is likely protected, or individual concern, which is likely unprotected?
- Has the employee acted in a manner intended to rectify the perceived problem (e.g., gone to superiors, filed a complaint with an outside agency, contacted the press, etc.) in which case the employee’s conduct or speech is most likely protected?
- Has the employee’s speech unnecessarily disrupted the workplace, resembles unsubstantiated gossip, or interfered with the smooth functioning of the employer? (Note: Some legitimate accusations are so controversial or explosive that they will inevitably be disruptive. Employee speech in such instances will likely be protected, both as free speech and under state and federal whistleblower statutes, discussed below.)

2. **Whistleblower Statutes**

   (a) **California Labor Code section 1102.5(b)**

   Labor Code section 1102.5(b) prohibits employers from taking an adverse action against an employee because the employee disclosed information of a violation of a local, state, federal rule or regulation to a government or law enforcement agency, regardless of whether disclosing the information is part of the employee’s job duties. Section 1102.5(b) prohibits employers, or anyone acting on the employer’s behalf, from retaliating against an employee for disclosing wrongdoing by either the employer or fellow employees. Section 1102.5 protects an employee’s disclosure of wrongdoing even if the employee is not the first one to report it. A disclosure of wrongdoing is not considered “whistleblowing” if the employer directed the employee to disclose the information for a legitimate business purpose. Employees who believes they have been retaliated against for being a “whistleblower” are not required to seek relief from the Labor Commissioner before filing a lawsuit.
Since 2016, California extended whistleblower protection to family members of someone who has, or is perceived to have, engaged in protected whistleblowing conduct. The law makes clear that an employer cannot retaliate against a whistleblower or any the whistleblower’s family members who may also work for the agency. Violation of Labor Code Section 1102.5(b) constitutes a criminal offense under Labor Code section 1103.

The phrase “government or law enforcement agency” includes a public employee’s own employer. To state a claim under Labor Code section 1102.5(b), the employee does not have to be correct in their belief that prohibited conduct had occurred. Instead, the employee need only show that they had reasonable cause to believe that a federal or state statute was violated.

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A public employee is not required to make a formal report to establish a claim under section 1102.5. Rather, a public employee can establish a claim based on any adverse action taken against an employee based on an employee’s informal disclosure of a violation of state or federal rule, regulation, or law.

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In 2022, the California Supreme Court held that the evidentiary standard set forth in Labor Code section 1102.6 applies to whistleblower claims brought under Labor Code section 1102.5, not the three-part burden-shifting framework the U.S. Supreme Court laid out in *McDonnell Douglas Corp. v. Green*.

Based on this recent ruling, when bringing a whistleblower retaliation claim under section 1102.5, an employee is not required to show that their employer’s lawful reason for taking an adverse action against them was pretextual. Even if an employer had a genuine, nonretaliatory reason for its adverse action, a plaintiff still meets their burden under section 1102.6 if it is shown that the employer also had at least one retaliatory reason that was a contributing factor in the action.

(b) **California Labor Code section 1102.8 – Posting of “Whistleblower Hotline”**

Labor Code section 1102.8 requires that employers display a poster listing employees’ rights and responsibilities under the whistleblower laws. This poster must include the phone number for the whistleblower hotline.

(c) **Private Attorney General Act of 2004 – California Labor Code section 2698 et seq.**

The California Labor Code contains a variety of provisions that allow the Labor and Workforce Development Agency to assess and collect civil penalties from employers found to have violated...
those provisions. Through Labor Code section 2698 et seq., aggrieved employees can themselves collect, by prevailing in a civil action brought on behalf of themselves or others, the civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency. The prevailing employees are also entitled to an award of reasonable attorneys’ fees and costs.

(d) California Government Code sections 53297-53298

Under Government Code section 53297, a public employee may file a written complaint under penalty of perjury with a local agency regarding: gross mismanagement, a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Pursuant to Government Code Section 53298, an employer is prohibited from taking any reprisal against any employee or applicant for employment who files a complaint pursuant to Section 53297, unless the local agency reasonably believes that said action or inaction is justified on the basis of separate evidence which shows any of the following:

- The employee’s complaint has disclosed information that the employee knows to be false or has disclosed information without regard for the truth or falsity thereof.
- The employee’s complaint has disclosed information from records which are closed to public inspection pursuant to law.
- The employee’s complaint has disclosed information which is confidential under any other provision of law.
- The employee was the subject of an ongoing or existing disciplinary action prior to the disclosure of information with the local agency.
- The employee has violated any other provision of the local personnel rules and regulations, has failed to perform assigned duties, or has committed any other act unrelated to the disclosure that would otherwise be subject to personnel action.

(e) Unfair Immigration Practices

Employers are prohibited from engaging in certain unfair immigration-related practices against employees who exercise a right protected under the Labor Code or other local ordinance.

“Unfair immigration-related practice” means any of the following practices, when undertaken for the retaliatory purposes:

- Requesting more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code, or a refusal to honor documents tendered pursuant to that section that on their face reasonably appear to be genuine.
- Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under Section 1324a(b) of Title 8 of the United States Code, or not authorized under any memorandum of understanding governing the use of the federal E-Verify system.
• Threatening to file or the filing of a false police report, or a false report or complaint with any state or federal agency.

• Threatening to contact or contacting immigration authorities.\textsuperscript{161}

Exercising a right protected by the Labor Code or local ordinance includes, but is not limited to, the following:

• Filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith.

• Seeking information regarding whether an employer or other party is in compliance with this code or local ordinance.

• Informing a person of their potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights.\textsuperscript{162}

Under the Labor Code, there is a presumption that immigration-related actions within 90 days of the exercise of a protected right are committed for the purpose of retaliation, and creates a civil cause of action against an employer who commits an unfair immigration-related practice.\textsuperscript{163}

Effective January 1, 2017, it is also unlawful for an employer to do any of the following in the course of verifying employment eligibility, regardless of whether an employee exercises a right protected under the under the Labor Code or other local ordinance:

• Request more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code;

• Refuse to honor documents tendered that on their face reasonably appear to be genuine;

• Refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work; or

• Attempt to reinvestigate or reverify an incumbent employee's authorization to work using an unfair immigration-related practice.\textsuperscript{164} This does not prohibit an employer from reverifying an employee’s employment authorization in a time and manner consistent with Federal law, e.g. if the individual’s employment authorization expires.\textsuperscript{165}

\textbf{(f) False Claims Act}

The False Claims Act is especially pertinent to public entities. These statutes—which exist at the federal and state levels—prohibit false claims for money, goods, or services to a public agency.\textsuperscript{166} They are designed “to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities.”\textsuperscript{167} These statutes define particular circumstances and procedures under which individuals may act as private attorney generals by initiating claims against employers that they believe have submitted false claims to a governmental entity.
These statutes also include provisions expressly prohibiting employers from retaliating against employees for initiating or assisting in the investigation of alleged false claims.\textsuperscript{168} Employers found to have violated the California False Claims Act can be liable for damages, including double the amount of back pay. The False Claims Act also mandates that the employer pay litigation costs and reasonable attorneys’ fees.\textsuperscript{169}

**Case Study on Whistleblower Retaliation**

*Wilkins v. St. Louis Housing Authority*\textsuperscript{170}

An employee of the St. Louis Housing Authority reported to the United States Department of Housing and Urban Development (HUD) deficiencies in the Authority’s security operations and its misrepresenting of those deficiencies to HUD. After raising his concerns, the Authority fired the employee. He sued the Authority under the federal False Claims Act. The Court of Appeals upheld a jury award against the Authority. The Court found that the employee’s conduct was protected because he reasonably believed that the Authority had acted fraudulently when it misrepresented its security operations.

### 3. Working Conditions

Many state and federal statutes that regulate working conditions or create worker protections also prohibit retaliation against employees who seek to enforce those statutes. The list below is not exhaustive, but illustrates the range of employer conduct that may be subject to retaliation claims:

- Laws that entitle employees to family medical leave: Both the federal Family Medical Leave Act\textsuperscript{171} and California Family Rights Act\textsuperscript{172} prohibit retaliation against employees who try to invoke their family medical leave rights. California Labor Code section 233(c) prohibits employers from threatening to discipline, disciplining, or in any way discriminating against employees who use or who attempt to use family sick leave. Additionally, California Labor Code section 234 expressly prohibits employers from counting Family Sick Leave toward absence control policies that may lead to or result in discipline, discharge, demotion, or suspension.
- Pregnancy disability law prohibits employers from retaliating against employees exercising their pregnancy leave rights.\textsuperscript{173}
- California’s military leave laws\textsuperscript{174} and the Uniformed Services Employment and Reemployment Rights Act\textsuperscript{175} ensure that employees are not adversely affected in their employment after taking leave for military service.
- Both the federal Fair Labor Standards Act\textsuperscript{176} and California Labor Code establish laws regulating wages. Both also explicitly protect employees who seek to enforce these laws from retaliation.\textsuperscript{177}
• Cal/OSHA explicitly protects employees who take steps to expose unsafe working conditions in violation of the safety standards and procedures required by Cal/OSHA.\textsuperscript{178}

• California Labor Code section 132a protects employees who file workers’ compensation claims from retaliation.

• The Clean Air Act of 1977\textsuperscript{179} provides for the development and enforcement of standards regarding air quality and air pollution. Employees are protected from retaliation for reporting violations, or alleged violations, of those standards.

• The Safe Drinking Water Act of 1974\textsuperscript{180} requires that all drinking water systems in public buildings and new construction of all types be lead free. Employees are protected from retaliation for reporting violations, or alleged violations, of those requirements.

**Case Study On Workplace Safety**

*Franklin v. Monadnock Co.*,\textsuperscript{181}

Franklin notified his employer that his co-worker had threatened his safety, as well as that of three other employees, by stating he would have them killed. The employer did nothing in response. A week later, the co-worker tried to stab Franklin with a screw-driver. Franklin complained to the police about the co-worker’s threats. The employer then terminated Franklin for complaining about the co-worker. Franklin’s allegations were sufficient to state a violation of public policy that protects an employee against discharge for making a good faith complaint about working conditions that he reasonably believes to be unsafe.

4. **Union Activities**

An array of state and federal statutes govern management-labor relations for different sectors of the workforce. In California, employee relations in the public sector are primarily governed by:

• The Meyers-Milias-Brown Act (MMBA) for local governments;\textsuperscript{182}

• The Educational Employment Relations Act (EERA) for public K-12 schools and community college districts;\textsuperscript{183}

• The Ralph C. Dills Act (Dills Act or SEERA) for state agencies;\textsuperscript{184}

• The Higher Education Employer-Employee Relations Act (1979) (HEERA);\textsuperscript{185}

• The Trial Court Employment Protection and Governance Act;\textsuperscript{186} and

• The Trial Court Interpreter Employment and Labor Relations Act.\textsuperscript{187}

In addition to these statutes, the Public Safety Officers Procedural Bill of Rights Act and the Fire Fighters Procedural Bill of Rights Act provide sworn personnel with certain rights and remedies if they are subject to punitive action.\textsuperscript{188} All of these statutory schemes prohibit retaliation against
employees for engaging in legitimate union activities or insisting upon the protections of these statutes, and treat such interference as an unfair labor practice.

Section 8  **PREVENTING HARASSMENT, DISCRIMINATION, AND RETALIATION**

It is unlawful for a public entity employer to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring in the workplace. This mandate, as it pertains to harassment, applies equally to employees, applicants, unpaid interns, volunteers, and anyone providing services pursuant to a contract regardless of immigration status.

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One notable example of the expanded scope of the FEHA is that the FEHA also protects unpaid interns from harassment and discrimination, and volunteers from harassment. The FEHA does not protect volunteers from unlawful discrimination, only unlawful harassment. Nonetheless, agencies should refrain from taking adverse actions against volunteers because of their membership in a protected classification.

An employer can lessen the likelihood of being liable for violating the anti-discrimination laws, if by the time the conduct occurred, the employer had already taken reasonable steps to prevent discrimination and harassment from occurring. This may include:

- Affirmatively raising the subject of harassment, discrimination, and retaliation;
- Expressing strong disapproval of such conduct;
- Developing appropriate sanctions for violating the agency’s anti-discrimination policy;
- Informing employees of their right to raise and how to raise the issue of, harassment, discrimination, and retaliation under California (FEHA) and federal (Title VII) law; and
- Developing methods to sensitize all concerned.

Indeed, to satisfy several of these steps, the FEHA requires that employers take the following specific actions:

- Post the California Civil Rights Department’s (CRD) (formerly known as the Department of Fair Employment and Housing) poster regarding discrimination and harassment in a prominent and accessible location in the workplace;
- Post a poster developed by the CRD regarding transgender rights in the workplace;

- Distribute a sexual harassment information sheet to all employees in a reliable way, such as with the employees’ paychecks. You may obtain an information sheet from the CRD or the California Department of General Services, or you may draft your own information sheet or include the information in your policy. If you draft your own information sheet, it should include the following:
  1. A statement that sexual harassment is illegal;
  2. The definition of sexual harassment under state and federal law;
  3. A description of sexual harassment, including examples;
  4. The public entity’s internal complaint process that is available for each employee;
  5. The legal remedies and complaint process available through the CRD;
  6. Directions on how to contact the CRD; and
  7. Notice of protection from retaliation for opposing unlawful discrimination and harassment.

- Effective April 1, 2016, the law requires employers to have a harassment, discrimination, and retaliation prevention policy that sets forth its complaint and investigation procedures.

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You may obtain one free copy of the poster and the information sheet from your local Civil Rights Department office or online at www.calcivilrights.ca.gov. You may also obtain multiple copies from the Office of Documents and Publications in the Department of General Services. Make sure you have the most recent version of the poster.

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Reliable ways to distribute your sexual harassment information sheet include: 1) distributing it as part of an orientation/employment packet to new hires; 2) reissuing the information sheet to employees on a regular basis; 3) including the required data in your employer’s harassment prevention policy; or 4) permanently posting the information sheet at all work sites in prominent and accessible locations.

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Employers should ensure that their policies expressly state that they apply to all forms of discriminatory harassment, not just sexual harassment.
While compliance with these steps will not insulate a public entity employer from liability for unlawful harassment, it will help to prevent unlawful harassment from occurring and possibly insulate the employer from tort liability as well as damages.\(^{193}\)

The following additional measures may also deter unlawful discrimination, harassment, and retaliation:

- Promote equal employment opportunity at all levels of the workplace;
- Treat all people on their individual merits, without regard to their sex, race, age, or other protected status;
- Ensure that the visual, verbal, and physical aspects of the work site do not contain indicators of stereotyping based on any protected classifications;
- Do not allow joking or rumors based on physical attributes or any other basis for protected status;
- Do not allow innuendo or gossip which isolate individuals by their protected status;
- Be sensitive to supervisor/subordinate personal relationships which could adversely impact the good judgment and neutrality of the supervisor;
- When monitoring the attire of agency employees, be sure to monitor the attire of all genders;
- Adopt and distribute to all personnel an effective policy against discrimination, harassment, and retaliation and review and re-distribute that policy on a regular basis;
- Regularly train all employees, particularly supervisors and managers, on how to avoid and prevent discrimination, harassment, and retaliation;
- Train supervisors and managers on appropriate procedures to follow when an employee reports discrimination, harassment, and retaliation;
- Investigate promptly all complaints of discrimination, harassment, and retaliation and intolerable working conditions;
- Take corrective action promptly, if needed, after each investigation of a complaint; and
- Do not take punitive action against anyone for complaining about harassment, discrimination, or retaliation, or for engaging in any other protected activity.

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All these preventive measures, however, must be balanced against your employees’ rights to free speech and association.\(^{194}\) In general, speech must be about a matter of “public concern” to be protected under the First Amendment. Religion is considered a topic of public concern. Courts weigh the individual’s...
right of free speech on a matter of public concern against the public employer’s right to the efficient functioning of government.

Example: A fire department violated the First Amendment by banning reading of *Playboy* magazine, even though the ban was instituted to avoid contentions of sexual harassment.\(^\text{195}\)

In addition, it is important for employers to document an employee’s misconduct or performance deficiencies carefully in order to successfully resist possible later challenges asserting unlawful discrimination.

In 2017, the Department of Fair Employment and Housing (now that Civil Rights Department) published a guide for California Employers on how to address and prevent workplace harassment.\(^\text{196}\) The guide describes the elements of an effective anti-harassment program, and outlines the investigatory steps an employer should take if it receives a report of harassment or other wrongful behavior.

### Section 9  ANTI-DISCRIMINATION LAWS DO NOT IMMUNIZE EMPLOYEES FROM DISCIPLINE WHEN WARRANTED

The tremendous growth in retaliation claims has left some supervisors afraid to discipline any employee who has, within recent memory, complained about anything. This dynamic not only chills legitimate and necessary employment actions, it encourages the filing of erroneous complaints. Some employees will lodge unfounded complaints so that they will have a “protected activity” to point to if they are ever subjected to an adverse employment action.

The best defense against erroneous claims, as well as the fear of such claims, is to implement basic, good management practices. Supervisors who operate in a work environment where objectivity and consistency are the norm will be less intimidated by the fear of retaliation claims. This is because they will be more confident that they will be able to defend their employment decisions, if challenged. Thus, employers should institute policies, procedures, and training that encourages fair and consistent treatment of all employees and thorough documentation of employer actions.

#### A. TREAT ALL SIMILARLY SITUATED EMPLOYEES THE SAME

If an employer treats its employees professionally, and applies the same standards, a retaliation claim will be difficult to prove. This is because the employer will be better positioned to rebut the claim of a causal link with a legitimate business reason for its actions. Thus, employers should administer both favorable and unfavorable treatment of its employees in a fair, objective, and consistent manner, regardless of whether an employee has engaged in protected activity.
B. PERFORMANCE EVALUATIONS

Evaluations should be grounded in objective criteria such as the job description and annual goals and objectives. Further, they should include a written description explaining the areas of positive performance, areas that require improvement, and suggestions for how to improve. Employees should be rated similarly for the same quality of work. Similarly, each employee’s evaluations should reflect the application of consistent standards. For example, if a supervisor or employer tends to give high ratings for average work, the supervisor or employer should not suddenly start giving an employee who complains average ratings for the same average work.

C. DISCIPLINE

As a general matter, all employees should receive the same level of discipline for the same offense (taking into consideration each employee’s unique history of performance and discipline in assessing the seriousness of the conduct at issue). Applying discipline that is supportable by past practice is especially important where the employee has recently engaged in a protected activity. Therefore, if an employee who engaged in protected activity thereafter engages in misconduct, the employer should impose discipline only if it is consistent with past practice regarding the same or similar misconduct. If the misconduct is extreme or unprecedented, discipline should still be imposed, despite the risk of a retaliation claim, because the severity of the misconduct is likely to demonstrate to a court that the employer had a reasonable business motive to impose the discipline.

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Some additional factors to consider before proceeding with any disciplinary action:

- Have you adequately documented the underlying action in which the discipline is based?
- Is the discipline comparable to other forms of discipline imposed on other employees for similar infractions?
- Are you aware of any complaints, formal or informal, lodged by the affected employee regarding any workplace issues? Or, has the affected employee participated in any litigation against the agency in the form of testifying or cooperating with the adverse party?
- If you are aware of such complaints, have these complaints been investigated?
- Have you or any other managerial employee made any “stray comments” about the employee’s complaints or participation in the protected activity?
Are you aware of any threats of reprisals made against the affected employee for participating in the protected activity?

If you are concerned about any of the above issues, you should consult your human resources director or an employment attorney to minimize any potential claims of retaliation.

Section 10 DEVELOPING AN ANTI-HARASSMENT, DISCRIMINATION, AND RETALIATION POLICY

Some harassing behavior may not be sufficiently severe or pervasive enough to violate the law, but is still unproductive and offensive. A public agency is well-advised to prohibit inappropriate behavior even if that behavior does not reach the level of illegal harassment, discrimination, or retaliation.

Employer standards for conduct should not mirror the law for two reasons. First, prohibiting inappropriate behavior enables an employer to take corrective action at an early stage, thus preventing more severe and potentially unlawful conduct from developing. Second, if the employer’s policy simply recites the legal standard, the employer could be held to have admitted that illegal conduct occurred if it finds that the conduct violated its policy. Any such finding could be used against the employer as an admission if litigation develops. For these reasons, employers should adopt a “zero tolerance” policy. Zero tolerance policies prohibit any abusive conduct, harassment, discrimination, and retaliation, whether or not the conduct meets the threshold of being either severe or pervasive.

A. CONTENTS OF THE POLICY

Regulations by the California Civil Rights Department (CRD) (formerly known as the Department of Fair Employment and Housing), amended effective February 11, 2021, set forth requirements regarding employer policies regarding prevention of harassment, discrimination, and retaliation. Not only do the laws require employers to have a policy, they also set forth specific requirements for such a policy, including that the policy must:

1. Be in writing.
2. List all current protected categories covered under the FEHA.
3. Indicate that the law prohibits co-workers, third parties, supervisors, and managers from engaging in conduct prohibited by the FEHA.
4. Set forth a complaint process that ensures complaints receive:
   a. Employer confidentiality, to the extent possible;
b. A timely response;
c. Impartial and timely investigations by qualified personnel;
d. Documentation and tracking for reasonable progress;
e. Appropriate options for remedial actions and resolutions; and
f. Timely closures.

5. Provide a complaint process that does not require an employee to complain directly to the employee’s supervisor, by providing additional avenues to lodge complaints, such as:
   a. Direct communication with a designated representative, such as a Human Resources manager, EEO officer, other supervisor, or ombudsperson;
   b. A complaint hotline; and/or
   c. A referral to the EEOC and CRD.

6. Instruct supervisors to report misconduct or complaints of misconduct to a designated representative or a Human Resources manager. If an employer has five (5) or more employees, this topic must be in the mandated sexual harassment training provided by the employer.

7. Indicate that, upon receipt of allegations of misconduct, the employer will conduct a fair, timely, and thorough investigation that provides all parties with due process and reaches reasonable conclusions based on the evidence collected.

8. State that the employer will keep the complaint and investigation confidential to the extent possible, but not indicate that the investigation will be completely confidential.

9. Indicate that appropriate remedial measures will be taken if, at the end of the investigation, misconduct is found.

10. Make clear that employees will not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

11. Includes a link to, or the CRD’s website address for, the sexual harassment online training courses created by the CRD.\textsuperscript{197}

To have a meaningful policy, the employer must design the complaint procedure to encourage victims to come forward. Coming forward can be particularly difficult if the complainant’s supervisor is both the alleged harasser and the only person to whom the complainant may report the conduct. There may be other reasons that the employee is not comfortable speaking to a direct supervisor as well. In recognition of these situations and to encourage reporting, the law prohibits employers from adopting complaint procedures that only direct an employee to complain to the employee’s supervisor. Instead, employers must adopt policies that provide employees with at least one alternative route to file a complaint.

To further encourage victims to come forward, employers must maintain confidentiality of complaints and investigations to the greatest extent possible. However, the employer must make clear in its policy that complete confidentiality cannot be guaranteed. The nature of
investigations and due process rights of the accused employee require some level of disclosure by the employer. Complainants should be informed that their complaints will be conveyed only to those who need to know about it, such as those investigating the complaint and any others involved in remedial or disciplinary action.

Complainants should be encouraged, but not required, to complain in writing. An employer must allow employees to submit verbal complaints, but may request that employees ultimately state their complaints in writing. After receiving a written complaint, the public employer must respond. A written response is recommended, but not required. The response should confirm that the employer has received the complaint, is investigating it, and when the complainant can expect a follow-up report.

B. DISSEMINATING THE POLICY

In addition to developing an anti-harassment, discrimination, and retaliation policy, the Employer must also disseminate the policy in one or more of the following ways:

1. Print and provide a hardcopy of the policy to all employees with an acknowledgement form for the employee to sign and return.
2. Send the policy via e-mail with an acknowledgement form for the employee to sign and return;
3. Post the policy on the employer’s intranet with a tracking system that ensures that all employees have read and acknowledged receipt of the policy;
4. Providing and discussing the policy with new hires; and/or
5. Any other way that ensures employees receive and understand the policy.

In addition to the policy, employers must post the poster developed by CRD regarding transgender rights in a prominent and accessible location in the workplace.

Employers with workforces where 10 percent or more of the employees primarily speak a language that is not English must translate their policy into every language spoken by that population of employees.198

C. DOCUMENTING AND TRACKING COMPLAINTS

The employer must keep documentation and track the progress of complaints through its process. To accomplish this, the person designated to receive complaints should keep a confidential log of the complaints received from non-sworn personnel. For sworn personnel, the employer should use its internal affairs procedures. A log can serve as a checklist, help the public employer track the progress of particular investigations and complaints, spot repeat victims and alleged offenders, monitor the effectiveness of the public employer’s prevention and remediation efforts, and serve as evidence of the public employer’s thorough prevention and prompt remediation efforts. The log may include:
• The names of the complainant and alleged harasser;
• The complainant’s protected status, if applicable;
• The nature of the complaint;
• The date the complaint was received;
• The name of the person assigned to investigate the complaint;
• The findings from the investigation;
• What, if any, remedial action was taken;
• Whether the complainant was satisfied with the result;
• Whether the complainant or alleged harasser filed a claim with the CRD or the EEOC; and
• Whether the complainant filed a tort claim or a lawsuit.

Any documentation created or kept by the employer regarding complaints may have to be produced in a lawsuit. The likelihood of production is rare, however, because of the privacy interests of the people who file complaints and the people who are disciplined. In the event that a court orders the disclosure of other complainants’ identities, the public entity would have to make such disclosures, regardless of the existence of a log.

Section 11  TRAINING EMPLOYEES TO PREVENT HARASSMENT, DISCRIMINATION, RETALIATION, AND ABUSIVE CONDUCT

All public employees, and particularly managers and supervisors, must treat their co-workers and subordinates professionally and respectfully and make decisions based on each employee’s individual merit. Employers should prohibit and discourage abusive conduct and conduct or decisions based on an employee’s protected status or on stereotypes related to a protected status. Training can further these goals by educating employees on how to identify workplace behaviors that constitute harassment, on the negative effects of harassment and abusive conduct, and on responding to and correcting harassing or abusive behavior.

There are a number of ways to train and raise awareness, including (but not limited to) the following:

• Orientation sessions for all new employees;
• Group sessions or webinars for management/supervisory employees taught by qualified trainers
• Individualized training with a trainer/facilitator;199
- Annual refresher trainings for all employees;
- As an agenda item at lunch meetings; and
- Bringing in speakers from organizations at the forefront of harassment prevention.

While required harassment training for supervisory employees has been in effect since 2005, California law was amended in 2018 to also require harassment training for nonsupervisory employees and seasonal/temporary employees hired to work less than six months (SB 1343/SB 778). As required by the 2018 amendments, the Civil Rights Department has developed online training courses on the prevention of sexual harassment in the workplace to assist employers in satisfying related harassment training requirements. However, employers may still conduct in-person classroom training and must still ensure compliance with FEHA’s training requirements. Below is a summary of the training requirements.

Employers must maintain the following information related to the mandated harassment trainings for a minimum of two years: (1) names of the employees trained; (2) dates of the trainings; (3) sign-in sheets; (4) copies of all certificates of attendance or completion issued; (5) types of trainings; (6) copies of all written or recorded materials that comprise the training; and (7) names of the training providers. In addition, for any interactive electronic trainings, the trainer must maintain copies of all materials, employee questions, and written responses to employee questions for two years.

A. SUPERVISORY EMPLOYEES

California law requires a private employer with five or more employees, as well as all public sector employers (state, political or civil subdivisions of the state, special districts, counties, or cities) to provide harassment prevention training to its supervisors. This is commonly referred to as “AB 1825” harassment training, based on the name of the legislative bill that enacted this training requirement.

Supervisors must receive at least two hours of training every two years. New supervisors must receive training within six months of being hired or promoted and then at least every two years thereafter. Employers must maintain training materials and documentation tracking attendance and compliance for a period of at least two years.

For purposes of harassment prevention training, the FEHA defines “supervisor” as:

“[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Because of this broad definition, “supervisors” are not limited to only those who are accountable or responsible for the work of their subordinates.
B. NON-SUPERVISORY EMPLOYEES

California law requires a private employer with five or more employees, as well as all public employers, to provide all non-supervisory employees with at least one hour of classroom or other effective interactive training and education regarding sexual harassment within six months of assuming their positions. For all employees, the required training must occur at least once every two years.  

C. TEMPORARY AND SEASONAL EMPLOYEES HIRED TO WORK LESS THAN SIX MONTHS

Effective January 1, 2021, employers must also provide the applicable supervisory or non-supervisory training for seasonal and temporary employees, or any employee that is hired to work for less than six months. This training must be provided within thirty calendar days after the employees’ hire date, or within their having worked 100 hours – whichever occurs first.

The California Civil Rights Department (formerly known as the Department of Fair Employment and Housing) has developed online training courses on the prevention of sexual harassment in the workplace. However, employers may still conduct in-person classroom training and must still ensure compliance with FEHA’s training requirements.

D. ELECTED/APPOINTED LOCAL AGENCY OFFICIALS

Effective January 1, 2017, “local agency officials” – defined as any member of a local agency (city, county, or special district) legislative body and any elected local agency official – are required to receive sexual harassment training and education within the first six months of taking office or commencement employment, and every two years thereafter, if the local agency provides any type of compensation, salary, or stipend to any local agency official of that agency. This is commonly referred to as “AB 1661” harassment training, based on the name of the legislative bill that enacted this training requirement. A local agency official who attends an AB 1825-compliant supervisor harassment training noted above will meet the training requirements of AB 1661.

There has been an open question about whether elected and appointed officials are “supervisors” subject to AB 1825 supervisor harassment training. While AB 1661 seeks to address this by requiring similar training for local agency officials, the statutory language of AB 1661 notes that its requirements to
E. Peace Officers

In addition to any applicable supervisory or nonsupervisory harassment training referenced above, peace officers must receive instruction on sexual harassment in the workplace as part of their Peace Officer Standards and Training (“POST”) basic training. The instruction must include at least:

- The definition of sexual harassment;
- A description of sexual harassment, with examples;
- A statement of the illegality of sexual harassment; and
- The complaint process, legal remedies, and protection from retaliation available to victims of sexual harassment.^[210]

F. Required Harassment Training Standards

Following the initial implementation of supervisory employee harassment training requirements in 2005 under AB 1825, the Civil Right Department (CRD) implemented regulations for employers to follow in providing compliant harassment training to employees. The CRD subsequently modified these regulations, effective January 1, 2021, to incorporate the new nonsupervisory employee and temporary/seasonal employee training requirements implemented under SB 1343/SB 778. The regulations generally outline the following terms and conditions for such training:

- Types of compliant trainings (classroom, e-learning, webinar);
- Trainer qualifications;
- Frequency and tracking of compliant trainings;
- Objectives and content of trainings;
- Documentation of trainings; and
- Remedies for failure to comply in providing required trainings.^[211]

Since AB 1825 was implemented in 2005 to provide harassment training, California law has been amended to expand scope of the training to include other topics, including:

- Since 2015, California law requires that mandatory harassment prevention training include a component on “prevention of abusive conduct.”^[212] Abusive
conduct is defined as malicious conduct from an employer or employee, unrelated to an employer’s legitimate business interests, that a reasonable person would find hostile or offensive. Statutorily listed examples of abusive conduct include: repeated verbal abuse, derogatory remarks, insults, epithets, verbal or physical conduct that reasonably appears threatening, intimidating, or humiliating, or sabotage of another’s work performance.

- Since 2018, California law requires that mandatory harassment prevention training include a component on harassment based on gender identity, gender expression, and sexual orientation.

- Employers are also allowed to provide “bystander intervention training” to enable bystanders to recognize potentially problematic behaviors and to motivate them to take action when they observe such conduct. Employers are not required to provide this training, but if they do, the training may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide them with resources they can call upon that support their intervention.

Section 12 INVESTIGATING ALLEGATIONS OF HARASSMENT, DISCRIMINATION, OR RETALIATION

Upon receiving a complaint or becoming aware of potential discriminatory, harassing, or retaliatory conduct, the public employer must investigate the allegations and not give advantages to one side over another. The investigation must be prompt, fair, and thorough. Courts, the EEOC, and the California Civil Rights Department (formerly known as the Department of Fair Employment and Housing) expect public employers who have established complaint investigation procedures to follow those procedures. It is particularly important to abide by all timelines.

LCW Practice Advisor Implementing specific investigative procedures can help ensure complete investigations and consistent handling of complaints of harassment, discrimination, and retaliation. Indeed, certain state regulations applicable to specified agencies, e.g., schools and colleges, require implementation of formal procedures.

Public employers in the process of establishing formal investigative procedures should, in the interim, follow accepted principles of investigative procedure.
Case Study on Investigating Allegations of Harassment, Discrimination, and Retaliation

Swenson v. Potter

Swenson believed that a co-worker was sexually harassing her but she did not report it to anyone. Once management became aware of Swenson’s complaints, they spoke to the alleged harasser and opened an investigation. The investigation did not find sufficient evidence to support formal discipline. Swenson then sued for sexual harassment. The Ninth Circuit held that the employer could not be held liable under Title VII. The employer’s prompt response once it learned of the alleged harassment and the fair and unbiased investigation fulfilled its duty to Swenson.

A. Appoint an Investigator

For purposes of accountability and continuity, one person should be responsible for investigating complaints. If possible, this responsibility should not be delegated to a different person during the course of the investigation.

The investigator, to fulfill the responsibility for acting promptly and fairly, must be provided the necessary resources, training, and access to information and potential witnesses.

If the charges are against a high-ranking employee, elected official, or involve particularly sensitive, complex, or specialized issues, consider retaining an independent, outside investigator who is qualified to undertake this type of investigation.

B. Keep the Investigation Confidential

Complaints should be processed as confidentially as possible. Identities should not be disclosed except to the extent necessary to continue the investigation. Statements made by employees should not be disclosed to other employees except when required to elicit specific, relevant, and necessary information from the employee.

Occasionally, complaining parties ask for an assurance of confidentiality before providing information. Employers cannot and should not guarantee complete confidentiality. Rather employers should tell complaining parties and witnesses that the complaint will be kept confidential to the extent necessary to conduct a full investigation or to the extent necessary to obtain testimony in any hearing that might be held.

Less frequently, complaining parties who report the incident of harassment request that the employer not do anything about it. Honoring such a request could place other employees at risk of harassment, and it could place the public employer at risk for liability for failure to investigate and take prompt remedial action. Once on notice of an alleged occurrence of harassment, the public employer is required to investigate—even if the complainant requests that there be no investigation. The employer should therefore advise the complainant that it will investigate the
complaint, but it should also elicit and address any specific concerns the complainant has regarding an investigation, such as retaliation or fear of physical harm.

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If litigation occurs after an investigation, the complainant, alleged harasser, or both, may seek all of the details of the investigation. The investigator must always remember that anything the investigator says to witnesses, writes in a report, or even in personal notes could be disclosed later in a lawsuit. This fact underscores the need for a methodical approach that affords fairness to all witnesses and ensures confidentiality.

**C. RIGHT OF REPRESENTATION**

Employees participating in investigatory interviews, who have a reasonable belief that discipline may result from the interview, have a right to be represented by their union representative or legal counsel in such an interview upon request. 219

**D. LYBARGER ADMONITIONS**

Employees do not have a right to refuse to answer questions. Such refusal can be grounds for insubordination and may result in discipline up to and including discharge. Additionally, at-will employees may be terminated for dishonesty during a harassment investigation. 220

Peace officers suspected of criminal misconduct must receive a Lybarger warning because of the special protections provided by the Public Safety Officers Procedural Bill of Rights Act (POBR). 221 Non-Sworn employees may be given a Lybarger warning as well. Investigators should note that the POBR also provides other procedural guarantees for public safety officers during interrogations. 222

In a departure from the POBR, however, the Firefighters Procedural Bill of Rights Act (FBOR) specifically provides that an employer “shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation.” 223 Once the grant of immunity is provided, the employing fire department shall inform a firefighter that the failure to answer questions directly related to the investigation or interrogation may result in punitive action. 224 Because the FBOR’s language requiring the grant of immunity is ambiguous, public agencies should consult with legal counsel in each case where this could be an issue.

**E. DISCRIMINATORY INVESTIGATIONS**

Victims of harassment, as well as employees who are accused, may challenge the fairness of the investigation. If an employer improperly performs an investigation, a court or administrative agency may find that the poor investigation itself is discriminatory.
To avoid discriminatory investigations, all parties must be given an opportunity to respond to the allegations of the other. An employer must also complete an investigation into harassment even if the harassment stopped, because the employer has a duty to both: (1) end harassment; and (2) deter future harassment by the same offender or others.

Case Studies on Discriminatory Investigations

*Aguilar v. Avis Rent a Car Systems*
When a client of Avis Rent a Car reported having left behind a calculator in a rental vehicle and the calculator could not be found, the employer initiated an investigation. The investigator, however, only questioned Latino employees about the suspected theft of the calculator. The calculator was subsequently found. The Latino employees filed a lawsuit alleging discrimination and harassment because of race and identified the investigation as one of the actions supporting their lawsuit. The jury found in the employees’ favor and the judge issued an injunction ordering the employer to cease and desist from conducting discriminatory investigations.

*Fuller v. City of Oakland, California*
A female employee made a complaint to employer City about a male co-worker sexually harassing her. The investigator never interviewed the alleged harasser. During the course of the investigation, the investigator discontinued the investigation without a good reason. The Ninth Circuit Court of Appeals found that the City failed to take appropriate remedial steps once it learned of the sexual harassment and was therefore liable under Title VII for a hostile environment and sexual harassment.

Section 13 Determining the Appropriate Remedy for Findings of Harassment, Discrimination, or Retaliation

It is unlawful for an employer who knows or should know of harassment to fail to take immediate and appropriate corrective action. Remember, the employer has a duty to both stop the current harassment and prevent future harassment of its employees.

**Example:** A City was liable for its decision not to take remedial action because the harasser had stopped his inappropriate conduct. The Court held that by doing nothing but hoping the harasser did not repeat his misconduct, the City effectively ratified the harassment. Instead, the City should have taken some kind of remedial action, whether it was to discipline the harasser or do something else to deter future harassment by any of its employees.
After a prompt and thorough investigation, the employer should immediately do whatever is necessary and appropriate to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from reoccurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, is always required.

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To discipline public employees for harassment, the public employer must follow appropriate statutory, regulatory, or collectively-bargained procedures. Otherwise, the public employer could be subject to liability from the disciplined harasser.

Generally, the corrective action should reflect the severity of the misconduct. The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not been retaliated against. If the employer’s remedial efforts are not effective, the employer should initiate additional, more severe measures until the harassment ends. The effectiveness of a remedial action is measured by whether it: (1) ends the current harassment; and (2) deters future harassment.

**Example:** For first time, minor offenses, an employer may discipline the harasser and try to prevent further harassment by giving the employee a verbal warning in a counseling session, expressing strong disapproval, demanding that the unwelcome conduct cease, and threatening more severe disciplinary action if the conduct does not cease. If the harassment continues despite the stern warning, the employer must then pursue disciplinary action more severe than counseling to ensure that the behavior ends.

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Remedial action should not include moving the complainant to a less desirable work location to separate the complainant from the alleged harasser and hostile work environment. Such action could be perceived as retaliation for complaining about harassment. A public employer should instead consider transferring or moving the alleged harasser to another department or location. The employer could also consult with the complainant as to how to improve the employee’s working environment or where, if anywhere, the employee would like to be moved.

**Case Study on Employer’s Duty to Prevent and Remedy Harassment**

*Birschtein v. New United Manufacturing, Inc.*

A co-worker made repeated sexual comments to an employee. A supervisor put an end to the comments, but the co-worker then began to stare at Birschtein several times a day. Birschtein complained to her employer but the employer
took no action to stop the co-worker’s conduct. Birschtein brought suit against her employer for sexual harassment. The trial court granted summary judgment for the employer, stating that staring did not constitute sexual harassment as a matter of law. A California Court of Appeal disagreed and found that summary judgment was not appropriate because there existed a triable issue of fact as to whether the staring constituted intimidation and hostility. Moreover, the Court found that managerial failure to intervene effectively to prevent or end sexual harassment in the workplace by a fellow employee can amount to a ratification of the misconduct for which the employer may be held liable.

Section 14  **INTERNAL ADMINISTRATIVE REMEDIES**

Even if a public employer has established its own administrative remedies for resolving complaints of discrimination, harassment, or retaliation, a public employee is free to bypass that process and file a claim directly with the EEOC or the California Civil Rights Department (CRD) (formerly known as the Department of Fair Employment and Housing).\(^{238}\)

Even though an employee is not required to exhaust the employer’s own internal administrative remedies before filing with the CRD or EEOC, failure to do so may be a basis upon which a public entity can argue the “avoidable consequences” doctrine to reduce damages.\(^{239}\)

Employees who wish to file a lawsuit seeking money damages against their public employer and/or their public employee co-workers, supervisors, or elected officials must ordinarily file a Tort Claim with the public employer within six months of the alleged wrongful conduct.\(^{240}\) Public employees who wish to sue their employers under Title VII, the ADEA, the ADA, or the FEHA do not need to file a Tort Claim.\(^{241}\) Instead, they must file a claim with either the EEOC or the CRD.\(^{242}\) In California, the EEOC and the CRD have a work-share agreement, so that when a complainant files with one agency, the complainant is deemed to have filed with the other agency as well.\(^{243}\)

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Once you receive notice from the EEOC or CRD of a charge of discrimination, make sure that any documents potentially related to the charge are maintained and not destroyed.
A. EEOC Administrative Remedies

In California, to seek damages solely under Title VII, the employee must generally file a charge of discrimination with the EEOC within 180 days of the unlawful conduct. If the employee seeks damages under both Title VII and the FEHA, then the employee must file the charges of discrimination within 300 days of the unlawful conduct. The EEOC must notify the employer of the charge within 10 days of receiving it and then promptly investigate it. If an employee fails to file charges with the EEOC alleging a violation of Title VII and then subsequently files a lawsuit against an employer, the employee’s claims may still proceed if the employer fails to assert as a defense at the beginning of the lawsuit that the employee failed to exhaust their administrative remedies with the EEOC.244

Case Studies on Statute of Limitations

*National R.R. Passenger Corp. v. Morgan*245

Abner Morgan, an African-American, sued his former employer National Railroad Passenger Corporation (Amtrak) under Title VII, alleging that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. Specifically, Morgan alleged that when he worked for Amtrak, he was “consistently harassed and disciplined more harshly than other employees on account of his race.” The Supreme Court considered whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period for filing a charge with the EEOC. The Supreme Court held that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period. But the Court further held that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period. A court may still, however, apply other equitable doctrines that may toll or limit the time period.

*Fort Bend County, TX v. Davis*246

Lois Davis filed an EEOC complaint against her employer, Fort Bend County. She alleged sexual harassment and retaliation for reporting harassment. While the EEOC complaint was still pending, the County fired Davis because she went to church on a Sunday instead of coming to work as requested. Davis attempted to amend her EEOC complaint by handwriting “religion” on an EEOC intake form; however, she never amended the formal charge document. Upon
receiving her right-to-sue notice, Davis sued the County in federal court for religious discrimination and retaliation for reporting sexual harassment. After years of litigation, the County alleged for the first time that the court did not have jurisdiction to decide Davis’ religious discrimination claim because that protected status was not included in her formal EEOC charge. The trial court agreed and dismissed the suit. On appeal, the Fifth Circuit reversed and held that an EEOC complaint was not a jurisdictional requirement for a Title VII suit, and therefore, the County forfeited its defense because it waited years to raise the objection. The U.S. Supreme Court then agreed to hear the case. The U.S. Supreme Court had to decide whether an EEOC complaint is a jurisdictional or procedural requirement for bringing a Title VII action. The Supreme Court concluded that Title VII’s complaint-filing requirement is not jurisdictional because those laws “do not speak to a court’s authority.” Instead, those complaint-filing requirements speak to “a party’s procedural obligations.” Therefore, the Court found that while filing a complaint with the EEOC or other state agency is still mandatory, the County forfeited its right to object to Davis’ failure to mention religious discrimination in her EEOC complaint because the County did not raise the objection until many years into the litigation.

During the investigation, each party may submit to the EEOC a statement of position and evidence regarding the allegations in the charge. The EEOC may also issue subpoenas requiring the attendance and testimony of witnesses, the production of evidence, and access to evidence.

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- Remember that although the investigation is confidential, the EEOC file may be made public if the complainant later sues the public agency in a civil lawsuit. Thus, your statement to the EEOC should be factual and persuasive.

- The Lilly Ledbetter Fair Pay Act also clarified the statute of limitations for Title VII claims. Employees may file a Title VII lawsuit for up to 180 days after they receive any paycheck they allege is discriminatory. In other words, each new allegedly discriminatory paycheck resets the statute of limitations under Title VII.

The EEOC has 120 days after receiving the charge to either dismiss the complaint or find that there is reasonable cause to find that the charge is true. If the EEOC determines that the charge might be true, it will seek to remedy any perceived unlawful harassment through confidential and informal methods of conference, conciliation, and persuasion. If conciliation fails, the EEOC will then refer the charge to the Attorney General who may bring a civil lawsuit against the respondent public employer. The EEOC’s reasonable cause finding is admissible in a lawsuit claiming a violation of Title VII. 247
If the EEOC dismisses the charge, or does not take action on it within 180 days of receiving it, the EEOC must give the complainant a Right-To-Sue letter. The complainant will then have 90 days in which to file a civil lawsuit against the respondent named in the charge.  

**B. CIVIL RIGHTS DEPARTMENT ADMINISTRATIVE REMEDIES**

On or before December 31, 2019, an employee seeking damages under the FEHA was required to file a claim with the Civil Rights Department (CRD) (formerly the Department of Fair Employment and Housing) within one year of the alleged unlawful conduct. Following the passage of Assembly Bill (“AB”) 9 as part of the 2019 Legislative Session, effective January 1, 2020, an employee seeking damages under the FEHA must file a claim with the CRD within three years of the alleged unlawful conduct. Once a complaint is filed, the CRD either investigates the complaint itself or refers it to the EEOC for investigation. If the CRD keeps the complaint, it will notify you that a complaint has been filed and will most likely ask you to provide information regarding the complaint.

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The Civil Rights Department statute of limitations stops running while an employee pursues an employer’s internal administrative process.

If the CRD keeps the complaint, investigates, and finds the complaint valid, it must then seek to resolve the complaint, in confidence, by conference, conciliation, and persuasion. If conciliation succeeds, the parties will reduce their resolution to writing and the CRD will conduct a compliance review the following year.

If the conciliation process fails, the CRD may bring a civil action in the name of the Department on behalf of the person bringing the complaint. Parties are required to undergo mandatory dispute resolution in the CRD’s internal dispute resolution division before the CRD will file a complaint. The prevailing party, including the CRD, may be awarded attorneys’ fees and costs, including expert witness fees.

If the CRD does not bring a civil action within 150 days after the filing of a complaint, or if the CRD decides earlier that no civil action will be brought, the CRD must issue a Right-To-Sue letter to the complainant upon the complainant’s request. If the complainant does not request a Right-To-Sue letter, then the CRD will issue its Right-To-Sue letter when it finishes its investigation but no later than one year after it received the complaint. Only after receiving a Right-To-Sue letter may a complainant file a lawsuit based on the alleged harassment. The complainant must file the lawsuit, if at all, within one year from the date of the Right-To-Sue letter.
Section 16  LIABILITY FOR MONEY DAMAGES

Successful plaintiffs cannot obtain punitive damages from public entity defendants but they can obtain such damages against individual public employees not acting in their official capacity. Moreover, successful plaintiffs may also be entitled to emotional distress damages, back-pay, front-pay, and any other actual damages they have suffered, as well as attorneys’ fees and pre-judgment interest.\(^{256}\) The FEHA also allows successful plaintiffs to request reimbursement of expert witness fees.\(^{257}\)

The California law that mandates training for supervisors expressly states that providing the training does not insulate against liability for the employer, nor does the failure to provide the training automatically result in liability.\(^{258}\) Nevertheless, it is reasonable to assume that employees will likely argue that if the employer had provided the training, it might have prevented the very injury that is now the subject of the lawsuit.

A. WHO CAN BE LIABLE?

1. THE PUBLIC ENTITY EMPLOYER

Under both the FEHA and Title VII, public entities may be directly liable to harassment victims in civil actions.\(^{259}\)

A public entity employer is strictly liable for sexual harassment under California’s FEHA if the harasser is an agent or supervisor.\(^{260}\)

The FEHA broadly defines “supervisor” to include any employee who has any level of supervisory discretion. Although employers are strictly liable for harassment by supervisors, employers can still mitigate their potential damages by showing the following:

- The employer took reasonable steps to prevent and correct workplace harassment;
- The employee unreasonably failed to use the preventive and corrective measures that the employer provided; and
- Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee incurred.

This affirmative defense, known as the “avoidable consequences” doctrine, only applies to damages that the employee could have avoided if it would have been reasonable for them to utilize the employer's anti-harassment procedures. If a supervisor commits an act of harassment, the employee can still recover damages for the harassing act itself. Moreover, the employee need not always immediately utilize an employer's grievance process if it is inadequate or not communicated, if the employee reasonably fears reprisal by co-workers or management, or if the employee has natural feelings of embarrassment or shame. The employee's conduct is to be evaluated on a reasonableness standard. Evidence of reasonableness would include whether
other complaints of harassment were properly handled, whether the employer prohibited retaliation for reporting harassment, whether sufficient confidentiality procedures existed, and whether the employer consistently and firmly enforced its policies.261

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Employers should consider more severe disciplinary measures against supervisors who engage in harassment.

2. **INDIVIDUAL PUBLIC EMPLOYEES**

Employees are subject to personal liability for harassment under the FEHA, but not under Title VII.262 Specifically, under the FEHA, employees may be held personally liable for harassment if they participate in unlawful harassment or if they substantially assist or encourage continued harassment. A supervisor, however, is not personally liable for inaction or acts constituting personnel management decisions.263

Further, individual public employees cannot be held liable for retaliation or for discrimination.264

**B. HARASSMENT BY CLIENTS OR NON-EMPLOYEES**

Even if the harasser is not an agent or supervisor of the public entity employer, the employer may still be liable if its agents or its supervisors knew or should have known of the harassment of any employee or applicant but failed to take immediate and appropriate corrective action.265

**C. CONSTRUCTIVE DISCHARGE**

In the common law action for constructive discharge, an employer is liable if its officers, directors, managing agents, or supervisory employees create or knowingly permit intolerable working conditions that force a reasonable employee to resign.266

The U.S. Supreme Court determined that a plaintiff claiming sexual harassment resulting in “constructive discharge . . . must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.”267 The Court further held that employers may raise the avoidable consequences doctrine (i.e., that the employer took reasonable care to prevent or correct the harassing behavior and that employee did not take advantage of these measures) to reduce damages only if the employee did not resign following an action by an employer that was so severe it changed the employee’s employment status or work situation. Examples of such severe behavior include a humiliating demotion, extreme cut in pay, or transfer to a position with unbearable working conditions.
D. Obligation to Defend and Indemnify Individual Public Employees

Public entity employers are required to defend and indemnify any public employee in a civil lawsuit if the act or omission giving rise to the injury occurred in the course and scope of the individual’s employment with the public entity.\(^{268}\)

The following principles govern whether a public entity employer may be liable for illegal harassment by an employee:

- An employer may be liable for an employee’s misconduct if the conduct resulted from or arose out of the employee’s pursuit of the employer’s interests;
- An employer may be liable for employee misconduct if events or conditions relating to the employment caused the misconduct;
- An employer may not be liable for employee misconduct if it arises out of a personal dispute;
- An employer may not be liable if an employee abuses job-created authority over others for purely personal reasons, even if the abuse occurs on the employer’s premises;
- If the employer has and disseminates a policy against harassment, an employer may not be liable for a non-supervisory employee’s acts of unlawful harassment because such acts are not within the course of the individual’s employment;\(^{269}\) and
- Even if a public employer has been dismissed from a lawsuit, it may still be liable if it fails to provide a defense for an employee it believes was not acting within the scope of employment, if the employee agreed to a stipulated judgment stating the employee acted in the course of employment and assigned the victim the rights to seek indemnification from the employer.\(^{270}\)

Case Study on Obligation to Defend and Indemnify

*Farmers Insurance Group v. County of Santa Clara*\(^ {271}\)

A county was not required to indemnify and pay the defense costs of a deputy sheriff in a sexual harassment lawsuit where the evidence was undisputed that the deputy sheriff “lewdly propositioned and offensively touched other deputy sheriffs working at the county jail.” The California Supreme Court held that deliberate targeting of an individual employee for inappropriate touching and requests for sexual favors is not within the scope of a deputy sheriff’s employment. The California Supreme Court explained that “the goal of eradicating sexual harassment from the public sector is more effectively advanced by denying sexual harassers the right to indemnity than by insulating them from financial responsibility for their own misconduct.” It declined, however, “to adopt a bright line rule that all sexual harassment falls outside the scope of employment as a matter of law under all circumstances.”
A public employer may defend and indemnify an employee in a civil suit alleging harassment if the entity determines that the harassment charges are not well founded. A public entity’s agreement to provide defense and indemnity in such instances does not affect its right to refuse to defend other employees whose acts of sexual harassment are undisputed. The public employer should study the circumstances of each case and seek legal counsel in determining whether to defend and indemnify an alleged unlawful harasser.
ENDNOTES

1. 42 U.S.C. § 2000e et seq.
2. 29 U.S.C. § 621 et seq.
5. Gov. Code, § 12900 et seq.
7. Gov. Code, § 12926, subd. (r)(1)(C) (Note: breastfeeding and a medical condition related to breastfeeding was added to the Government Code in 2013, pursuant to Assem. Bill No. 2386).
10. Since 2016, Government Code section 12940 prohibits an employer or other covered entity from retaliating or otherwise discriminating against a person for requesting accommodation of their disability or religious beliefs, regardless of whether the accommodation request was granted.
18. The Americans with Disability Act of 2008 broadens protections of the disabled under federal law. However, the federal law will have limited application in California because the Fair Employment and Housing Act’s disability provisions have already provided for much broader coverage.
19. 29 C.F.R § 1630.2; Gov. Code, § 12926, subd. (m)(1)(A).
22. Gov. Code, § 12926, subd. (m)(2).
24. Gov. Code, § 12926, subd. (m)(6); see 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3.
Gov. Code, § 12926, subd. (j)(5).  
Gov. Code, § 12926, subd. (i)(1).  
Cal. Code Regs., tit. 2, § 11030, subd. (b).  
Cal. Code Regs., tit. 2, § 11030, subd. (e).  
2 C.C.R. § 11030.  
2 C.C.R. § 11034.  
Bostock v. Clayton County (2020) 140 S. Ct. 1731.  
Gov. Code, § 12949.  
Gov. Code, § 12949.  
France v. Johnson (9th Cir. 2015) 795 F.3d 1170 as amended on rehg. (Oct 14, 2015).  
Gov. Code , § 12940, subd. (1)(a).  
Gov. Code, § 12926, subd. (s).  
Bostock v. Clayton County, Georgia (2020) 140 S.Ct. 1731.  
Fam. Code, § 297 et seq.  
Gov. Code, § 12940 et seq.  
Fam. Code, § 297.5, subd. (g).  
29 C.F.R. § 1635.7.  
Preventing Workplace Harassment, Discrimination, and Retaliation

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60 Gov. Code, § 12940.
62 Gov. Code, § 12926, subd. (k).
63 Department of Fair Housing and Employment, Workplace Rights for members of the military and Veterans (2016).
64 Cal. Gov. Code, § 12940, subd. (p).
68 Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1044 [32 Cal.Rptr.3d 436, 116 P.3d 1123].
69 Gov. Code, § 12926, subd. (o).
72 Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1052 [32 Cal.Rptr.3d 436, 453, 116 P.3d 1123].
73 42 U.S.C. § 2000e-2(a); Gov. Code, § 12940, subd. (c).
74 42 U.S.C. § 2000e-2(a); Gov. Code, § 12940, subd. (c).
78 Mayes v. WinCo Holdings, Inc. (9th Cir. 2017) 846 F.3d 1274, 1280.
80 Harris v. City of Santa Monica (2013) 56 Cal.4th 203 [152 Cal.Rptr.3d 392, 294 P.3d 49], rehbg. den. (Apr 17, 2013).
81 Harris v. City of Santa Monica (2013) 56 Cal.4th 203 [152 Cal.Rptr.3d 392, 294 P.3d 49], rehbg. den. (Apr 17, 2013).

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al. v. Johnson Controls, Inc. (1991) 499 U.S. 187 [111 S.Ct. 1196]; see also Western Air Lines, Inc. v. Criswell, et al. (1985) 472 U.S. 400 [105 S.Ct. 2743](holding that being younger than 60 years of age was valid BFOQ for the position of flight engineer as it was necessary to the safe transportation of passengers).


Lam v. University of Hawai‘i (9th Cir. 1994) 40 F.3d 1551, 1560, n. 13, as amended (Dec 14, 1994); see also Bollenbach v. Board of Education of Monroe-Woodbury Central School District (S.D. N.Y. 1987) 659 F.Supp. 1450 (holding that school district’s refusal to assign female bus drivers to routes serving an all male religious school of Hasidic Jews violated Title VII).

Teamsters Local Union No. 117 v. Washington Dept. of Corrections (9th Cir. 2015) 789 F.3d 979.


Rehmani v. Superior Court (2012) 204 Cal.App.4th 945 [139 Cal.Rptr.3d 464].


Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797, 115 P.3d 77].


Gov’t Code, § 12923 (a).

Gov’t Code, § 12923 (b).

Gov’t Code, § 12923 (c).

Gov’t Code, § 12923 (d).

Gov’t Code, § 12923 (e).


Miller v. Department of Corrections (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 814].


111 *Zetwick v. County of Yolo* (9th Cir. 2017) 850 F.3d 436.


113 Gov. Code, § 12940, subd. (j)(1).


115 *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1478, fn. 1 (citing *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 516, overruled on other grounds); 29 C.F.R. § 1604.11(a)(1)-(a)(2).


117 *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511-513, overruled on other grounds; 29 C.F.R. § 1604.11(a).


119 Gov. Code, § 12950.1, subd. (a)(2).

120 Gov. Code, § 12950.1, subd. (h)(2).

121 Gov. Code, § 12950.1, subd. (h)(2).

122 Gov. Code § 12950.1 subd. (h)(2).


126 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043 [32 Cal.Rptr.3d 436, 445].

127 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046-1047 [32 Cal.Rptr.3d 436, 448-449].

128 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046-1047 [32 Cal.Rptr.3d 436, 448-449].

129 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 [32 Cal.Rptr.3d 436, 452].

130 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 [32 Cal.Rptr.3d 436, 455].

131 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 [32 Cal.Rptr.3d 436, 454].

132 *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054-1055 [32 Cal.Rptr.3d 436, 454-455].


Shannon v. Bellsouth Telecommunications, Inc. (11th Cir. 2002) 292 F.3d 712. The court found that denial of overtime was an adverse action, reasoning that while not everything that makes an employee unhappy is an adverse action, conduct that alters an employee’s compensation, terms, conditions, or privileges of employment does constitute adverse action.

Signer v. Tufey (2d Cir. 2003) 66 Fed.Appx. 232. The court held that relocation of an office to the basement and reduction in duties is an adverse employment action. The court reasoned that adverse actions are considered material if they are of such quality or quantity that a reasonable employee would find the conditions of their employment altered for the worse.

Gunnell v. Utah Valley State College (10th Cir. 1998) 152 F.3d 1253.


Tran v. Trustees of the State Colleges in Colorado (10th Cir. 2004) 355 F.3d 1263.


Poland v. Chertoff (9th Cir. 2007) 494 F.3d 1174, on remand (2008) 559 F.Supp.2d 1127.


Konits v. Valley Stream Central High School (2nd Cir. 2005) 394 F.3d 121, 125-126.

Lab. Code, § 1102.5, subd. (b).


Lab. Code, § 1102.5, subd. (e).


Lab. Code, § 1102.8.

Lab. Code, § 2699, subd. (a).

Lab. Code, § 2699, subd. (g)(1).

Gov. Code, § 53297.

Gov. Code, § 53298, subd. (b)(5).

Lab. Code, § 1019.

Lab. Code, § 1019, subd. (b)(1)(D).

Lab. Code, § 1019, subd. (a)(3).
The California False Claims Act is codified at Government Code, § 12650 et seq. The Federal False Claims Act can be found at 31 U.S.C. § 3729 et seq.


Gov. Code, § 12650 et seq.

Wilkins v. St. Louis Housing Authority (8th Cir. 2002) 314 F.3d 927.

29 U.S.C. § 2601 et seq.

Gov. Code, § 12945.2.

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38 U.S.C. § 4301 § et seq.

29 U.S.C. § 201 et seq.


Lab. Code, § 6310.


42 U.S.C. §§ 300f - 300j.


Gov. Code, § 3500 et seq.

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Gov. Code, § 3560 et seq.

Gov. Code, § 71600 et seq.

Gov. Code, § 71800 et seq.


Gov. Code, § 12940, subd. (k).

Gov. Code, § 12940, subd. (j)(1); Cal. Code Regs., tit. 2, §§ 11009(e), 11019(b)(1) ; Hirst v. City of Oceanside (2015) 236 Cal.App.4th 774 [187 Cal.Rptr.3d 119] (applying FEHA to woman contracted to provide phlebotomy services to the City); Salas v. Sierra Chemical Co. (2014) 59 Cal.4th 407 [173 Cal.Rptr.3d 689] (FEHA protects all employees regardless of immigration status).

Gov. Code, § 12940, subd. (c) and (j).

Gov. Code Regs., tit. 2, § 11019, subd. (b)(4); 29 C.F.R. § 1604.11(f).

Gov. Code, § 12950, et seq.


197 2 CCR § 11023(b).

198 2 CCR § 11023(e).


203 Gov. Code, § 12950.1.

204 2 CCR § 11024(b)(2).

205 Gov. Code, § 12926, subd. (t).


207 Gov. Code, § 12950.1, subd. (a) [as amended by Sen. Bill 1343 (January 1, 2019) and Sen. Bill 778 (Aug. 30, 2019).]


211 2 C.C.R. § 11024.

212 Gov. Code, § 12950.1, subd. (a)(2).

213 Gov. Code, § 12950.1, subd. (h)(2).

214 Gov. Code, § 12950.1, subd. (b)(2).

215 Gov. Code, § 12950.1, subd. (a)(3).

216 Gov. Code, § 12950.2 [as amended by Sen. Bill 1300 (January 1, 2019)].


218 Swenson v. Potter (9th Cir. 2001) 271 F.3d 1184.


222 Gov. Code, § 3303.

223 Gov. Code, § 3253, subd. (e)(1).

224 Gov. Code, § 3253, subd. (e)(1).

226 Fuller v. City of Oakland, Cal. (9th Cir. 1995) 47 F.3d 1522, 1528-1529, as amended (Apr 24, 1995).


228 Fuller v. City of Oakland, Cal. (9th Cir. 1995) 47 F.3d 1522, as amended (Apr 24, 1995).

229 Fuller v. City of Oakland, Cal. (9th Cir. 1995) 47 F.3d 1528–1529, as amended (Apr 24, 1995).


231 Fuller v. City of Oakland, Cal. (9th Cir. 1995) 47 F.3d 1528–1529, as amended (Apr 24, 1995).


234 Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 882.

235 Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773.


238 Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074 [6 Cal.Rptr.3d 457, 79 P.3d 569], as mod.

239 State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441, 79 P.3d 556].


244 Fort Bend County, TX v. Davis (2019) 139 S.Ct. 1843.


246 Fort Bend County, TX v. Davis (2019) 139 S.Ct. 1843.

247 Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475, 1483 (citing Plummer v. Western Intern. Hotels Co., Inc. (9th Cir. 1981) 656 F.2d 502, 504.)


250 Gov. Code, § 12960 [as amended by Asm. Bill 9 (January 1, 2020).]

251 McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal.4th 88, 112–113 [84 Cal.Rptr.3d 734, 194 P.3d 1026].

252 Gov. Code § 12965, subd. (a).

253 Gov. Code, §§ 12965, subd. (a), 12981, subd. (a).
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Gov. Code, § 12965, subd. (b).

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State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441, 79 P.3d 556].


Gov. Code, § 12940, subd. (j)(1).


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