

2024 APMA ANNUAL FORUM

MONTEREY PLAZA HOTEL

Thursday, January 25, 2024
4:00 p.m. - 5:00 p.m.

Presented by:

James Gumberg

Patane · Gumberg · Avila, LLP
4 Rossi Circle, Suite 231
Salinas, California 93907
(831) 755-1461
jgumberg@pglawfirm.com



PATANE · GUMBERG · AVILA, LLP
ATTORNEYS AT LAW



**Navigating the
Evolving Standards
in Today's
Workplaces for
Discrimination,
Retaliation,
Harassment and
Gender Equality**




PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW




Today's Agenda



1 DEI... What is it? How does it affect your business? 

2 Legal requirements effecting gender equality, anti-discrimination and harassment policies in the workplace.

3 Question and Answer 



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

What is DEI?

Diversity, Equity and Inclusion (DEI)

- Diversity refers to the identity of your workforce, and looks at factors such as gender, ethnic, racial, age, religion, language, and sexual orientation.
- Equity means treating people fairly, the theory being that someone's identity does not predetermine their success or failure at the workplace.
- Inclusion means that workers of all backgrounds are welcome and have support from their employer.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

Trends or Here for the Duration?

- 1 No (at present) mandate under CA law for private business to have DEI policy; compare to publicly traded corporations, which must have minimum number of female directors on the board
- 2 Pressure from external stakeholders to make progress on diverse workforce
- 3 Could uncover unconscious and subconscious bias in hiring
- 4 Discoverable in the legal process; and problematic if discriminatory practices uncovered but no remedial action is taken.
- 5 Could create "reverse discrimination" claims

<https://fortune.com/2024/01/15/dei-backlash-fearless-fund-companies-changing-programs-avoid-wave-lawsuits-alleging-discrimination/>



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

DEI ...and the Legal Landscape Haltigan v. Drake (UC Santa Cruz)

UC Santa Cruz has an Office for Diversity, Equity and Inclusion.

UCSC requires all faculty job applicants to submit statements detailing how they would contribute to DEI on campus.

Haltigan, the plaintiff, has a PhD in developmental psychology and wanted to work at UCSC. He did not apply because he could not on to the university's DEI statement because it conflicts with his views on "merit-based evaluation", "colorblind inclusivity" and "viewpoint diversity."

Statements should include particular beliefs about race, fairness, "and other controversial socio-political issues." (Per Pacific Legal Foundation.)

Judge Edward Davila dismissed the case on procedural grounds, finding that since Haltigan never applied for the position cited in the lawsuit, he did not have standing to bring his lawsuit.



Sources of Federal Law

Title VII of the
1964 Civil Rights
Act ("Title VII")

Americans with
Disabilities Act
("ADA")

Age
Discrimination in
Employment Act
("ADEA")



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

**Sources
Federal
Law
Protect
ed
Classes
Under
Title VII**

Race, Color, Religion, Sex and National Origin

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.



Is Sexual Orientation a Protected Class under Federal Law?

*In Bostock v Clayton County, Scotus ruled 6–3 that two gay men and a transgender female were denied employment **because of their sex**.*

"[b]y discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer discriminates against persons with one sex identified at birth and another today."

The "but for" standard.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

DFEH Has Been Rebran ded as CRD

Effective July 2022, the Department of Fair Employment and Housing (DFEH) has been rebranded as the California Civil Rights Department.

Note new URL <https://civildrights.ca.gov>.

Former URL [https://dfeh.ca.gov/](https://dfeh.ca.gov) no longer works

Update your handbooks.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

Sources

Protected Classes Under California FEHA (Continued)

Sex/Gender Identity & Expression, pregnancy, childbirth and related medical conditions

Gender related appearance

Genetic Information

Ancestry

Disability/Medical Condition/Physical/Mental Disability

Race/National Origin/Color

Opposition to Harassment/Unfair Immigration Practices

Association/Perception

Religion



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

Sources

Protected Classes Under California FEHA (Continued)

Familial Status, including pregnant women, foster parents, and persons in process of securing legal custody or becoming foster parents

Age

Sexual Orientation

Opposition to Harassment/Unfair Immigration Practices

Association/Perception

Military & Veteran Status

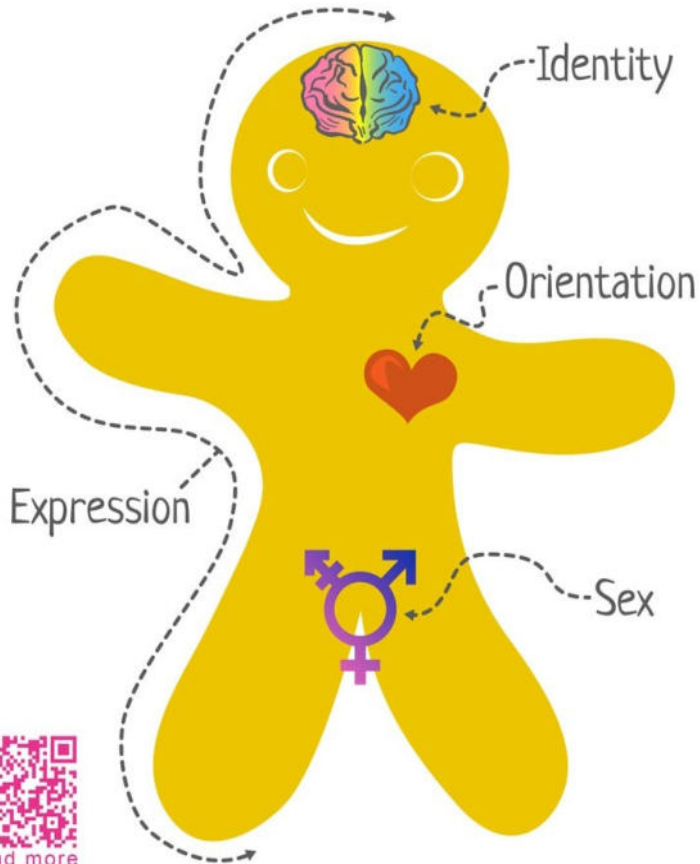
Contraceptive Equity Act “reproductive decisionmaking”



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

The Genderbread Person

by www.ItsPronouncedMetrosexual.com



Gender Identity

Woman Genderqueer Man

Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g., hormonal levels) and how you interpret what that means.

Gender Expression

Feminine Androgynous Masculine

Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.

Biological Sex

Female Intersex Male

Biological sex refers to the objectively measurable organs, hormones, and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; intersex = a combination of the two.

Sexual Orientation

Heterosexual Bisexual Homosexual

Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.

Restrooms...



Gender identity /gender related appearance is a protected class.

Use of restrooms. Employees have the right to use the restroom consistent with their gender identity.

Employers cannot dictate which restroom workers use.

Single-stall restrooms must be labeled as "All Gender," "Unisex," "Gender Neutral," or something similar.

Employees have a right to safe and appropriate restroom facilities.

Can talk in a confidential manner, and what steps take to enhance safety and provide appropriate facilities.

Gender Identity

- Employers are prohibited from inquiring about or requiring documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment.
- Discrimination against an applicant who fails or declines to designate male or female on an application form is prohibited.
- Exception for government issued documentation to meet legally mandated obligations.
- DMV has three gender options on the driver's license. Can mark "X" for nonbinary in the gender category.
- Dress codes: Employees may be asked to comply with the grooming/dress standards consistent with their gender identity.
- Allow for use of preferred pronouns and name.

What is a Deadname?

- Person's name before transition.
- Must update personnel documents to update current information.



Gender Affirming Health Care

Gender-affirming care, as defined by the World Health Organization, is care “designed to support and affirm an individual’s gender identity” when it conflicts with the gender they were assigned at birth.

“Gender affirming health care” and “gender affirming mental health care” are authorized under CA law, and required to be provided under a health plan.

At least 19 states have laws restricting gender-affirming care for minors.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW



Protected Classes Under FEHA (Cannabis, AB 2188)

Starting in 2024, employers are prohibited from discriminating in hiring, termination, or any term or condition of employment, or taking adverse action against a person for using cannabis (marijuana) *while off the job and away from the workplace.*

AB 2188 does not permit an employee to possess or be impaired by cannabis while on the job. AB 2188 is not intended to interfere with an employer's right to maintain a drug-free and alcohol-free workplace.

Review your Drug Testing Policies! THC Testing vs. Non-Psychoactive Testing

THC is “Tetrahydrocannabinol,” the chemical that results in impairment. THC testing is based on analyzing bodily fluids, such as saliva and blood. These forms of testing may establish that a person has consumed cannabis in the past several hours.

Employers may not test for the non-psychoactive cannabis metabolites found in a person’s hair, blood, urine, or other bodily fluids.

Need to work with your drug testing collection site!

Raines v. U.S. Healthworks

Cal.Sup.Ct

Pre-Employment Medical Screening

- Plaintiffs Kristina Raines received an employment offer from Front Porch Communities and Services, and Figg received an employment offer from the San Ramon Valley Fire Protection District. Both of their offers were conditioned on passing a pre-employment medical screening that would be conducted by U.S. Healthworks Medical Group (USHW).
- Plaintiffs were asked questions on a health history questionnaire that included asking about venereal diseases, penile and vaginal discharge, problems with menstrual periods, diarrhea, constipation, and painful/frequent urination.
- Plaintiffs believed the screening tests were overbroad and unrelated to the functions of any job and sued the testing company USHW alleging the examinations violated FEHA.
- Plaintiffs were not employees of USHW.

Raines v. U.S. Healthwo rks Cal. Sup. Ct.



Under FEHA, pre-employment post-offer medical inquiries must be job related and consistent with business necessity.



Raines applied to be a food service aide in the kitchen.



Figg applied to work on the Fire Protection District's volunteer communication reserve.



Beware of broadly worded inquiries in post-offer medical inquiries.



USHW ... (is a) large business enterprise() operating on a national scale."



Raines v. U.S. Healthworks *Cal. Sup. Ct.*

WHO IS THE EMPLOYER?

FEHA DEFINES "EMPLOYER" AS "ANY PERSON REGULARLY EMPLOYING FIVE OR MORE PERSONS, OR ANY PERSON ACTING AS AN AGENT OF AN EMPLOYER."

THE P LAIN MEANING AND LEGISLATIVE HISTORY OF FEHA AND PUBLIC POLICY SUPPORT THE CONCLUSION THAT AN.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

Special Definition of Employer for Harassment Claim

What is an employer?

FEHA defines "employer" as "any person regularly employing five or more persons, or any person acting as an agent of an employer."

FEHA harassment definition. "Employer" is "any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract."
All California employers, public and private, are subject to FEHA's sexual harassment prohibition.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

California Pay Data Reporting



Pay Data Reports are due 5/8/2024



California law requires private employers of 100 or more employees and/or 100 or more workers hired through labor contractors to annually report pay, demographic, and other workforce data to CRD.



Employees located inside and outside of California are counted when determining whether an employer has 100 or more employees.



<https://calcivilrights.ca.gov/paydatareporting/faqs/>: Under Government Code section 12999(a)(2), a private employer that has 100 or more labor contractor employees within the prior calendar year (anywhere as long as it has one labor contractor employee in California) shall submit a separate pay data report to CRD covering the labor contractor employees in the prior calendar year.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW



Mental Disabilities and Concept of Neurodivergence

FEHA is more comprehensive than ADA.

"Mental disability" includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as "mental retardation"), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

Concept of neurodivergence. According to Harvard Medical School, neurodiversity describes the idea that people experience and interact with the world around them differently; there is no one "right" way of thinking, learning, and behaving, and differences are not viewed as deficits.

Usually used in the context of autism.

Is neurodivergence a mental disability under FEHA? Not yet....



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

Remote Work Policies

Remote work (or hybrid work) is here to stay.

Labor Code allows distribution of workplace postings by email.

DEI seems to favor remote work, especially for neurodivergent employees.

Does requiring all employees to return to work violate FEHA?

Employers are not required to accommodate all requests to work remotely. Could be reasonable accommodation depending on the circumstances.

Avoid terms like *"returning to normal"*.



Avoiding Bias in the Workplace *The Concept of “Fairness”*

Who thinks they are unfair?

The desire to be fair is fundamental.

In any workplace, concept of ‘fairness’ is paramount.

It can be very upsetting.

How do we make decisions in the workplace?

What information do we consider, and what do we ignore?

The perception of unfairness drives employees to lawyers.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW



Recognizing Bias



What is bias?
Merriam-Webster defines bias as:

- a: an inclination of temperament or outlook *especially*:
- a personal and sometimes unreasoned judgment : **PREJUDICE**
- b: an instance of such prejudice



Where does bias come from?

- Could be based on stereotypes
- Could be based on favoritism
- Could be our individual life experiences
- Could come from the media and Internet
- What we observe from people around us



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

Avoiding Bias in Hiring Decisions



"blind" as possible

- Remove/redact applicant names
- Determine criteria before making a decision
- Job descriptions
- Prepare interview questions in advance
- Hiring decisions must be made on objective, job-related criteria
- Retain interview notes
- Counsel interviewees to only ask relevant questions.
- Rate all candidates objectively



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW

California Fair Pay Act



wage rates less than the rates paid to employees of the opposite sex for substantially similar work” except where the employer demonstrates:

- (1) The wage differential is based upon one or more of the following factors:
 - Seniority system.
 - A merit system.
 - A system that measures earnings by quantity or quality of production.
 - A bona fide factor other than sex, such as education or training or experience.

California Fair Pay Act



- Permissible to ask for salary expectations are, but salary history cannot justify any disparity in compensation "so long as any wage differential resulting from that compensation decision is justified by one or more of the factors in this subdivision."
- Prior compensation cannot be sole justification for the wage differential. For current employees, compensation decisions may be made based on prior salary, but wage differential must be justified and nondiscriminatory.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW



Pay Transparency

Pay Transparency in Job Postings - must include pay scale for the position.

Pay transparency for current employees for the position in which the employee is currently employed

Recordkeeping requirement. Must maintain records of a job title and wage rate history for each employee for the duration of the employment plus three years after the end of the employment.



PATANE • GUMBERG • AVILA, LLP

ATTORNEYS AT LAW

DISCLAIMER

While the presenter believes the information contained in this presentation is accurate, this presentation contains general information and guidance under CA law and cannot be relied upon for a specific factual situation or as legal advice. The law is constantly evolving and changing. For specific advice, please consult Patane Gumberg Avila or your legal counsel.



PATANE • GUMBERG • AVILA, LLP
ATTORNEYS AT LAW



THANK YOU!



PATANE • GUMBERG • AVILA, LLP

ATTORNEYS AT LAW