

EMPLOYMENT,  
LABOR &  
WORKERS'  
COMPENSATION

ADVICE  
SOLUTIONS  
LITIGATION

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A L A W C O R P O R A T I O N

## **“I’ve Been Subjected to a Hostile Work Environment”**

### **What Is Discrimination and What Is Not**

#### **Employment Law Workshop**

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The attached workshop material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies so as to avoid potential liability.

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**I. At The Workplace**

**A. General Theory**

1. Labor Code, Section 2922 presumes that employee is employed at will and can be terminated at any time, with or without notice, with or without cause.
2. Presumption can be eroded and then good cause may be necessary.
3. Basis as to why investigations into misconduct to establish "good cause" are necessary:
  - a. *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93: California Supreme Court finds that a reasoned conclusion that good cause exists should be supported by "substantial evidence" gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.
  - b. Protections Against Harassment - discrimination laws require that the employer take immediate corrective action to address and remedy harassment. Investigation as to the extent of the alleged unlawful act and how to correct the situation cannot be accomplished without an investigation.
4. **Conduct a Thorough and Proper Investigation:** It is vitally important to conduct a thorough and proper investigation and give the accused employee the right to respond to charges against him before deciding what discipline should be imposed. When interviewing accused employees, it is always appropriate to ask their side of the story and ask for witnesses to the particular incident in question. The employer should always investigate the employee's side of the case before making a final decision on discipline. Any investigation should be full and complete and properly documented.

**B. Drug/Alcohol Use**

1. The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and alcohol. The employer may also be required under federal or state law, or by contract to ensure a drug-free workplace.
2. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and alcoholics.
  - a. An individual who is **currently** engaging in the illegal use of drugs is not protected.

- b. An alcoholic may be disciplined, discharged, or denied employment when the employee's alcohol use impairs job performance or conduct to the extent they are not a qualified individual with a disability.
  - 3. Reasonable Suspicion Testing - The decision to test must be based on a reasonable and articulated belief that the employee is using alcohol or a prohibited drug on the basis of specific contemporaneous observations concerning the appearance, behavior, speech, or body odors of the employee.
    - a. It is imperative that only those supervisors who have been trained in "reasonable suspicion" determinations make the decision to order a drug/alcohol test.
    - b. Testing policy should be set out in handbook or otherwise distributed to employees.
- C. Harassment/Discrimination
  - 1. Sources of Liability:
    - a. Agents and Supervisors
      - (1) The US Supreme Court has ruled that under Title VII, an employer is strictly liable for sexual harassment committed by supervisory personnel, *even if the employer did not know or have reason to know at the time that the harassment was occurring* and was not negligent in preventing its occurrence.
      - (2) Under California law, an employer is strictly liable for harassment perpetrated by an agent or supervisor. (Govt. Code §12940(j)(1).)
    - b. Employees and 3<sup>rd</sup> Parties
      - (1) An employer is liable if it knew or should have known of the harassment and failed to take prompt remedial action to stop it. (29 CFR §1604.11(d)–(e).)
      - (2) Remedial action must include immediate and corrective action calculated to (1) end the current harassment and (2) deter future harassment from the same offender or others.
    - c. Affirmative Defense to Harassment
      - (1) Under Title VII, an employer has an affirmative defense to harassment in instances when the employee has not suffered a tangible employment action.

- (2) An employer may avoid liability by proving both of the following:
  - (a) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and
  - (b) the victim unreasonably failed to take advantage of any preventative and corrective opportunities provided by the employer or to otherwise avoid harm.
- (3) A tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.
- (4) In California, strict liability is not absolute liability.
  - (a) The affirmative defenses available in Federal claims may be available to reduce the employer's liability in damages.
  - (b) Avoidable consequences doctrine
    - (i) Employer took reasonable steps to prevent and correct workplace harassment
    - (ii) Employee unreasonably failed to use the preventative and corrective measures that the employer provided, and
    - (iii) Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.
  - (c) No tangible employment action is required for employer liability.

D. Violence/Threats: Under California Code of Civil Procedure, Section 527.8, an employer may have an obligation to act on behalf of an employee to obtain a Temporary Restraining Order (TRO) and a permanent injunction against anyone, including another current employee, who engaged in unlawful violence or made a credible threat of violence at the workplace.

- 1. Employer should have a zero tolerance policy outlining what is prohibited and what steps an employee and supervisor should take when an actual/potential situation occurs.

2. Obtaining a TRO/injunction requires the gathering of evidence, thus necessitating an investigation.
- E. Theft: An employer should not take action against an employee for theft unless it has a good faith belief that the employee engaged in the conduct.
  1. An employer takes a risk in deducting from an employee's paycheck any amount allegedly stolen from the company.
  2. Employer's best response would be to have employee voluntarily return funds, and/or work with local law enforcement officials for a restitution order, and/or file a claim against the employee.
  3. Employer may face claims of defamation and/or unlawful deductions, if the company takes action without sufficient information.
- F. Solicitations/Unfair Competition: An employer has the right to protect its trade secrets as well as protect confidential information from unauthorized disclosure. The employer also has the ability to stop any unlawful interference of contractual relationships between the company and third parties.
  1. Employees may not utilize or disclose trade secrets without prior authorization.
  2. Employees may not disclose confidential or proprietary information of a third party or co-worker.
  3. Employees have a duty of loyalty while working for the company.
  4. Employees should be apprised of the Company's policies and asked to sign non-disclosure agreements.

## **II. Outside Activities**

- A. Lawful Conduct: Employees cannot be disciplined for engaging in lawful off-duty conduct unless it creates a potential or actual conflict of interest.
  1. Moonlighting policies
  2. Intra-office relationships
  3. Consumption on alcohol off-premises may lead to discipline if the lawful off-duty conduct affects the employee's performance.
- B. Unlawful Conduct
  1. An employer may be able to discipline an employee for unlawful off-duty conduct if it:
    - a. Affects the reputation of the company;
    - b. Causes the employee to be absent; or

- c. Affects performance of the employee.
- 2. Arrest Records - An arrest, without conviction, can not form the basis of termination. Employer may discipline for absent employee or for conduct reasonably believed by the employer to have occurred.

### **III. How to Conduct and Document An Investigation**

- A. Reasons to Conduct Investigation - investigation should be conducted by employer anytime that it has reason to believe that conduct that could lead to discipline of an employee or impose liability on the employer has occurred.
- B. Interviews
  - 1. Complaining Employee: Define the employee's complaint by interviewing the employee who is complaining.
    - a. Such interview should include a description of the conduct in question and any similar conduct engaged in by the accused that previously occurred.
    - b. The complaining employee should be requested to provide the names of any witnesses who can support their claims. In all cases, obtain dates, times, places and persons present to any incidents.
    - c. Memorialize the employee's complaint in writing, if possible.
      - (1) This can either be accomplished by requesting that the employee prepare a complaint in writing or by preparing a statement for the employee which summarizes the points presented from an interview.
      - (2) If possible, obtain the complaining employee's signature on such statement.
      - (3) If the employee refuses to sign or subsequently withdraws complaint, do not simply abandon an investigation.
    - d. Ask the employee what action does he/she believe would be necessary to alleviate his/her concerns.
    - e. Do not guarantee confidentiality to any party involved.
  - 2. Witnesses: Interview all witnesses that have been identified by the complaining employee concerning the incident in question. All interviews should be conducted using the same procedure as set out in the "Complaining Employee" section above.
    - a. Each employee should be advised that if any retaliation occurs, they should notify management immediately.

- b. They should also be advised that the information that they provide and receive from the interview should be kept confidential, and that they should not discuss it with other employees.
    - c. Each employee should be requested to sign a statement which summarizes the results of the interview.
  - 3. Accused: Interview the accused employee concerning each and every incident that is alleged to have occurred.
    - a. Obtain dates, times, places and witnesses from the accused employee.
    - b. The accused employee should be requested to sign a statement which summarizes their side of the story and should be advised that any retaliation will result in discipline.
    - c. If a union setting, if the accused employee requests union representation at any stage of the interview, the interview should be suspended until a union representative is present.
    - d. Interview all witnesses the accused employee has identified unless the accused employee admits every allegation.
  - 4. Report: Prepare a confidential summary report which identifies each witness and the relevant facts elicited from each witness and the recommended disposition or discipline.
  - 5. Conclusion: Before deciding what discipline or remedy to take, request the complaining employee's input, and discuss any discipline or remedy with upper management or legal counsel.
  - 6. Corrective Action: Document any discipline in a separate discipline report which states the basic facts, the policies violated and the discipline imposed.
- C. Drug Testing
- 1. Have a supervisor trained in "reasonable suspicion" testing make a determination whether the employee is impaired or unfit for duty.
  - 2. Use the least intrusive means of testing possible.
  - 3. Determine level of discipline and/or employee assistance.
  - 4. Maintain confidentiality of medical records and other personal health information.



D. Lie Detector Tests

1. State and federal laws prohibit private employers from requiring applicants or employees to take a polygraph examination as a condition of employment.
2. An employer may request that an employee take a lie detector test, but only if the employer first advises the employee of their right not to take the test.
  - a. If the employee voluntarily consents to take the tests and damaging information is obtained, the employer may discipline the employee.
  - b. Due to the ease of claiming duress and difficulty of establishing "voluntariness", employers should be extremely cautious in requesting employee participation.
  - c. Federal law provides greater protection to employees:
    - (1) Test may only be administered in connection with an ongoing investigation involving economic loss or injury to business (i.e., theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage);
    - (2) Employee had access to property that is the subject of the investigation;
    - (3) The employer had a reasonable suspicion that the employee was involved in the incident;
    - (4) The employer has to provide a statement to the employee specifying the basis for testing the employee, including detailing information the employer has regarding sections 1-3 above.
      - (a) The statement must be signed by the employer and employee.
      - (b) The statement must be retained for at least 3 years.

E. Searches

1. Only conduct a search of property if the company has taken steps to reduce the employee's expectation of privacy.
2. Only conduct a search of the property reasonably necessary to investigate.
3. Searches of employee's property such as a purse or car must be done with care, if at all. Employer will pay the consequences through invasion of privacy or defamation claims if they are wrong!

4. Option - Ask the employee for consent and memorialize consent. However, claims of duress may always be raised by employees.

F. Surveillance/Electronic Monitoring

1. Labor Code, Section 435 prohibits audio or video recording of employee restrooms, locker rooms, changing room, or any other room designated by the employer for changing clothes.
2. Penal Code, Sections 631 and 632 prohibits intentional eavesdropping upon or recording of a confidential communication between parties without the consent of all parties to the communication.

G. *Weingarten* Rights

1. Union Setting: The rights of employees to have present a union representative during investigatory interviews were announced by the U.S. Supreme Court in *NLRB vs. Weingarten, Inc.* (1975) 420 U.S. 251, 88 LRRM 2689. These rights have become known as the Weingarten rights.
  - a. Employees have *Weingarten* rights only during investigatory interviews, including interviews conducted during an investigation into harassment. An investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his or her conduct.
  - b. The following is a list of possible subjects that can be considered "investigatory" interviews:
    - (1) Absenteeism
    - (2) Accidents
    - (3) Damage to company property
    - (4) Drinking
    - (5) Drugs
    - (6) Falsification of records
    - (7) Fighting
    - (8) Insubordination
    - (9) Lateness
    - (10) Poor attitude
    - (11) Sabotage
    - (12) Theft

(13) Violation of safety rules

(14) Work performance

- c. If an employee has a reasonable belief that discipline or other adverse consequences may result from what he or she says during the investigatory interview, the employee has the right to request the presence of a coworker.
- d. Management is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to know and request.
- e. Additionally, the rights only apply to investigatory interviews-not to disciplinary meetings or discharge conferences which do not have an investigatory component.
- f. No *Weingarten* rights exist where the purpose of the meeting is simply to inform the employee they are to be disciplined or discharged. Unless there is going to be some sort of investigation at the meeting, where the employee's responses to certain questions could affect the employer's decision, the employee does not have the right to have a coworker present.
- g. The employer only has to allow a coworker to be present, but does not have to allow an outsider such as a lawyer to attend the meeting.
- h. *Weingarten* rights are considered Section 7 rights under the NLRA which allow the right to engage in concerted activity. It is distinguished from a Section 9 right which includes the right to bargain. Thus, the coworker does not have the right to obstruct the process or bargain on behalf of his or her coworker.
- i. When the employee makes the request for a coworker to be present, management has three options:
  - (1) It can stop questioning until the coworker arrives,
  - (2) It can call off the interview, or,
  - (3) It can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to the presence of a coworker (an option the employee could always refuse.) In such a case, the employee may be told that the investigation will go on without the interview of the employee.

- j. Employers will often assert that the only role of a coworker in an investigatory interview is to observe the discussion. The Supreme Court, in *Weingarten* however, clearly acknowledges a right to assist and counsel workers during the interview.
  - k. The Supreme Court has also ruled that during an investigatory interview, management must inform the coworker of the subject of the interrogation. The coworker must also be allowed to speak privately with the employee before the interview, unless the scheduling of the interview was such that the employee had opportunity to obtain consultation prior to the interview. During the questioning, the coworker can interrupt to clarify a question or make an objection to perceived confusing or intimidating tactics.
  - l. While the interview is in progress the coworker can not tell the employee what to say but he may advise them on how to answer a question. Each answer must come from the employee. At the end of the interview the coworker can add information to support the employee's case.
2. Non-union Setting
- a. Pre-IBM: On July 10, 2000, the National Labor Relations Board extended to nonunion employees the right, already held by union employees, to bring along a coworker to a disciplinary meeting with an employer.
  - b. In *Epilepsy Foundation of Northeast Ohio and Arnis Borgs and Ashraful Hasan* (331 NLRB No. 92), the NLRB made *Weingarten* rights available to nonunion employees. The NLRB decided that the rights were based on a section of employment law that says employees have the right to "mutual aid or protection" and that the rationale is "equally applicable where employees are not represented by a union," the decision states.
  - c. Post-IBM: In this new case, three non-union employees of IBM Corp. (IBM) alleged they requested and were denied co-worker representation during investigatory interviews concerning workplace harassment. Following their termination, the employees filed unfair labor practice charges against IBM.
    - (1) The NLRB's decision relies on an employer's need to conduct confidential and discreet investigations in the workplace. The NLRB also commented on the difference between non-union and union workforces, where the presence of a union representative at an investigatory interview is essential to the protection of the interests of the bargaining unit.

- (2) The Board concluded that non-union employees have the right to request the presence of a co-worker at an investigatory interview, and cannot be disciplined for making such a request. However, employers have no obligation to grant the request in the non-unionized setting. *IBM Corp.*, 341 NLRB No. 148 (June 15, 2004).

3. Document and Follow Up

- a. All steps of the investigation should be documented.
- b. Employees' acknowledgments of company policies relating to any investigation should be obtained and filed in a personnel file.
- c. Employee counseling should be in writing and acknowledged by employee. If employee refuses to sign, have supervisor and/or witness indicate that employee received copy but refused to sign.
- d. If discipline or counseling indicates that employer will review or take steps in the future, such as review, probation, training, make sure that it is accomplished.

**PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

**DISCRIMINATION ALLEGATION/EVENT REPORTING FORM**

**TO:** Alfred J. Landegger, Esq. Michael S. Lavenant, Esq.  
**FAX NO.** (818) 986-5147 (805) 987-7148  
**COMPANY:** LANDEGGER, BARON, LAVENANT & INGBER  
**FROM:** \_\_\_\_\_  
**DATE:** \_\_\_\_\_  
**CC:** \_\_\_\_\_

This form must be completed by the Branch Manager, Supervisor or by the corporate Human Resource Department no later than the next business day after any allegation of harassment or discrimination in the workplace.

**1** Please complete the attached First Report of Event or Circumstance. When interviewing the employee, do not feel compelled to ask the questions in the same order. Feel free to ask additional questions. Always be a good listener and take accurate notes. Never label the behavior, statement or allegation as "sexual harassment" or "discrimination". Document the words used by employee. No further investigation is to take place until instructed to do so by \_\_\_\_\_ and Landegger, Baron, Lavenant & Ingber;

**2** Attach a copy of the personnel file of the employee making the allegation of harassment or discrimination; and

**3** Attach the personnel file of the employee(s) against whom the allegation of harassment or discrimination has been made.

If you have any questions concerning this Discrimination Allegation/Event Reporting Form, or the attached First Report of Event or Circumstance, please contact Alfred J. Landegger, Esq. at (818) 986-7561 or Michael S. Lavenant, Esq. at (805) 987-7128.

## **FIRST REPORT OF EVENT OR CIRCUMSTANCE**

**Date:** \_\_\_\_\_

1. Name of Employee Being Interviewed: \_\_\_\_\_
2. Name of Interviewer: \_\_\_\_\_
3. Name Facility or Location: \_\_\_\_\_
4. Tell Me What Happened: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
5. Who was involved? \_\_\_\_\_
6. When did the incident(s) happen? \_\_\_\_\_
7. Where did the incident(s) happen? \_\_\_\_\_
8. Were there any other incident(s)? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
9. How did this incident make you feel? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
10. Was your work affected? \_\_\_\_\_
11. Was this the first time this had happened? \_\_\_\_\_

**(NOTE: Attach additional documentation as necessary.)**

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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12. Were there any previous incidents of inappropriate behavior? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

13. Have you kept any records, such as written notes, tape recordings or anything else?

\_\_\_\_\_  
\_\_\_\_\_  
(If so, please attach.)

14. Do you know of any other employee(s) who had similar experiences? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

15. Have you discussed this with anyone at work? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

16. Have you discussed this with anyone outside of work? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

17. Did you participate in the incident? \_\_\_\_\_

(NOTE: Attach additional documentation as necessary.)



**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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18. If yes, tell me how you participated: \_\_\_\_\_

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19. How would you describe your relationship with the employee about whom you are complaining? \_\_\_\_\_

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20. Are there any other issues we should discuss? \_\_\_\_\_

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21. Were any other facts or other information that you think I should know? \_\_\_\_\_

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22. Who do you think I should talk to? \_\_\_\_\_

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(NOTE: Attach additional documentation as necessary.)

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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23. Do you have any suggestions as to how best to resolve the situation? \_\_\_\_\_

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\_\_\_\_\_  
Type/Print Name of Person  
Conducting Interview

\_\_\_\_\_  
Signature of Person Conducting Interview

Date: \_\_\_\_\_

(NOTE: Attach additional documentation as necessary.)

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## Guide for Complainants and Respondents

Notice of Right to Sue. The complainant may request a Notice of Right to Sue at any time during the investigation. If not requested earlier, a Notice of Right to Sue will be automatically issued when the complaint is closed or one year from the date the complaint was filed.

In housing cases, a complainant has the right to file a lawsuit on his/her own behalf in a California court within two years of the alleged discriminatory act. It is not necessary to file a complaint with DFEH prior to the filing of a lawsuit. The time during which a complaint is pending with DFEH will not count when computing the two-year period within which a lawsuit must be filed.

Complainants who wish to file a lawsuit for housing under the Ralph Act (hate violence) or Unruh Act (business establishments) are not required to file with DFEH and do not need a Notice of Right to Sue.

For more information, contact DFEH toll free at (800) 884-1684

TTY number at (800) 700-2320  
or visit our web site at [www.dfeh.ca.gov](http://www.dfeh.ca.gov)

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State of California  
Department of Fair Employment & Housing

DFEH-159 (04/04)

The Department of Fair Employment and Housing (DFEH) enforces the California *Fair Employment and Housing Act* (FEHA), *Unruh Civil Rights Act*, and *Ralph Civil Rights Act*. The following information is designed to assist persons who believe that they have been discriminated against in violation of California law, and persons or organizations charged with discrimination under California law, in understanding their rights and responsibilities.

### THE LAW

DFEH proceedings are administrative or civil, not criminal. There are four areas in which DFEH accepts complaints of discrimination:

#### Employment

The FEHA prohibits harassment and discrimination in employment because of race, color, religion, sex (gender), sexual orientation, marital status, national origin (including language use restrictions), ancestry, disability (mental and physical, including HIV and AIDS), medical condition (cancer/genetic characteristics), age (40 and above), pregnancy, denial of medical and family care leave, or pregnancy disability leave (Government Code sections 12940, 12945, 12945.2).

#### Housing

The FEHA also prohibits discrimination in the sale, rental or financing of housing accommodations because of race, color,

religion, sex (gender), sexual orientation, marital status, national origin (including language limitations), ancestry, familial status (households with children under age 18), source of income, disability (mental and physical, including HIV and AIDS), medical condition (cancer/genetic characteristics), and age (Government Code section 12955).

### **Business Establishments**

Under the *Unruh Civil Rights Act*, all persons are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, including both private and public entities. The *Unruh Civil Rights Act* protects all persons against arbitrary and unreasonable discrimination by a business establishment (Civil Code section 51).

### **Hate Violence**

The *Ralph Civil Rights Act* prohibits violence or threats of violence based on an individual's race, color, religion, ancestry, age, disability, sex, sexual orientation, political affiliation, or position in a labor dispute (Civil Code section 51.7).

## **THE PROCESS**

### **Filing a Complaint**

DFEH accepts complaints from persons who believe that they have experienced discrimination in violation of these laws. Complaints must be filed within **one year** of the alleged act of discrimination. However, in cases alleging *hate violence*, complaints must be filed within **one year** of the day the victim becomes aware of the perpetrator's identity, but not more than **three years** from the date of injury.

The person filing the complaint is the **complainant**. The employer, landlord, business, or individual filed against is the **respondent**. The

complaint is the written document that states what happened and why the complainant believes the action or incident was illegal. An individual seeking to file a complaint should contact DFEH through its Communication Center at (800) 884-1684 for Employment, Unruh, and Ralph act violations and (800) 233-3212 for Housing violations. An intake interview is conducted with the complaining party.

A complaint is accepted for investigation after a careful screening process. The complaint must contain allegations that, if proven, constitute a violation of the law. Acceptance of the complaint by DFEH does not represent any determination that the law has been violated. Filing the complaint initiates the investigative process through which the Department will determine if there is sufficient evidence to support prosecution. During an investigation, DFEH is a neutral fact-finder. DFEH represents the State of California, not the complainant.

### **Service and Response**

After a complaint is filed for investigation, a copy is served on the respondent. The complaint may also be referred to another state or federal agency. A respondent has the right to answer the complaint and should provide a response that answers each allegation in the complaint in detail and includes supporting documentary evidence.

### **Settlement**

A case may be settled at any time after the complaint is filed, and settlements may occur in several ways. If the respondent approaches a complainant directly, the complainant may contact DFEH for assistance. Settlements may also result from negotiations initiated by DFEH.

Efforts to resolve the complaint may include the negotiation of a no-fault settlement. This provides an opportunity to resolve the complaint voluntarily without a determination as to its merits. This process allows the parties to avoid the administrative and financial burden of a complete investigation.

DFEH will discuss all settlement offers with the complainant and the complainant is free to accept or reject them. However, DFEH may take no further action on a complaint if the complainant rejects a settlement offer that DFEH believes is reasonable. A settlement signed by the complainant, respondent, and DFEH is enforceable in a court of law. DFEH will determine appropriate settlement terms for any agreement it signs.

### ***Investigation***

If the complaint is not resolved during the preliminary stages, it will be fully investigated by DFEH. The complainant will also be advised of his/her right to file a lawsuit. Throughout the process, both complainants and respondents are given the opportunity to ask questions, provide information, and suggest witnesses.

As the investigation proceeds, DFEH may need to

- Interview the respondent, as well as any other relevant witnesses;
- Access pertinent records and documents for review;
- Make an on-site inspection of facilities and operations; and/or
- Initiate formal discovery, which may include the issuance of subpoenas, interrogatories, or the depositions of witnesses.

### ***Complainant's Responsibilities During the Investigation***

- The complainant must cooperate fully with DFEH by providing accurate information, such as names, addresses, telephone numbers, dates, and places.
- The complainant will be asked to identify witnesses and supply documents to support the charges listed in the complaint.
- Complainants must notify DFEH in writing if they decide to withdraw their complaint, decide to file a lawsuit on their own behalf, and/or change their address, telephone number, or contact information.

If a complainant does not respond to DFEH contacts or otherwise fails to cooperate, the complainant's case may be closed.

In an employment case, complainants who allege that they have been illegally fired must continue to look for work and keep records of each contact with a potential employer, including the employer's name and address, the position sought and date of application, and the name of the company representative.

### ***Respondent's Responsibilities During the Investigation***

- The law prohibits retaliation against a complainant or any person who provides information to DFEH.
- Respondents must retain any written materials relevant to the complaint until a determination has been reached and all appeals and proceedings have been terminated.
- Respondents must provide DFEH with requested data and any additional relevant information regarding the complaint. DFEH can subpoena records and witnesses if necessary but prefers to work cooperatively with respondents.
- Respondents must file their current address with DFEH and notify DFEH of any change of address that occurs while the complaint is pending.

*Employment cases:* The law requires employers to maintain all applications, personnel, membership, or employment referral records for a minimum of two years. After a complaint is filed, all such records shall be retained until a determination has been reached.

### ***Confidentiality***

Offers and counteroffers made in an effort to settle a case, as well as any information disclosed during formal conciliation efforts by DFEH, will be held confidential. All other information gathered in the course

of an investigation is subject to disclosure unless otherwise protected by the individual's right to privacy (e.g., medical records).

### **Conciliation**

If the complaint is substantiated, a formal conciliation conference to settle the complaint may be scheduled with DFEH. Settlement terms may require:

- The previously denied employment, housing, or service be made available
- Compensation for any out-of-pocket losses incurred by complainant because of the discrimination
- Compensation for the complainant's emotional distress
- Correction of other harm(s) resulting from the violation(s)
- Modification of practices that adversely affect persons protected under the law
- Other actions to eliminate the effects of discrimination

The terms of any settlement will be formalized in a written agreement.

### **Prosecution**

If DFEH determines that the law has been violated and is unable to resolve the complaint through conciliation, the director of DFEH may issue an accusation of discrimination. The accusation must be issued within one year of the date a complaint is filed (two years if hate violence is alleged). In employment complaints, the respondent may elect to have the matter heard by the Fair Employment and Housing Commission, or transfer the matter to court if DFEH is seeking emotional distress damages or administrative fines. In housing complaints, either the respondent or the complainant can also elect to have the matter transferred to court.

In housing cases, the accusation should be issued within 100 days of the filing of the complaint, unless it is impracticable to do so. However, the

accusation must be issued within one year of the date the complaint is filed. After an accusation is issued, the respondent and complainant have 20 days to choose either to have the matter heard by the Fair Employment and Housing Commission or to transfer the matter to court.

### • **Fair Employment and Housing Commission**

If the respondent elects to have the matter heard by the Commission, the Commission will hear testimony under oath, take evidence, render a decision, and issue a legally enforceable order. If the Commission finds there has been illegal discrimination, the order may award to the complainant out-of-pocket losses, hiring or reinstatement (employment cases), offer of previously denied housing (housing cases), changes in a respondent's policies or practices, additional damages for emotional distress, administrative fines paid to the state (employment cases), and civil penalties paid to the complainant (housing cases). In employment discrimination cases, the Commission is limited to awarding a maximum of \$150,000 for emotional distress damages and administrative fines combined.

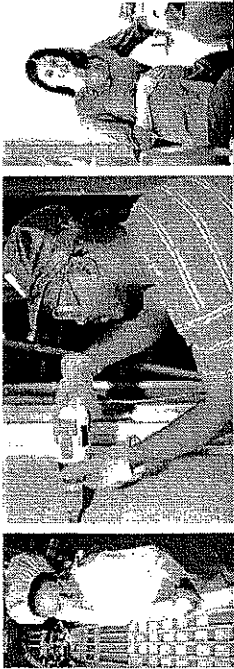
In cases in which hate violence occurs in violation of the *Ralph Civil Rights Act*, the Commission may order remedies for out-of-pocket and emotional distress damages as well as a civil penalty, which is awarded to the complainant. The Commission's order may be appealed to or enforced by a Superior Court.

### • **Court**

If a complaint is transferred to court, DFEH may file a lawsuit on the complainant's behalf and represent complainant's interests during the trial. Damages are unlimited in court.

### **Right to Sue**

Complainants who file private employment lawsuits on their own behalf under the FEHA must obtain a Notice of Right to Sue from DFEH. The lawsuit must be filed within one year from the date of the



Harassment and discrimination in employment, housing, public accommodations, and services are against the law.

Department of Fair Employment and Housing

### Hate Violence

Under the *Ralph Civil Rights Act*, it is against the law for any person to threaten or commit acts of violence against a person or property based on race, color, religion, ancestry, national origin, age, disability, gender, sexual orientation, political affiliation, or position in a labor dispute.

### Filing a Complaint

If you believe you are a victim of illegal discrimination or hate violence, you can file a complaint with DFEH by following these steps:

- Contact us at (800) 884-1684 (employment, public accommodation, and hate violence) and (800) 233-3212 (housing)
- Be prepared to present specific facts about the alleged harassment, discrimination, or denial of leave
- Provide copies of documents that support the charges in the complaint
- Keep records and documents about the complaint, such as paycheck stubs, rent receipts, membership applications, and other materials

DFEH will conduct an impartial investigation.

We are not an advocate for either the person complaining or the person complained against. We represent the State of California. DFEH will, if possible, try to assist both parties to resolve the complaint.

If a voluntary settlement cannot be reached, and there is sufficient evidence that establishes a violation of the law, DFEH may issue an accusation and litigate the case before the Fair Employment

## Discrimination is Against the Law

### Civil Rights in California

The Department of Fair Employment and Housing (DFEH) enforces California state laws that prohibit harassment and discrimination in employment, housing, and public accommodations and that provide for pregnancy leave and family and personal medical leave. It also accepts and investigates complaints alleging hate violence or threats of hate violence.

### What DFEH Does

DFEH enforces these laws by

- Investigating harassment, discrimination, and denial of leave complaints
- Assisting parties to voluntarily resolve complaints involving alleged violations of the laws enforced by DFEH
- Prosecuting violations of the law
- Educating Californians about the laws prohibiting harassment and discrimination by providing written materials and participating in seminars and conferences

### Discrimination in Employment

The California *Fair Employment and Housing Act* (FEHA) prohibits harassment and discrimination in employment based on the following:

- Race
- Color

For more information, contact DFEH toll free at (800) 884-1684

(employment, public accommodation, and hate violence)

(800) 233-3212 (housing)

Oakland area & out-of-state at (510) 622-2945

Sacramento area & out-of-state at (916) 227-0551

TTY number at (800) 700-2320

or visit our web site at [www.dfeh.ca.gov](http://www.dfeh.ca.gov)

*In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.*



State of California

Department of Fair Employment & Housing

DFEH-151 (04/04)



The mission of the Department of Fair Employment and Housing is to protect the people of California from unlawful discrimination in employment, housing and public accommodations, and from the perpetration of acts of hate violence.

- Religion
- Sex (gender)
- Sexual orientation
- Marital status
- National origin (including language use restrictions)
- Ancestry
- Disability (mental and physical, including HIV and AIDS)
- Medical condition (cancer/genetic characteristics)
- Age (40 and above)
- Request for family care leave
- Request for leave for an employee's own serious health condition
- Request for Pregnancy Disability Leave
- Retaliation for reporting patient abuse in tax-supported institutions

Discrimination is prohibited in all employment practices, including the following:

- Advertisements
- Applications, screening, and interviews
- Hiring, transferring, promoting, terminating, or separating employees
- Working conditions
- Participation in a training or apprenticeship program, employee organization, or union

California workers are

- Guaranteed leaves if disabled because of pregnancy
- Guaranteed reasonable accommodation for pregnancy

- Guaranteed leaves for the birth or adoption of a child; for the employee's own serious health condition; or to care for a parent, spouse, or child with a serious health condition
- Protected from harassment because of their sex, race, or any other category covered under the law
- Protected from retaliation for filing a complaint with DFEH, for participating in the investigation of a complaint, or for protesting possible violations of the law

California workers with disabilities are also entitled to reasonable accommodation when necessary in order to perform the job.

### ***Discrimination in Housing***

FEHA also prohibits discrimination in the rental and sale of housing based on the following:

- Race
- Color
- Religion
- Sex (gender)
- Sexual orientation
- Marital status
- National origin (including language use restrictions)
- Ancestry
- Familial status (households with children under age 18)
- Source of income\*
- Disability (mental and physical, including HIV and AIDS)
- Medical condition (cancer/genetic characteristics)
- Age

\*Until 12/31/04 unless extended by statute.

Discrimination is prohibited in all aspects of the housing business, including, but not limited to:

- Advertisements
- Mortgage lending and insurance
- Application and selection processes
- Terms, conditions, and privileges of occupancy, including freedom from harassment
- Public and private land-use practices, including the existence of restrictive covenants

Persons with disabilities are entitled to reasonable accommodation in rules, policies, practices, and services and are also permitted, at their own expense, to reasonably modify their dwelling to ensure full enjoyment of the premises.

As in employment discrimination law, persons are protected from retaliation for filing complaints.

### ***Discrimination in Public Accommodations and Services***

Discrimination in public services and accommodations is prohibited under the *Unruh Civil Rights Act*. The law requires "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments." Business establishments covered by the law include, but are not limited to:

- Hotels and motels
- Nonprofit organizations
- Restaurants
- Theaters
- Hospitals
- Barber shops and beauty salons
- Housing accommodations
- Local government and public agencies
- Retail establishments



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## **EMPLOYEE RELATIONS POLICY WITH ACKNOWLEDGMENT**

### **A. POLICY AGAINST DISCRIMINATION.**

\_\_\_\_\_ (the "Company") is committed to providing a work environment that is free of discrimination. In keeping with this commitment, the Company maintains a strict policy prohibiting unlawful discrimination. This policy applies to all employees of the Company, including supervisors and non-supervisory employees. The policy also, applies to non-employees of the Company including clients, customers, vendors and any other person doing business with the Company.

All aspects of employment with the Company will be governed on the basis of merit, competence and qualifications and will not be influenced in any manner by an individual's race, ancestry, color, religion, national origin, marital status, sex (including sexual harassment and gender identity), sexual orientation, disability (physical or mental including HIV/AIDS diagnosis), pregnancy, medical condition (cancer and genetic characteristics), age or exercising the right to any legally provided leave of absence in the application of any policy, practice, rule or regulation.

All decisions made with respect to recruiting and hiring, evaluations and promotions for all job classifications will be based solely on individual qualifications as related to the requirements of the position. Likewise, all other personnel matters such as compensation, benefits, transfers, lay offs, training, educational opportunities and programs will be administered free from any illegal discriminatory practices.

### **B. POLICY AGAINST HARASSMENT, INCLUDING SEXUAL HARASSMENT.**

The Company is also committed to providing a work environment that is free of harassment, including sexual harassment.

Sexual harassment includes:

1. Unwanted sexual advances;
2. Offering employment benefits in exchange for sexual favors;
3. Making or threatening reprisals after a negative response to sexual advances;
4. Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters;

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5. Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes;
  6. Verbal sexual advances or propositions;
  7. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes, or invitations; and
  8. Physical conduct: touching, assault, impeding or blocking movement.

**C. COMPLAINT AND INVESTIGATION PROCEDURE.**

Any form of discrimination or harassment, including sexual harassment, is absolutely prohibited. Any incident of possible discrimination or harassment should be brought immediately to the attention of the Human Resources Department of the Company which will thoroughly investigate the matter in confidence. After reviewing all the evidence, the Company will make a determination concerning whether reasonable grounds exist to believe that harassment has occurred.

Disciplinary action, up to and including discharge, will be taken against any employee who is found to have engaged in harassment.

No employee shall be subjected to any form of retaliation for reporting any violation of this policy truthfully and in good faith.

**HARASSMENT BY NON-EMPLOYEES.**

In addition, the Company will take all reasonable steps to prevent or eliminate sexual harassment by non-employees including customers, clients and suppliers who are likely to have workplace conduct with our employees.

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**EMPLOYEE RELATIONS POLICY ACKNOWLEDGMENT**  
**EMPLOYEE RELATIONS POLICY ACKNOWLEDGMENT**

I have read and received a copy of the Company's Employee Relations Policy, including the policies against discrimination and harassment, including sexual harassment, and fully understand my obligations and responsibilities as outlined therein.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Witness: \_\_\_\_\_

Date: \_\_\_\_\_