Federal Law on Steroids
California Discrimination and Harassment Laws

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Today’s presenters and some notes...

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Introduction

- California workplace discrimination and harassment laws are often more stringent than federal statutes that protect employees under the same circumstances. Thus, when deciding to terminate California employees, employers need to be mindful of the legal consequences - possible discrimination and harassment administrative claims and lawsuits.
- This presentation provides an overview of the California laws, including differences with federal laws, and will suggest best practices for employer handbooks and policies, to prepare for and implement termination decisions, and to handle post-termination issues, including communications, job references, and legal action.
Employee Handbook

A well-drafted employee handbook serves many useful purposes:

- Creates and promotes a desired image;
- Reduces employer/employee disputes;
- Shows a coherent employee relations philosophy;
- Sets forth the employer’s most direct statement to the employee concerning its basic employment guidelines.
Suggested Clauses/Provisions

- Disclaimer Clause.
- Grievance Clause.
- Discipline and Discharge Clause.
- “No Harassment/Discrimination” Clause.
Grievance Clause – Arbitration Agreements

Arbitration agreements generally are enforceable under California state law. There is a strong public policy in favor of arbitration. A written agreement to submit to arbitration is valid, enforceable and irrevocable except on grounds that exist for revocation of any contract. (Code of Civil Procedure § 1281.)
Arbitration Agreements, continued

- Mandatory language – “Any claim, dispute, and/or controversy between the employee and the employer shall be submitted to binding arbitration…”
- Any doubts as to the scope of the clause must be resolved in favor of arbitration
- Employment arbitration agreements can encompass antidiscrimination claims
- However, unconscionable agreements are unenforceable. Both procedural and substantive unconscionability are required to invalidate an arbitration agreement.
- Procedural unconscionability.
- Substantive unconscionability.
- The party opposing arbitration has the burden of proving the arbitration provision is unconscionable.
Arbitration Agreements – Armendariz v. FHPS, Inc. (2000) 24 Cal.4th 83

- In Armendariz, the California Supreme Court concluded that claims brought under FEHA are arbitrable if the arbitration permits an employee to vindicate his/her statutory rights. The Court set forth five minimum requirements for lawful arbitration of nonwaivable statutory civil rights in the workplace pursuant to a mandatory employment arbitration agreement, finding that an arbitration agreement is lawful if it:
  - Provides for neutral arbitrators;
  - Provides for more than minimal discovery;
  - Requires a written award;
  - Provides for all types of relief that would otherwise be available in court;
  - Does not require employees to pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to arbitration.
Federal Arbitration Act and Arbitration under California Code of Civil Procedure

- Federal Arbitration Act (9 U.S.C. § 2) – a written provision in a contract relating to a transaction involving interstate commerce to settle by arbitration a controversy arising out of the contract is valid and enforceable. The FAA applies to arbitration provisions in employment agreements. When parties to an arbitration agreement expressly state that an arbitration proceeding must move forward under the FAA’s procedural provisions rather than under state procedural law, the FAA must govern the arbitration;

- California Code of Civil Procedure §§ 1280, et seq. provides detailed arbitration procedures to be followed.
Training and Education of Supervisors

- California Government Code § 12950.1 requires employers having 50 or more employees to provide at least two hours of sexual harassment training to all supervisory employees employed as of July 1, 2005 and to all new supervisory employees within six months of their assumption of a supervisory position;
- Sexual harassment training may be in a classroom or interactive (e.g., online);
- Frequency;
- Minimum threshold;
- Knowledge and expertise of trainers.
Training and Education of Supervisors, continued

Training and education must include:

- Information and practical guidance regarding the federal and state statutory provisions regarding prohibition, prevention and correction of sexual harassment;
- Remedies available to victims of sexual harassment (e.g., back pay, front pay, injunctive relief, compensatory damages and punitive damages); and
- Practical examples to aid supervisors in the prevention of harassment, discrimination and retaliation.
Employee Performance Evaluations

- Document the employee’s file – Document, document, document!
  - An effective performance evaluation procedure is an important step toward limiting potential liability for wrongful discharge.
  - A properly documented employee personnel file gives the employer the ability to show that a discharge was for a good reason
    - Employee who misses two work days or shows up two days late without excuse;
  - Managers must be properly trained in evaluation procedures.
    - Provide the employee accurate, timely and specific information on performance;
      - Prepare a written evaluation – unbiased, truthful, detailed, candid and objective;
      - Schedule a meeting with employee to discuss evaluation;
      - During meeting, encourage meaningful discussion;
      - Allow an opportunity for employee to respond
      - Where improvement is needed, set a plan and timetable for improvement;
      - Have the performance evaluation be subject to review by the next higher level of management;
      - Obtain the signature of the employee on the review, documenting that the employee has read and received the review.
Responding to Harassment Complaints

- Promptness;
- Use unbiased investigator;
- Fact gathering;
- Interview complainant;
- Interview alleged harasser;
- Interview witnesses;
- Advise complainant and alleged harasser that the company does not tolerate retaliation for complaints;
- Prepare report and make timely decision;
- Advise complainant of federal and state laws regardless of company’s decision.
California’s Fair Employment and Housing Act

- The Fair Employment and Housing Act (FEHA) prohibits discrimination and harassment based on race, religion, color, national origin, marital status, medical condition, physical and mental disability, sex, age, sexual orientation, pregnancy or taking family care leave;

- The FEHA requires exhaustion of its administrative remedies prior to pursuing a FEHA civil action
  - The administrative procedures include a one-year period after the last act of discrimination or harassment during which one may file an administrative complaint and a one year period after receipt of the right to sue letter during which one may file a civil suit.

- Remedies include compensatory and punitive damages and attorneys’ fees as well as back pay and injunctive relief.
Title VII of the Civil Rights Act of 1964

- Title VII prohibits employment discrimination, including discharge, on the basis of race, color, sex, religion, or national origin;
- It also prohibits retaliation against an employee who opposes any practice prohibited by Title VII;
- An employee or job applicant who believes that he/she has experienced discrimination in violation of Title VII must file a charge of discrimination with the Equal Employment Opportunity Commission within prescribed periods of time;
- The complainant must commence a civil action within 90 days of the EEOC’s issuance of a notice of a right to sue;
- A Title VII plaintiff may be able to obtain back pay, injunctive relief and attorney’s fees. Compensatory and punitive damages, up to a statutory maximum, are available in actions involving intentional discrimination.
Americans With Disabilities Act

- The Americans With Disabilities Act of 1990 prohibits employment discrimination against disabled persons;
- A disabled person who has suffered discrimination must file a timely charge with the EEOC;
- The aggrieved individual may ultimately file a civil action and receive various remedies including equitable relief, reinstatement with or without back pay, and front pay;
- Limited compensatory and punitive damages are also available in cases involving intentional discriminatory conduct.
Termination and Beyond

- Termination
- Post-termination
Terminate with Preparation

- Some rules to keep in mind when making a decision to terminate an employee
  - Treat every termination decision as having the potential of resulting in a claim or lawsuit
  - View all personnel file documents and related conversations and e-mails as potential evidence in a legal hearing
  - Possible witnesses include the employee’s supervisor, co-workers, the person(s) who decided to hire and/or terminate, and disgruntled ex-employees
  - If it isn’t in writing, it didn’t happen – the classic “he said, she said”-type scenario
Terminate with Preparation

- The Decision to Terminate
  - The personnel file should be complete and up to date
  - Composition of the termination decision makers
    - Involved in the decision to hire?
    - A member of the same protected class?
    - If either, might be evidence of non-discriminatory motive
  - Basis for the termination
    - At-will employment is presumed in California – OK to terminate for no reason or any non-illegal reason
    - Economic reasons
    - Cause or misconduct
      - Is it documented?
      - Will it be a surprise to employee?
Terminate with Preparation

- Prepare for termination meeting
  - At least two (2) at termination meeting
  - Agree on roles: One person does the talking, the other is a witness
  - Usually, termination meeting should be employee’s last work day
  - Schedule termination meeting for a Friday
  - Agree on script:
    - Should you tell the employee the reason for termination?
      - If you do, be sure it is truthful and documented
    - Don’t waver – final decision, cannot be changed
    - Don’t argue or explain
    - Keep it short
Terminate with Preparation

- Prepare for termination meeting (continued)
  - Be sure proper paperwork is ready to hand to employee at termination meeting:
    - Final paycheck – reflects unpaid, earned wages and unused, accrued vacation
    - Notice of COBRA and Cal-COBRA rights
    - Notice of change in status for employee to sign (copy to employee) – include employer’s name, employee’s name and SSN, whether a termination or resignation, and date of the action.
    - Severance payment and severance agreement (discussed later)
Terminate with Preparation

The termination meeting
  • Stick to script
  • Demand return of company property (e.g., keys, laptop)
  • Hand paperwork to employee:
    – Final paycheck
    – Notice of Cobra/Cal-COBRA rights
    – California EDD pamphlet
    – Notice of change in status – employee sign
    – Severance payment/agreement – employee sign (unless subject to Older Workers Benefit Protection Act ("OWBPA") – More on this later
  • Monitor employee packing up and leaving
Terminate with Preparation

- Severance payments/agreements
  - Severance not required, unless policy of employer
  - Employee releases all claims in exchange for extra payments and/or benefits
  - Some important terms:
    - Waives all rights under California Civil Code Sec. 1542.
    - If employee 40 years plus - OWBPA requirements in severance agreement, including 21 days to think about it plus 7 more days to revoke employee’s signing of the severance agreement
Post-Termination

- After termination, be consistent
  - In responding to government agency, be consistent with termination position
    - Don’t let feelings of guilt, pity sway your position with California agencies
  - Actual case:
    - To receive EDD unemployment benefits, an employee’s unemployment must not be due to the employee’s fault
    - Employer terminated an employee for stealing and he then applied for EDD benefits. The EDD then asked the employer to explain the reason for termination
    - The HR director, feeling sorry for the former employee, replied in writing that the employee had been terminated without any misconduct
    - The HR director learned a valuable lesson after being aggressively cross-examined over this issue during the ensuing wrongful termination lawsuit.
Post-Termination

- After termination, be consistent (continued)
  - Don’t rehire the employee you terminated for harassment (trust me, this happens)
    - This could be evidence that the employer ratified or condoned the harassment
  - Actual case:
    - A male supervisor was accused of sexually harassing a female employee
    - An internal investigation confirmed the harassment, so the supervisor was terminated on that basis
    - Shortly after termination, the employer felt guilty about the termination and rehired the male supervisor for a temporary job
    - The female employee filed a complaint with the EEOC, which the employer settled very quickly upon the advice of counsel
Post-Termination

Administrative Charges

• California Department of Fair Employment and Housing (DFEH) and EEOC have concurrent jurisdiction
• FEHA complaint with DFEH – up to 1 yr after last act
• DFEH – request right-to-sue letter v. investigate/legal
• EEOC – right-to-sue v. early mediation v. investigate/legal; some significant delays
• FEHA suit – up to 1 yr after date of right-to-sue letter
Post-Termination

- **Lawsuits**
  - FEHA claims v. Federal claims
    - In California, individual workplace discrimination/harassment lawsuits are generally brought under state law (FEHA)
    - FEHA: More protection than Federal Laws
      - Covers discrimination and harassment (Title VII does not expressly cover harassment)
      - Liberal Employer definition – discrimination (5 employees); harassment (1)
        - Title VII -15 employees; ADEA - 20 employees
      - FEHA doesn't have damage caps, limited attorney fee provisions, restrictive legal burdens of proof or special employer defenses
  - Wrongful termination re public policy
  - Defenses
    - Statute of Limitations re FEHA Claims
    - FEHA claims limited to DFEH complaint
    - Contractual Arbitration
Post-Termination

- Responding to a request for job reference
  - The risks of providing negative information
    - Criminal liability/damages
      - In California, it is a misdemeanor (Labor Code sec. 1050) for a person who, by making misrepresentations, prevents or tries to prevent a former employee from obtaining a job
      - Liability for damages, including treble (triple) damages, may be imposed against the person who made the misrepresentation and against his/her employer (if the employer knowingly permitted the misrepresentation or failed to take reasonable steps to prevent it). (Labor Code sec. 1052, 1054).
Post-Termination

- Responding to a request for job reference
  - The risks of providing negative information (continued)
    - Defamation claim by former employee
    - California has a qualified defense for the former employer so long as the negative reference was made without malice. *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363. Malice means "actual malice," which is hatred or ill will towards the former employee or the lack of reasonable grounds for belief in the truth of the negative information (reckless disregard of the former employee’s rights).
Post-Termination

- Responding to a request for job reference
  - The risks of failing to provide negative information
    - Liability to third-party physically injured by former employee
      - California Supreme Court, in *Randi W. v. Muroc Joint Unified School District*,
        - Plaintiff, a minor, alleged that her vice principal sexually molested her;
        - She contended that her school hired the VP after receiving only positive references from the VP’s prior school, even though the former school knew of similar complaints against the same VP;
        - The California Supreme Court held that the former employer could be held liable for fraud and negligent misrepresentation;
        - The Court reasoned that, although the defendant did not have a duty to independently disclose the misconduct, once it provided a positive character reference for the VP, it had to disclose the VP’s full character, including any known investigations or misconduct.
POST-TERMINATION

- Responding to a request for job reference
  - **Best Practices**
  - There is *no duty to independently disclose negative information*
  - Per the California Supreme Court in *Randi W*, the former employer might have avoided liability by:
    - a reference letter disclosing *all* relevant facts about the VP’s background, or
    - a no-comment letter, or
    - simply verifying basic employment dates and details.
POST-TERMINATION

- Responding to a request for a job reference
  - Best Practices (continued)
    - Have a neutral reference policy—limit job reference information to employment dates, job titles, and maybe final salary
    - All job reference inquiries should be directed to and handled by a job-reference contact in your firm.
      - The contact should not be the departing employee’s former supervisor with whom the employee may have had a conflict
    - Ensure all your managerial and supervisory personnel know this neutral reference policy
    - If you must provide negative information, avoid statements about the employee’s character or other subjective assessments and be sure your statements have corroborating documents
    - In general, the best, safest practice is a neutral job reference
Thank You.

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