

MCLE ON THE WEB

(\$20 PER CREDIT HOUR)

TEST # 66

1 HOUR CREDIT

ELIMINATION OF BIAS

To earn one hour of MCLE credit in the special category of Elimination of Bias, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

Hot Button Issues In The Workplace

From dress codes to grooming to ethnicity, federal and state laws offer protections for employees

By **ROBERTA J. BURNETTE**

Managing a successful law firm requires “multi-tasking.” Not only must you be an expert in your areas of practice, but also in ethics, accounting, marketing, interpersonal persuasion with clients, employee management and many other subjects. Workplace bias is one area that practitioners must know well in order to avoid liability and for their practice to thrive.

What EEO laws apply to small employers?

The primary law regulating workplace discrimination in California is the Fair Employment and Housing Act, California Govt. Code §12940 *et seq* (FEHA). The FEHA prohibits employers from discriminating against or harassing applicants and employees based on legally protected characteristics, or retaliating for complaints of unlawful discrimination or harassment. The characteristics protected by the FEHA include those protected by federal law (Title VII of the Civil Rights Act of 1964, as amended) plus several additional areas.

Very small employers are covered by provisions of the FEHA. The discrimination provisions apply to employers who have employed five or more full-time employees during the past 12 months. The harassment provisions, however, apply to employers with one or more employee or regular contractor. So even small firms must pay heed to the FEHA.

The only exemption from the FEHA applies to religious, nonprofit organizations. To qualify, the organization must be both religious and nonprofit. However, religious nonprofit companies are subject to Title VII of the federal Civil Rights Act of 1964, as amended, though under federal law such organizations may discriminate in favor of co-religionists.

The FEHA is administered by the Department of Fair Employment and Housing (DFEH), which is the state administrative agency that oversees employer compliance and that investigates employee complaints. Filing a charge of discrimination with the DFEH is a prerequisite to filing a civil lawsuit under the FEHA for employment discrimination, harassment or retaliation.

Other forms of unlawful discrimination

Prohibition on wearing pants

In addition to the protected characteristics described above, California law prohibits employers covered by the FEHA from “refusing to allow employees to wear pants” in the workplace on account of gender. In other words, employees may choose to wear pants unless the employer has a gender-neutral policy prohibiting the wearing of pants. Cal. Govt. Code §12947.5. Enforcement of this provision is within the auspices of the DFEH.

Dress codes contrary to employee gender identity

A recent amendment to the FEHA requires that, although employer may implement dress codes, those standards must allow an employee to appear or dress consistently with her or his “gender identity.” In other words, a male employee who has a female gender identity may not be prohibited from wearing female clothes to work based on a dress code policy. Cal. Govt. Code §12949. The DFEH oversees enforcement of this law.

That provision does not directly address discrimination against transsexual, transgendered or cross-dressing employees. It also does not offer guidance to employers about difficult employee relations issues that arise, such as which restrooms the employees may use.

Accommodating lactating employees

Every employer must provide a reasonable amount of break time for a lactating employee either to breast feed her child or to express (pump) breast milk. The break time may run concurrently with other break time already provided to the employee. If additional time is needed beyond the existing break, then the additional time may be unpaid. Cal. Lab. Code §1030.

In addition to time off to feed or pump, employers must make reasonable efforts to provide a private location for breast feeding or pumping. Cal. Lab. Code §1030.
Height, weight and grooming

Height, weight and grooming “discrimination”

Employers must be careful about using height, weight and grooming issues (e.g. wearing beards) when making employment decisions. Such factors may have an adverse impact on protected classes of people. For example, an employer who imposes a minimum height requirement may have an adverse impact on women or certain racial minorities. 2 Cal. Code Regs. §7291.0(b). The U.S. Supreme Court has indicated that an employer must prove a business necessity for height and weight requirements that have a disparate

impact on women. *Dothard v. Rawlison* (1977) 433 U.S. 321, 331, 97 S.Ct. 2720, 53 L. Ed. 2d 786 (1977).

In the past, California courts held that employers' decisions based on weight (without some underlying disability) was not unlawful. *Cassista v. Community Foods Inc.* (1993) 5 Cal.4th 1050, 1061, 22 Cal.Rptr.2d 287. However, recent amendments to California disability law suggest that courts may reach a different conclusion today. See Cal. Govt. Code §12926.1 (FEHA has broader sweep than federal disability law and extends to persons with "limitations," not "substantial limitations," on major life activities.)

Other grooming standards may implicate religious discrimination issues or race. For example, employers with no-beard policies have faced challenges from persons whose religion discourages shaving, as well as African American males, 25 percent of whom suffer from a condition (psudofolliculitis barbae) that prevents shaving. See *EEOC v. Sambo's* (ND Ga 1981) 530 F.Supp. 86 (Sikh challenge to no-facial-hair policy); *EEOC v. Trailways* (D. Colo 1981) 530 F.Supp. 54 (African American challenge to no-facial-hair policy).

Such policies also may run afoul of the law prohibiting employers from limiting lawful off-duty conduct and from applying dress standards that interfere with gender identity, as discussed above.

Restricting lawful off-duty conduct (e.g. moonlighting)

Employers of any size may not discriminate based on lawful off-duty conduct of employees and applicants. Employees and applicants may not be discharged, threatened with discharge, demoted, suspended or in any other manner discriminated against in the terms and conditions of their employment because of their lawful off-duty conduct. Cal. Labor Code §98(k) and §98.6.

This law applies in numerous contexts. Common examples are employers that discriminate against employees who smoke or drink, date other employees or have second jobs ("moonlighting"). In order for an outside activity to be protected, it must be (1) lawful and (2) performed outside working hours.

Many conflict-of-interest policies run afoul of these provisions. Such policies are only valid if the second job would (1) actually and directly conflict with the employer's essential enterprise-related interests, and (2) cause a substantial disruption of the employer's business operations. It is important for employers to have carefully drafted conflict-of-interest and trade secret protection policies to comply with this law.

As a provision of the Labor Code (and not part of the FEHA), this law may be enforced, at the employee's option, by a claim with the California Division of Labor Standards Enforcement or by a private lawsuit under the California Private Attorneys General Act of 2004, Cal. Lab. Code §§2698 et seq. A private lawsuit may be brought in an individual or representative capacity. The employee may be entitled not only to damages but also

penalties and attorneys' fees, which are payable only to prevailing employees (and not to employers).

Limits on political activity

Employers may not forbid employees from participating in political activities or running for public office or direct political activities or affiliations of employees. Cal. Lab. Code §1101. In addition, employers may not threaten employees' jobs in order to influence an employee's political activities or actions. Cal. Lab. Code §1101. This provision has been interpreted very broadly to stop employers from taking adverse action based on employees' support or beliefs relating to social causes, including abortion activists, gay rights activists and the like.

Use of credit history, financial information or bankruptcy

Employers that rely on credit checks or other financial information about employees in connection with hiring or other job decisions may only do so under limited conditions. The employer must provide the applicant or employee with a written notice of the adverse action. The notice must include what adverse action was taken, how to contact the consumer reporting agency that provided the adverse information, notice that the applicant has the right to a free credit report and a statement that the applicant has the right to dispute the accuracy of the statement. Cal. Civ. Code §1785.20(a).

Any such investigation should only seek job-related information. E.g. *Johnson v. Pike Corp.*, (CD Cal. 1971), 332 F. Supp. 490 (court rejected employer's "business necessity" argument for terminating employees who had multiple wage garnishments, finding no correlation between wage garnishments and employee's ability to perform job effectively). Moreover, employers should exercise caution in relying on such reports when so many persons have credit problems, not because of their own behavior, but because they are victims of identity theft.

Employers may not discriminate against employees or applicants because they sought or received bankruptcy protection, were insolvent before filing for bankruptcy, or did not pay a debt discharged in bankruptcy. 11 U.S.C. §525(b). Unlike most discrimination laws that make it unlawful to use a protected characteristic as even one factor in an employment decision, this law has been applied to require the employee to prove the bankruptcy was the sole factor relied on. See *Comeaux v. Brown & Williams Tobacco Co.* (9th Cir. 1990) 915 F. 2d 1264 (employer did not unlawfully discriminate because there was no showing that the debtor's bankruptcy status was the sole reason the employer decided not to employ him).

Illegal immigrants protection

Employers regardless of size must provide illegal immigrants with all protections, rights and remedies available under California law, except the reinstatement remedy prohibited by federal law. Cal. Lab. Code §1171.5.

Accommodating alcohol and drug rehabilitation needs

Every private employer with 25 or more employees must reasonably accommodate an employee's request for up to 30 days off to participate voluntarily in an alcohol or drug rehabilitation program. Employers may only refuse requests for time off based on proof of undue hardship. The law does not prohibit employers from refusing to hire or discharging an employee who, because of his or her current use of alcohol or drugs, is unable to perform the job duties at all or performs in a manner that would endanger the health or safety of the employee or others. Cal. Lab. Code §1025.

Criminal history inquiries

Inquiries about arrests and detentions that did not result in conviction (except for arrests for which the applicant is out on bail or released on his or her own recognizance pending trial) are generally prohibited. Cal. Lab. Code §432.7, 2 Cal Code Regs. §7287.4(d)(1).

In addition, employers may not inquire about the following pursuant to California Labor Code §§432.7 and 432.8:

- Inquiries about convictions for certain marijuana-related offenses more than two years old;
- Inquiries about convictions that have been expunged, sealed or eradicated; and
- Inquiries about certain misdemeanor convictions for which probation has been completed or otherwise discharged and the case dismissed.

No recrimination for protected time off

Employers may not discriminate or otherwise take adverse action against employees who take protected leave time. Examples of protected leave include the following:

- Pregnancy leave, Cal. Govt. Code §12940
- Jury duty, Cal. Lab. Code §230
- Appearance as a witness in a court proceeding, Cal. Lab. Code §230
- Use of up to one half of existing sick leave to care for ill child, parent, spouse or domestic partner, Cal. Lab. Code §233
- Leaves for employees who are victims or whose family or domestic partners are victims of crime, Cal. Lab. Code §230.2
- Volunteer firefighter duty leave, Cal. Lab. Code §230.3
- Reserve police officer duty leave, Cal. Lab. Code §230.3
- Emergency rescue personnel leave, Cal. Lab. Code §230.3

- Leave to attend school with suspended child, Cal. Lab. Code §230.7
- Leave to volunteer in child's school, Cal. Lab. Code §230.8
- Leave for work-related injury or illness, Cal. Lab. Code §132a

California and federal laws contain numerous protections for employees beyond the traditional EEO laws. It is essential for employers of any size to be aware of the legal traps associated with those additional bias laws and to take steps to avoid liability.

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Test — Elimination of Bias
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Elimination of Bias.

- 1.** Provisions of the California employment discrimination law apply to which employers:
A. Employers who have employed five or more full-time employees during the past 12 months; B. Employers who currently have five or more employees; C. Employers who have employed 15 or more employees during the past 12 months.
- 2.** The harassment provisions of California employment discrimination law apply to which employers: A. Employers who currently have 15 or more employees; B. Employers with 25 or more employees in one work location; C. Employers with one or more employee or regular contractor
- 3.** Nonprofit organizations are exempt from the California employment discrimination law.
- 4.** Religious organizations are exempt from Title VII of the Federal Civil Rights Act of 1964, as amended.
- 5.** Before filing a lawsuit alleging employment discrimination, harassment or retaliation under California law, an employee must first do what: A. Mitigate damages; B. File a notice with the Labor and Workforce Development Agency; C. File a complaint with the Department of Fair Employment and Housing.
- 6.** The primary law regulating workplace discrimination in California is the Equal Employment Opportunity Act.
- 7.** Which of the following protected characteristics are covered by both federal and California employment discrimination laws: A. Marital status; B. Color; C. Medical condition.
- 8.** For a workplace dress code, California employers are prohibited from which of the following: A. Prohibiting visible tattoos in the workplace; B. Prohibiting visible facial piercings in the workplace; C. Refusing to allow employees to wear pants in the workplace on account of gender.
- 9.** Employers must be careful about using height, weight and grooming issues when making employment decisions because: A. Such factors may have an adverse impact on people based on protected characteristics; B. Employers may only make employment decisions based on experience, qualifications and job performance; C. Employers must have diversity of appearance in the workplace.

10. An employer with 10 full-time employees is subject to the provisions of Title VII of the federal Civil Rights Act of 1964.

11. An employer's policy that is race neutral, such as a policy against wearing beards, may be unlawful if it: A. Has an adverse impact on persons based on race or other protected characteristics; B. Expressly mentions only men and not women; C. Allows goatees but not soul patches or long sideburns.

12. An employer's violation of the California Labor Code may be remedied by either an administrative claim with the California Division of Labor Standards Enforcement or, at the employee's option, by a private lawsuit.

13. Xco Corp. has an employee handbook policy that states that all employees must have prior approval of management to be involved with any political campaign or charitable organization. Such a policy potentially runs afoul of the California Labor Code.

14. An employer may deny employment to an applicant based on his or her credit history without notifying the applicant of the reason for denial of employment.

15. Employers must provide illegal immigrants with all protections, rights and remedies (except reinstatement) available under California law.

16. Goga, an employee of Xco Corp. (a company with 40 employees), arrived at work extremely intoxicated. Based on its policy prohibiting employees from being intoxicated at work, Xco promptly terminated Goga's employment. Xco's actions violate California law.

17. Time off from work to volunteer in his or her child's school may be legally protected in California.

18. Xco Corp. planned an expansion project and needed the support of the city council. One of its employees, Jermot, decided to challenge an incumbent and run for city council. Concerned that Jermot's political ambition could jeopardize its expansion plans, Xco notified Jermot that she had to choose between keeping her job or running for office. Under California law, Xco may legally give an employee such an ultimatum.

19. As part of its new wellness program, Xco Corp. notified all employees who smoke that they have 30 days to quit or else they will be terminated. Xco may lawfully choose to have only nonsmokers as employees.

20. Employers may not discriminate against employees or applicants solely because they sought or received bankruptcy protection, were insolvent before filing for bankruptcy, or did not pay a debt discharged in bankruptcy.

Certification

■ This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of elimination of bias.

■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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1. A. ___ B. ___ C. ___
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