Torrance
Professionals & Supervisors Association
October 2019 News

California's Fair Employment & Housing Act Turns 60!

Last month, California's employment discrimination law – the Fair Employment & Housing Act of 1959 ("FEHA") – officially turned 60. Codified as Government Code §§12900 – 12996, the FEHA passed by the legislature and Governor Pat Brown signed it into law. It took effect September 18, 1959. It is the main state law prohibiting employment discrimination. It broadly applies to both public and private sector employers, even those with fewer than 5 employees.

Conduct Prohibited: FEHA prohibits any harassment or discrimination based on a protected classification, and other forms of unlawful employment discrimination. It prohibits retaliation for opposing or reporting any unlawful employment discrimination or harassment. It also prohibits retaliation for filing a complaint, testifying, or participating in FEHA proceedings.

Protected classifications: The law prohibits employment discrimination based on race or color; religion; national origin or ancestry; physical disability; mental disability or medical condition; marital status; sex or sexual orientation; gender identity or expression; age (with respect to persons over the age of 40); genetic information; military and veteran status; and pregnancy, childbirth, or related medical conditions.

Milestone Achievement for the Civil Rights Movement: FEHA also declares that the "opportunity to seek, obtain, and hold employment without discrimination . . . is hereby recognized as and declared to be a civil right." The law quickly became a model for other

state and federal civil rights laws, at a time when the Civil Rights movement in America was reaching an apex. The main federal law prohibiting employment discrimination – Title VII of the Civil Rights Act of 1964 – was proposed by President Kennedy in June 1963. But, when President Kennedy was assassinated in Dallas on November 22, 1963, President Johnson made it a top priority and helped push it over the finish line and to a successful vote in Congress. President Johnson signed the bill into law at the White House on July 2, 1964, with several prominent civil rights leaders, including Martin Luther King Jr., standing behind him.

Enforcement: The State of California, Department of Fair Employment and Housing ("DFEH") is tasked with enforcing the FEHA's protections. DFEH is the largest state civil rights agency in the country, with 220 fulltime permanent staff and five offices throughout California. The agency investigates FEHA complaints, facilitates mediation, resolves disputes, and enforces the law by prosecuting violations in court. A FEHA complaint can help you recover lost wages and DFEH can require your employer to post notices about the violation, and undergo training, reporting, and compliance procedures. Complaints should be filed within one year of when the discrimination occurred.

DFEH does not have unlimited resources, and, truth be told, doesn't have the capacity to fully investigate every charge of discrimination, harassment or retaliation. Unfortunately, workplace harassment, discrimination, and retaliation are still too prevalent to leave enforcement of FEHA's protections to a single state agency. But if the DFEH does not pursue a violation, private attorneys often will. An attorney may request a "right-to-sue" letter from the DFEH and file a FEHA lawsuit in state court on your behalf. If you're separated from employment in violation of the FEHA, the typical legal remedy is money damages for lost earnings. This can be a substantial sum. FEHA even allows for the private attorney to collect fees and costs from the employer if the employer is found liable.

Both FEHA and Title VII are intended to prevent discrimination, harassment, and retaliation from occurring in the first place. For harassment, the remedy is typically for the harassment to stop. Most, if not all, public agencies have an official Equal Employment Opportunity (EEO) policy. This may be in the personnel rules. There's often an EEO policy clause in the MOU. So, it's best to start with filing an internal EEO complaint or a grievance over the violation, to allow the agency the chance to remedy it and stop future abuses at the earliest possible stage. Don't forget to seek support from your employee organization and professional staff. If you put the agency on notice, and they

still fail to prevent violations, you should consider escalating it to the next step. Ultimately, this may mean filing with DFEH or a civil lawsuit.

Fall 2018 Amendments: The FEHA has been amended many times over its 60-year history, most recently in the wake of the "Me-Too" movement last year, which brought a renewed focus to sexual harassment in the workplace. The recent revisions that took effect earlier this year codified various legal concepts that were developed in the courts. This includes a standard suggested by Justice Ruth Bader Ginsburg in a U.S. Supreme Court Case (*Harris v. Forklift Systems*, 510 U.S. 17 (1993)), that a plaintiff should have to prove that a reasonable person would find that the harassment so altered working conditions as to make it more difficult to do the job. Traditionally, the plaintiff had a higher burden, to show that the harassment was so severe and pervasive that a reasonable person in plaintiff's situation would find that it unreasonably interfered with their work performance. Other changes that took effect in January include:

- A "single incident" of harassment can now be enough to create a question for a jury trial
- Harassment cases are rarely appropriate for summary judgment, a legal procedure used to dismiss cases on an early motion and thereby prevent cases from reaching a jury trial
- A discriminatory remark, even if not made directly in the context of an employment decision (known as a "stray remark"), is relevant circumstantial evidence of discrimination
- The legal standard of what constitutes sexual harassment doesn't vary by workplace. It is irrelevant whether an occupation or job site may have been characterized by a greater frequency of sexually related commentary or conduct in the past.
- Supervisory employees of businesses with five or more, but less than 50, employees must now take 2 hours of sexual harassment training every two years.
- All non-supervisory employees must take 1 hour of sexual harassment training every two years

Summer 2019 Amendments: This summer, Governor Newsom signed into law a few more amendments of the FEHA. This includes SB 188, which prohibits discrimination based on one's natural hair. Known as the CROWN Act (Create a Respectful and Open Workplace for Natural Hair), it prohibits discrimination in employment based on natural hair and hairstyles associated with race, including hairstyles such as afros, braids, locks, and twists.

SB 188 applies to public agency employers. Dress code policies, at least insofar as they prohibit these hairstyles, are no longer enforceable. Considering this legal development, agencies may be proposing changes to their dress code and uniform policies in order to come into compliance. Your Association has the right to meet and confer over any proposed changes, but if the only changes are to comply with the CROWN Act, there's probably not a reason to meet and confer. Contact professional staff if you need help.

Another is SB 778, which Governor Newsom signed into law on August 30, 2019. It's predecessor, SB 1343, took effect in January and required all non-supervisory employees to participate in sexual harassment training for one hour every two years. It also required training of supervisory employees of smaller employers. The initial deadline to complete the training was January 1, 2020. SB 778 extends this deadline to January 1, 2021. SB 778 also clarifies an ambiguity regarding deadlines for those who were previously trained. The DFEH took the position that any employee who completed anti-harassment training in 2018 had to receive it again in 2019 in order to satisfy SB 1343. SB 778 says that employees who were trained in 2018 have until January 1, 2021 to get retrained, and that employees who were trained in 2019 do not need to be trained until two years have passed (sometime in 2021), and then every two years thereafter. Bottom line, you now have more time to complete the required training.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

1.7% - CPI for All Urban Consumers (CPI-U) Nationally

2.6% - CPI-U for the West Region

3.0% - CPI-U for the Los Angeles Area

2.6% - CPI-U for the Riverside Area (from July)

1.4% - CPI-U for San Diego Area (from July)

2.7% - CPI-U for San Francisco Bay Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: A co-worker is telling me that she heard if you retire after 30 years with PERS, it changes your windfall elimination for social security. She is saying that you would get much more social security if you put in a full 30 years. We don't pay into social security and for me, for example, my social security payment would be very minimal even though I have my 40 quarters from prior jobs. I have never heard of the number of years employed here changing anything with social security, but I'm not too well versed with that. Can you please let me know if this is true and how this works?

Answer: In 1983, Congress passed the Windfall Elimination Provision (WEP) to prevent employees who collect pensions not paid through Social Security taxes from getting an undeserved higher Social Security benefit. This law could reduce your Social Security benefit, but it would not impact your PERS benefit. Not all PERS members are impacted by the WEP. You should check your pay stub to see if Social Security taxes are withheld. The question is whether you paid Social Security tax on 30 years of substantial earnings. It's 30 years paying into Social Security, not 30 years paying into PERS. If you have 30 or more years of substantial earnings where you paid Social Security taxes, the WEP probably won't even apply. If you had between 20-30 years of substantial earnings covered by Social Security, the WEP may apply, but at a reduced level. It's a sliding scale. Currently the maximum reduction from the WEP is $463 per month.

If your Social Security benefit will be very minimal, the WEP may cause a larger amount to be withheld from your Social Security checks. But if you don't pay into Social Security currently, then working longer at that agency won't have an effect. Know too that if you choose to take a refund of your PERS contributions in a lump sum, Social Security will still calculate the reduction as if you had received monthly pension payments.

If you believe your Social Security benefits are being reduced incorrectly, and you are unable to resolve the issue at the Social Security field office, you may escalate your case through one of the following methods. Contact the San Francisco Social Security Administration Public Affairs team or call (800) 772-1213 or for TTY users, (800) 325-0778. Contact the California Official State Social

Security Administrator (SSSA) office by email or call (916) 795-0810. The SSSA serves as a liaison with the Social Security Administration to address coverage-related issues and questions.

Question: I just learned that, at some point recently, the City has made a change in the doctor it uses for employee DMV physicals. Well, one of my co-workers was sent to this new doctor and failed his DMV required physicals because the doctor's office said he could not read the last letter on the last line of the eye test chart. He was then sent to the optometrist for an eye exam to try and clear this up. Management never discussed this change with us, nor did they ever provide any notification of the change. Is this a change that requires notification to employees and is it a meet and confer item? Or is the Agency within its right to do such a thing?

Answer: Changes that an Agency makes about who specifically administers the DMV physicals is not subject to meet and confer. But issues with these doctors are not uncommon and can be addressed with management. Management often has the same interest in getting employees through the process efficiently and consistently. It may be that a second opinion is warranted.

But there should not be a change in the standards that are applied unless there is some regulatory change required by the State. If this doctor is applying new or unreasonable standards for the test, document it and demand to meet with HR. Your professional staff can help you make your case.

Question: Management sent me to an all-day training about 20 miles west of our facility. They paid me for my time attending the training, but I think they shorted me on my mileage. Instead of paying me from my house to the training and back to my house, which is what I drove, they reimbursed me for the 20 miles to and from our facility. In other words, they paid me for 40 miles, but I drove closer to 80 miles. There's no contract language on this, but there is a policy that says they must reimburse at the IRS rate and that "the most economical mode and class of transportation reasonably consistent with scheduling needs and cargo space must be used, using the most direct and time-efficient route." Others have told me they've been reimbursed from their home and back. Do I have a grievance?

Answer: If the contract is silent on the issue, and you have a well-established past practice of paying mileage to employees in a similar circumstance from home to the training, then you may have a grievance. The past practice must have been consistently applied and you will have to be able to provide the specific examples of when another staff was paid

to travel from home when that payment was greater than it would've been if they'd gone to the training site from the workplace. Professional staff can help draft and present the grievance.

It is common for Agencies to pay the mileage between where you usually report to work and the location of the training session. The distance from your home to work is considered your daily commute and ordinarily is not calculated. The Agency will say they can't consider where everyone lives and should not have to pay for that difference.

Question: I live in the same City that I work. The City Council is considering a pretty big change in how it provides services. I think it's a terrible decision. I'd like to go to the next Council meeting and protest by submitting a comment card and giving them my 2 minutes of why I think they have their heads screwed on backwards. There's just been so much cronyism with certain Councilmembers and they can't be trusted to look out for the benefit of the residents anymore. I know this to be true because of my job. Is there anything I can't say or does the First Amendment protect my employment because I'm speaking out in a public forum? I need to prepare my remarks in advance, or I will get too carried away. Please advise. Thanks.

Answer: Both you as an individual, and your Association as the representative of the workforce, have a right to express concerns about the impact of services on the public due to reorganization or some other change in how the Agency conducts business. If you do have concerns, it's best for the Association to bring these to the Agency's attention. The Association can speak to both the impact on providing quality services and the impact the change may have on your co-workers (e.g., morale, workload, etc.). Having the Association document these concerns could be helpful down the road as issues emerge due to any changes.

If you do go to the Council meeting, you should do this carefully. You should stick to the policy issues, not the individuals involved. For example, they are going to reduce library hours and you want to highlight the loss of the programs to the public. Keep your comments factual based on what you can prove to be true, and not argumentative. Avoid getting entangled in the Council's politics.

The Supreme Court has applied the "Pickering-Connick" test when reviewing the balance between a public employee's free speech versus the employer's ability to govern. The test takes its name from two public employee free speech decisions and asks if the employee spoke on matters of public concern and if the free speech rights of the government employee outweighs the Agency's interest in a disruption-free workplace.

Contact professional staff if you'd like help drafting your comments in advance.

Question: Management hired an outside investigator and I've been given notice that I'm the subject of the investigation. I believe this concerns an off-duty relationship that I have with one of my co-workers. I'm guessing Management found out about it and now they want to find out all the details about my personal life including this affair, especially because my co-worker is married. I know that I have the right to a union representative, but I want to know in advance what the investigator can ask me. Can I be forced to answer questions about my personal life, or my off-duty relationship with this co-worker? What if the questions concern possible criminal conduct? Can I refuse to answer? What are my rights during the interview? Can I demand that they provide the questions to me in advance so that I can properly object?

Answer: Unfortunately, you can't refuse to answer questions about your outside personal relations IF it is tied to an accusation about work misconduct. For example, if an employee is accused of harassing an employee on the job because they have broken off an affair, and that conduct is also occurring off the job, it could be relevant to establishing the facts for the case.

If you feel the Agency is overreaching in its questions, you may object to the nature of the questions. But if you are directed to answer, your objections notwithstanding, failing to answer a question may put you in jeopardy of being insubordinate. If the questions are clearly unrelated to any workplace issue, you may be within your rights to not answer, but contact professional staff before you refuse.

If the questions could put you in criminal jeopardy, the Agency can read you a "Garrity statement" (also known as a "Lybarger admonishment) that says you are being compelled to answer the questions and so any self-incriminating statement cannot be used against you in any criminal proceedings, with some small but important exceptions. You may still choose not to answer the question, but you would then be subject to discipline for insubordination.

During the interview, you have a right to know what the general line of questioning will be, and whether you are the subject of an allegation of possible violation of the Agency's policies. You don't have a right to know the specific questions ahead of time. You have a right to record the interview, but California law prohibits you from doing so secretly. You may take a break when needed, ask that questions be clarified, and have the interview conducted in a professional manner. You should not be subject to any threats or verbal abuse. You have a right to union representation, who can help protect your rights!

2019 Survey Reveals Most Popular Employee Benefits

Did You Know?

The Society for Human Resource Management (SHRM) recently released the results of their Employee Benefits Study, conducted in April 2019, which revealed that leave benefits and flexible working arrangements remain among the most popular workplace benefits. Almost all organizations surveyed provide paid vacation, sick leave, or paid time off benefits, and about 20% of employers reported offering paid or unpaid leave benefits to meet the needs of caregiving employees in addition to what is mandated under state and federal law. About one-third of employers currently provide paid maternity or paternity leave benefits. They also report that flexible work arrangements continue to be very popular with employees. Organizations reported offering ad hoc telecommuting (69%), full time telecommuting (27%), and flextime during core business hours (57%). The survey found that employers offering ad hoc telecommuting is up 13% since 2015.

The biggest increases to benefits (20%) are in the health and wellness benefits categories. Other notable increases are student loan repayment (4%), standing desks (7%), and part-time telecommuting (5%). Many organizations reported offering various types of supplemental benefits, such as accidental death and dismemberment insurance (83%), long term disability insurance (71%), short term disability insurance (61%), and accident insurance (27%). Almost all employers reported offering some type of retirement plan, with many employers now expanding services to include retirement investment advice (57%), nonretirement financial advice (36%), and credit counseling services (18%). A majority (56%) of employers offered tuition assistance and over a quarter (26%) offer paid time off for volunteer work. Expanded wellness benefits include quiet meditation rooms (21%) and on-ramping programs for parents returning to work from parental leave (12%).

In addition to the survey, SHRM recently launched an initiative to improve management-labor communication. The initiative is focused on how to engage in constructive conversations about the biggest issues impacting workplace culture. According to SHRM's research, one in five workers has left or wanted to leave their job due to their workplace culture. 65% of workers say that managers contribute the most to poor morale, though 38% of managers say that creating the right culture is difficult. SHRM cites four areas that can benefit the most from better communication and sharing ideas between management and labor. These are: (1) handling workplace harassment, (2) addressing skills gaps, (3) improving inclusion, and (4) ensuring equity in the workplace.