

**COUNCIL ON EDUCATION IN MANAGEMENT  
THE DEFINITIVE GUIDE TO EMPLOYMENT LAW  
FOR HR PROFESSIONALS IN CALIFORNIA**

LA JOLLA, CALIFORNIA

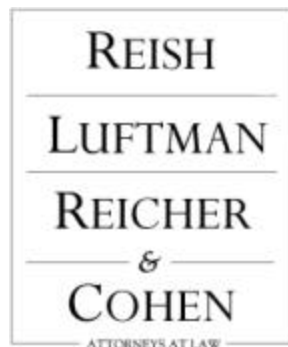
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**AVOIDING DISCRIMINATION AND  
RETALIATION UNDER STATE AND  
FEDERAL LAW**

*Presented by*

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## I. PROTECTED CLASSES IN CALIFORNIA

A. In California, the protected classes include:

1. Race/Color;
2. National origin/ancestry;
3. Sex (including gender identity);
4. Religion;
5. Age (for persons 40 and older);
6. Mental or physical disability;
7. Veteran status;
8. Medical Condition (including genetic characteristics);
9. Marital Status;
10. Sexual orientation; and
11. Pregnancy.

B. The California Fair Employment and Housing Act (FEHA) protects:

1. Actual and perceived membership;
2. Actual and perceived association with a member.

C. Two Basic Claim Types:

1. Disparate Treatment.
2. Disparate Impact

## II. CALIFORNIA JURY INSTRUCTIONS

[CONTINUES ON FOLLOWING PAGE]

### III. COMMON AND COSTLY MISTAKES MADE BY EMPLOYERS THAT UNWITTINGLY HELP PLAINTIFFS PURSUE DISCRIMINATION CLAIMS

#### A. No Company-Wide Plan For Employment Practices and Personnel Decisions.

1. Written Employment Policies, Procedures and Standards.
2. Carefully drafted employment policies, procedures, and standards for personnel management decisions help avoid ad hoc, inconsistent and subjective personnel decisions.
3. Juries believe that employees should have notice of the rules and consistency in their implementation.
4. Selection based on subjective decision making is ripe for disparate treatment or disparate impact discrimination claims because it permits managers to more easily “prefer” workers outside of a protected class.
5. A basic personnel management plan ought to include policies and procedures regarding: recruiting, screening, hiring and initial placement; transfer; promotion; performance evaluation; compensation; discipline and discharge; discrimination, harassment and retaliation prohibition, and effective internal complaint investigation procedure.
6. The absence of a plan makes proof of defenses more difficult.
7. Company size issues.

#### B. What Will Plaintiff’s Counsel Want To Know?

1. Is there consistency in policies or practices by work division or location?
2. Are there guidelines from headquarters that control decision making?
3. Do the policies or practices permit subjective decision making by managers?
4. How does the company monitor implementation of the policies and practices?
5. What is the impact do these have on protected class employees?
6. Other “landmines” (e.g., overtime pay).

C. There Is A Company-Wide Plan For Employment Practices And Personnel Decisions, But The Company Does Not Follow It.

1. The best laid plans are only as good as their implementation.
2. Often, the plan is designed to alter past unlawful practices.
3. Buy-in, commitment, and communication from senior management.
4. Train managers so that the policies, practices and procedures are consistently followed.
5. Evaluation procedures to see if managers are properly executing the plan
6. Routine measurement of the impact of personnel decisions on protected classes
7. Take appropriate action.

D. Affirmative Action Plan And/Or Diversity Policies Are Not Followed.

1. Such plans and policies are defense evidence of its good faith and affirmative efforts to comply with the law.
2. Is it a charade or real?
3. Plaintiff's counsel will argue that little or no implementation is: evidence of intentional discrimination; and a predicate for an award of punitive damages.
4. A court could permit a claim of punitive damages to go to the jury on proof of intentional discrimination that might not seem to amount to "outrageous" conduct that is "beyond all bounds of human decency."

E. Failure To Periodically Evaluate Management Practices.

1. Consider conducting an internal "audit."
2. Attorney – client privilege or regular business function.
3. Feedback from a representative sample of managers and employees.
4. Review written personnel policy and procedure documents.

5. Review the complaint process.
- F. The Internal Complaint Process Is Ineffective.
1. The existence of a credible internal complaint mechanism may provide a defense to claims of sexual (and other) harassment and punitive damages.
  2. In November 2003, the California Supreme Court established in *McGinnis v. State Department of Health Services* an “avoidable consequences” defense to sex harassment cases where the alleged victim unreasonably fails to complain to stop the misconduct. The case encourages and rewards employers who:
    - a. publish written and understandable anti-harassment, discrimination and retaliation policies;
    - b. consistently enforce policies against sex harassment;
    - c. immediately investigate allegations; and
    - d. and take prompt and appropriate disciplinary action.
  3. Consider additions to your employee handbook to include: “The Company wants you to use these procedures so you can (a) help us put a stop to unlawful harassment and (b) avoid any further harm you may have suffered.... and “Employee confidentiality will be protected to the extent practical for the Company to investigate and take appropriate disciplinary action.”.
  4. Employer goals of deterrence and employee safety and productivity are enhanced by an effective complaint mechanism.
- G. Failure to Manage The Rapidly Changing Workforce.
1. The anti-discrimination laws apply in personnel decisions triggered by mergers and acquisitions, and in downsizing.
  2. Hiring, transfer and termination.
  3. Surviving culture and employment practices.
- H. The Employer and Jury Will Hate
1. “Iron fist” vs. “Firm, but fair.”
  2. “Don Rickles” managers.

3. Other bad business practices.
4. Poor public relations.

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