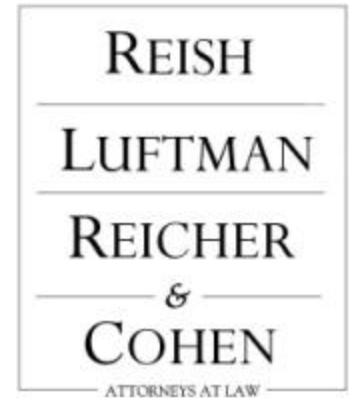


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EMPLOYMENT LAW ISSUES INVOLVING DOMESTIC PARTNERS

Presented to

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About the Speaker

Mark Terman is a partner with Reish Luftman Reicher & Cohen where he heads the Firm's Employment Law Practice Group. He counsels employers and management in claim prevention, hiring, policy, crisis, and discipline and termination matters; and he represents them in federal and state court, arbitration and government agency litigation. Mark was recently selected as a "Super Lawyer" lawyer by his peers in the recent 2004 California Super Lawyers Survey in which 65,000 California Lawyers were polled.

He has chaired the California CPA Education Foundation's annual Employment Practices conference, is a member of the Cal CPA Society's statewide Human Resources Committee, and has been retained by CAMICO to represent its insureds in employment matters. He has also serves as General Counsel for the UCLA Alumni Association and as a member of its Board of Directors. He has served as a Superior Court appointed arbitrator.

Mark frequently speaks to and writes for client and industry groups on litigation avoidance and management, wage and hour issues, trade secret protection, and avoiding sexual harassment, among other employment law topics. Please take a look at www.reish.com.

I. DISCRIMINATION AND HARASSMENT IN EMPLOYMENT

- A. In California, the classes who are protected from discrimination and harassment include:
1. Race/Color.
 2. National origin/ancestry.
 3. Sex.
 - a. Effective January 1, 2004, AB 196 outlawed gender identity discrimination as a form of sexual discrimination. Gender means the employee's actual gender or the employer's perception of the employee's actual gender or behavior normally associated with birth gender. Employers are required to permit transgendered employees to appear and dress consistently with their declared 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.
 - a. Not defined, but has only been applied to those who are legally "married."
 - b. Employers have the right to refuse to permit spouses to work in the same department, division or facility if the work involves potential conflicts of interest or other hazards that are greater for spouses than for other persons. Cal. Govt. Code. § 12926(q).
 10. Sexual orientation.
 - a. Means heterosexuality, homosexuality, and bisexuality. Cal. Govt. Code. § 12926(q).
 11. Pregnancy.

- B. The California Fair Employment and Housing Act (FEHA) protects:
 - 1. Membership.
 - 2. Association with a member.
 - a. Perceived membership or association with a member. Cal. Govt. Code. § 12926(m).
- C. Basic FEHA Claims:
 - 1. Disparate treatment discrimination.
 - 2. Disparate impact discrimination.
 - 3. Harassment because of actual or perceived membership or association.
 - 4. Sexual Harassment.
- D. Examples of related claims:
 - 1. Wrongful termination or constructive discharge in violation of public policy.
 - 2. Intentional infliction of emotional distress.
 - 3. Invasion of privacy.
 - 4. Constitutional right of free speech.
 - 5. California Labor Code Section 98.6 prohibits an employer from discharge or discrimination against an employee who engages in conduct protected by the Labor Code.
 - a. Example: Lawful conduct during off-duty hours away from the employer's premises. Cal. Labor Code § 96(k).

II. THE DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT OF 2003 (AB205)

- A. Beginning January 1, 2005, registered California domestic partners will have all of the rights and responsibilities afforded married persons under California law. Rights and policies benefiting employees of private employers and their spouses, must be provided to employees and their registered domestic partners.
- B. AB 205 does not affect federal laws. Federal law does not recognize the relationships of same-sex couples.
- C. California Domestic Partner Registry: http://www.ss.ca.gov/dpregistry/dp_faqs.htm

- D. Examples of California employment laws that do or will affect domestic partners.
1. Group Health Insurance.
 - a. Employers are not currently required to provide health insurance to their employees; but, most do as that benefit is customary.
 - b. However, starting January 1, 2006, SB 2 requires that employers with 200+ workers must provide and pay for 80% of the premiums for coverage for employees and provide a coverage option for their dependents. In 2007, the rules will apply to 50 to 199 employee workplaces. Employers with 20 to 49 workers may be required to provide coverage if certain tax credits are enacted by the Legislature. Smaller employers are exempt. A repeal referendum may put on future ballots. ERISA may preempt the new law.
 - c. Currently, private employers are not required to provide domestic partner health insurance coverage. Effective January 1, 2005, employers who provide health insurance to spouses must offer insurance to registered domestic partners.
 - d. AB 2208, currently pending before the California Legislature, is “cosponsored by Insurance Commissioner John Garamendi, who states this bill simply conforms insurance statutes with AB 205 and establishes a necessary and consistent standard of non-discrimination in insurance.” See, http://www.leginfo.ca.gov/pub/bill/asm/ab_2201-2250/ab_2208_cfa_20040720_105315_sen_floor.html.
 2. “COBRA” Health Insurance Continuation.
 - a. COBRA is a federal law that applies to group health insurance plans of employers with 20 or more employees.
 - i. A domestic partner is not a “qualified beneficiary” entitled to COBRA coverage under COBRA because federal law does not recognize a domestic partner as a spouse. AB 205 will not change that.
 - ii. If employees are allowed by their plans to cover their domestic partners, the domestic partner can continue coverage only as a “dependent” (*i.e.*, if the covered employee elects coverage too) unless the insurance company or HMO agrees. Covered spouses or dependent children are qualified beneficiaries.
 - b. Cal-COBRA is a state law applies to employers with two to 19 employees. Effective January 1, 2005, Cal-COBRA will afford domestic partners the same rights as spouses.

- i. Under Cal-COBRA, a “qualified beneficiary” is anyone who is covered under the group health plan at the time of a qualifying event. A “qualifying event” includes, the death of a covered employee, termination or reduction of hours of employment, and divorce or legal separation of the covered employee from their spouse, the loss of dependent status.
3. Kin Care – California Labor Code Section 233.
 - a. If any employer provides paid sick days off, then it must allow employees to use up to one-half a year’s accrual to attend to an ill parent, child, spouse or domestic partner.
 - b. Section 233(c) prohibits discrimination for exercising or attempting to exercise these rights.
 - c. Registered domestic partners were added January 1, 2002.
4. California Family Rights Act (CFRA) – California Government Code Sections 12945.2.
 - a. CFRA is the California version of The Family and Medical Leave Act, a federal law not affected by AB 205.
 - b. Permits up to 12 weeks unpaid leave of absence to bond with a newborn or adopted child, care for a family member with a serious health condition, and/or the employee’s own serious health condition. Certain return to work and other rights apply.
 - c. A family member is currently defined as children (biological, step, adopted and foster), parents (biological, step, adopted, foster, legal guardian, *in loco parentis*; but, not parents-in law) and spouses.
 - d. Effective January 1, 2005, CFRA will give rights to employees who have relationships with or arising from registered domestic partners.
 - e. To be eligible, the employee must have worked for an employer for at least 12 months, have worked 1250 hours in the preceding 12 months, and work for an employer with 50 or more employees working within a 75-mile radius.
5. Crime Victim Leave.
 - a. Effective January 1, 2004, SB 478 permitted employees who are victims of crime, and employees who are closely related to a crime victim, to take time off from work to attend related judicial proceedings.

- b. Employers cannot discharge, retaliate or discriminate against any employees who ask for or take the leave.
 - c. The law does not limit the amount of leave, nor does it require minimum employee notice of the need for the time off.
 - d. Effective January 1, 2005, it is likely that a domestic partner will be viewed as “closely related.”
6. Spousal/Child Support Orders and Garnishments.
- a. Effective January 1, 2005, the same rules will apply to Orders obtained by or against domestic partners.
 - b. Give a copy to the employee and comply with the Court Order unless you receive a withdrawal or change in the Order.
7. Paid Family Leave.
- a. Starting July 1, 2004, California “Paid Family Disability Leave Insurance” permitted employees to receive limited replacement wages for up to six weeks of leave in any 12 month period to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child by birth, adoptions or foster care placement. PFL deals only with compensation during the leave; it is not an entitlement to leave.
 - b. Leave entitlement is still governed by FMLA/CFRA and employer policy/practices.
 - c. Employees must apply to the EDD for benefits and employers must give employees a PFL brochure published by the EDD. For information and brochures, call the California PFL information center at “1-877-BE-THERE.”
8. Bereavement leave.
- a. Not required by law; but, if an employer permits such leave for death of a spouse, then such leave will be available on death of a domestic partner occurring after January 1, 2005.

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