



2018 CALIFORNIA EMPLOYMENT LAW UPDATE

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Phyllis W. Cheng provides mediation services in Los Angeles. She is on the mediation panels of ADR Services, Inc., U.S. District Court, Central District of California, and California Court of Appeal, Second Appellate District. She has resolved disputes as a neutral on matters related to employment discrimination, harassment and retaliation; wage and hour; class actions; civil rights; attorneys' fees; housing discrimination, harassment and retaliation; and public accommodations and disability access.

Phyllis was Partner at global firm DLA Piper, Of Counsel at employment firm Littler Mendelson, and Associate at civil rights firm Hadsell & Stormer.

Phyllis served in the administrations of California Governors George Deukmejian, Pete Wilson, Arnold Schwarzenegger and Jerry Brown. For nearly seven years, Phyllis was Director of the California Department of Fair Employment and Housing (DFEH), the largest state civil rights agency in the United States, where she oversaw six and seven-figure settlements and established a Dispute Resolution Division. She was also a Senior Appellate Court Attorney, Deputy Attorney General, and member of the State's Fair Employment and Housing Commission, Comparable Worth Task Force, and Commission on the Status of Women.

Phyllis is co-editor of California Fair Housing and Public Accommodations (The Rutter Group Civil Litigation Series), author of the California Lawyers Association's Labor & Employment Case Law Alert, and contributor to various publications, including Employment Litigation (The Rutter Group California Practice Guide), California Labor & Employment Law Review, Daily Journal, Bender's Labor & Employment Bulletin, The Corporate Counselor, Law.com and Cal Bar Journal. The State Bar named her the 2012 Ronald M. George Public Lawyer of the Year. She was on Inside Counsel Magazine's May 2014 cover.

Phyllis received her B.A. and M.Ed. from UCLA, J.D. from Southwestern University School of Law, and Ph.D. from USC.

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INTRODUCTION



- General Overview of Federal and State employment discrimination laws
- Legal, Legislative and Regulatory Update
- Statistics, Trends & Practice Pointers



GENERAL OVERVIEW

- Federal and state employment discrimination law
- Protected bases
- Federal and state workshare agreement
- Exhaustion of administrative remedies
- Deadline for filing runs from
- Right-to-sue letters
- EEOC deadlines in a nut shell
- DFEH deadlines in a nut shell

GENERAL OVERVIEW

Federal & State Employment Discrimination Laws



- FEDERAL
 - Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).
 - Employers with 15 or more employees.
 - Enforcing agency: Equal Employment Opportunity Commission (EEOC).
- STATE
 - California Fair Employment and Housing Act (FEHA) (Gov. Code, §12900 et seq.).
 - Applicable to employers with 5 or more employees, but harassment protections applicable to all employers.
 - Enforcing agency: Department of Fair Employment and Housing (DFEH).

GENERAL OVERVIEW

Protected Bases



FEHA Discrimination, Harassment and Retaliation

- Age (40 and over)*
- Ancestry*
- Color*
- Religious creed*
- Denial of family and medical care leave*
- Disability*(mental and physical), including HIV and AIDS
- Marital status
- Medical condition (cancer and genetic characteristics)
- Military and Veteran Status*
- Genetic information*
- National origin*
- Race*
- Sex* (includes gender, pregnancy, childbirth, and medical conditions related to
 - pregnancy or childbirth, breastfeeding or medical conditions related to breastfeeding)
- Gender, gender identity and gender expression
- Sexual orientation

(*Indicates protected bases under federal law: Title VII, FMLA, ADA, ADEA, GINA, USERRA)

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GENERAL OVERVIEW

Federal & State Workshare Agreements



- Workshare Agreements:
 - 42 U.S.C. § 2000e-8(b); 29 C.F.R. § 1626.10(c).
- Constructive Filing:
 - 29 C.F.R. §1626.10(c)
 - Compare, Amendments. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1729-30 (where DFEH deferred federal age claim to EEOC and litigant subsequently amended claim with EEOC but not DFEH, litigant could not avail herself of state remedies for additional claims).)
- Dual Filing

GENERAL OVERVIEW

Exhaustion of Administrative Remedies



TITLE VII Claims:

- 180 days to file a Title VII claim with the EEOC.
- 300 days to file a Title VII claim with the DFEH (42 U.S.C. § 2000e-5(e)(1).)

FEHA Claims:

- 1 year to file a FEHA claim with the DFEH (Gov. Code, § 12960, subd. (d).)
 - 90-day extension for delayed discovery.
 - 1 year from 18th birthday for minors (Gov. Code, § 12960, subd. (d)(4).)

GENERAL OVERVIEW

Deadline for Filing Runs from



Date of Alleged Unlawful Employment Practice.

Title VII:

- 42 U.S.C. § 2000e-5(e)(1).

FEHA:

- Government Code section 12960; California Code of Regulations, title 2, section 10002, subdivision (b).
- Continuing violations.

GENERAL OVERVIEW

Right-to-Sue Letters



- Is DFEH right-to-sue letter sufficient for Title VII claims?
 - But, where employee entitled to receive a right to sue letter from the EEOC, see, *Surrell v. California Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1105.
- EEOC right-to-sue letter not sufficient for FEHA claims.

GENERAL OVERVIEW

EEOC Deadlines in a Nut Shell



- Service of Complaint - 10 days after filing of complaint. (42 U.S.C. § 2000e-5(e)(1).)
- Right to Sue –
 - Upon request after 180 days after filing of charges (42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(a)(1).)
 - Or sooner?
- Filing Lawsuit - 90 days from “giving of such notice” (42 U.S.C. § 2000e-5(f)(1)) v. “receipt of authorization” (29 C.F.R. §1601.28(e).)

GENERAL OVERVIEW

DFEH Deadlines in a Nut Shell



- Service of Complaint – 60 days after filing of complaint. (Gov. Code, § 12962; Cal. Code Regs., tit. 2, § 10021, subd. (b).)
- Right to Sue-
 - Immediately (Cal. Code Regs., tit. 2, § 10005, subd. (a).)
 - Upon complainant's request:
 - When DFEH closes file; or
 - When DFEH fails to bring civil action within 150 days after filing of complaint.
 - 1 year after complaint is filed.
 - (Gov. Code, § 12965, subd. (b); Cal. Code Regs., tit. 2, § 10005, subd. (f).)
- Filing Lawsuit –
 - By DFEH:
 - 1 year from filing of complaint.
 - 2 years from filing of complaint for Director's, class or group actions.
 - (Gov. Code, § 12965, subd. (a).)
 - By Complainant
 - 1 year after date on right to sue. (Gov. Code, § 12965, subds. (b) & (d).)

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LEGAL UPDATE

- Recent Case Law
- Statutory Amendments
- Regulatory Amendments

LEGAL UPDATE

Recent Case Law: Sexual Harassment



Zetwick v. County of Yolo (9th Cir. 2017) 850 F.3d 436

Female county correctional officer brought action against county and male sheriff, alleging that sheriff created sexually hostile work environment, in violation of Title VII and California Fair Employment and Housing Act (FEHA), based on unwelcome hugs and at least one unwelcome kiss. The District Court granted summary judgment to county and sheriff. Officer appealed.

Holding: The Court of Appeals held that fact issues existed as to whether sheriff's alleged conduct was sufficiently severe or pervasive.

Reversed and remanded.

LEGAL UPDATE

Recent Case Law: Disability



Featherstone v. So. Cal. Permanente Med. Grp. (2017) 10 Cal.App. 5th 1150

Employee brought action against employer to challenge employer's refusal to rescind employee's resignation under the Fair Employment and Housing Act (FEHA) and public policy. The Superior Court granted summary judgment for employer. Employee appealed.

Holdings: The Court of Appeal held that:

- 1 employer's refusal to allow employee to rescind her resignation was not an adverse employment action under the FEHA;
- 2 employer was not on notice of any temporary mental disability triggering a duty to accommodate; and
- 3 employer had no duty under FEHA to engage in an interactive process with employee.

Affirmed.

LEGAL UPDATE

Recent Case Law: Family Leave

CALIFORNIA FAMILY RIGHTS ACT



Bareno v. San Diego College District (2017) 7 Cal.App.5th 546

Former employee brought action against community college and community college district for retaliation under California Family Rights Act (CFRA). The Superior Court granted summary judgment for college and district. Employee appealed.

Holdings: The Court of Appeal held that:

1. fact issue existed as to whether employee properly notified community college district that she was taking medical leave;
2. fact issue existed as to whether employee submitted sufficient medical certification to support her need for medical leave; and
3. fact issue existed as to whether district decided to interpret employee's absences as "voluntary resignation" in retaliation for employee taking CFRA medical leave.

Reversed and remanded.

LEGAL UPDATE

Recent Case Law: Marital Status Discrimination



Nakai v. Friendship House Assn. of American Indians, Inc. (2017) 15 Cal.App.5th 32

Former employee, who was terminated by mother-in-law CEO after his wife informed CEO that he had a gun and was angry at co-workers, and that she had obtained a restraining order against him, brought wrongful termination action against former employer, claiming marital status discrimination and failure to conduct a reasonable investigation prior to his firing. The Superior Court granted summary judgment for former employer, and former employee appealed.

Holdings: The Court of Appeal held that:

1 allegation that former employee was terminated solely because of his status as the spouse of complaining employee and the son-in-law of the CEO did not establish prima facie case of marital status discrimination;

2 former employer had legitimate nondiscriminatory and nonpretextual reason to terminate former employee; and

3 former employer did not have any duty to investigate before discharging at-will former employee.

Affirmed.

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LEGAL UPDATE

Recent Case Law: Retaliation



Arias v. Raimondo (9th Cir. 2017) 860 F.3d 1185

Employee brought action against employer's attorney, alleging claims including retaliation under the Fair Labor Standards Act (FLSA) arising from attorney's plan to have employee taken into custody by U.S. Immigration and Customs Enforcement (ICE) to derail his state court wage claims against employer. The United States District Court granted attorney's motion to dismiss. Employee appealed.

Holdings: The Court of Appeals held that:

- 1 application of FLSA's anti-retaliation provision was not limited to actual employers, and
- 2 employee's allegations stated a claim against employer's attorney under the FLSA anti-retaliation provision.

LEGAL UPDATE

Recent Case Law: Retaliation



Husman v. Toyota Motor Credit Corp. (2017) 12 Cal.App.5th 1168

Former employee sued former employer for discrimination and retaliation in violation of Fair Employment and Housing Act (FEHA) and for wrongful discharge, alleging he had been fired from his executive-level management position because of his sexual orientation and criticisms he made concerning employer's commitment to diversity. The Superior Court granted employer's motion for summary judgment. Employee appealed.

Holdings: The Court of Appeal held that:

1 summary judgment evidence demonstrated that employer had legitimate, nondiscriminatory reason for discharging employee;

2 summary judgment evidence supporting same-actor theory did not demonstrate that employee's discharge was unmotivated by impermissible bias;

3 fact issue as to whether employee's discharge was substantially motivated by impermissible bias precluded summary judgment on discrimination claim under FEHA; but

4 employee's complaints allegedly concerning employer's commitment to diversity did not demonstrate employee was engaging in protected conduct.

Affirmed in part, reversed in part, and remanded with instructions.

LEGISLATIVE UPDATE

Workplace Immigration Enforcement (AB 450)



Prohibits an employer from providing access to a federal government immigration enforcement agent to any non-public areas of a place of labor if the agent does not have a warrant.

LEGISLATIVE UPDATE

Job-Protected “Parental Leave” for Medium-Size Employers (SB 63)



Makes it an unlawful employment practice for an employer, of 20 or more employees, to refuse to allow an eligible employee to take up to 12 weeks of job protected parental leave to bond with a new child within one year of the child’s birth.

Prohibits an employer from refusing to maintain and pay for the employee’s continued group health coverage during the duration of the leave.

LEGISLATIVE UPDATE

“Ban the Box” Law (AB 1008)



Prohibits an employer, with certain exceptions, from inquiring about or considering a job applicant's conviction history prior to a conditional offer of employment, and sets requirements regarding the consideration of conviction histories in employment decisions.

LEGISLATIVE UPDATE

Prohibition of Salary Information (AB 168)



Prohibits all employers, including the Legislature, the state, and local governments, from seeking salary history information about an applicant for employment and requires an employer to provide the pay scale for a position to an applicant upon reasonable request, among other things.

LEGISLATIVE UPDATE

Expanded Harassment Training (SB 396)



Requires that employers with 50 more employees include, as a part of the existing sexual harassment training, training on harassment based on gender identity.

Requires each employer to post a poster developed by the Department of Fair Employment and Housing (DFEH) regarding transgender rights in a prominent and accessible location in the workplace.

Adds transgender and gender nonconforming to the list of individuals facing employment barriers for the purposes of workforce investment training.

LEGISLATIVE UPDATE

Legislative Employee Whistle Protection Act (AB 403)



Protects legislative employees who make disclosures about specified misconduct by Members and fellow employees of the Legislature by prohibiting interference with an employee making a "protected disclosure" and prohibiting retaliation in response to such a disclosure.

Imposes criminal and civil liability on a Member of the Legislature or legislative employee, who interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure.

Imposes civil liability on an entity that interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure.

LEGISLATIVE UPDATE

Hostile Work
Environment for Military
Service Personnel (AB
1720)



Conforms state law to the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) by protecting service members from hostile work environments in their civilian jobs.

REGULATORY UPDATE

Criminal History in Employment



Cal. Code Regs., tit. 2, § 11017 et seq.

Clarify and expand Criminal History in Employment Decisions Regulations of the FEHA Regulations, including:

- Clarify the only time when a policy or practice that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is permissible is when it is job-related and consistent with business necessity;
- Add examples of convictions that can be judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law.

REGULATORY UPDATE

Transgender Identity and Expression



Cal. Code Regs., tit. 2, § 11030 et seq.

- Make clear that each person has a gender identity;
- Clarify that a bona fide occupational qualification defense will not be justified by the mere fact that an individual is transgender or gender non-conforming, or that the sex assigned at birth is different from the sex required for the job;
- Clarify that employers should provide feasible alternative facilities to respect the privacy interests of all employees, rather than to “balance” interests as initially stated;
- Make clear that sections 11016(b)(1) and 11032(b)(2) of the FEHA’s regulations already preclude inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, unless the employer establishes a permissible defense.

STATISTICS, TRENDS & PRACTICE POINTERS

- Statistics
- Trends
- Practice Pointers

STATISTICS

EEOC Enforcement Statistics



2017 EEOC Enforcement Statistics

Retaliation: 41,097 (48.8 percent of all charges filed)

Race: 28,528 (33.9 percent)

Disability: 26,838 (31.9 percent)

Sex: 25,605 (30.4 percent)

Age: 18,376 (21.8 percent)

National Origin: 8,299 (9.8 percent)

Religion: 3,436 (4.1 percent)

Color: 3,240 (3.8 percent)

Equal Pay Act: 996 (1.2 percent)

Genetic Information: 206 (.2 percent)

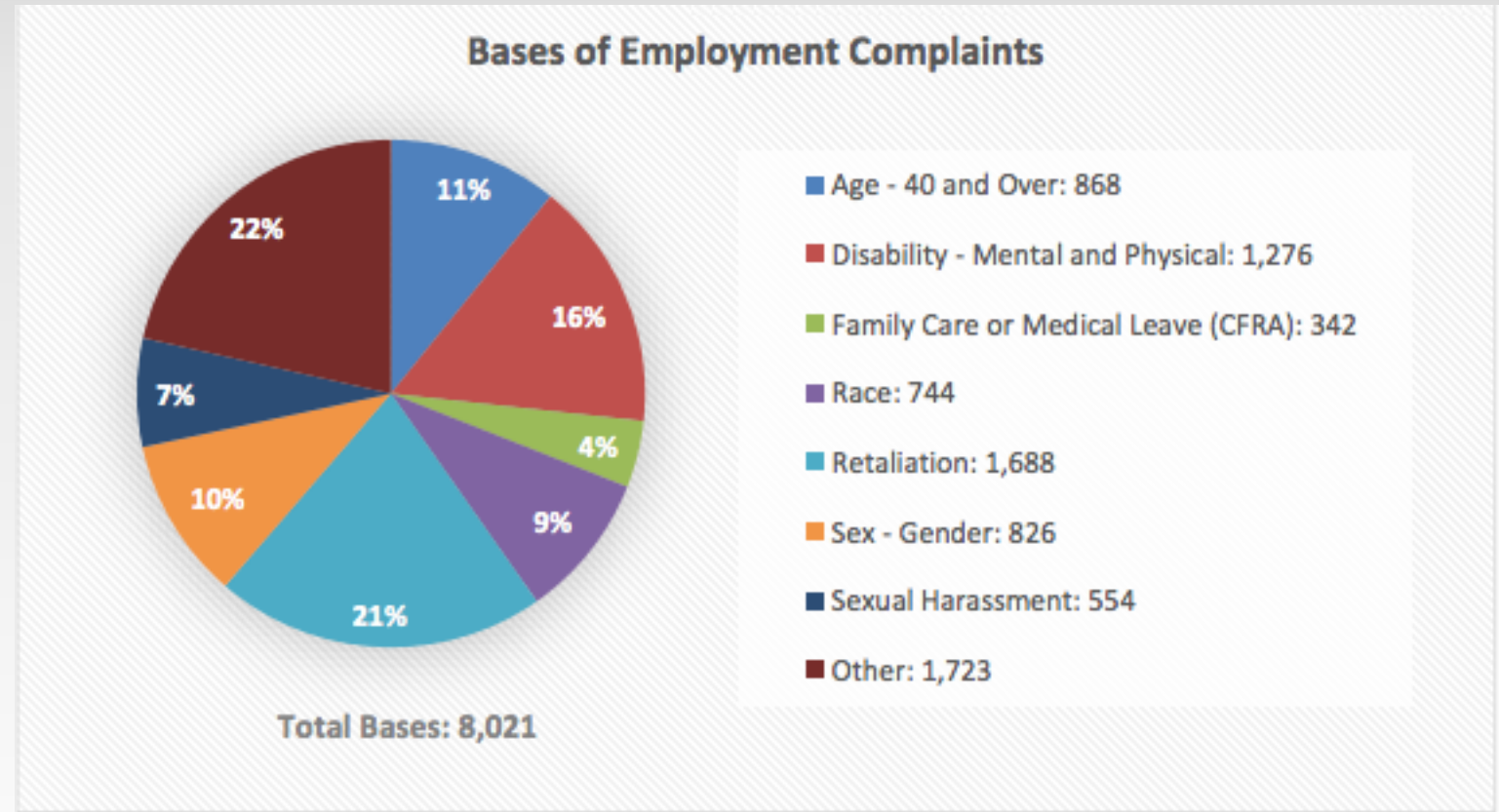
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STATISTICS

DFEH Enforcement Statistics

2016 DFEH Enforcement Statistics



TRENDS



- Sexual Harassment
- National Origin Discrimination
- Disability Discrimination
- Retaliation

PRACTICE POINTERS



- Implement an effective anti-discrimination and harassment policy
 - Include an effective complaint procedure
- Keep employees fully informed of their rights
 - DFEH poster
 - DFEH information sheet
 - www.dfeh.ca.gov
- Investigate complaints immediately
- Promptly take appropriate remedial action

PRACTICE POINTERS



- Stay up to date with latest employment case law and legislation
- MCLE programs
- Sign up for CLA's free California Labor & Employment Case Law Alert prepared by Phyllis Cheng



THANK YOU

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