



WHAT'S TRENDING IN CALIFORNIA EMPLOYMENT LAW

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About CDF



- ❑ **CDF Represents California Employers Exclusively in Labor, Employment & Immigration Matters**
 - ❑ We cover the full spectrum of labor and employment law - from guiding employers on policies and training to prevent litigation, to defeating individual lawsuits and class action threats with claims from thousands of plaintiffs
- ❑ **Five Offices Throughout California**
 - ❑ Sacramento, San Francisco, Los Angeles, Orange County & San Diego

What We Will Cover Today



- **New Laws Generating Litigation**
- **Agency Enforcement Trends**
- **Hot, New Areas For Lawsuits**
- **Practical Advice To Avoid Being A Target**

2015 – The Year of Agency Enforcement



CA Labor Commissioner: Mandatory Paid Sick Leave

- ❑ Started [July 1, 2015](#)
- ❑ **No Exclusion For Small Employers**
- ❑ **At Least 1 Hour For Every 30 Hours Worked**
- ❑ **3 Days/Year For FTE – Can Cap At 6**
 - ❑ Lump sum or accrual method
 - ❑ No payment on term
- ❑ **New Regulations Passed In July**
 - ❑ Can state “unlimited” for exempts and others
 - ❑ PTO of at least 6 days/year solves problem
- ❑ **Penalties = \$4K Max + \$50/Day/Employee**
- ❑ **DLSE Predicts “Major Enforcement Action”**
 - ❑ Likely an excuse for more on-site visits



EEOC & DFEH Trends



- **EEOC's Strategic Enforcement Plan For 2013-16**
 - ▣ DFEH has Already Announced It Is Following EEOC's Lead
 - ▣ Eliminating Barriers in Recruitment & Hiring
 - Targeting class-based recruitment and hiring practices
 - ▣ Protecting Immigrant, Migrant & Other “Vulnerable” Workers
 - ▣ Enforcing Equal Pay Laws
 - Tremendous increase in regulations
 - ▣ Preserving Access To The Legal System
 - *i.e., Making it easier to obtain a “right to sue letter”*
 - CA has already done this
 - ▣ Significant Increase in On-Site Investigations

EEOC/DFEH Focus in 2015:

Transgender Issues

- **Expansion Of “Sex” Definition – Gender Identity**
 - November 2014 – Issued new document on Enforcement Protections for LGBT workers
 - *EEOC v. RG and GR Harris Funeral Homes, Inc.* and *EEOC v. Lakeland Eye Clinic* – Transgender Discrimination Lawsuit
 - Catching up to California law
- **All Actions In This Area Are Getting Media Coverage**
 - This was true BEFORE Caitlyn
 - 2000% increase in enforcement actions over 5 years ago
- **Make Sure “Gender Identity” Is Listed As A Protected Characteristic In All Your Notices & Training**
- **Accommodation Usually Starts With Bathroom Issues**
 - Hard to argue “undue hardship”

EEOC Focus: Religious Garb

- **Religious Garb + Grooming In The Workplace: Rights & Responsibilities – EEOC 2014**
 - Number 1 enforcement issue has been Muslim religious dress
 - U.S. Supreme Court June 2015 in Abercrombie case
 - Employee need NOT request an accommodation for liability
 - Watch uniform policies, loose clothing policies, safety policies
 - Make sure management is trained to refer all issues to HR or Legal



CA DFEH Focus:

Medical Condition Accommodation

- **12 Weeks Of Leave May Not Be Enough**
 - ▣ Based on differences between federal and CA law, courts are finding “reasonable accommodation” may require more than 12 weeks of leave
 - ▣ Key is documentation supporting “undue hardship”
 - ▣ Have to stay on top of leaves
 - ▣ Consider “indefinite medical leave of absence”



CA DFEH Focus:

National Origin Discrimination

- **FEHA's Definition Of "National Origin Discrimination":**
 - Amended to add discrimination for having a Vehicle Code §12801.9 license (CDL issued to a person who cannot prove right to be in the U.S.)
- **Employer Compliance With Federal Immigration Laws Is Not Discrimination Under This New Law**
 - Has become a cottage industry
 - Stick to documents listed in the I-9 – and use a form letter if possible for all applicants

Beware!

New SSN's from Old Employees

- **Labor Code 1024.6**
 - Employers may not take any adverse action against an employee for updating or attempting to update personal information, including providing a new SSN, unless the changes relate to required job skills, qualifications, or knowledge
- **This Prevents Discharging An Employee Who Presented False Documents/Information In The I-9 Process**
 - No enforcement of “Honesty Policy” in CA
- **Labor Code § 2699 - \$100 For Each Aggrieved Employee Per Pay Period For Initial Violation & \$200 For Each Subsequent**
- **Up To \$10,000 Per Employee For Each Instance Of *Retaliation***
 - Cal. Lab. Code § 98.6(b)(3)

Beware!

Threatening to Deport Employees IS a Crime!

- **Employers Who Retaliate Against Workers By Threatening To Report Immigration Status May Lose Their Business License**
 - ▣ California Labor Code § 244(b) (SB 666)
 - ▣ Does not apply to compliance with I-9
- **Threats To Report Immigration Status May Constitute Criminal Extortion**
 - ▣ Cal. Penal Code § 518
- **DLSE Is Working With State Attorney General**
- **Your Untrained Managers Will Get You Sued Here**

DFEH Alert: Mandatory Abusive Conduct Prevention Training

□ AB 2053 Now In Effect

- Expands scope of FEHA's requirement that employers with 50+ employees provide 2 hours of sexual harassment prevention training to supervisors every 2 years
- That training must now include training on prevention of "abusive conduct:" malicious conduct that a reasonable person would find hostile, offensive, and unrelated to legitimate business interests
- Includes repeated verbal abuse, such as derogatory remarks and insults, threatening or intimidating conduct
 - DFEH is using this as an excuse for on-site investigations



DOL/DLSE:

Increased Wage & Hour Enforcement

- **California DLSE Has Increased Staffing**
 - Min. Wage goes to \$10 January and maybe \$11
 - Wage & Hour Lawsuits Have Increased 10+% Each Year For The Past 3 Years
- **DOL to raise salary for OT exemption**
- **Both DOL & DLSE Are Targeting IC's, Commissioned Employees & Classification Issues**
 - Significant increase in enforcement actions
 - And on-site, surprise visits by the Labor Commissioner

What Now?

Time for a Wage & Hour Audit ! ?



Review All IC's and Exemptions for State & Federal Compliance

- Have review done by in-house or outside counsel
- Reclassify in a way that minimizes waving a red flag



Maximize Use of Individuals with Business Licenses & Established Business



Assume Any Enforcement Action Will Not Settle

Litigation Trend: Telecommuting Issues



- **Only Exempt Employees:**
 - Should Work remotely
 - Receive company smartphone or participate in BYOD plan
 - After Hours Emails & Texts Add Up To Big Liability
- **Workers' Comp issues**
- **Check Your Travel Policy**
 - Anything more than “standard commute” is compensable time

Litigation Trend: No Cell Phone Use While Driving

- **All Employees Should Be Told:**
 - ▣ Using a cell phone or any other wireless communication device for company business at any time while driving is prohibited
- **Must Be Part Of Any BYOD Program**
- **Include Prohibition on “Hands-Free”**
- **Modify Any Policies or Practices Requiring Employees To Answer Phones Or Text Messages Immediately**
- **Huge Increase In Litigation Nationwide**
- **May Not Be Able To Enforce**
 - ▣ But Can Reduce Damages



Litigation Trend: Medical Marijuana

- ❑ **You Will Get A Lawsuit Involving Medical Marijuana**
- ❑ **Disability Laws (e.g. FEHA and ADA), Require Accommodating The Underlying Medical Condition**
- ❑ **CA Law Does Not Require Employers To Accommodate Use In The Workplace**
 - ❑ Drug & Alcohol Policies should list medical marijuana as an “illegal drug”
- ❑ **Have a good lab lined up**
 - ❑ You only want to know pass or fail
- ❑ **Applicants & Employees Will Volunteer Their Medical Marijuana Status**
 - ❑ Managers need to expect it and be trained



Litigation Trend: Monitoring Employees

- **What's Getting Employers Sued:**
 - Breaking the law
 - Monitoring off-duty conduct improperly
 - Monitoring in a discriminatory fashion



Beware!

Technology Is Advancing Faster Than The Law

- **Video**
- **GPS Trackers**
 - ▣ Cars, smartphones, laptops
- **Drones**



What Can/Should Employers Do?

- **All Monitoring Should Pass A Cost/Benefit Analysis**
- **Must Comply With The Law**
 - e.g. No cameras in changing areas or bathrooms
 - No audio recording in CA or states requiring consent
 - No off-duty monitoring of employees (some limited exceptions)
- **Must Respect The “Reasonable Expectation Of Privacy”**
 - This can be reduced with an appropriate policy
 - Always need to have a legitimate business purpose
 - May reduce the effectiveness to warn employees
- **Juries Decide What Is “Reasonable”**
 - Drones, night vision, telescopic lenses may never be deemed to be “reasonable”
- **Have A Third Party Assess The Need For Monitoring**
- **Have A Good Policy That States The Need For The Action**

Huge Litigation Trend: Social Media in Hiring

- **Fastest-Growing Area Of Agency Action & Lawsuits:**
 - **Using Social Media For Employee:**
 - Recruiting
 - Screening
 - Hiring
- **Privacy Claims Are At The Heart Of The Violations At Each Stage**

Jobs Are Scarce
Lawyers Are Not

Social Media: In Recruiting

- **Efficient Way To Reach Applicants**
- **Also Efficiently Reaches More Potential Plaintiffs**
- **Rules Are different For Finding Candidates**
 - ▣ Until they are an “applicant,” there are less risks
 - ▣ Using LinkedIn to find potential recruits may be fine
 - ▣ Using Facebook can be problematic because of content
- **When Using SM To Recruit - Consider:**
 - ▣ Where you place ads (**Beware targeted ads**)
 - ▣ The language you use
 - ▣ How applicants are to respond
 - ▣ How you screen submissions
 - ▣ SM is easier to manipulate/re-post
- **EEOC/OFCCP/Plaintiffs’ Counsel**
 - ▣ Will look at these issues



Social Media: Best Practices to Avoid Liability

- ❑ **Don't Use Social Networking Sites To Screen Applicants**
 - ❑ 2013 SHRM survey – over 75% use social media to advertise/recruit
 - ❑ But - only 20% use it for applicant screening
- ❑ **Save Checks To Post-Offer, Pre-Employment**
- ❑ **Have An Appropriate Disclaimer In The Application & Maybe Even In Job Posting**
 - ❑ Don't check SM until you have signed consent
 - ❑ Consider providing job posting to applicant before the interview to avoid confusion
- ❑ **Have Indemnification Agreements With Background Check Companies**
- ❑ **Decide In Advance What Info You NEED To Look For**
 - ❑ Is social media expertise a requirement of the job?
 - ❑ Will the employee be high profile?
 - ❑ Do you need more than just résumé verification?
- ❑ **What Is Public Domain Info vs. Private – Don't “Oversurf” The Web**
 - ❑ If you have to pay for info – it may not be public
- ❑ **Do Not Break The Rules To Check On Applicants – No Fake Accounts**

Related Litigation Trend: Avoid Liability Related to Hiring

- **Use Applicant Testing Sparingly**
 - ▣ Performance tests may be OK – but confirm
 - ▣ Psychological tests are almost always a problem
- **Follow-Up On References**
 - ▣ Avoid “negligent hiring” cases
- **Only HR Should Do Any Social Media Checks**
 - ▣ Managers must be scared into compliance
- **Be Careful With Criminal Background Checks**
 - ▣ Have language in application and use a service
 - ▣ Be prepared for medical marijuana issues
 - ▣ Be prepared for “volunteered” information
- **Train Managers**
 - ▣ Not to make promises
 - ▣ Not to keep personal notes



Related Litigation Trend:

Avoid Liability for Post-Termination Conduct

- ❑ **Be Careful With Requests For Verification**
 - ❑ Centralized control
 - ❑ Assume it's a conspiracy
- ❑ **Employees & Their Lawyers Can Access Personnel Files Now**
 - ❑ 21 days for payroll records – 30 days for personnel file
 - ❑ All “personnel records” – not just the file
 - ❑ Have a right to copy the entire file now
- ❑ **NLRB, EEOC, DFEH Responses Are Public Record**
- ❑ **Don't Ignore Labor Commissioner Claims**
 - ❑ Can quickly morph into class actions
- ❑ **Be Wary Of Independent Contractors Who Sue**

Steps Employers Should Take

- **Review Employment Screening & Potential Barriers**
 - EEOC/DFEH are looking for pre-employment tests, background screens, date of birth screens in online applications to see if they impact groups
 - Control any social media applicant screening



Steps Employers Should Take, Cont.

- **Review & Revise Handbooks & Policies As Needed**
 - EEOC has announced plans to target disparate pay, job segregation, harassment, and discriminatory language policies affecting “vulnerable workers”
 - Have mandatory orientation and training for new employees
 - Consider having orientation in other languages – but beware language “Catch 22”
 - *i.e., Workers who speak minority language feeling disenfranchised*
 - Have at-will statements everywhere in plain English (or other language)
 - Consider an online Employee Handbook with mandatory “I agree” button

Steps Employers Should Take, Cont.

- **Train Management & Warn Executive Management**
- **Encourage Internal Grievances**
 - ▣ Improvement incentive programs
 - ▣ Supervisor bonuses for reduced claims





THANK YOU FOR ATTENDING!

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- CallaborLaw.com



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