
LANDEGGER BARON LAW GROUP, ALC

Exclusively Representing Employers

Alfred J. Landegger
Larry C. Baron
Oscar E. Rivas
Roxana E. Verano

Marie D. Davis
Rebecca L. Gombos
Patrick E. White III
Christopher W. Hughes
Rodrigo J. Torres
Kristina Kourasis
Evelyn Zarraga

LANDEGGER BARON LAW GROUP PRESENTS:

"THE HIRING GAME IS NOT FOR THE FAINT HEARTED"

The Legal RX to Keep Employers Protected

May, 2019 Workshop

SPEAKER:

ROXANA E. VERANO, ESQ.

This program has been approved for 1.5 hours (California) recertification credit hours toward PHR, SPHR & GPHR through the HR Certification Institute (HRCI) and SHRM-CP and SHRM-SCP.

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Main Office

15760 Ventura Blvd.
Suite 1200
Encino, CA 91436
(818) 986-7561
Fax (818) 986-5147

Ventura Office

751 Daily Drive
Suite 325
Camarillo, CA 93010
(805) 987-7128
Fax (805) 987-7148

www.landeggeresq.com



The attached 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 to avoid potential liability.

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EMPLOYMENT INQUIRIES: WHAT CAN EMPLOYERS ASK APPLICANTS AND EMPLOYEES?

The California Fair Employment and Housing Act prohibits discrimination against job applicants and employees on the basis of age, race, color, religion, sex (including pregnancy, childbirth, breastfeeding, and related medical conditions), gender (including gender identity and gender expression), sexual orientation, marital status, national origin, ancestry, mental and physical disability (including HIV and AIDS), medical conditions (such as cancer and genetic characteristics), genetic information, and military and veteran status. The law forbids both directly discriminatory practices, and neutral practices that have a disproportionately negative effect on members of protected groups, unless those neutral practices can be shown to have a business purpose.

The Department of Fair Employment and Housing (DFEH) developed this fact sheet to provide employers with guidance about questions that can be asked of applicants and employees. DFEH encourages employers, applicants, and employees to contact us for further information on the issues discussed in this fact sheet. If you are an applicant or employee who believes your rights have been violated, you may also file a pre-complaint inquiry. Please visit www.dfeh.ca.gov for further information.

In general, in order to comply with California law, employers should limit requests for information during the pre-employment process to those details essential to determining a person's qualifications to do the job (with or without reasonable accommodations). California law specifically prohibits employers from requesting, either verbally or through an application form, information disclosing an applicant's membership in the groups listed above, unless such inquiry is made pursuant to a permissible defense. And unless the employer can prove that the characteristic or basis in question is a bona fide occupational qualification, it is also unlawful to express, directly, or indirectly, any intent to limit employment or to discriminate against applicants or employees on the bases listed above. The law does allow collection of applicant flow data and other record keeping data for statistical purposes, or to help ensure broad outreach when advertising employment. But misuse of this data constitutes a violation of California law. We suggest using a tear sheet or another form separate from the application to collect such data.

NAME

It is acceptable to ask an applicant's name or previous name for purposes of checking their past work record. But an employer should not ask questions about an individual's name that would indicate ancestry, marital status, national origin, race, or religion (i.e., asking for an applicant's "maiden" name, or asking questions about the origin of a name, rather than simply asking if other names have been used).

AGE

It is acceptable to ask individuals to affirm that they meet legal age requirements during the application process, and to require proof of age after hire. But unless age is a bona fide occupational qualification, it is not acceptable to ask questions that would otherwise reveal age, such as school attendance dates. Nor may employers either directly or indirectly indicate age preferences, such as by requesting “college age” or “digital native” applicants.

RACE / COLOR

It is never acceptable to ask questions about an applicant’s or employee’s race or color, and race or color are never a bona fide occupational qualification.

SEX

It is not acceptable to ask questions about an applicant or employee’s sex, unless sex is a bona fide occupational qualification. Nor may employers use proxies for sex, such as stating height or weight preferences, unless they are a bona fide occupational qualification.

PREGNANCY / BREASTFEEDING / FERTILITY

An employer may not ask questions about pregnancy, breastfeeding, or fertility/childbirth, unless non-pregnant, non-fertile, or non-breastfeeding status is a bona fide occupational qualification. The bona fide occupational qualification defense in this context is very narrow, and cannot be based on fears of danger to the employee or her fetus, fears of potential tort liability, assumptions and stereotypes about the employment characteristics of pregnant women such as their turnover rate, or customer preference.

GENDER / GENDER IDENTITY / GENDER EXPRESSION

It is never acceptable to ask questions about an applicant’s gender identity, expression, or medical or surgical status or procedures, and an employer may ask about biological sex or gender only if it is a bona fide occupational qualification.

MARITAL OR FAMILY STATUS

An employer may make a statement of company policy regarding work assignment of employees who are related. An employer may also ask an applicant whether they have a spouse or adult child who is presently employed by the employer. This information, however, may only be used if, for reasons of supervision, safety, or morale the employer wishes to refuse to place a close relative under the direct supervision of another relative, or if the work involves potential conflicts of interests or other hazards increased by the familial relationship. Otherwise, an employer may not ask questions regarding marital status. Nor may an employer ask questions or make statements regarding age/number of children or dependents.

DISABILITY / MEDICAL CONDITIONS

It is acceptable for employers to inquire if an applicant can perform essential job-related functions with or

without accommodation; and to make inquiry as to, or request information regarding the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

Employers may also state that employment may be made contingent upon passing a job-related mental or physical exam, including a vision test, if required of all applicants within the same classification; or require a job-related physical agility or fitness test if required of all applicants within the same classification. Any such tests given must be non-discriminatorily applied – that is, required of all applicants within the same classification – and job-related. Drug testing is generally permitted if required of applicants after a conditional offer is made.

But an employer may not make generalized inquiries as to an applicant's health, present medical condition, or any mental/physical disability; conduct medical or psychological exams at the pre-offer stage, regardless of whether they are job related; make any inquiry into medical history, including any history of substance addiction; inquire into prior on-the-job injuries, workers' compensation claims, or absences due to illness; or require genetic makeup tests or inquire as to their results.

NATIONAL ORIGIN / ANCESTRY

An employer may request information from all applicants or employees regarding language ability in languages other than English, if relevant to the job in question. But employers may not ask questions about nationality, ancestry, descent or parentage, or ask questions regarding how foreign language ability was acquired.

PHYSICAL APPEARANCE

It is acceptable for an employer to make a statement that a photograph may be required after employment. But employers may not require or request that applicants submit photographs with their applications, or require a photograph after an interview but before hiring, unless there is a defensible business reason to do so.

CITIZENSHIP

It is acceptable to make statements regarding the requirement that applicants have the legal right to work in the United States, although employers may not do so on a discriminatory basis. But employers may not ask questions about the birthplace of an applicant or the applicant's family. Employers also may not inquire into citizenship status before making an offer of employment, unless U.S. citizenship is a legal job requirement. Nor may an employer require an applicant to present a drivers' license, unless possession of a license is job related. Finally, an employer may not require an applicant to produce employment authorization documents prior to hire.

RELIGION

An employer may make a statement as to regular days, shifts and hours to be worked, or inquire into availability to work on weekends or evenings where reasonably related to normal business requirements. And an employer may ask all employees or applicants whether, apart from absences for religious observances,

the individual will be available to meet their work schedule, with reasonable accommodation if necessary. But, except when it is a bona fide occupational qualification, an employer may not ask questions regarding an individual's religion or lack thereof, or about religious practice, affiliation, or religious holidays observed. Nor may an employer ask questions about religious dress, unless it is a bona fide occupational qualification.

RESIDENCE / FINANCIAL INFORMATION / BACKGROUND CHECKS

Employers should use caution before requesting information about applicants' or employees' residences, running applicant credit checks pursuant to Labor Code 1024.5, or conducting background searches. While the law does not contain a blanket prohibition on these activities, they are impermissible if used for a discriminatory purpose and may be impermissible if they have a discriminatory impact and are not sufficiently related to a business requirement. And employers may not selectively request such reports.

Employers must comply with written notice requirements when running credit or background checks. Credit and background checks may not be used to obtain otherwise prohibited information about marital status, race, age, certain financial information, etc. Please contact DFEH for more information.



U.S. Equal Employment Opportunity Commission

Pre-Employment Inquiries and Arrest & Conviction

Federal law does not prohibit employers from asking about your criminal history. But, federal EEO laws do prohibit employers from discriminating when they use criminal history information. Using criminal history information to make employment decisions may violate Title VII of the Civil Rights Act of 1964, as amended (Title VII).

1. Title VII prohibits employers from treating people with similar criminal records differently because of their race, national origin, or another Title VII-protected characteristic (which includes color, sex, and religion).
2. Title VII prohibits employers from using policies or practices that screen individuals based on criminal history information if:
 - o They significantly disadvantage Title VII-protected individuals such as African Americans and Hispanics; AND
 - o They do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

See also:

- [What You Should Know About the EEOC and Arrest and Conviction Records](#)
- Enforcement Guidance on [Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#)

Difference Between Arrest Records and Conviction Records

The fact that an individual was arrested is not proof that he engaged in criminal conduct. Therefore, an individual's arrest record standing alone may not be used by an employer to take a negative employment action (e.g., not hiring, firing or suspending an applicant or employee). However, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies such action.

In contrast, a conviction record will usually be sufficient to demonstrate that a person engaged in particular criminal conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

Several states' laws limit employers' use of arrest and conviction records to make employment decisions. These laws may prohibit employers from asking about arrest records or require employers to wait until late in the hiring process to ask about conviction records. If you have questions about these kinds of laws, you should contact your state fair employment agency for more information.

Consumer Protections and Criminal Background Checks

Employers that obtain an applicant's or employee's criminal history information from consumer reporting agencies (CRAs) also must follow the Fair Credit Reporting Act (FCRA). For example, FCRA requires employers to:

- Get your permission before asking a CRA for a criminal history report;
- Give you a copy of the report and a summary of your rights under FCRA before taking a negative employment action based on information in the report.
- Send you certain notices if it decides not to hire or promote you based on the information in the CRA report.

If you would like to know more about FCRA, visit the [Federal Trade Commission's \(FTC\) website](#) (the federal agency that enforces FCRA). Or contact the FTC at 1-877-FTC-HELP (1-877-832-4357); TTY: 1-866-653-4261.

EMPLOYMENT APPLICATION

GENERAL DATA

Last Name	First Name	Middle Name			
Have you ever used another name? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If yes, please specify for purposes of a reference check:					

Present Address	Number	Street	City	State	Zip Code
Years at Above Address			Home Telephone Number		
			()		
Position Applying For				Date of Application	
Full Time or Part Time			Shift or Hours Preferred		
Drivers License Number (if applicable)			Expiration Date		

If employed in the position for which you have applied, would you be in a supervisory or subordinate relationship to any relative of your household? Yes No

PERSONAL DATA

Person to notify in case of an Emergency:	Name	Home Telephone Number			
		()			
Present Address	Number	Street	City	State	Zip Code
<i>How did you learn of this job opening?</i>					
<input type="checkbox"/> Advertisement	<input type="checkbox"/> Friend	<input type="checkbox"/> Walk-In			
<input type="checkbox"/> Employment Agency	<input type="checkbox"/> Relative	<input type="checkbox"/> Other _____			
List membership in professional organizations which you feel would enhance your application.					
You may exclude any whose names would indicate the race, religious creed, color, national origin, or ancestry of its members.					

WE ARE AN EQUAL OPPORTUNITY EMPLOYER

If under 18 years of age, can you after employment, submit a work permit? N/A Yes No

SKILLS

Typing Speed (wpm):	Shorthand (wpm):
Machines Operated:	
Other Training/Skills (include bilingual ability if relevant to the position for which you are applying:	
Branch of Military Service:	State Dates: From: To:
State relative skills acquired during military service:	

PROFESSIONAL & TECHNICAL APPLICANTS ONLY

Professional License Number:	Expiration Date:	Type of License:	State:
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Is there any reason why you would be unable to perform or to safely perform any of the duties of the position for which you have applied, as set forth on the job description for that position? Yes No

If "Yes," please explain:

EDUCATION

	HIGH SCHOOL	COLLEGE	TRADE, PROFESSIONAL SCHOOL OR OTHER
Name			
Address			
Number of Years			
Course or Major			
Diploma/Degree			

WORK EXPERIENCE

Last/Present Employer	Length of Service (Dates)		Duties Performed
Address	<u>Start</u>	<u>Leave</u>	
Telephone Number(s)			
Supervisor's Name and Position			
Your Job Title			
Reason For Leaving			
May we contact now? __ Yes __ No (If still employed)			
Employer			Length of Service (Dates)
Address	<u>Start</u>	<u>Leave</u>	
Telephone Number(s)			
Supervisor's Name and Position			
Your Job Title			
Reason For Leaving			
May we contact now? __ Yes __ No (If still employed)			
Employer			Length of Service (Dates)
Address	<u>Start</u>	<u>Leave</u>	
Telephone Number(s)			
Supervisor's Name and Position			
Your Job Title			
Reason For Leaving			
May we contact now? __ Yes __ No (If still employed)			
Employer			Length of Service (Dates)
Address	<u>Start</u>	<u>Leave</u>	
Telephone Number(s)			
Supervisor's Name and Position			
Your Job Title			
Reason For Leaving			
May we contact now? __ Yes __ No (If still employed)			

APPLICANT'S STATEMENT

I hereby certify that I have been informed of the duties, the hours and days of work of the position for which I am applying, and that the information on this application is correct and complete to the best of my knowledge.

I agree to have any of the statements checked by the Company unless I have indicated to the contrary. Further, I understand that falsification or omission of any material information on this application, if I receive a job offer, may be considered sufficient cause for immediate termination. I agree that if employed, I will abide by all policies and procedures established by the employer.

I hereby acknowledge that my employment is "at-will," that I may resign at any time and the Company may terminate my employment at any time, with or without cause, and with or without notice, that any assurances of continued employment, whether written, oral or by conduct, shall not be interpreted as changing the nature of the employment relationship unless specifically acknowledged in writing by the President of the Company.

By: _____
Signature of Applicant

Date

FOR COMPANY USE ONLY

Interviewed: Yes No

Remarks: _____

Employed: Yes No Starting Date: _____

Job Title: _____ Salary: _____ Dept: _____

By: _____
Name and Title Date

(Revised 11-06-2017)

NEW HIRE CHECKLIST

The following items must be signed and contained in every new hire employee packet. If a document does not apply, please write N/A. Please initial that the document has been presented to the employee and signed.

Employment Application (completed, dated and signed by applicant)	(Optional)	_____
Labor Code Section 2810.5 for New Hires	(Mandatory)	_____
Post-Hire Employee Data Sheet	(Optional)	_____
Federal Form W-4 - Employee Withholding Allowance	(Mandatory)	_____
California State Form DE-4 Employees Withholding Allowance Certificate	(Mandatory)	_____
I-9 Form - (completed by applicant and company representative)	(Mandatory)	_____
I-9 Instructions	(Mandatory)	_____
Voluntary Information Form	(Optional)	_____
Authorization to Obtain Investigative Report	(Optional)	_____
Notification of Request for Investigative Report	(Optional)	_____
Summary of Rights Under the Fair Credit Reporting Act	(Optional)	_____
Workers' Compensation Benefits Statement and Physician Election Form (English and Spanish/Acknowledgment)	(Mandatory)	_____
State Disability Insurance Booklet-DE-2515 (English/Spanish)	(Mandatory)	_____
EDD For Your Benefit Booklet-DE-2320 (English)	(Mandatory)	_____
Family Care and Medical Leave and Pregnancy Disability Leave (DFEH-100-21) (State) (Replaces Notice B)	(Optional)	_____
Family and Medical Leave Act of 1993 (Federal)	(Optional)	_____
California Paid Family Leave-DE-2511 (English and Spanish)	(Mandatory)	_____
Department of Fair Employment and Housing Sexual Harassment Pamphlet (English and Spanish)	(Mandatory)	_____
Transgender Rights in the Workplace (DFEH)	(Mandatory)	_____
Rights of Victims of Domestic Violence, Sexual Assault and Stalking	(Mandatory)	_____
Employee Relations Policy with Acknowledgment (English & Spanish)	(Mandatory)	_____
Company's Drug and Alcohol Policy with Acknowledgment	(Optional)	_____
Meal and Rest Period Policy	(Optional)	_____
Sick Leave Policy	(Mandatory)	_____
Timesheet	(Optional)	_____
Employee Handbook (Company handbook)	(Optional)	_____
Employee Statement Re: Acknowledgment of Receipt of Handbook	(Optional)	_____
Insurance Premium Authorization	(Optional)	_____
Unearned Vacation Agreement	(Optional)	_____
Supplies/Uniform Cost Authorization	(Optional)	_____
Acknowledgment of Receipt of Mandatory Documents	(Optional)	_____

Date: _____

By: _____
Supervisor's Signature

Date: _____

By: _____

POST-HIRE EMPLOYEE DATA SHEET

Personal Information:

Name: _____

Address: _____

Phone No.: _____ Date of Birth: _____

Social Security No.: _____

Name of Whom to Contact in Emergency: (Name) _____

(Phone) _____

The following information may be obtained if there is a business need for such information, e.g., health benefits:

Marital Status: _____

Spouse's Name: _____ Date of Birth: _____

List of Dependents:

Name	Relationship	SSN	Date of Birth
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Date of Hire: _____ Rate of Pay: _____

Benefits Arrangements:

Vacation: _____ Sick Days _____

Insurance: _____

Review Date: _____

NOTICE TO EMPLOYEE
Labor Code section 2810.5

EMPLOYEE

Employee Name: _____
Start Date: _____

EMPLOYER

Legal Name of Hiring Employer: _____

Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? Yes No

Other Names Hiring Employer is "doing business as" (if applicable):

Physical Address of Hiring Employer's Main Office:

Hiring Employer's Mailing Address (if different than above):

Hiring Employer's Telephone Number: _____

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:

Name: _____

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____

Rate by (check box): Hour Shift Day Week Salary Piece rate Commission

Other (provide specifics): _____

Does a written agreement exist providing the rate(s) of pay? (check box) Yes No

If yes, are all rate(s) of pay and bases thereof contained in that written agreement? Yes No

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday: _____

WORKER'S COMPENSATION

Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____

PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

- a. May accrue paid sick leave and may request and use up to 3 days or 24 hours of accrued paid sick leave per year;
- b. May not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
- c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
 - 1. requesting or using accrued sick days;
 - 2. attempting to exercise the right to use accrued paid sick days;
 - 3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
 - 4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code.

The following applies to the employee identified on this notice: (Check one box)

- 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.
- 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.
- 3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period.
- 4. The employee is exempt from paid sick leave protection by Labor Code §245.5. (State exemption and specific subsection for exemption): _____

ACKNOWLEDGEMENT OF RECEIPT

(Optional)

(PRINT NAME of Employer representative)

(PRINT NAME of Employee)

(SIGNATURE of Employer Representative)

(SIGNATURE of Employee)

(Date)

(Date)

The employee's signature on this notice merely constitutes acknowledgement of receipt.

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.

EMPLOYEE STATEMENT

1. I acknowledge receipt of my copy of the Company Employee Handbook. I have read and understand its contents, including the Company policies and rules governing my conduct, wages and working conditions as an employee. I have had the opportunity to ask questions about the Company's policies and rules. I agree to abide by these policies and rules during my employment and understand the consequences if I do not.

2. I understand that this Employee Handbook, and the Company's policies, rules and benefits may be changed at any time at the sole discretion of the President. I further understand that my employment is "at-will", that either I or the Company may terminate the employment relationship at any time that I may be disciplined, including demoted, at the discretion of the Company, and that the Employee Handbook is not a contract of employment. I further acknowledge that there are no express or implied agreements which contradict this provision of at-will employment, that the only party empowered to modify or alter this provision of at-will employment is the President, and that any agreement to modify the at-will status of my employment must be in writing and fully executed by the President and myself. I further understand that this acknowledgment supersedes all previous agreements, written or oral.

3. I will observe strict secrecy as to the affairs of all clients, and as to all the transactions of the Company of whatever description with its clients, Company employees and officers. I will not divulge any said matters, I will not divulge any of the personal information of any person, company or corporation which I may acquire as an employee or use any information of whatsoever kind or character which I may receive as an employee for any purpose other than for the advancement of the interests of the Company, and I will at no time divulge any such information to any person not entitled thereto.

4. I further promise that I will honestly and faithfully conduct myself, and duly and diligently perform all the duties assigned to me while in the employ of the Company, and I will truly and faithfully account for and deliver to the Company all property belonging to the Company which I may receive for, from or on account of the Company, and that upon termination of my employment, I will at once deliver to the Company, all books, documents or other property belonging to the Company.

5. I shall be bound by all the rules and regulations of the Company now in force, and by all such other rules and regulations as may be hereinafter called to my notice and I will faithfully observe and abide by the same.

Dated: _____ Employee's Signature: _____

Please return the Employee Statement when you have completed reading this booklet.

ACKNOWLEDGMENT OF RECEIPT

I, _____, acknowledge that I have received
(print name)

copies of the following documents:

Initials

_____ Labor Code Section 2810.5 for New Hires

_____ Federal Form W-4

_____ State Form DE-4 Employees Withholding Allowance Certificate

_____ Form I-9

_____ Form I-9 Instructions

_____ Workers' Compensation Benefits Statement and Physician Election Form
(English and Spanish)

_____ State Disability Insurance Booklet (DE-2515)

_____ EDD For Your Benefit Booklet (DE-2320)

_____ California Paid Family Leave (DE-2511)
(English and Spanish)

_____ Department of Fair Employment and Housing Sexual Harassment Pamphlet
(English and Spanish) (DFEH-185 and DFEH-185s)

_____ Company's Employee Relations Policy with Acknowledgment

_____ Sick Leave Policy

Date: _____

Employee Signature