

# Employment Law Update

## What Every California Public Entity Needs to Know About Employment Related Claims and the Department of Fair Employment & Housing

The Department of Fair Employment & Housing (DFEH) receives approximately 23,000 complaints annually from members of the public who allege that they have been the victim of civil rights violations. Over half of the claims are requests for an immediate “Right to Sue” in employment cases. In these cases, the complainants bypass DFEH’s investigation process, file a complaint with the Department and receive a Right to Sue letter from DFEH, which is required for a complainant to file a case in civil court alleging violations of the employment provisions of the Fair Employment & Housing Act (FEHA). The remaining claims are investigated by DFEH.

The FEHA (Gov. Code, § 12900 et seq.) prohibits workplace discrimination and harassment on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex (including pregnancy, childbirth, or related medical conditions), gender, gender identity, gender expression, age, sexual orientation, and military and veteran status, or because another person perceives the employee to have one or more of these characteristics.

Included in the FEHA is the California Family Rights Act (CFRA), which requires employers of 50 or more employees to provide protected leave of up to 12 work weeks in a 12-month period to eligible employees to care for their own serious health



condition or that of an eligible family member. Included as well is California’s Pregnancy Disability Leave Act (PDLA), which requires an employer to provide employees disabled by pregnancy, childbirth, or a related medical condition leave of up to four months and the right to return to work.

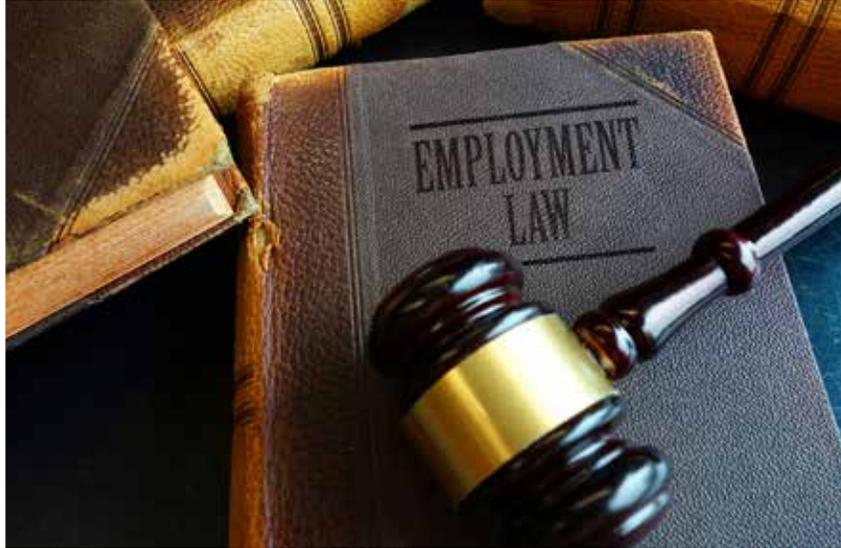
To initiate the investigation process, a member of the public files an initial inquiry with DFEH. This can be done by calling the DFEH Communications Center, submitting a paper Pre-Complaint Inquiry (PCI), or submitting a PCI through the DFEH online portal. The PCI is assigned to a DFEH investigator, who schedules and conducts an intake interview with the complainant and determines whether

DFEH has jurisdiction to accept the complaint. If the complaint is accepted, a written complaint is drafted by the investigator and mailed to the complainant for signature.

Once a signed complaint is received by DFEH, pursuant to Work-Sharing Agreements with the United States Equal Employment Opportunity Commission (EEOC) and the United States Department of Housing and Urban Development (HUD), the investigator determines if the complaint meets the criteria for federal dual-filing status. If so, the complaint is also assigned a federal identification number. Complaints originally filed with DFEH that are dual-filed with EEOC or HUD are investigated by DFEH. DFEH

receives funding from EEOC and HUD for handling these cases.

Complaints are served on the respondent by certified mail. The assigned consultant investigates the case by interviewing parties and witnesses and reviewing supporting documentation. The investigator may attempt to resolve the case with the parties, refer the case to the Dispute Resolution



Division (DRD) for possible mediation, or refer the case to the Legal Division for possible prosecution. If the parties reach an agreement and execute a settlement, the case is closed. If the investigator determines there is insufficient evidence to prove a violation of the law, the case is closed. If the Investigator determines the case is potentially meritorious and it is not resolved, the case is transferred to the Legal Division. When DFEH finds a complaint has merit, the FEHA requires in most circumstances that DFEH file a civil complaint within 365 days from the date the complaint was filed. Before a civil complaint can be filed, the law requires that the parties be referred to mandatory mediation conducted by DRD.

*SDRMA provides its participating members with **Employment Practices Coverage** which includes: **Sexual Harassment Incident** means: any actual or alleged negligent or intentional act, error or omission, amounting to or resulting in unwelcome sexual advances, requests*

for sexual favors or other conduct of a sexual nature actually or allegedly perpetrated upon a person by another person, or persons, acting in concert, which causes physical and/or mental injuries, where:

- A. The submission to or rejection of such conduct is made either explicitly or implicitly a condition of a person's employment, or a basis for employment decisions affecting a person; or
- B. The conduct has the purpose of, or effect of interfering with a person's work performance or creating an intimidating, hostile or offensive work environment.

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**Wrongful Employment Practice**

means any act resulting in Damages to:

- A. Any person arising out of any:
  1. Refusal to employ that person;
  2. Termination of that person’s employment, either actual or constructive; or
  3. Employment-related practices, acts or omissions such as coercion, demotion, evaluation, reassignment, discipline, retaliation, defamation, harassment, humiliation or discrimination directed at that person;
- B. The spouse, child, parent, brother or sister of that person as a consequence of loss to the person at whom any of the employment-related practices described in paragraph 1, 2, 3 above is directed.

It is further agreed that **Wrongful Employment Practice** means:

- A. Any action relating to a past, present, or prospective Employee of the Member for or arising out of any actual or alleged wrongful dismissal, discharge or termination, either actual or constructive, of employment, employment related misrepresentation, wrongful

| 2016 EMPLOYMENT COMPLAINTS FILED BY BASIS            |       |      |
|--|-------|------|
| Age - 40 or Over                                     | 868   | 11%  |
| Ancestry   | 140   | 2%   |
| Association with a Member of a Protected Class       | 110   | 1%   |
| Color  | 291   | 4%   |
| Disability - Mental and Physical                     | 1,276 | 16%  |
| Family Care or Medical Leave (CFRA)                  | 342   | 4%   |
| Genetic Information                                  | 15    | 0%   |
| Marital Status                                       | 63    | 1%   |
| Medical Condition -Cancer or Genetic Characteristics | 229   | 3%   |
| Military or Veteran Status                           | 33    | 0%   |
| National Origin                                      | 292   | 4%   |
| Race   | 744   | 9%   |
| Religion   | 141   | 2%   |
| Retaliation  | 1,668 | 21%  |
| Sex – Gender   | 826   | 10%  |
| Sex – Gender Identity or Gender Expression           | 55    | 1%   |
| Sex – Pregnancy                                      | 208   | 3%   |
| Sexual Harassment                                    | 554   | 7%   |
| Sexual Orientation                                   | 136   | 2%   |
| Total Employment Basis                               | 8021  | 100% |

discipline, failure to grant tenure or negligent employee evaluation; sexual or workplace harassment of any kind, including, but not limited to, the alleged operation or maintenance of a harassing workplace environment, unlawful discrimination, whether direct, indirect, intentional or unintentional, failure to provide adequate employee policies and procedures;

or abusive, hostile, offensive or other illegitimate conduct, including verbal abuse, derogatory remarks, insults, epitaphs, or other verbal or physical conduct which is threatening, intimidating or humiliating or amounts to the gratuitous sabotage or undermining of a person’s work performance.

- B. Any action brought under state, local, or federal law, whether common or statutory, including the following laws as amended as well as any regulation promulgated there under;
  1. Americans with Disabilities Act of 1992(ADA);
  2. Civil Rights Act of 1991;
  3. Age Discrimination in Employment Act of 1967 (ADEA), including the Older Workers Benefit Protection Act of 1990;
  4. Title VII of the Civil Rights Law of 1964, as amended (1993), including the Pregnancy Discrimination Act of 1978;
  5. Civil Rights Act of 1866; and
  6. Fifth and Fourteenth amendments of the U.S. Constitution.

For further information, please contact Dennis Timoney, SDRMA’s Chief Risk Officer at dtimoney@sdrma.org or 800.537.7790.



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