

CELEBRATING



NEW YEAR. NEW LAWS

An Empty Seat...and Reflections on the Future of Workplace Discrimination Law

Glen E. Kraemer, Esq.
Hirschfeld Kraemer LLP
233 Wilshire Boulevard, Suite 600
Santa Monica, CA 90401
T: (310) 255-1800 ♦ E: gk@HKemploymentlaw.com

An Uncertain US Supreme Court – and What it Means for California Employers



Is this good news or bad for you as a CA HR Professional?



Does it even matter!?

POST-ELECTION POLITICAL MAP OF THE UNITED STATES



California Today: With Trump's Rise, a Return to the 'Rebel State', NY Times, Nov. 9, 2016:

- “As the nation delivered Donald J. Trump a stunning victory, **California went the other direction**, embracing a progressive agenda.”

California Today: Democratic Dominance in Sacramento, NY Times, Nov. 29, 2016

- “The Democrats’ victory does highlight California’s growing role as the **progressive counterpoint** to President-elect Donald J. Trump and the Republicans...“the supermajority achievement underscores the obvious: the Republicans are pretty much irrelevant to the policy-making process in Sacramento.”

2017 EEO Law Update Agenda: Time To Sharpen Your Skills

CONTINUED MOMENTUM ON THE PAY EQUITY FRONT

LGBT WORKPLACE ISSUES: A STILL - EVOLVING LANDSCAPE

HR AS “MIXOLOGIST”: THE POTENT WORKPLACE COCKTAIL OF
RACE, NAT’L ORIGIN, RELIGION AND FEAR

TRENDS IN DISABILITY LAW

STEALTHY DEVELOPMENTS...INVESTIGATION AND
RETALIATION CONSIDERATIONS

THINK YOU KNOW HARASSMENT PREVENTION TRAINING –
THINK AGAIN!

Continued Momentum on the Pay Equity Front

SB 358 (eff. as of January 2016): California's FAIR PAY ACT significantly amended CA Labor Code section 1197.5

January 1, 2017 – two new amendments went into effect:

- AB 1063: PROHIBITING WAGE INEQUALITY BASED ON RACE OR ETHNICITY FOR SUBSTANTIALLY SIMILAR WORK
- AB 1676: EMPLOYEE'S PRIOR SALARY CANNOT, BY ITSELF, JUSTIFY COMPENSATION DISPARITY

Quick Reminder Re California Fair Pay Act

- Prohibits employers from paying members of opposite sex less for “substantially similar” [not “equal”] work.
 - Based on composite of skill, effort & responsibility.
 - Similar working conditions.
 - Need not be at same location/facility.
- Exceptions:
 - Seniority system [same];
 - Merit system [same];
 - Compensation system that measures earnings by production [same]; &
 - *Bona fide factor other than sex [revised]*.
- Employees have legal right to discuss compensation.
- Recordkeeping – pay & performance for at least 3 years.
- Creates a private right of action for retaliation and discrimination.

California Fair Pay Act (SB 358) – The “Bona Fide Factor” Exception

- Bona Fide Factor Other than Sex Exception
 - Must be consistent with business necessity, such as difference in training, education or experience that is job-related.
 - Business necessity = overriding legitimate business purpose *and* factor effectively fulfills the purpose.
 - Business necessity does not apply if an alternative employment serves the same purpose without producing a wage differential.
 - Factor must be applied reasonably.
 - The factor(s) must account for entire wage differential.
 - Burden on employer to prove.

- **Salary History by Itself not a Bona Fide Factor Justifying Gender-Based Wage Differential (AB 1676)** - Amends Fair Pay Act to prohibit employers from considering prior salary to justify any disparity in compensation.
- Early version of the bill would have barred employers from asking job applicants about prior salary, and required private employers to provide an applicant with the pay scale for a position upon request. A similar version of this bill was vetoed by Gov. Brown last year.

New Pay Equity Laws Expanding Fair Pay Act (SB 1063)

Bill further expands last year's Fair Pay Act - strengthening prohibitions on gender-based pay differentials by adding a new Labor Code provision precluding wage differentials based on race or ethnicity.

While Obama administration pay equity momentum may be halted, California intends to eradicate unfair wage disparities

- Conduct a privileged wage audit/review of employee pay equity:
 - Compare “substantially similar” work, across all locations.
 - ID discrepancies not justified by differences in training/education, responsibility, skill.
- Update job descriptions to accurately reflect actual duties.
- Update policies, handbooks & training to reflect commitment to equal pay and eliminate prohibitions on discussing pay.
- Train managers re rights to discuss pay and need for nondiscriminatory & justifiable compensation decisions.
- Consider performing some or all of the foregoing under the shield of attorney work-product.
- Retain compensation and performance records for 3+ years.

LGBT Issues In Workplace: An Evolving Legal Landscape

THE RIGHTS OF TRANSGENDER PEOPLE CONTINUES TO BE FOCUS OF FEDERAL AND STATE LEGISLATION AND JURISPRUDENCE

- US Supreme Ct. will determine whether “sex” discrimination prohibition covers gender identity in Title IX case
 - ✓ *Gloucester Cty. School Bd. v. G.G.*, U.S. Supreme Ct., #16-273
 - ✓ Cf. w/N. Carolina law that use of public bathrooms must correspond to birth certificate gender (Charlotte pro-LGBT ordinance followed by state-wide ban)

DFEH ISSUED NEW GUIDANCE RE TRANSGENDER EMPLOYEE RIGHTS

- ✓ What can employers ask transgender applicants and employees
- ✓ Implementation of dress code and grooming standards
- ✓ Addressing the restroom issues – access shall be allowed corresponding to gender identity

AND RE SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII:

En banc 7TH Circ. appears poised to be first federal circuit ct of appeals to rule Title VII includes ban on sexual orientation

- ✓ Almost Certainly Will Go To Supreme Ct.
- ✓ Creates further momentum but CA FEHA already prohibits

- New guidance, but no new law created: however, articulates compliance standards that CA employers will be held to
- In line with fed OSHA standards re best practices concerning restroom access
- Improper inquiries enumerated relating to body, plans to have gender reassignment surgery
- Dress codes must be enforced in nondiscriminatory manner as to both transgender and nontransgender females/males
- If possible, provide access to unisex single stall bathroom, but any employee may use restroom or locker that corresponds to their gender identity

HR As “Mixologist”: The Potent Workplace Cocktail Of Race, Religion, National Origin – And Fear

“Anti-Muslim incidents jumped 67% in 2015, according to newly released FBI hate crime statistics.”

- “257 reported bias crimes against Muslims last year (2015), compared with 154 in 2014.”

Will this translate into workplace strife for CA employers?

YES.

- ✓ Council on American-Islamic Relations (CAIR-California): 2016 Report shows Anti-Muslim bias incidents jumped more than 50%
- ✓ “*Threatening Letters Are Sent to Mosques,*” November 27, 2016, Los Angeles Times

Religious Accommodation Issues Still A Challenge for Employers

Nov. 2016: EEOC files lawsuit against Akebono Brake Corporation alleging Title VII violation for refusal to hire violated federal law when it refused to hire a temporary laborer because of her religion

- Applicant is observant member of a Pentecostal faith, could not wear pants b/c she is a woman – commanded to wear a dress
- Akebono maintained a dress code policy requiring employees to wear pants while at Akebono's facility. Ultimately, Akebono directed the temp agency not to hire Burnett because of her religious belief. Acc'd to EEOC, Akebono did not consider any potential religious accommodations
 - ✓ Allegedly no interactive process
 - ✓ No showing of undue hardship

“Immigration-Related Practices” Protections Expanded (SB 1001 – Eff. 1/1/17)

- New CA Labor Code section 1019.1 strengthens prohibition on “unfair immigration-related practices”
 - ✓ Employer cannot request more or different documents than req’d under federal law
 - ✓ Cannot refuse to accept documents that reasonably appear to be genuine
 - ✓ Cannot refuse to honor work authorization based on a specific status or term of status
 - ✓ Cannot reinvestigate or reverify an incumbent employee’s authorization to work

“Fair Chance Initiative for Hiring” – signed 12/9/16, eff. 1/22/17

- ERs w/10 ees banned from pre-offer criminal history inquiries
 - Located or doing business in City of LA
 - Covers FT, PT, contractor, contingent worker, temp
- Broad prohibitions before conditional offer is made:
 - Asking on application about criminal history
 - Asking about criminal history during job interview
 - Internet search, or running background
- “Fair Chance Process” following post-offer criminal inquiry:
 - “Written assessment” linking specific criminal history, risks inherent in duties; consider EEOC’s individualized assessment factors
 - Provide written notice of planned action, copy of the assessment, and appeal opportunity
- Exceptions: job req’s use of gun, or background legally req’d

EEOC's 8 Assessment Factors for Criminal Backgrounds

1. The facts or circumstances surrounding the offense or conduct;
2. The number of offenses for which the individual was convicted;
3. Older age at the time of conviction, or release from prison;
4. Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
5. The length and consistency of employment history before and after the offense or conduct;
6. Rehabilitation efforts, e.g., education/training;
7. Employment or character references and any other information regarding fitness for the particular position; and
8. Whether the individual is bonded under a federal, state, or local bonding program.

Hargett v. Fla. Atlantic University Bd. of Trustees, USDC, S.D.
Florida, Nov. 8, 2016

- Hargett sought less stressful environment, end to hostile confrontations with manager as an accommodation under ADA
 - ✓ Stress brought on epileptic seizures
 - ✓ Accommodation requested calm, fair, non-confrontational treatment
- Ct. held that “specific stressors...may in some cases be legitimate targets of accommodation, an employee cannot immunize herself from stress and criticism in general.”
- **CA-specific note: Do not dispense with interactive process even in the face of this type of request**
 - ✓ Failure to engage is independent ground for violation of FEHA; might be a brief back and forth – but have it!

Trends In Disability Law: *Accommodation* of Employees Associated w/Disabled Person

Castro-Ramirez v. Dependable Highway Express, Cal.Ct.App.2016

- Whether FEHA req's an employer to provide accommodation to employee who is associated with a disabled individual?
- Castro-Ramirez argued a motivating factor in his termination was his inability to work assigned shift because he needed to be home to administer son's dialysis
- August 2016 - on rehearing Ct. backed away from deciding issue, but "suggested" FEHA may reasonably be interpreted to require such accommodation for association with a disabled person
- Nov. 30 – Cal. Sup. Ct. denies review petition: For now, arguably employers now required to reasonably accommodate *non-disabled* employees who are relatives of disabled person
 - Not just prohibition against associational discrimination

Highlights From May 2016 EEOC Resource Document Related To Disability Leave

Attempts to clarify leave as an accommodation under the ADA

- Equal access to leave under employer policies
- Leave as an accommodation
 - ✓ Employer must consider providing unpaid as a reasonable accommodation so long as it does not create an undue hardship; this is true even when:
 - employer does not offer leave as an employee benefit
 - employee is ineligible for leave under employer's policy
 - employee has exhausted the leave the employer does provides as a benefit (including leave exhausted under a workers' compensation program or FMLA)

2016 EEOC Guidance Also Addresses “Maximum Leave” & “100% Healed” Policies

- Employers allowed to have maximum leave policies but may have to grant additional leave as a reasonable accommodation unless the employer can show undue hardship
 - ✓ Employees with disabilities are not exempt from these “no fault” leave policies, but policies may have to be modified as a reasonable accommodation for absences related to a disability
- An employer will violate the ADA if it requires disabled employee to have no medical restrictions -- be "100%" healed or recovered - if the employee can perform her job with or without reasonable accommodation unless the employer can show providing needed accommodations would cause undue hardship.

Discrimination Protections: FEHA Regulations Concerning Investigations and Retaliation

Effective April 1, 2016, California employers must have a written:

- 1) Discrimination, harassment and retaliation policy
- 2) Investigation policy

Discrimination Protections: FEHA's Investigation Policy Requirements

- Investigation procedures, which must include a fair, timely, and thorough investigation that provides all parties appropriate due process
- Remedial measures
- Company representatives designated to receive complaints
- Confidentiality
- Protections against retaliation
- File complaints with the DFEH and/or the EEOC

Until past year, request for accommodation for religious practice or disability by itself was not “protected activity” in context of retaliation claim

- FEHA now expressly prohibits employers from retaliating against employees for requesting an accommodation, whether it is granted or not.
- This change brings the FEHA in line with federal law

“Protected Activity”

- 1) Participating in an EEO process; or
- 2) Reasonably opposing conduct that is unlawful under Title VII, ADEA, ADA or other EEO law.

“Protected Activity” includes:

- Informal reports to internal investigators;
- *Reports of behavior that does not yet rise to the level of harassment; and*
- Reports of behavior that the EEOC views as unlawful, even if courts disagree.

“Retaliation” includes any action that might *deter* a reasonable person from engaging in protected activity, such as:

- Work-related warnings or reprimands;
- Negative evaluations;
- Change in work conditions; and
- Actions against other employees, such as family or close friends.

2017

PIHRA LEGAL UPDATE

NEW YEAR. NEW LAWS

CONCLUDING THOUGHTS REGARDING HARASSMENT PREVENTION TRAINING

(pssst....you've got it all
*wrong...**)

*according to the EEOC