Protecting Against Employment Discrimination Claims for Owners, Contractors & Construction Managers

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Discrimination
Discrimination Claims

- Costly to Defend
- **Sensitive/Complicated Issues**
- Increased Liability Exposure
- Impact on Overall Business Operations
Proving Discrimination

1) Prima Facie Claim
   - Protected Class
   - Adverse Employment Action
   - Causal Connection

2) Legitimate Non-Discriminatory Business Reason for Adverse Employment Action

3) Pretext
Federal Law

- The Equal Pay Act of 1963 (“EPA”)
- Title VII of the Civil Rights Act of 1964 (“Title VII”)
- The Age Discrimination in Employment Act of 1967 (“ADEA”)
- Rehabilitation Act of 1973
- Pregnancy Discrimination Act of 1978
- The Americans with Disabilities Act of 1990 (“ADA”)
- Civil Rights Act of 1991
- The Family Medical Leave Act of 1993 (“FMLA”)
- The Genetic Information Non-Discrimination Act of 2008 (“GINA”)
- Lilly Ledbetter Fair Pay Act of 2009
- Civil Rights Act of 1991
What are “Protected Classes”?

- Race / Color / National Origin
- Religious Creed
- Sex
- Age (over 40)
- Disability
- Genetic Information
- Sexual Orientation / Gender Identity
- Gender
- Pregnancy / Marital Status
EEOC LGBT Protections

• EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.

• Examples of Claims:
  – Failing to hire an applicant because she is a transgender woman,
  – Firing an employee because he is planning or has made a gender transition,
  – Denying an employee equal access to a common restroom corresponding to the employee’s gender identity, or
  – Harassing an employee because of gender transition, such as failing to use the new name that the employee now identifies with.

• FEHA – Expressly prohibits discrimination on basis of sexual orientation and gender identity.
Brome v. California Highway Patrol (2020)

• **FACTS**
  
  – Brome sued the CHP after resigning as a law enforcement officer, claiming he had been subjected to harassment and discrimination because of his sexual orientation.

  – Brome began to suffer from anxiety and stress on the job and became suicidal before beginning a medical leave of absence and filing a workers’ compensation claim based upon work-related stress in 2015.

  – After his workers’ compensation claim was resolved in his favor, Brome took industrial disability retirement and ended his employment with the CHP in February 2016.

  – Brome filed suit in September 2016 alleging discrimination and harassment based on his sexual orientation and constructive termination.
• **THE LAW**
  - Under the FEHA at the time of the lawsuit, an employee’s DFEH complaint must have been filed within one year of the alleged discriminatory or harassing conduct.

• **ON APPEAL**
  - The CHP sought to dismiss the lawsuit as untimely.
  - The CHP argued that Brome could only sue based on acts occurring on or after September 2015 (exactly one year before he filed his FEHA complaint).
ON APPEAL

The filing of his workers’ compensation claim could equitably toll the one-year deadline for filing his discrimination claim with the Department of FEHA to the extent the workers’ compensation claim put the CHP on notice of the potential discrimination claim.

NOTE: Effective January 1, 2020, the statute of limitations to file a DFEH claim has been extended from 1 to 3 years.
The ADEA - *The Basics*

- The ADEA and FEHApresents discrimination on the basis of age against any individual employee over the age of 40.
- Prima Facie Claim simply requires that the employee be over the age of 40 and suffer an adverse employment action.
Discrimination
Disparate-Treatment / Age Discrimination

• EEOC v. Montrose Memorial Hospital, Inc. (2018)
  – Montrose terminated or forced to resign 29 employees, aged 40 and older
  – Longtime employees, many with 10 to 20 or more years of work history at hospital, were fired for performance deficiencies for which younger employees were treated more leniently
  – EEOC suit alleged that hospital managers made ageist comments, including that younger nurses could "dance around the older nurses" and that they preferred younger and "fresher" nurses
  – Claim settled for $400,000 and requirement for training and revision and distribution of anti-discrimination policy and continued court jurisdiction for three years
The ADA - The Basics

- The ADA prohibits discrimination in the workplace against employees suffering from a physical or mental impairment which substantially limits one of more major life activities.
- The ADA prohibits discrimination in the workplace against employee “regarded as” or perceived as disabled.
- Applies to employers engaged in an industry affecting commerce with 15 or more employees working on each work day in 20 or more calendar weeks.

NOTE” FEHA is 5 or more employees
Interactive Process — Further Legal Requirements

- Employer’s obligation to engage in the interactive process begins when a request for a reasonable accommodation is made to:
  - Employee’s supervisor;
  - A manager or supervisor;
  - An EEO officer; or
  - An office designated by the employer to handle the reasonable accommodation process.

- Or when an employer determines that an employee is not capable of requesting an accommodation.
What are Accommodations?

- *Reasonable* accommodations entail the removal of workplace barriers to allow an individual with a disability to perform the essential functions of a job.

- Categories of accommodations include:
  - Changes to the job application process
  - Modifications to the work environment
  - Changes that allow an individual with a disability to enjoy equal benefits and privileges of employment

- Interactive Process is Vital to Good Faith Process
Doe v. Department of Corrections and Rehabilitation (2019)

FACTS

• John Doe, who worked as a psychologist at Ironwood State Prison, alleged discrimination, harassment and retaliation based upon a disability.

• Doe also alleged that the employer violated FEHA in that it failed to engage in the interactive process and failed to accommodate his two alleged disabilities (asthma and dyslexia) by not relocating him to a “cleaner and quieter office” and provide him with computer equipment he had requested.

• In support of his requests, Doe submitted medical notes from his physician, which indicated that Doe had a “learning disability,” a “chronic work-related medical condition” and a “physical disability” that made him “easily distracted” and disorganized when under stress.
Doe v. Department of Corrections and Rehabilitation (2019)

FACTS

• CDCR did not accommodate Doe’s requests, and after taking three paid medical leaves of absences, Doe submitted his resignation and then filed suit.

• Doe alleged CDCR subjected him to adverse employment actions by (i) criticizing his work performance, (ii) ordering a wellness check when he was out sick, (iii) suspecting him of bringing his personal cell phone into work in violation of work policy, (iv) assigning him to a primary crisis position on the same day as a union meeting, and (v) forcing him to take medical leave when he did not receive his requested accommodations.
Doe v. Department of Corrections and Rehabilitation (2019)

THE LAW

• To prove discrimination and retaliation, a plaintiff must prove that they were subjected to an adverse employment action, which is an action or a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of plaintiff’s employment.

• To prove harassment, a plaintiff must prove that they were subjected to harassing conduct that was severe or pervasive to make the harassment hostile.

ON APPEAL

• The trial court granted summary judgment to the employer, and the Court of Appeal affirmed.
Doe v. Department of Corrections and Rehabilitation (2019)

ON APPEAL

• The Court held that the discrimination and retaliation claims failed because criticizing his work during an “interrogation-like meeting” and engaging in other “relatively minor conduct” did not constitute an adverse employment actions to satisfy the requirements of FEHA.

• Similarly, the Court held there was no evidence of conduct that rose to the level of actionable harassment: “Workplaces can be stressful and relationships between supervisors and their subordinates can often be contentious. But FEHA was not designed to make workplaces more collegial.”
Doe v. Department of Corrections and Rehabilitation (2019)

ON APPEAL

• Finally, the Court rejected Doe’s claim that the employer had failed to engage in the interactive process or accommodate an alleged disability because the doctors’ notes that Doe submitted were not sufficient to place the employer on notice that Doe suffered from a disability.

• Doe’s medical notes indicated that he had a “chronic work-related medical condition” and “physical disability,” but did not state that Doe had asthma or dyslexia.

• Further, the medical notes failed to describe the extent of limitations his disability caused, which rendered CDCR unable to determine whether it could reasonably accommodate Doe.
Equal Pay Act
### Equality in Pay, Benefits, and Terms/Conditions of Employment

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<tr>
<th>Equal Pay Act</th>
<th>Title VII</th>
<th>Lilly Ledbetter Act</th>
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<td>- Requires equal pay to men/women and to individuals of all races/national origin who perform jobs requiring equal skill, effort, and responsibility and are performed under similar working conditions in same establishment</td>
<td>- Prohibits compensation discrimination based on sex (as well as race, color, religion, national origin, age, and disability)</td>
<td>- Establishes that the 180-day statute of limitations for filing equal-pay lawsuits resets with each new paycheck affected by discriminatory action</td>
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FACTS

• Rizo, a female math teacher, brought a claim under the Equal Pay Act ("EPA") against the Fresno County Superintendent of Schools for paying her substantially less than her male counterparts.

• The school district did not dispute that she was paid less and asserted that it determined her salary based on her past salary under an objective formula it had used for many years.

• Thus, the school district argued its actions fell under one of the EPA’s affirmative defenses – that the pay disparity was due to “any other factor other than sex.”
THE LAW

- Under the EPA, an employee must first prove the receipt of different wages for equal work because of sex. The burden then shifts to the employer to show the wage disparity falls under one of following exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a factor other than sex.

ON APPEAL

- The Ninth Circuit determined that the affirmative defense of “any other factor other than sex” was limited to job-related factors only.
ON APPEAL

• The Court held that an employee’s prior pay is not job-related, and not a factor other than sex for EPA purposes.

• The court concluded that “any other factor other than sex” is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.

• Because prior pay may carry with it the effects of sex-based pay discrimination, an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay determination.
Pregnancy Discrimination and Related Accommodation Issues

• EEOC Enforcement Guidance on Pregnancy Discrimination (2014)
  – Described when employers’ actions may constitute unlawful discrimination on basis of pregnancy, childbirth, and/or related medical conditions in violation of Title VII, as amended by PDA
  – Clarified obligation of employers under PDA to provide pregnant workers equal access to employment benefits
  – Opined that PDA requires employers to treat women affected by pregnancy or related medical conditions the same way as non-pregnant applicants or employees of similar ability/inability to work
Anatomy of a Retaliation Claim

• Protected Activity
• Adverse Employment Action
• Causal Connection

- Title VII of Civil Rights Act of 1964
- Americans with Disability Act
- Age Discrimination in Employment Act
- Family Medical Leave Act
- Fair Labor Standards Act
State Laws that Prohibit Retaliation

- Government Code §12940(h)
- Labor Code § 1102.5
- Government Code § 8547
- Labor Code § 98.6
Protected Activities

When the employee has exercised a legal right or privilege

• Testifying on behalf of an employee who filed a claim with the DFEH/EEOC;
• Reporting harassment/retaliation/discrimination;
• Filing a workers’ compensation claim.

When the employee has satisfied a legal obligation

• Seeking to enforce a state law (whistleblowing);
• Participating in union activities;
• Reporting to military duty.

When the employee has opposed the employer’s unlawful practice

• Reporting safety violations in the workplace;
• Refusing to work under unlawful working conditions;
• Refusing to commit a criminal act.
Health & Safety Complaints & Retaliation

- OSHA is responsible for enforcing a wide variety of anti-retaliation provisions under 23 separate whistleblower statutes.
- Complaints filed within 30 days of adverse action.
- Lower causation standard—the “contributing factor” standard—may apply in some circumstances.
- Good faith basis for making the allegation.
- Federal & state laws apply with various remedies.
Labor Code § 1102.5 Amendment

- AB1947 amends §1102.5 to provide that the “court is authorized to award reasonable attorney’s fees to a plaintiff who brings a successful action for a violation of these [1102.5] provisions.”
- Effective January 1, 2021
Practical Considerations

- Encourage employees to report health and safety concerns.
- Ensure multiple avenues to reporting.
- Caution against termination of employees that were disciplined or terminated because they raised or escalated complaints.
- If independent reason for action, ensure those reasons are properly documented and consistent with company policies and procedures.
Prophylactic Measures

• Obvious – don’t terminate an employee for complaining about perceived violation of law or health and safety issues

• Good time to review organizational structures and reporting mechanisms for employees to express concerns
  – Consider a third party to allow for anonymity

• Remind supervisors and managers to take seriously any concern raised by an employee
  – Establish processes to escalate complaints to the appropriate department or individual
  – Document complaint and remediation

• Remind and train all levels of management on these issues
Question & Answer Session
Thank You
For questions or comments, please contact:

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