



Civil Rights
Department
STATE OF CALIFORNIA

■ Education and Outreach

Retaliation in Higher Education

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CRD Disclaimer

This guidance is for informational purposes only, does not establish substantive policy or rights, and does not constitute legal advice. The opinions expressed by the presenters do not necessarily reflect the opinions of CRD.

Mission

The Civil Rights Department (CRD) is California's civil rights agency. The mission of CRD is to protect the people of California from unlawful discrimination in employment, housing, public accommodations, and state-funded and state-administered programs and activities, as well as from hate violence and human trafficking.

Effective July 1, 2022, we are now known as the Civil Rights Department, formerly known as the Department of Fair Employment and Housing. This name change better encompasses our full scope of responsibilities.

CRD Responsibilities

- Engage in public outreach and provide training and technical assistance to employers, business establishments, housing providers, and other stakeholders regarding their responsibilities under the law.
- Investigate discrimination complaints and cases of systemic discrimination.
- Facilitate mediation and resolution of disputes involving civil rights.
- Enforce the laws by prosecuting violations in civil court.
- Issue regulations that implement the FEHA and other statutes to provide greater clarity.

Intro to Fair Employment and Housing Act (FEHA)

- Went into effect in 1959, with many updates since
- Codified in Government Code sections 12900 – 12999 (and associated regulations)
- Covers both employment and housing.



FEHA & Employment

- Applies to all public employers AND private employers with 5 or more employees
- Makes it illegal for employers to discriminate against or harass job applicants/employees based on a protected characteristic
- Prohibits employers from retaliating against employee/applicant if they assert their rights under the law
- Requires reasonable accommodations for disabilities and sincerely held religious beliefs.

Note: Harassment is prohibited for private employers of ANY size (not just 5+)

Employment Protected Categories

- Race (incl. hair texture and style)
- Color
- Ancestry
- National Origin
- Religion
- Age (40 and over)
- Disability (mental and/or physical)
- Sex
- Gender
- Sexual Orientation
- Gender Identity
- Gender Expression
- Medical Condition
- Genetic Information
- Marital Status
- Military and Veteran Status

**Includes actual OR perceived identities and associational discrimination.

Govt Code §§ 12926, 12940

What is retaliation?

Pursuant to Govt. Code § 12940:

- It is unlawful for an employer to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under FEHA.
- It is also unlawful for an employer to retaliate or otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted

Note: an employer can generally be held liable for the retaliatory actions of a supervisor. (*See Wysinger v. Automobile Club of SoCal* (2007) 157 Cal.App.4th 413)

Legislative purpose

“The legislative purpose underlying FEHA’s prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints.”

Steele v. Youthful Offender Parole Bd.
(2008) 162 Cal.App.4th 1241, 1253.



Special retaliation claims

An employer cannot retaliate against someone who has opposed discrimination or harassment on the basis of national origin by threatening to disclose their (or their family members') immigration status to authorities. (2 C.C.R. § 11028)

All individuals, regardless of whether they qualify for California Family Rights Act (CFRA), are protected from retaliation for opposing any practice that is, or that they reasonably believe is, a violation of that law. (2 C.C.R. § 11094).

A note about retaliation against students

CSU has an internal policy that covers retaliation against students: [Policy Prohibiting Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation](#).

The definition of retaliation in CSU's policy mirrors the definition in the FEHA and associated regulations. However, CSU's policy explicitly prohibiting retaliation against students falls outside of the scope of FEHA and therefore outside the scope of this presentation.

Establishing a claim of retaliation

“To establish a prima facie case of retaliation under FEHA [...] the employee must show the following:

- (1) He or she was engaged in a protected activity,
- (2) The employer subjected the employee to an adverse employment action, and
- (3) A causal link exists between the protected activity and the employer's adverse action.”

Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1125

What are protected legal activities? (1 of 3)

- Filing a CRD complaint or seeking advice from CRD
- Helping someone else file a CRD complaint
- Cooperating with an investigation
- Opposing employment practices that a person reasonably believes are illegal
- Participating in an activity that the employer perceives to be in opposition to discrimination, whether or not that is the person's intention
- Contacting a local org to discuss possible employment discrimination

2 C.C.R. § 11009

What are protected legal activities? (2 of 3)

“Standing alone, an employee's **unarticulated belief** that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.

[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.”

Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1046 [internal citations omitted].

What are protected legal activities? (3 of 3)

BUT note: “An employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.”

Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1047.

- FEHA does not only protect people with sophisticated legal knowledge!
- The relevant question is NOT whether the employee made a formal, legally valid accusation, but whether their communications sufficiently conveyed their reasonable concerns that the employer acted unlawfully.

Protected legal activities – Case study (1 of 2)

Mary is an administrator in the admissions department of Hypothetical University. Her supervisor, the Director of Admissions, is having a sexual relationship with June, another administrator. The Director of Admissions promotes June to a management position in the department, despite Mary being a more qualified candidate. Mary complains to HR that promoting someone based on a sexual relationship is unfair.



Is Mary engaging in a protected legal activity?

Protected legal activities – Case study (2 of 2)

Yes.

- Based on 2 C.C.R. § 11009, Mary is opposing an employment practice that she reasonably believes is illegal → sexual favoritism
- FEHA recognizes that sexual harassment occurs when a sexual relationship between a supervisor and a subordinate is based upon an asserted quid pro quo
- BUT even if she was wrong about her boss' conduct being illegal, still protected as long as her belief was reasonable and she sufficiently communicated her concerns



Miller v. Dept. of Corrections (2005) 36 Cal.4th 446

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What is an adverse employment action? (1 of 2)

- Demoting or suspending
- Cutting hours
- Failing to hire or consider for hire
- Terminating from employment (including constructive termination)
- Failing to give equal consideration in making employment decisions
- Unfairly negative evaluations or recommendations for subsequent employment
- Worsening working conditions, including by intensifying harassment
- Denying employment benefits
- Otherwise discriminating against the employee

2 C.C.R. § 11009; Govt. Code § 12940(h)

What is an adverse employment action? (2 of 2)

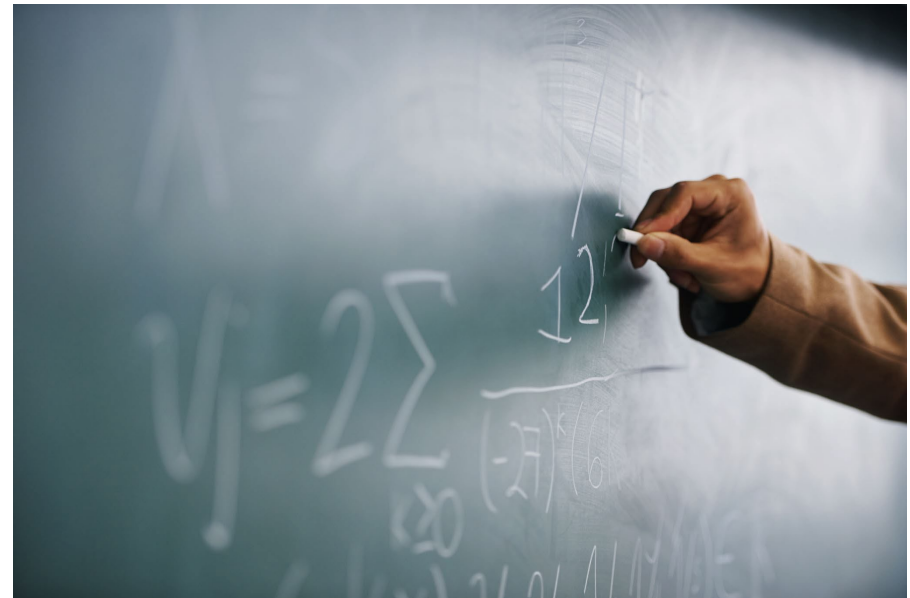
Includes the entire spectrum of employment actions that are reasonably likely to **adversely and materially** affect an employee's job performance or opportunity for advancement in his or her career.

- Likely won't include "mere offensive utterance or even a pattern of social' slights by either the employer or coemployees"
- However, may include a pattern of acts that might not individually be sufficient to constitute discrimination or retaliation, but taken as a whole establish prohibited conduct.
- → Notion of an adverse action must be interpreted liberally and with a reasonable appreciation of the realities of the workplace

Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1053-1054.

Adverse employment action – Case Study (1 of 3)

Mark is a professor in the math department of Hypothetical U. He is Muslim. He requests a reasonable accommodation to reschedule a Friday class so he can attend mosque services. The department head grants his request, but writes a negative evaluation calling him ‘inflexible’ and ‘not a team player’. In a department meeting, he jokingly refers to him as ‘high maintenance’ in front of his colleagues. He schedules a department party on a Friday, knowing Mark cannot attend.

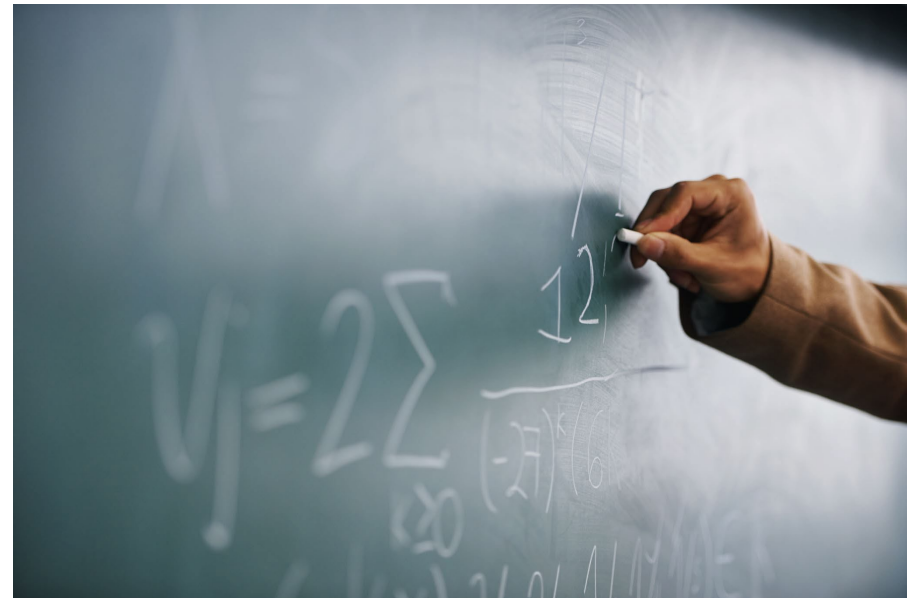


Adverse employment action?

Adverse employment action – Case Study (2 of 3)

Probably.

- “[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.”
- Collectively, these actions go beyond a “mere social slight” and materially affect Mark’s ability to advance in his career.



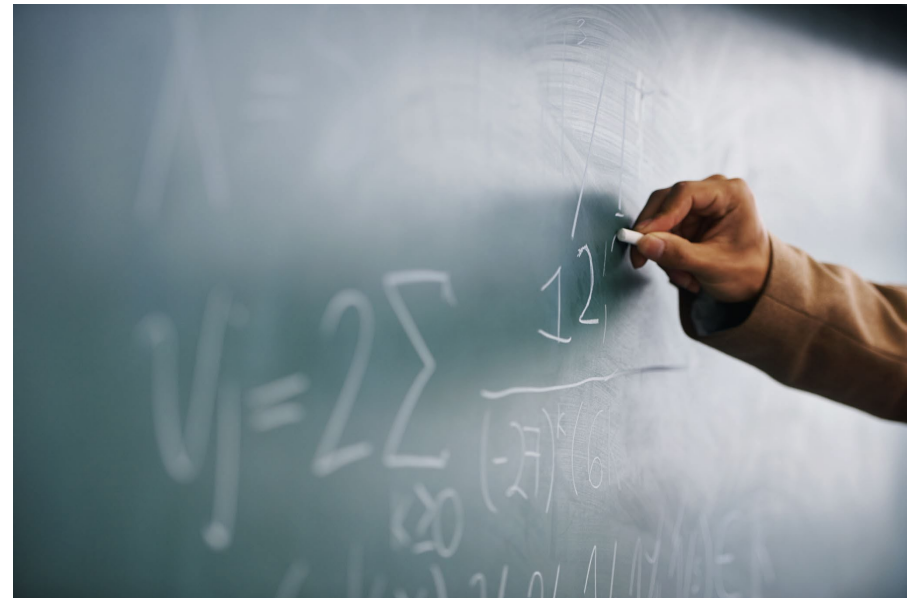
Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028.

Adverse employment action – Case Study (3 of 3)

But note:

Court has found an employer's collective actions did NOT constitute an adverse employment action where employer:

- Did not respond to employee's email asking to collaborate on a business plan;
- Did not invite employee to lunch; and
- Decided not to hire employee's acquaintances in new position at his suggestion.



Blount v. Morgan Stanley Smith Barney (2013)
982 F.Supp.2d 1077

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Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1125

What is a causal link?

- Retaliation is proved by showing that employee engaged in protected activities, that his or her employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.
- Both direct and circumstantial evidence can be used to show causal link.
- Circumstantial evidence may include factors like the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers.

Colarossi v. Coty US Inc. (2002) 97 Cal.App.4th 1142, 1153; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615.

Burden of proof

Once an employee proves a causal link between the protected activity and the adverse employment action, burden shifts to employer to show a legitimate, non-retaliatory reason for the adverse employment action.

- If the employer does this successfully, the presumption of retaliation “drops out of the picture” and the burden returns to the employee to prove that the employer’s justification is a pretext.
- Retaliatory intention must be least a substantial or motivating factor in the adverse employment decision (even if there are other factors present).

Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028; *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475.

Causal link – Case study (1 of 3)

Morgan worked as an electronic technician at UC in the engineering dept. He was one of two African American technicians. In August, he filed an internal grievance claiming racial discrimination after he was docked for leaving work early, but his white colleagues were not. An internal investigation determined all employees should have been docked but noted that Morgan had an ongoing attendance problem. Morgan was laid off in May of the following year due to budget cuts.



Causal link – Case study (2 of 3)

U.C. informed Morgan he would get preference for rehire if jobs for which he was qualified became available in other departments. A Computer Resource Specialist II position in the library systems department became available. Morgan applied but was not hired. Morgan alleged U.C.'s termination of his job, and refusal to rehire him as a Computer Resource Specialist II, constituted retaliation based on his discrimination complaint.

Causal link?



Causal link – Case study (3 of 3)

No. In this case, after the burden shifted to the employer, the employer was able to prove:

- Legitimate reason for lay-off (budget cuts)
- Hiring staff for Computer Resources Specialist II position were unaware of his past grievance
- Morgan was not qualified for the Computer Resources Specialist II position; didn't know software
- Morgan unable to prove pretext.



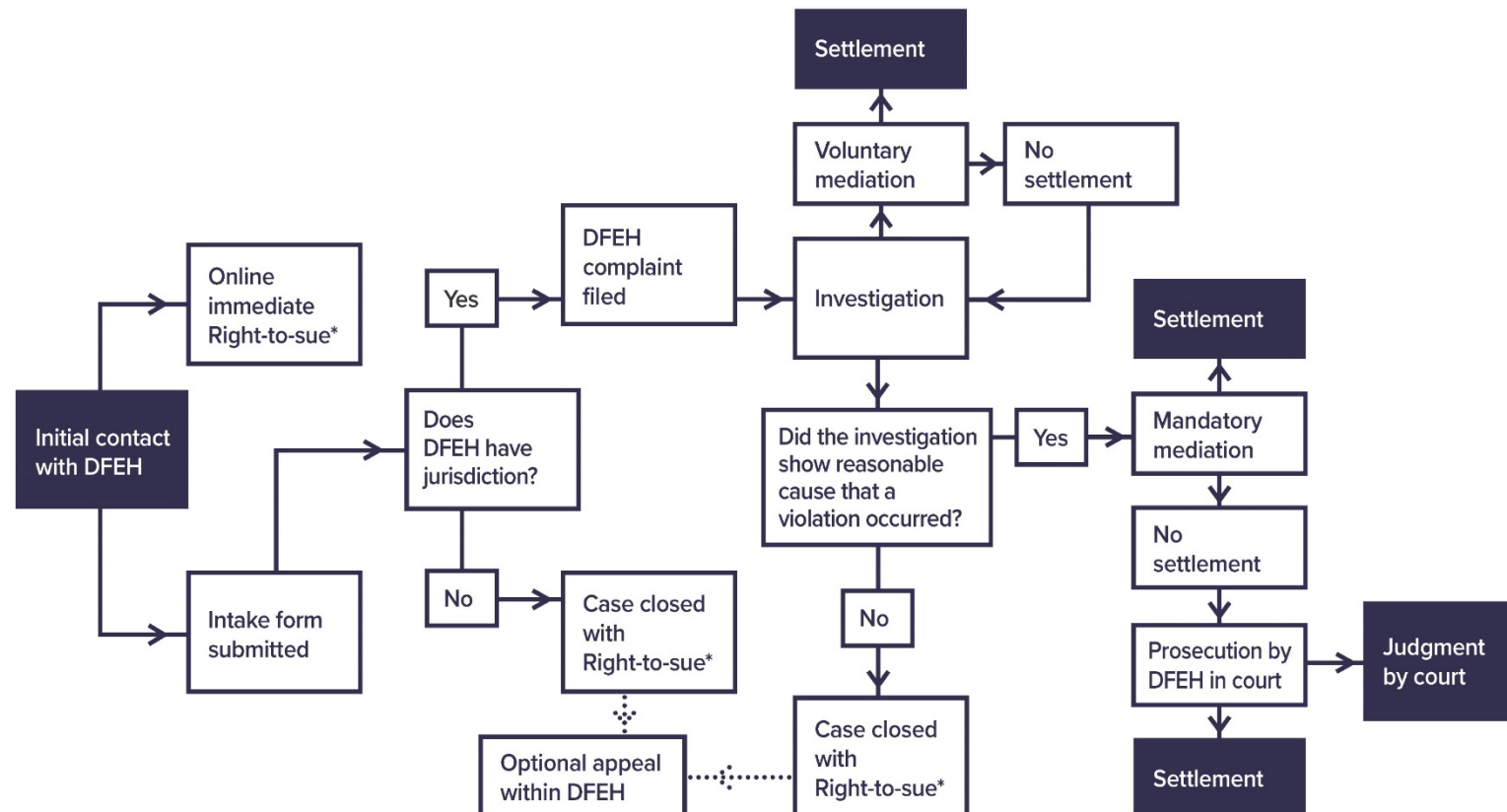
Morgan v. Regents of University of Cal. (2000)
88 Cal.App.4th 52

Retaliation complaints

If someone believes they were subject to unlawful retaliation, they should:

- Document their experience (names, dates, specifics, etc.), including specific information about both the protected legal activity AND the adverse employment action (See 2 C.C.R. § 10002)
- As appropriate, speak with a supervisor, manager, or HR representative → could remedy situation
- Fill out a CRD intake online, by mail, or by phone within 3 years.

Employment Complaint Flowchart



Remedies May Include:

- Reimbursement for actual losses and compensation for emotional distress
- Hiring or reinstatement
- Back pay or promotion
- Training and policy changes
- Monitoring and ongoing reporting
- Civil penalties
- Punitive damages

CRD Resources



In California, LGBTQ+ people have equal civil rights, dignity, and worth. The California Department of Fair Employment and Housing (DFEH) is here to help.

It is unlawful for employers, landlords, businesses of all kinds, health care providers and insurers, homeless shelters, state-funded programs and services, and others to discriminate against anyone or treat them unequally because of their sexual orientation, gender identity, gender expression, or sex. Similarly, it is against the law to assault or threaten anyone (or their property) with violence because of these characteristics. If you have experienced discrimination or violence because you are, or are perceived to be, or are a friend or family member of an

LGBTQ+ person for any other sexual orientation or gender identity, file a complaint with DFEH. Likewise, if you have experienced discrimination or violence because of how you express your gender, such as the clothes you choose to wear or how you do your hair, file a complaint with DFEH.

And, don't forget that California law protects everyone (including LGBTQ+ people) from discrimination and violence based on race, national origin, disability, and other protected characteristics.

ADDITIONAL EXAMPLES OF UNLAWFUL DISCRIMINATION

- A state-funded program for small businesses turns you away because of bias against transgender and/or lesbian women of color
- A bank gives you less favorable loan terms or denies you a loan because you have a same-sex partner who doesn't speak English and is an immigrant
- A housing provider tries to evict you because you have a Section 8 voucher and a pride flag in your window
- An employer won't even consider your application for a job because you're an older LGBTQ+ person

If you have a disability that requires a reasonable accommodation, DFEH can assist you by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or you can contact us below.

TO FILE A COMPLAINT

Department of Fair Employment and Housing
dfeh.ca.gov
Toll Free: 800.884.1684
TTY: 800.700.2320

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The Ralph Civil Rights Act forbids acts of violence or threats of violence because of a person's actual or perceived sex (gender), including pregnancy, childbirth, and related medical conditions, gender identity and gender expression, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, immigration status, political affiliation, or position in a labor dispute (California Civil Code section 51.7). These listed characteristics are merely examples and other bases for a discrimination claim under the act are possible. The acts forbidden by civil law may also be criminal acts and can expose violators to criminal penalties. The Ralph Civil Rights Act also forbids a person from requiring a waiver of the act's protections as a condition of entering into a contract for goods or services, including the right to file a complaint or lawsuit or notify the attorney general, Department of Fair Employment and Housing (DFEH), or prosecutor or law enforcement agency.

WHAT TYPE OF ACTS ARE FORBIDDEN UNDER CALIFORNIA LAW?

California law forbids verbal or written threats, physical assault or attempted assault, graffiti, and vandalism or property damage. Other California laws establish criminal penalties for acts that include disturbing a group of people gathered to worship; vandalizing a place of worship or a building owned and occupied by a religious educational institution; attending to discourage religious activities by threats of violence; or using a bomb or arson to cause a person to fear for his/her personal safety in places of worship or on any private property if the property was targeted because of the owner's or occupant's race, color, religion, ancestry, or other protected bases.

HOW DO THESE LAWS HELP VICTIMS?

These laws provide civil remedies for persons who have been victims of acts of violence or threats of violence because of race, color, religion, ancestry, national origin, age, disability, sex, sexual orientation, political affiliation or position in a labor dispute.

Available civil remedies include:

1. Restraining Orders
2. Actual Damages
3. Punitive Damages
4. Civil Penalties
5. Attorney Fees

There are several steps one can take to exercise the rights provided by these laws.

WHAT DFEH DOES

The Department of Fair Employment and Housing enforces the California civil laws that prohibit hate violence by:

1. Investigating complaints;
2. Prosecuting violations of the law; and
3. Educating Californians about the laws prohibiting hate violence, human trafficking, harassment, and discrimination by providing written materials and participating in seminars and conferences.



Sexual harassment is a form of discrimination based on sex (gender) (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may include harassment of a person of the same gender as the harasser, regardless of other person's sexual orientation or gender identity.

THERE ARE TWO TYPES OF SEXUAL HARASSMENT

1. "Quid pro quo" (Latin for "this for that") sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.
2. "Hostile work environment" sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interferes with your work performance or creates an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you. The harassment must be severe or pervasive to be unlawful. A single act of harassment may be sufficiently severe to be unlawful.

SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS

BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:

1. Unwanted sexual advances
2. Offering employment benefits in exchange for sexual favors
3. Leering, gawking, or displaying sexually suggestive objects, pictures, cartoons, or posters
4. Derogatory comments, epithets, slurs, or jokes
5. Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations
6. Physical touching or assault, as well as impeding or blocking movements

Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful. Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within three years of the last act of harassment or retaliation.

DFEH serves as a neutral factfinder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer's policies and practices, punitive damages, and attorney's fees and costs if it prevails in litigation. Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right to Sue Notice has been issued.

EMPLOYER RESPONSIBILITY & LIABILITY

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer of an employee, applicant, or person providing services for the employer). An employer will only be liable for this form of harassment if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.



WHAT DOES "TRANSGENDER" MEAN?

Transgender is a term used to describe the people whose gender identity differs from the sex they were assigned at birth. Gender expression is defined by the law to mean a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex or birth." Gender identity and gender expression are protected of transsexuals under the Fair Employment and Housing Act. That means that employers may not discriminate against someone because they identify as transgender or gender non-conforming. This includes the protection that someone is transgender or gender non-conforming.

What are the obligations of employers when it comes to bathrooms, showers, and locker rooms?

All employees have a right to safe and appropriate restrooms and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity, regardless of the employer's assignment at birth. In addition, where possible, an employer should provide an easily accessible, unisex single-stall restroom for use by any employee who desires increased privacy, regardless of the underlying reason. Use of a unisex single-stall restroom should always be a matter of choice. No employee should be forced to use one either as a matter of policy or due to harassment in a gender-appropriate facility. Unless exempted by other provisions of state law, all single-use toilet facilities in any business establishment, place of public assembly, or state or local government agency must be identified as all-gender toilet facilities.

WHAT IS A GENDER TRANSITION?

1. "Social transition" involves a process of socially signaling one's gender with their external sense of self (e.g., changes in name and pronouns, bathroom facility usage, participation in activities, etc.).

2. "Physical transition" refers to medical treatments an individual may undergo physically sign their body with internal sense of self (e.g., hormone therapies or surgical procedures).

A person does not need to complete any particular step in a gender transition in order to be protected by the law. An employer may not consider its treatment or accommodation of a transitioning employee upon completion of a particular step in a gender transition.

FAQ FOR EMPLOYERS

What is an employer allowed to ask?

Employers may ask about an employee's employment history, and may ask for consent references, in addition to other non-discriminatory questions. An employer should not ask questions designed to detect a person's gender identity, including asking about their marital status, spouse's name, or relation of household members to one another. Employers should not ask questions about a person's body or whether they plan to have surgery.

How do employers implement dress codes and grooming standards?

An employer who requires a dress code must ensure it is a non-discriminatory measure. This means that, unless an employer can demonstrate otherwise, each employee must be allowed to dress in accordance with their gender identity and gender expression. Transgender or gender non-conforming employees may not be held to any different standards of dress or grooming than any other employee.

FILING A COMPLAINT

If you believe you are a victim of discrimination you may, within three years* of the discrimination, file a complaint of discrimination by contacting DFEH.

To schedule an appointment, contact the Communication Center below.

If you have a disability that requires a reasonable accommodation, the DFEH can assist you by writing, or make by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or you can contact us below.

CONTACT US

Toll Free (800) 884-1684
TTY: (800) 700-2320
contactcenter@dfeh.ca.gov
www.dfeh.ca.gov

Accommodations and Language Access (1 of 2)

The Department provides equal access to people with disabilities. Anyone needing an accommodation should email contact.center@dfeh.ca.gov or accommodations@dfeh.ca.gov, call 844-541-2877 (voice) or via California Relay Service 711 or 800-700-2320 (TTY).

Accommodations and Language Access (2 of 2)

The Department offers bilingual services and provides some translated documents for people with limited English proficiency. You may contact our Communications Center and request assistance in a language other than English:

contact.center@dfeh.ca.gov, call 844-541-2877 (voice) or via California Relay Service 711 or 800-700-2320 (TTY).

Thank you!

For more information, please contact CRD:

www.dfeh.ca.gov

Rashida.harmon@dfec.ca.gov

Phone: (916) 584-3327