



# Discrimination and Sexual Harassment in the Workplace\*

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# FEHA – DISCRIMINATION - PROTECTED CLASSES

- California Fair Employment Housing Act (“FEHA”) applies to public and private employers, labor organizations and employment agencies
- FEHA prohibits an employer from discriminating against a protected individual based on:
  - Race, religious creed (including religious dress and grooming practices), color, national origin, ancestry, physical or mental disability, medical condition (cancer), genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, military and veteran status, age (if 40 or over); or pregnancy, childbirth, breastfeeding or related medical conditions of any female employee
- **Employer** – any person regularly employing **five or more employees**
  - Five or more employees includes part-time employees, but not independent contractors
    - **Exception:** Harassment claims may be asserted against any person or entity employing one or more persons
  - Employees of the entity are not personally liable for FEHA discrimination
    - **Exception:** Employees may be liable for their own acts of proscribed harassment
- **Employee** – any individual under the direction and control of an employer “under any appointment or contract of hire or apprenticeship, express or implied, oral or written”



# FEHA – DISCRIMINATION CLAIMS – BUSINESS PRACTICES

- These state laws barring discrimination apply to all business practices, including:
  - Advertisements
  - Applications, screening, and interviews
  - Hiring, transferring, promoting, termination, or separating employees
  - Working conditions, including compensation
  - Participation in a training or apprenticeship program, employee organization or union
- Any person – employee, intern, volunteer, applicant or former employee
- Out-of-state employees working for a California employer covered by FEHA
- Immigration status is **irrelevant** for purposes of liability under these laws



# FEHA – DISCRIMINATION CLAIMS

- **Disparate Treatment** – intentional discrimination on prohibited grounds, i.e., treating some people less favorably than others because of a protected characteristic
  - Discrimination must be the “substantial motivating factor” in the employer’s actions towards plaintiff
- **Disparate Impact** – employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by a business necessity
  - Plaintiff is challenging specific personnel practices and policies
  - Not required to show proof of intent to discriminate
- **Failure to Accommodate** – arise out of employers’ statutory duty to accommodate specified characteristics, including religious beliefs, physical and mental disabilities, and certain conditions related to pregnancy and childbirth



# FEHA – ADVERSE EMPLOYMENT ACTION

- **Adverse Employment Action**– kind, nature or degree of action against an employee that is enough to state a claim
  - The discrimination must adversely and materially affect the terms, conditions or privileges of Plaintiff's employment
  - **Examples:** refusing to hire or employ; refusing to select for a training program leading to employment; discharge from employment; discharge from a training program leading to employment; transfer of job duties and undeserved performance ratings; reducing employee's authority; disadvantageous transfer; refusal to promote; demotion with pay cut; loss of benefits and significantly diminished material responsibilities



# FEHA – HARASSMENT CLAIMS

- **FEHA prohibits “Harassment”**
  - Prohibits “harassment” on the basis of “sex,” “gender,” “gender identity,” “gender expression” or “sexual orientation” (or race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, age or military and veteran status)
    - Harassment may also qualify as “discrimination” under the FEHA
    - Discrimination (delegable authority is the institution or corporate employer) v. Harassment (no official exercise of power by corporation, its bias expressed or communicated through interpersonal relations in the workplace)
    - Covers: job applicants, independent contractors, unpaid interns, volunteers and employees
    - Applies irrespective of the number of employees
- **California Supreme Court**
  - FEHA “harassment” is “conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives”
- **Duty to prevent harassment** – FEHA requires take “all reasonable steps necessary to prevent discrimination and harassment from occurring”
- **Types of Harassment**
  - **Verbal harassment** – e.g., epithets, derogatory comments or slurs (or repeated romantic overtures, sexual comments and jokes or prying into one’s personal affairs);
  - **Physical harassment** – e.g., unwanted touching, rubbing against someone, assault and physical interference with movement or work; or
  - **Visual harassment** – e.g., derogatory cartoons, drawings or posters or lewd gestures



# FEHA – SEXUAL HARASSMENT CLAIMS

- **Types of sexual harassment**

- **Quid Pro Quo:** employee's [express or implied] subjection [by a supervisor] to sexual conduct is linked to the grant or denial of job benefits
  - (1) unwelcome sexual advances, conduct or comments (2) by a *supervisor* with immediate or successively higher authority over the employee; (3) based upon sex; (4) employee's reaction to the harassment complaint of *affected tangible aspects* of the employee's compensation, terms, conditions or privileges of employment
  - **Examples:** getting or retaining a job; receiving a favorable performance review or promotion or transfer; or alternatively, loss of job benefits, termination or demotion
  - Vicarious liability/Strict Liability for the employer
- **Hostile Work Environment:** creating a "hostile environment," where the sexual conduct had the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment
  - **Elements:** (1) unwelcome sexual advances; (2) based on sex; and (3) "so severe or pervasive" as to "alter the conditions of the victim's employment and create hostile work environment" . . . **No tangible employment action required!**
  - **Employer liability:** employer knew or should have known of the harassment and didn't take prompt remedial action
  - **Persons whose conduct may create hostile environment:**
    - **Supervisors:** sexual advances, offensive sexual comments or hostile conduct, may create a hostile environment for employees
    - **Coworkers:** sexual conduct or remarks by coworkers
    - **Nonemployees:** harassment of its employees by nonemployees (e.g., the employer's customers or clients), where the employer is aware of the problem and fails to take prompt and appropriate corrective action



# SEXUAL HARASSMENT – EMPLOYER’S POLICIES AND COMPLAINT PROCEDURES

- **Employer’s investigation and response:** prompt action to investigate and respond to the charge, and, if necessary, take remedial action to correct the harassment (temporary and permanent)
- **Why is this important?** (1) the right thing to do and (2) avoidable consequences defense (shows that the employer took effective steps to encourage victims to come forward with complaints of unwelcome sexual conduct, and to respond effectively to their complaints and to preserve confidentiality)





# SEXUAL HARASSMENT – FEHA POSTER AND DFEH SHEET

- **FEHA requires employer**
  - to display a poster on the illegality of sexual harassment in the workplace; and
  - to distribute an information sheet on sexual harassment to all employees
- **In the alternative to the DFEH sheet**, an employer may provide equivalent information to all employees that contains the following information, at a minimum:
  - The illegality of sexual harassment;
  - The definition of sexual harassment under applicable state and federal law;
  - A description of sexual harassment, with examples of proscribed conduct;
  - The employer's internal complaint process available to the employee;
  - The legal remedies and complaint process available through the DFEH;
  - Directions on how to contact the DFEH; and
  - The legal protection against retaliation for opposing sexual harassment or for filing a complaint or otherwise participating in an investigation, hearing or other proceeding regarding a claim of sexual harassment
- **Employer's written policy** to same effect in handbooks and other materials



# SEXUAL HARASSMENT – EMPLOYER’S POLICIES

- **FEHA regulations also provide that employers with five or more employees must develop a written harassment, discrimination and retaliation prevention policy**
- The policy must contain the following:
  - A list of all protected categories under the FEHA (race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status);
  - A statement that the law prohibits unlawful harassment, discrimination and retaliation by supervisors, managers, coworkers and third parties;
  - A description of the complaint process (The process should not require an employee to complain directly to his or her immediate supervisor, but rather must provide the names or titles of others to whom the employee can complain—i.e., human resources, EEO officer, an ombudsperson, a hotline, and/or the EEOC or DFEH. The process must also ensure confidentiality to the extent possible; a timely response to complaints; a timely, fair and thorough investigation by a qualified person; documentation and tracking for reasonable progress; appropriate due process for all involved parties; a reasonable conclusion based on the evidence collected; appropriate options for remedial actions and resolutions; and timely closure.);
  - An instruction to all direct supervisors to report any complaints of violations to a designated company representative, such as human resources, so the company can try to resolve the claim internally;
  - A statement that if, at the end of the investigation, misconduct is found, appropriate remedial measures shall be taken;
  - A clear statement that employees shall not be retaliated against as a result of lodging a complaint or participating in any workplace investigation
- Employers must give employees a copy of the policy in a manner that ensures receipt
- Also, the policy must be translated into every language that is spoken by 10% or more of the workforce



# SEXUAL HARASSMENT – TRAINING

- An employer having **five or more employees (even if all employed in same location or work or reside in California)** shall provide:
  - at least 2 hours of training regarding sexual harassment and abusive conduct prevention to all supervisory employees and
  - 1 hour of training to all nonsupervisory employees
  - six months of their assumption of position (for supervisors) and hire (for nonsupervisory employees)
    - Temporary or season employees – train within 30 calendar days from they begin working or 100 hours of work, whichever occurs first
  - Employees must be retrained once every two years



# SEXUAL HARASSMENT - TRAINING

## Any training must explain:

- The definition of sexual harassment under FEHA;
  - The statutes and case-law prohibiting and preventing sexual harassment;
  - The types of conduct that can be sexual harassment;
  - The remedies available for victims of sexual harassment;
  - Strategies to prevent sexual harassment;
  - Supervisors' obligation to report harassment;
  - Practical examples of harassment;
  - The limited confidentiality of the complaint process;
  - Resources for victims of sexual harassment, including to whom they should report it;
  - How employers must correct harassing behavior;
  - What to do if a supervisor is personally accused of harassment;
  - The elements of an effective anti-harassment policy and how to use it; and
  - "Abusive conduct" under Gov. Code section 12950.1(g)(2)
- **Any training must discuss** harassment based on gender identity, gender expression, and sexual orientation, which shall include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation
  - **Any training must include** questions that assess learning, skill-building activities to assess understanding and application of content, and hypothetical scenarios about harassment with discussion questions



# Arbitration of Sexual Assault and Sexual Harassment Claims

- **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021** (“Act”) signed into law on March 3, 2022
  - the Act amends the Federal Arbitration Act (FAA) to prohibit the enforcement of any **pre-dispute** arbitration agreement or class/collective action waiver relating to sexual assault or sexual harassment disputes brought under federal, tribal, or state law if the alleged victim (or representative of a class/collective action) chooses to file their claim in court
  - the amendment gives alleged victims the choice to pursue these disputes in court regardless of whether they signed an arbitration agreement or waiver (so not *per se* invalid)
  - effective immediately; applies to arbitration agreements and waivers entered into by the employee prior to the effective date
  - agreement and waiver is still enforceable if entered into after the dispute arises
  - any dispute re arbitrability must be resolved by Court not the arbitrator



# NON-DISCLOSURE OF SEXUAL HARASSMENT(or unlawful acts) FACTS IN AGREEMENTS

- **CCP 1001 - Stand Together Against Non-Disclosure (STAND) Act**
  - **prohibits settlement agreements** from including a provision that prevents the disclosure of factual information related to claims of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such an act
- **Government Code § 12964.5 -**
  - unlawful for employer, in exchange for a raise or bonus, or as a condition of employment or continuing employment, to: (1) require employee to sign a release of claim or right under the FEHA, or (2) to require employees to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose **information about unlawful acts in the workplace**
    - **carve-out:** A nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."
  - "information about unlawful acts in the workplace" – include, without limitation, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful
  - an agreement related to that employee's separation from employment – must notify the employee that they have a right to consult an attorney regarding the agreement; provide at least 5 five business days in which to do so