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Labor

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Labor

Labor; employment discrimination on the basis of sexual orientation

Labor Code § 1102.1 (new).
AB 2601 (Friedman); 1992 STAT. Ch. 915

Under existing law, an employee's right to engage in political activity¹ may not be infringed upon by an employer's rules, regulations, or threat of discharge.² Chapter 915 expands existing law by designating an employee's actual or perceived sexual orientation³ as a political activity.⁴ Chapter 915 prohibits employers⁵ from using sexual orientation as a basis for different or discriminatory treatment of a person in any aspect of, or opportunity

1. See *Mallard v. Boring*, 182 Cal. App. 2d 390, 395, 6 Cal. Rptr. 171, 174 (1960) (defining political activity as the advocacy of a candidate or cause); see also *NAACP v. Button*, 371 U.S. 415, 429 (1963) (stating that litigation may be a form of political expression); *Gay Law Students v. Pacific Telephone & Telegraph*, 24 Cal. 3d 458, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979) (considering the struggle for homosexual rights to be a political activity).

2. CAL. LAB. CODE §§ 1101, 1102 (West 1989).

3. See CAL. CIV. CODE § 51.7(b) (West Supp. 1992) (defining sexual orientation as heterosexuality, homosexuality, or bisexuality); see also *A Glossary of Terms Commonly Associated with Sexual Orientation*, California State Personnel Board, Sept. 1980, at 1 (defining sexual orientation as a direction of sexual attraction, emotional and/or physical attraction); Russell J. Davis, Annotation, *Refusal to Hire, or Dismissal from Employment, on Account of Plaintiff's Sexual Lifestyle or Sexual Preference as Violation of Federal Constitution or Federal Civil Rights Statutes*, 42 A.L.R. FED. 189, 191 (1991) (stating that the definition of sexual orientation can also conceivably include transsexuals and adulterers).

4. CAL. LAB. CODE § 1102.1(a) (enacted by Chapter 915).

5. See *id.* § 1102.1(b)(1) (enacted by Chapter 915) (defining employer as any person, agent of an employer, or state entity that regularly employs at least five persons). Non-profit religious associations and corporations are not included in the definition of employer. *Id.* § 1102.1(b)(2) (enacted by Chapter 915). These are the same definitions as used in the California Fair Employment and Housing Act. CAL. GOV'T CODE § 12926(c) (West 1992). *But cf.* Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 701(b) (1992) (stating that an employer is only regulated by Title VII if it maintains fifteen or more employees for twenty or more weeks during a year).

for, employment.⁶ Civil remedies are available for a violation of Chapter 915, however, criminal penalties do not apply.⁷

6. CAL. LAB. CODE § 1102.1(a) (enacted by Chapter 915). Chapter 915 neither abridges an employer's right to make decisions based on an employee's conduct that is illegal in California nor establishes hiring quotas. *Id.* § 1102.1(d)-(e) (enacted by Chapter 915); *see* *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (stating that if an employee's homosexuality is rationally related to job fitness, then an employer may discharge the employee on that basis); *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975) (holding that a discharge is proper if an employer shows a rational connection between the employee's homosexuality and job efficiency or suitability); *Childers v. Dallas Police Dep't.*, 513 F. Supp. 134, 147-48 (Tex. 1981) (allowing the discharge of a police officer when it was shown that his homosexuality caused an inability to gain the respect and trust of his partners); *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1332-33 (Pa. 1977) (citing the possible adverse affect on school children as the reason for upholding a discharge of two adulterous school librarians); *Gay Law Students*, 24 Cal. 3d at 474-75, 595 P.2d at 602, 156 Cal. Rptr. at 24 (stressing that the state and federal equal protection clauses prohibit arbitrary discrimination in employment but not the exercise of an employer's legitimate business judgment). *See generally* Davis, *supra* note 3 (describing cases in which employment decisions based on an employee's sexual conduct were held either valid or invalid under the United States Constitution).

7. CAL. LAB. CODE § 1102.1(f) (enacted by Chapter 915). Civil remedies are available for employees injured under Chapter 915. *Id.* § 1105 (West 1989); *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 486, 171 P.2d 21, 25 (1946) (holding that a complainant may file a civil action for the tort of wrongful discharge). Criminal sanctions remain in force for the violation of California Labor Code sections 1101 and 1102. CAL. LAB. CODE § 1103 (West 1989). Discrimination complaints by employees may be filed with the Labor Commissioner who then makes a determination whether a violation of the Labor Code has occurred. *Id.* § 98.7(a)-(b) (West 1989). Remedies may include employee rehiring, reinstatement, reimbursement of lost wages, or other equitable relief. *Id.* § 98.7(c) (West 1989). Either party may appeal the Commissioner's determination to the Director of Industrial Relations or to the court system where the case will be heard de novo. *Id.* §§ 98.2(a), 98.7(e) (West Supp. 1992); *Jones v. Basich*, 176 Cal. App. 3d 513, 518-19, 222 Cal. Rptr. 26, 28-29 (1986). The California courts have prosecuted employment discrimination claims following federal standards. *Clark v. Claremont Univ. Center*, 6 Cal. App. 4th 639, 662, 8 Cal. Rptr. 2d 151, 164 (1992); *Walker v. Blue Cross of Cal.*, 4 Cal. App. 4th 985, 998, 6 Cal. Rptr. 2d 184, 192 (1992). The United States Supreme Court formulated the following guidelines for discrimination cases: (1) The complainant must establish by a preponderance of the evidence a prima facie case of discrimination and thereby create a rebuttable presumption; (2) the burden of production shifts to the employer who must supply a legitimate nondiscriminatory reason for his employment decision in order to negate the presumption; and (3) the complainant is then given an opportunity to demonstrate that the employment decision was a pretext for intentional unlawful discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Complainants establish a prima facie case by showing that: (1) They belong to a protected class; (2) they were qualified and applied for a position that the employer was soliciting applicants for; (3) their rejection occurred despite their qualifications; and (4) after their rejection the employer continued to solicit applicants with the same qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Since complainants must prove the discriminatory intent of the employer, the purpose of the burden of production shift is to promote fairness between the parties. *Mixon v. Fair Employment & Hous. Comm'n*, 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884, 890 (1987). The ultimate burden of persuasion remains on the complainant, except in the case of an employer's motion for summary judgment when the employer must produce sufficient evidence to either negate a discrimination claim or firmly establish

COMMENT

The enactment of Chapter 915 comes just one year after a similar and controversial homosexual rights bill was vetoed by Governor Wilson.⁸ According to its proponents, Chapter 915 will help to rectify the pervasive discriminatory treatment homosexuals receive from employers.⁹ Supporters propose that Chapter 915 merely codifies the *Gay Law Students v. Pacific Telephone & Telegraph*¹⁰ and *Soroka v. Dayton Hudson Corporation*¹¹ decisions.¹² The court

the legitimacy of his employment decision. *Valdez v. City of Los Angeles*, 231 Cal. App. 3d 1043, 1051, 282 Cal. Rptr. 726, 730 (1991); *U.S.C. v. Miller*, 222 Cal. App. 3d 1028, 1036, 272 Cal. Rptr. 264, 269 (1990). In a mixed motive claim where the employer made an adverse employment decision based on both legitimate and discriminatory reasons, the burden of proof shifts to the employer who must show by a preponderance that the complainant would have been denied the opportunity even without the discriminatory basis. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260-61 (1989).

8. See *Veto Message of Governor Pete Wilson Concerning Assembly Bill AB 101*, Sept. 29, 1991, at 4 (stating that without evidence of pervasive discrimination, the interest of the state to create a new protected class for sexual orientation did not outweigh the burden that it would impose on numerous small businesses). The burdens suggested by Governor Wilson were in regard to increased insurance costs, avoidance of spurious litigation, and the unfair application of the law on innocent employers. *Id.* at 3. Explaining his reasons for signing AB 2601, Wilson stated, albeit incorrectly, that Chapter 915 provides remedies for discrimination that are less onerous than those that had been proposed under AB 101. *California Governor Signs Legislation Barring Employment Discrimination Against Gays*, DAILY LAB. REP., No. 189, Sept. 29, 1992, at A-11; *Today's Summary & Analysis*, DAILY LAB. REP., No. 192, Oct. 2, 1992, at A-A.

9. SENATE COMMITTEE ON INDUSTRIAL RELATIONS, STAFF ANALYSIS OF AB 2601, at 2 (1992); Terry B. Friedman, CHAIRMAN, LABOR AND EMPLOYMENT COMMITTEE, FACT SHEET ON AB 2601, at 3 (1992) (citing a 1987 *Wall Street Journal* poll indicating that 66% of respondent chief executives of Fortune 500 companies would hesitate to place a homosexual on a management committee); see John C. Sims, Essay, *Moving Toward Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543, 1543-48 (1992) (discussing public and governmental attitudes regarding homosexual conduct). *Contra Marco, Oppressed Minority, or Counterfeits?*, FOCUS ON THE FAMILY CITIZEN, Apr. 20, 1992, at 2 (providing statistics to refute claims that homosexuals are economically, educationally, or culturally disadvantaged). When comparing the average homosexual to the average American, the former makes almost twice as much income, is three times as likely to have a professional or managerial position, is three times as likely to hold a college degree, and four times as likely to have traveled overseas. *Id.*

10. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

11. 235 Cal. App. 3d 654, 1 Cal. Rptr. 2d 77 (1991), review granted, 822 P.2d 1327, 4 Cal. Rptr. 2d 180 (1992).

12. See CAL. LAB. CODE § 1102.1 (enacted by Chapter 915); Terry B. Friedman, LABOR AND EMPLOYMENT COMMITTEE, FACT SHEET ON AB 2601, at 1 (1992); see 69 Cal. Op. Att'y Gen. 80, 84 (1986) (suggesting that Labor Code sections 1101 and 1102 prohibit discrimination on the basis of homosexual orientation). *Contra Lawe v. Chateaux & Manor Houses, Inc.*, No. 17-27133/188, Dep't. of Industrial Relations, Div. of Lab. Standards Enforcement (1987) (refusing to follow the Attorney General's opinion and holding that perceived or manifest homosexuality without other

in *Gay Law Students* recognized the equal rights struggle by homosexuals to be a political activity, and construed the Labor Code to prohibit a public utility from discriminating against manifest homosexuals in employment decisions.¹³ The *Soroka* court further interpreted the Labor Code to proscribe tests for employment that stigmatize homosexuals, repress job applicants from expressing their homosexuality, and discriminate against those who do.¹⁴

Opponents argue that the stated purpose of Chapter 915 is misleading and deceptively suggests to the public that it codifies existing case law.¹⁵ Interpreting the holding of *Gay Law Students* narrowly, opponents argue that the decision is not applicable to private employers or homosexuals that do not make an issue of their sexual status.¹⁶ Furthermore, at the time Chapter 915 was still pending in the Legislature, the *Soroka* decision had no precedential value because it was awaiting review by the California Supreme

political activity is not protected under Labor Code sections 1101 and 1102).

13. *Gay Law Students*, 24 Cal. 3d at 463, 595 P.2d at 595, 156 Cal. Rptr. at 17.

14. *Soroka*, 235 Cal. App. 3d at 670, 1 Cal. Rptr. 2d at 88.

15. David L. Llewellyn, Jr., WESTERN CENTER FOR LAW AND RELIGIOUS FREEDOM, Memorandum to the Honorable Pete Wilson, re AB 2601, AB 3019 and AB 3825, at 3-6 (Apr. 7, 1992) (copy on file at *Pacific Law Journal*). According to opponents, those members of the public who opposed AB 101, would have opposed Chapter 915 on the same grounds, but for the proponent's disingenuous use of case law. *Id.* at 4; see, e.g., *Wilson Signs Bill on Gay Job Rights*, L.A. TIMES, Sept. 26, 1992, § A, at 1, col. 5 (stating that Chapter 915 received no major opposition from business, while the California Chamber of Commerce and the California Manufacturer's Association remained neutral). Even after AB 2601 was signed by Wilson, major periodicals were uninformed as to the true nature of the bill and erroneously stated that Chapter 915 allowed only administrative remedies. See *id.*; *California Governor Signs Legislation Barring Employment Discrimination Against Gays*, DAILY LAB. REP., No. 189, Sept. 29, 1992, at A-11; *Today's Summary & Analysis*, DAILY LAB. REP., No. 192, Oct. 2, 1992, at A-A.

16. *Gay Law Students*, 24 Cal. 3d at 469, 488, 595 P.2d at 598, 610, 156 Cal. Rptr. at 20, 33. The court in *Gay Law Students* based its decision upon the manifest nature of the plaintiff's homosexuality, the capriciousness of the discrimination, and the similarity between the defendant as a state-protected monopoly and the state itself. *Id.* Additionally, the plaintiffs in *Gay Law Students* were specifically identified as homosexuals and not generically as persons with a sexual orientation. *Id.* at 488, 595 P.2d at 610, 156 Cal. Rptr. at 32.

Court.¹⁷ Those in opposition also argue that Chapter 915 is vague, will permit frivolous litigation, and will put an excessive economic burden on small employers.¹⁸ Additionally, opponents believe Chapter 915 will have a deleterious impact on the religious freedoms of employers whose beliefs do not condone non-marital sexual relationships.¹⁹ Since federal law does not recognize sexual orientation as a classification worthy of special protection,²⁰ it appears inevitable that further confrontations between these

17. CAL. R. CT. 976(d) (prohibiting the publication of opinions superseded by a grant of review); CAL. R. CT. 977(a) (prohibiting courts or parties to an action from citing or relying upon unpublished opinions); see *Faiz v. Ruegg*, 114 Cal. App. 3d 967, 970, 171 Cal. Rptr. 149, 150 (1981) (stating that unpublished cases cannot be cited or used as precedent).

18. *Analysis of AB 2601/AB 3019*, CAPITAL RESOURCE INSTITUTE, at 2 (1992) (opposing the broad implications of the "actual or perceived sexual orientation" language and the imposition of unnecessary regulations on small employers); *Facts from Focus on the Family; AB 2601 Homosexual Legislation*, FOCUS ON THE FAMILY, at 1 (1992) (listing businesses not exempt from the regulation of Chapter 915 including day care centers, medical and dental offices, restaurants, and for-profit Christian-oriented businesses); see sources cited *supra* note 3 (supplying possible definitions for sexual orientation). Under the expansive language of Chapter 915, employers may be unable to rebut a presumption of discrimination created by an employee's prima facie case. See CAL. LAB. CODE § 1102.1(a) (enacted by Chapter 915) (failing to define terms for the purpose of interpreting the meaning of "perceived sexual orientation", "any aspect of employment", and "different treatment"); see also sources cited *supra* note 7 (describing the burden shift for discrimination claims).

19. David L. Llewellyn, Jr., *AB 2601: WCLRF Fact Sheet*, WESTERN CENTER FOR LAW AND RELIGIOUS FREEDOM, at 2 (1992) (stating that Chapter 915 violates freedom of conscience and religious liberty by prohibiting the use of evidence of an employee's personal character as an evaluative criteria in employment decisions); see *Leviticus* 18:22-24, *Romans* 1:25-32, 1 *Corinthians* 6:9-10, 1 *Timothy* 1:9-10 (explaining the biblical perspective on various types of sexual conduct). The First Amendment may bar the enforcement of a law that affects religious conduct if the law infringes both the Free Exercise Clause and another concurrent constitutional right. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 881 (1990); see *id.* at 882 (stating possible examples of concurrent constitutional rights such as freedom of association, parental rights, and any communicative activity).

20. See *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986) (stating that homosexual conduct is not a fundamental right protected by substantive due process under the United States Constitution); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (holding that homosexuality is not a suspect category and refusing to apply heightened scrutiny for discrimination claims by homosexuals); Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2(1) (1992) (proscribing only employment discrimination based on race, color, religion, sex, or national origin). Congress did not anticipate the protection of sexual orientation when enacting Title VII and the courts will not exceed the legislative intent. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

competing ideologies will seek resolutions in the California courts and Legislature.²¹

Labor; farm labor contractors

Labor Code §§ 1684, 1691, 1695 (amended).
AB 3146 (Areias); 1992 STAT. Ch. 1349

Existing law governs the licensing of any person acting as a farm labor contractor.¹ Under existing law, certain prerequisites must be satisfied before the issuance or renewal of such a license.² Existing law provides that, as a prerequisite for the issuance or renewal of the

21. Sims, *supra* note 9, at 1573. State statutes are widely divergent on the subject of homosexuality. See, e.g., CAL. GOV'T CODE § 12940(a) (West 1992) (proscribing employment discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex); D.C. CODE ANN. § 1-2512 (1991) (prohibiting employment discrimination wholly or partially on the basis of sexual orientation); KY. REV. STAT. ANN. § 510.100 (Baldwin 1992) (punishing homosexual intercourse as the crime of sodomy in the fourth degree); S.C. CODE ANN. § 16-15-120 (1990) (considering buggery to be a crime against morality and public decency and punishing it as a felony).

1. CAL. LAB. CODE §§ 1682-1699 (West 1989 & Supp. 1992); see *id.* § 1682(b) (West 1989) (defining farm labor contractor); *id.* § 1682.4 (West 1989) (stating that farm labor contractor does not include a commercial packing house engaged in both harvesting and packing citrus or soft fruit for a client or customer); cf. IDAHO CODE § 44-1902(3) (1992) (defining farm labor contractor as any person who, for a fee, furnishes workers to a farm operator); ILL. ANN. STAT. ch. 111, para. 803 (Smith-Hurd 1978) (providing that any person acting as a farm labor contractor must have a certificate of registration in his or her immediate possession). See generally Michael G. Tierce, *The Joint Employer Doctrine Under The Federal Migrant And Seasonal Agricultural Workers Protection Act*, 13 RUTGERS L. J. 863, 863-97 (1986) (discussing the joint-employer doctrine which affects migrant workers and farm labor contractors).

2. CAL. LAB. CODE § 1684(a)-(e), (g) (amended by Chapter 1349); see *id.* (listing the following as prerequisites: (1) An application; (2) an investigation of the applicant; (3) a deposit of a surety bond; (4) payment of a license fee; (5) an examination unless specified criteria are met; and (6) registration as a Farm Labor Contractor pursuant to the federal Migrant and Seasonal Agricultural Worker Protection Act); *id.* § 1684(e) (amended by Chapter 1349) (requiring, as deemed necessary by the Labor Commissioner for the safety and protection of farmers, farmworkers, and the public, that the person taking the examination show knowledge of laws and regulations relating to farm labor contractors); *id.* § 1682(c) (West 1989) (defining license); *id.* § 1687 (West 1989) (specifying the content of a license).

license, applicants must pass an examination which requires a demonstration of knowledge of safe work practices related to pesticide use.³ Chapter 1349 expands existing law by requiring the examination to further include a demonstration of knowledge of the current laws and regulations regarding wages, hours, and working conditions.⁴

Existing law permits the Labor Commissioner⁵ to renew⁶ a license without requiring the applicant to take an examination when the applicant has not violated any pesticide worker safety requirements in the past year, and has complied with all other requirements.⁷ Under prior law, the applicant was required to have satisfactorily completed the examination during the immediately preceding four years.⁸ Chapter 1349 reduces the preceding four years to two years.⁹

Existing law requires the Labor Commissioner to suspend¹⁰ the license of a licensee¹¹ who has been subjected to two or more final judgments by a court for failing to pay wages due within a five year period.¹² Chapter 1349 further requires that the Labor Commissioner maintain a telephone information line to advise

3. *Id.* § 1684(e) (amended by Chapter 1349). The following subjects are included in safe work practices related to pesticide use: (1) Field re-entry regulations; (2) worker pesticide safety training; (3) employer responsibility for safe working conditions; and (4) symptoms and appropriate treatment of pesticide poisoning. *Id.* § 1684(e)(1)-(4) (amended by Chapter 1349); *see id.* § 1684(e)(4) (amended by Chapter 1349) (specifying that in preparation of educational materials relating to the examination and the examination itself, the Labor Commission must consult with specified departments); *id.* (increasing the fee for taking the examination from \$ 35.00 to \$100.00 dollars).

4. *Id.* § 1684(e) (amended by Chapter 1349).

5. *See id.* § 21 (West 1989) (defining Labor Commissioner).

6. *See id.* § 1689 (West 1989) (stating the information that is needed on all applications for license renewal).

7. *Id.* § 1684(f)(1)-(3) (amended by Chapter 1349).

8. 1991 Cal. Legis. Serv. ch. 1197, sec. 1, at 5018 (West) (amending CAL. LAB. CODE § 1684(f)).

9. CAL. LAB. CODE § 1684(f)(1) (amended by Chapter 1349).

10. *See id.* § 1690 (West 1989) (providing grounds for revocation, suspension, and refusal of a license).

11. *See id.* § 1682(d) (West 1989) (defining licensee).

12. *Id.* § 1691(a) (amended by Chapter 1349).

employees¹³ of the compliance of individual farm labor contractors with applicable laws and regulations.¹⁴

Existing law requires the Farm Labor Contractor licensee to perform certain duties with respect to maintaining a license.¹⁵ Chapter 1349 additionally requires that the licensee provide information and training on specified laws and regulations¹⁶ to each employee whose duties include supervision,¹⁷ direction, or control¹⁸ of any agricultural employee¹⁹ on behalf of a licensee or with respect to a contract entered into with a licensee.²⁰

DLR

Labor; sexual harassment

Government Code § 12950 (new).
AB 2264 (Speier); 1192 STAT. Ch. 908

13. See *id.* (specifying potential or actual employees).

14. *Id.*

15. *Id.* § 1695 (amended by Chapter 1349). Every licensee must perform the following duties: (1) Carry his or her license at all times; (2) file at the United States Post Office the address of the licensee, as specified; (3) promptly pay or distribute all money or things of value that are due; (4) comply with all legal and valid agreements entered into as a farm labor contractor; (5) have rates of compensation available for inspection; (6) take out liability insurance; (7) have rates of compensation printed in English and Spanish displayed at all work sites and on all vehicles; and (8) register with the agricultural commissioner in the county where contracts were entered into with growers. *Id.*

16. See CAL. FOOD & AGRIC. CODE §§ 12980-12988 (West 1986 & Supp. 1992) (providing laws and regulations governing worker safety).

17. See CAL. LAB. CODE § 1140.4(j) (West 1989) (defining supervisor as an individual who has specified authority).

18. See *id.* § 1695(a)(9) (amended by Chapter 1349) (including crew leaders and foremen in this category).

19. See *id.* § 1140.4(b) (West 1989) (defining agricultural employee); *cf.* ALA. CODE § 25-4-10 (1992) (providing that an individual who is a member of a crew performing services in agricultural labor will be treated as an employee of the crew leader if the crew leader holds a valid Farm Labor Contractor certificate of registration, and if that individual is not employed by another person such as any employee or officer of a corporation); ARIZ. REV. STAT. ANN. § 23-612.01(A)(1)-(3) (1991) (defining crew leader as an individual who: (1) Furnishes individuals to perform agricultural labor for another; (2) pays the individuals for the work performed; and (3) has not entered into an agreement with another under which the individual is designated as an employee of the other person).

20. *Id.* § 1695(a) (amended by Chapter 1349).

Existing law prohibits an employer,¹ labor organization,² employment agency,³ training program,⁴ or any person from harassing⁵ an employee⁶ or applicant because of race, religious creed,⁷ color, national origin, ancestry, physical handicap,⁸ medical condition,⁹ sex,¹⁰ age¹¹ or marital status.¹² Existing law requires an employer to post prominently in the workplace a poster describing discrimination in employment.¹³ Chapter 908 requires the Department of Fair Employment and Housing¹⁴ to amend the

1. See CAL. GOV'T CODE § 12940(h) (West 1992) (defining employer as a person who employs at least one employee for purposes of harassment claims). *But cf. id.* § 12926(c) (West 1992) (defining employer as a person employing at least five employees for all other subdivisions of the California Fair Employment and Housing Act, Government Code sections 12900 through 12999).

2. See *id.* § 12926(e) (West 1992) (defining labor organization).

3. See *id.* § 12926(d) (West 1992) (defining employment agency).

4. See *id.* § 12940(c) (West 1992) (prohibiting discrimination in any apprenticeship training program as well as any program potentially resulting in employment).

5. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987) (recognizing two categories of sexual harassment: *Quid pro quo* and hostile work environment); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 607-08, 262 Cal. Rptr. 842, 851 (1989) (citing *DFEH v. Bee Hive Answering Service*, FEHC No. 84-16 at p.18 (1984)) (holding that hostile work environment harassment includes conduct which sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being); 29 C.F.R. § 1604.11 (1991) (defining federal Equal Employment Opportunity guidelines on sexual harassment); *cf. Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (holding that sexual harassment is conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment). See generally Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1365-66 (1990) (discussing situations which fall under the definition of sexual harassment); *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 (1984) (examining situations in which courts have held employers liable for acts of sexual harassment).

6. See CAL. GOV'T CODE § 12926(b) (West 1992) (defining employee).

7. See *id.* § 12926(i) (West 1992) (defining religious creed).

8. See *id.* § 12926(h) (West 1992) (defining physical handicap).

9. See *id.* § 12926(f) (West 1992) (defining medical condition).

10. See *id.* § 12926(j) (West 1992) (defining sex as gender).

11. See *id.* § 12926(a) (West 1992) (defining age). *But see id.* § 12941(a) (West 1992) (limiting a proscription against discrimination based on age to situations where the person being discriminated against is over the age of 40).

12. *Id.* § 12940(a) (West 1992); see 42 U.S.C. §§ 12101-12213 (1990) (establishing the Americans with Disabilities Act of 1990 which mandates equal opportunities for individuals with disabilities); see, e.g., CONN. GEN. STAT. § 46a-60(8) (1990) (prohibiting sexual harassment by employers); ILL. REV. STAT. ch. 68, para. 2-102(D) (1991) (prohibiting sexual harassment by any employer, employment agency or labor organization).

13. CAL. CODE REGS. tit. 2, § 7287.0(d) (1990).

14. See CAL. GOV'T CODE § 12925 (West 1992) (defining Department of Fair Employment and Housing).

discrimination poster to include information describing the illegality and definition of sexual harassment.¹⁵ Chapter 908 further requires employers to distribute an information sheet¹⁶ with information describing the illegality and definition of sexual harassment, the internal complaint process of the employer, the complaint process available through the Fair Employment and Housing Commission¹⁷ and the protection against retaliation¹⁸ provided by law to all employees.¹⁹

LGC

15. *Id.* § 12950(a) (enacted by Chapter 908); *see id.* (enacted by Chapter 908) (requiring the department to amend the poster and distribute it to employers when the supply of the current poster is exhausted). *See generally* Michelle Landsberg, *Are You Being Sexually Harassed?*, TORONTO STAR, Aug. 22, 1992, at K1 (suggesting that the Clarence Thomas-Anita Hill hearings have finally given women an understanding of what constitutes gender-based harassment); Troy Segal, *Sexual Harassment: The Age of Anxiety*, BUSINESS WEEK, July 6, 1992, at 16 (stating that the Thomas-Hill hearings have inspired the publication of several manuals for managers which offer definitions and descriptions of sexual harassment).

16. *See* CAL. GOV'T CODE § 12950(b) (enacted by Chapter 908) (providing that the department will make available an information sheet discussing sexual harassment for employers to reproduce and distribute in a manner that ensures distribution to each employee).

17. *See id.* § 12935 (West 1992) (stating the functions, powers and duties of the Fair Employment and Housing Commission); *see also id.* § 12960 (West 1992) (outlining the process for filing a verified complaint with the Fair Employment and Housing Commission within one year of the alleged harassment).

18. *See* CAL. CODE REGS. tit. 2, § 7287.8 (1990) (prohibiting employers from demoting, suspending, discharging or failing to hire employees in retaliation for filing or participating in the investigation of a complaint); *see also* CAL. GOV'T CODE § 12940(e) (West 1992) (prohibiting employers from discharging, expelling or otherwise discriminating against an employee in retaliation for filing a complaint).

19. CAL. GOV'T CODE § 12950(b) (enacted by Chapter 908).