



1-1-1978

# Employment Practices

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## Recommended Citation

University of the Pacific; McGeorge School of Law, *Employment Practices*, 9 PAC. L. J. 519 (1978).

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# Employment Practices

## Employment Practices; voluntary retirement

Education Code §23922 (new); Government Code §§20983.5, 20983.6, 31671.03, 45346 (new); §21258.1 (amended); Labor Code §1420.15 (new); §1420.1 (amended).

AB 568 (Alatorre); STATS 1977, Ch 852  
(Effective September 16, 1977)

Support: California Department of Aging

Opposition: Public Employees Retirement System, State Association of County Retirement System Administrators

AB 586 (Alatorre); STATS 1977, Ch 851

Support: Protective Council of Senior Californians, Inc.; State Commission on Aging

Opposition: California Conference on Employer Associations; California Manufacturers Association; United Airlines

Having determined that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices [CAL. STATS. 1977, c. 851, §1, at —; CAL. STATS 1977, c. 852, §1, at —], the legislature has enacted Chapters 851 and 852 in an apparent attempt to stem the downward trend in involuntary retirement age levels occurring in both the public and private sectors [See CAL. STATS. 1977, c. 851, §1, at —; CAL. STATS. 1977, c. 852, §1, at —].

Prior to the enactment of Chapter 851, there were no mandatory retirement provisions applicable to private employers, but it was generally an unlawful employment practice for an employer to discriminate in the hiring, firing, or promotion of any individual between the ages of 40 and 65 solely on the basis of age [See CAL. STATS. 1972, c. 1144, §1, at 2211]. It was not unlawful, however, to reject an applicant or terminate an employee who failed to meet bona fide requirements of the job [CAL. STATS. 1972, c. 1144, §1, at 2211]. Chapter 851 has amended Section 1420.1 of the Labor Code to eliminate the 65 year age ceiling for employer discrimination, thereby extending this antidiscrimination protection to all persons over 40 years of age. Chapter 851 does not affect the right of an employer to terminate or not hire an individual who fails to meet bona fide job requirements [CAL. LAB. CODE §1420.1(a)]. Furthermore, as under the old law, the general proscription against age discrimination contained in Chapter 851 does not extend to bona fide retirement or pension plans [Compare CAL. LAB. CODE §1420.1 with CAL. STATS. 1972, c. 1144, §1, at 2211]. In addition, this new law exempts existing collective bargaining agreements

during the life of the contract, or until January 1, 1980, whichever occurs first [CAL. LAB. CODE §1420.1(a)].

Further, Chapter 851 has added Section 1420.15 to the Labor Code to provide that every employer in the state, except public agencies, must permit an employee to continue his or her employment beyond the normal retirement date if he or she indicates in writing, in a reasonable time, a desire to do so and can demonstrate an ability to perform his or her job adequately and the employer is satisfied with the employee's work quality. The California Supreme Court has generally held that when performance of a contract calls for the satisfaction of one of the parties, the performance must meet the satisfaction of a reasonable person. [*E.g.*, *Leboire v. Royce*, 53 Cal. 2d 659, 672, 349 P.2d 513, 521, 2 Cal. Rptr. 745, 753 (1960); *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 296, 197 P. 105, 110 (1921)]. In the case of employer dissatisfaction with the work of employees, however, the court has held that it is the subjective satisfaction of the employer, exercised in good faith, and not the satisfaction of a reasonable person that is controlling [*See Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 700-01, 182 P. 428, 428-29, 430 (1919)]. Thus, it would appear that an employer could find dissatisfaction with the work of an employee based on purely subjective criteria as long as his or her decision was made in good faith, therefore, apparently limiting the overall impact of Chapter 851. Finally, Section 1420.15 specifically states that it shall not be construed to require: (1) any change in funding, benefit levels, or formulas of any existing retirement plan; (2) any increase in employer's payments for insurance plan benefits; or (3) changes in any bona fide retirement or pension plan or existing collective bargaining agreement for the life of the contract or until January 1, 1980, whichever occurs first. Finally, any employee who continues his or her employment beyond the normal retirement date is now required to give written notice in reasonable time of his or her intent to retire or terminate employment if the retirement or termination occurs after the normal retirement date [CAL. LAB. CODE §1420.15].

In related legislation, Chapter 852 has been enacted to permit any member of the State Teacher's Retirement System who has attained age 65 to continue in employment beyond the age of normal retirement if he or she is certified as competent pursuant to rules and regulations adopted by the members' respective retirement board and both the employee and employer have filed a notice that the member is continuing in employment [CAL. EDUC. CODE §23922]. Furthermore, Section 23922 of the Education Code, as added by Chapter 852, provides that should any member choose to continue in employment and be allowed to do so, both the employee and employer must continue to make contributions to the Teacher's Retirement Fund.

Similarly, every Public Employee Retirement System member, except a patrol or safety member and every such local member, other than a local safety member, will have the right to continue in employment beyond the normal retirement age if he or she is certified as competent pursuant to rules and regulations adopted by the members' respective governing body [CAL. GOV'T CODE §§20983.5, 20983.6]. In such cases, the effective date of retirement is delayed until the day after the last day for which salary is paid, but contributions to the Public Employees Retirement Fund by both employee and employer must continue to be paid until retirement or death before retirement [CAL. GOV'T CODE §§20983.5, 20983.6]. The new retirement provisions of Section 20983.6 of the Government Code, which apply to local Public Employee's Retirement System members, do not extend to any contracting agencies, unless such agencies elect to be governed by the new law either by amendment to existing contracts or by express terms in contracts entered into after January 1, 1978 [See CAL. GOV'T CODE §20983.6].

In addition to giving members of the State Teachers' Retirement System and the Public Employees' Retirement System the right to be certified for continued employment beyond the normal retirement age [CAL. EDUC. CODE §23922; CAL. GOV'T CODE §§20983.5, 20983.6], Chapter 852 also allows county and city retirement systems to establish similar procedures [See CAL. GOV'T CODE §§31671.03, 45346]. Furthermore, all of the new voluntary retirement provisions of Chapter 852 supersede any other provision of law [See CAL. EDUC. CODE §23922; CAL. GOV'T CODE §§20983.5, 20983.6, 31671.03, 45346], thereby apparently eliminating the various mandatory retirement provisions of California law.

Chapter 852, unlike the new retirement scheme for private employment, contains no provisions to allow the employer to terminate persons who have been certified if the employer is not satisfied with the quality of the employee's work [Compare CAL. EDUC. CODE §23922 and CAL. GOV'T CODE §§20983.5, 20983.6, 31671.03, 45346 with CAL. LAB. CODE §1420.15]. Therefore, it would appear that unless an employer can show cause to dismiss an employee from service as provided by law [E.g., CAL. EDUC. CODE §§44930-44985; CAL. GOV'T CODE §§19570-19588], or the rules and regulations adopted by the respective governing bodies establish procedures for certification review, a public employee once certified, may continue in employment until he or she chooses to retire. Thus, by eliminating the use of a fixed age criteria as determinative of retirement, Chapters 851 and 852 would appear to provide a flexible body of retirement law that will allow those qualified persons who seek to work beyond their normal retirement age the opportunity to do so.

See Generally:

- 1) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §429(c) (unlawful employment practices—age discrimination) (8th ed. 1974).
- 2) RESTATEMENT OF CONTRACTS §265 (1932).

### **Employment Practices; unlawful employment practices**

Health and Safety Code §35732 (repealed); §§35730.6, 35732 (new); §§35710, 35730, 35730.5, 35731, 35733, 35734, 35735, 35736, 35737, 35738 (amended); Labor Code §§1415.5, 1418, 1421, 1421.1, 1422, 1422.1, 1422.2, 1423, 1424, 1425, 1427, 1428 (repealed); §§1413.1, 1418, 1419.1, 1421, 1421.1, 1421.2, 1422, 1422.1, 1422.2, 1424, 1425, 1427, 1429.1, 1430.1 (new); §§1415, 1419, 1419.5, 1419.7, 1419.9, 1426, 1426.5, 1429, 1430, 1431 (amended).

AB 738 (Lockyer); STATS 1977, Ch 1188

Support: Commission on the Status of Women; Department of Industrial Relations; Fair Employment Practices Commission; Southern California Rehabilitation Association

Opposition: California Hotel and Motel Association

Chapter 1188 has been enacted to revise the procedures through which an individual can seek to eliminate discrimination in housing and employment [for a discussion of new procedures enacted by this law to prevent housing discrimination, see 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION this volume at 620 (1978)]. Chapter 1188 has amended the procedures involving discriminatory employment practices by granting duties formerly vested in the Fair Employment Practices Commission to the Division of Fair Employment Practices of the Department of Industrial Relations [*Compare* CAL. LAB. CODE §§1418, 1419 *with* CAL. STATS. 1976, c. 1293, §3, at —]. Pursuant to Chapter 1188, a person now claiming to be aggrieved of an unlawful employment practice must file his or her complaint with the Division of Fair Employment Practices [CAL. LAB. CODE §1421], which must determine the validity of the complaint [CAL. LAB. CODE §1422]. Subject to certain exceptions, it is considered an unlawful employment practice for an employer to discriminate against an individual because of his or her race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex [CAL. LAB. CODE §1420]. If the division determines that the complaint is valid, it must attempt to eliminate the unlawful employment practice through conference, conciliation, and persuasion [CAL. LAB. CODE §1422]. The chief of the division can issue a written accusation against the employer if this attempt to obtain voluntary compliance has failed to eliminate the unlawful employment practice [CAL. LAB. CODE §1422.2]. If an accusation is issued, the

Fair Employment Practices Commission, as under prior law, must hold hearings on the accusation [*Compare* CAL. LAB. CODE §1424 with CAL. STATS. 1965, c. 967, §2, at 2586] and should the commission find that an unlawful employment practice has occurred, it must take corrective measures [CAL. LAB. CODE §1426].

In addition, Section 1430.1 of the Labor Code, as added by Chapter 1188, provides that employers, labor organizations, and employment agencies are required to maintain and preserve records and files for up to one year and, if a complaint has been filed against them, to retain these records and files until final disposition of the complaint. Failure to keep records in the prescribed manner is punishable by a fine up to \$500 and/or imprisonment in county jail not exceeding six months [CAL. LAB. CODE §1430.1]. Furthermore, Section 1421.1 provides that when the complaint adversely affects a group or class of persons of which the aggrieved party is a member, or when the discrimination alleged raises a question of law or fact common to such a group, the individual is permitted to file a class action complaint. In addition to altering the procedures for filing and reviewing complaints, Chapter 1188 has made provisions for individuals to pursue a civil action on their own behalf if the Division of Fair Employment Practices fails to issue an accusation within 150 days of the filing of a complaint, or has earlier determined that no accusation will be issued [CAL. LAB. CODE §1422.2].

Prior to the enactment of Chapter 1188, if the Fair Employment Practices Commission dismissed the complaint of a person claiming to be aggrieved of a discriminatory employment practice, the individual's remedy was limited to an appeal of this determination [*See* CAL. STATS. 1959, c. 121, §1, at 2004] by filing a writ of mandate in superior court [*See* CAL. CIV. PROC. CODE §1085] within 30 days after notice of dismissal of the complaint [CAL. GOV'T CODE §11523]. Under these provisions, the judicial review was limited to a determination of whether the commission had proceeded without, or in excess of, jurisdiction and whether there was any prejudicial abuse of discretion [CAL. CIV. PROC. CODE §1094.5(b)]. At least one court has indicated that a refusal to proceed on the basis that a case is marginal and does not justify the expense, or that the commission desires not to proceed in order to maintain its ability to deal effectively with unlawful employment practices, are *not* abuses of discretion [*See* *Marshall v. Fair Employment Practices Comm'n*, 21 Cal. App. 3d 680, 685, 98 Cal. Rptr. 698, 702 (1971)]. Thus, except in extraordinary cases, the individual apparently was forced to accept the decision of the Fair Employment Practices Commission as the final determination of his or her rights.

Section 1422.2 has been added to the Labor Code to provide that if, after an investigation, the Division of Fair Employment Practices decides not to issue a written accusation, or fails to issue an accusation within 150 days

after a complaint has been filed, the division must so notify the complainant. After receipt of the notice, the complainant has one year in which to commence a private civil action on his or her own behalf [CAL. LAB. CODE §1422.2].

Similar provisions exist under Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§2000a to 2000h-6 (1970) (amended 1973)] to allow the Federal Equal Opportunity Commission to enforce laws prohibiting unlawful employment practices [42 U.S.C. §2000e-5 (Supp. III 1973)]. Under Title VII, a charge must be filed within 180 days after the alleged act of discrimination occurs [42 U.S.C. §2000e-5(e) (Supp. III 1973)], as opposed to the one year filing period in California [CAL. LAB. CODE §1421]. If the Equal Employment Opportunity Commission determines that there is reason to believe that the charge is true it must attempt to obtain voluntary compliance by the employer [42 U.S.C. §2000e-5(b) (Supp. III 1973)]. After being notified, the complainant has 90 days in which to bring a civil action on his or her own behalf [42 U.S.C. §2000e-5(f)(1) (Supp. III 1973)].

Past experience has shown that, under federal law, private civil litigation is an effective and necessary remedy to prevent unlawful employment practices [See Comment, *Jurisdictional Prerequisites to Private Actions Under Title VII of the Civil Rights Act of 1964*, 41 MO. L. REV. 215 (1976)]. Since Chapter 1188 provides a civil remedy to the individual similar to that established under federal law, but with expanded time limitations, the use of this remedy may also prove to be an effective deterrent to employment discrimination in California. On the other hand, if the Division of Fair Employment Practices issues an accusation, but the Fair Employment Practices Commission determines that no unlawful employment practice has taken place, it would appear that the individual may still be limited to judicial mandamus review [See CAL. CIV. PROC. CODE §1094.5(b); CAL. GOV'T CODE §11523; CAL. LAB. CODE §§1426, 1427]. Nevertheless, by providing the individual with a civil remedy of his or her own in cases in which he or she has not been granted a complete hearing by the Fair Employment Practices Commission and establishing new procedures for the filing and review of complaints of employment discrimination, Chapter 1188 may help deter unlawful employment practices in California.

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See Generally:

- 1) 5 B. WITKIN, CALIFORNIA PROCEDURE 2D, *Extraordinary Writs* §§210-243 (administrative mandamus) (2d ed. 1971); §§210-241 (Supp. 1977).
- 2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS §§5.1-.75 (mandamus proceedings) (1966); §§5.2-.75 (Supp. 1975).
- 3) Draper, *Civil Rights Act of 1964*, 18 HOW. L. REV. 29 (1973).

**Employment Practices; discrimination in state employment—  
handicapped persons**

Government Code Chapter 11 (commencing with §3550) (repealed);  
Article 9 (commencing with §19230) (new); §19702 (amended).

AB 1284 (Egeland); STATS 1977, Ch 573

Support: California Chapter of the National Association of Women;  
California Department of Education

AB 1309 (Bates); STATS 1977, Ch 1196

Support: California Association of the Physically Handicapped

Chapter 573 has amended Section 19702 of the Government Code to include physical handicap as a basis for discrimination prohibited by the State Civil Service Act [CAL. GOV'T CODE §§18500-19786], unless the particular handicap is "job-related." As introduced, Chapter 573 excepted from its requirements only those particular handicaps that prevented the performance of the work involved [AB 1284, 1977-78 Regular Session, *as introduced*, March 31, 1977] rather than those that are job-related. It appears that this change reflects a legislative intent to make the demands of Chapter 573 less stringent by providing state employers with the power to deny employment to a person who has a handicap that would merely affect the performance of his or her duties and to avoid requiring the state to demonstrate that a handicapped employee could not perform the work involved [*Compare* CAL. GOV'T CODE §19702(a) *with* AB 1284, 1977-78 Regular Session, *as introduced*, March 31, 1977].

Section 19702 of the Government Code specifically excludes obesity or any health impairment caused by a person's obesity from the definition of physical handicap, but includes "impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, *or any other health impairment which requires special education or related services*" (emphasis added). This definition appears to include within the category of "physical handicap" those individuals who suffer from mental or emotional impairments that require special education or related services as well as those who suffer from the other specified impairments [*See* CAL. GOV'T CODE §19702]. Further, it would appear that the scope of Chapter 573 is quite broad since there is no limiting language in the new law to exclude, for example, psychological or socially generated handicaps from the covered impairments [*See* CAL. GOV'T CODE §19702(b)].

In related legislation, Chapter 1196 has been enacted to establish goals and timetables for the employment of disabled persons in state services [CAL. GOV'T CODE §19232]. Prior to the enactment of Chapter 1196, it was the policy of the state to encourage and enable certain physically disabled



persons "to participate fully in the social and economic life of the state and to engage in remunerative employment" and to encourage the public employment of such persons [CAL. STATS. 1968, c. 461, §2, at 1094]. Chapter 1196 has broadened the application of this policy to include any qualified disabled person [CAL. GOV'T CODE §19230]. Disabled persons are those with a physical or mental impairment that substantially limits one or more of their major life activities, who have a record of such impairment, or who are regarded as having such an impairment [CAL. GOV'T CODE §19231]. A person is "substantially limited" for the purposes of Chapter 1196 if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of the disability [CAL. GOV'T CODE §19231]. Thus, whereas the state policy formerly extended only to the blind, visually handicapped, and other physically disabled persons [CAL. STATS. 1968, c. 461, §2, at 1094], Chapter 1196 would extend this legislative declaration to the physically and mentally impaired as defined under the new law [CAL. GOV'T CODE §19231].

Chapter 1196 also adds Section 19232 to the Government Code to make each state agency responsible for establishing an affirmative action employment plan that will ensure disabled persons access to state positions on an equal and competitive basis with the general population if they are capable of remunerative employment. Subject to the review and approval or modification by the State Personnel Board, each agency is required by Section 19232 of the Government Code to annually set goals and timetables for implementing these affirmative action programs and to make such objectives and schedules available to the public upon request.

Chapter 1196 requires the State Personnel Board to outline specific actions to improve the representation of disabled persons in state employment, survey the number of such persons in each state department and compare those numbers with the number of disabled persons in the work force, and to establish guidelines so that agencies and departments may set goals and timetables to improve the representation [CAL. GOV'T CODE §19233]. In addition, Chapter 1196 provides for an annual review of state agencies' hiring activities and requires each agency to correct any underrepresentation [CAL. GOV'T CODE §19234]. Moreover, each state agency is required to establish committees of disabled employees to advise agency heads [CAL. GOV'T CODE §19235]. The State Personnel Board is further required annually to report to the Governor and legislature regarding the employment program for the disabled [CAL. GOV'T CODE §19237] and to provide technical assistance, statewide advocacy, and coordination and monitoring of plans to achieve the purposes of Chapter 1196. Thus, Chapters 573 and 1196, by adding physical disability as a prohibited basis of discrimination in state employment and directing state agencies, under the

supervision of the State Personnel Board, to establish and implement an affirmative action employment plan for the disabled, should overcome and correct some of the past discriminatory practices against disabled persons.

See Generally:

- 1) 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 528 (state civil service affirmative action) (1978).
- 2) Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L.R. 785 (1976).

## **Employment Practices; discrimination in employment—religious associations and corporations**

Labor Code §1413 (amended).

AB 1047 (Alatorre); STATS 1977, Ch 1019

Support: California Commission on the Status of Women; Fair Employment Practices Commission

The California Fair Employment Practices Act [CAL. LAB. CODE §§1410-1433] prohibits employers, employment agencies, and labor unions from discriminating in the hiring, firing, or promotion of any person on the basis of race, religion, creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex [CAL. LAB. CODE §1420]. "Employer" is defined by this act as any person regularly employing five or more persons, or any person acting as an employer's agent, the state and its political subdivisions, or any city [CAL. LAB. CODE §1413].

Prior to the enactment of Chapter 1019, social clubs and fraternal, charitable, educational, or religious associations or corporations not organized for private profit were excluded from the definition of "employer" for the purpose of these antidiscrimination provisions [CAL. STATS. 1975, c. 431, §3, at 924]. Thus, it would appear that, under prior law, an individual claiming discrimination by any of these nonprofit organizations was without a remedy in California [See CAL. LAB. CODE §1420; CAL. STATS. 1975, c. 431, §3, at 924]. Chapter 1019 has amended Section 1413 of the Labor Code to exclude from this definition, *only* a religious corporation or association not organized for private profit. Thus, Chapter 1019 has the effect of now providing individuals who claim discrimination by other than religious nonprofit organizations an administrative review of their complaint [Compare CAL. LAB. CODE §1413 with CAL. LAB. CODE §§1420-1426].

It would appear that the limited exemption provided by Chapter 1019 will still allow nonprofit religious associations and corporations to discriminate on *any* basis and would leave persons claiming such discrimination without an administrative remedy under California law. This conclusion finds support through comparison of the religious exemption provided under federal law [42 U.S.C. §2000e-1 (Supp. III, 1973)] with Chapter 1019 and prior

versions of this bill [See AB 1047, 1977-78 Regular Session, *as amended*, Aug. 17, 1977; AB 1047, 1977-78 Regular Session, *as amended*, May 9, 1977], which contain more restrictive language in permitting such religious associations and corporations to discriminate only on a religious basis. Furthermore, the federal law has been interpreted to permit religious entities to discriminate on the basis of religion, but not on any other basis [See *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)]. By excluding the restrictive provisions of the exemption under California law [Compare CAL. LAB. CODE §1413 with AB 1047, 1977-78 Regular Session, *as amended*, May 9, 1977] it would appear that Chapter 1019 is intended to allow nonprofit religious associations and corporations to discriminate on any basis. Nonetheless, Chapter 1019 should preclude all discrimination by nonprofit employers in California with the exception of these religious associations and corporations.

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See Generally:

- 1) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §427 (Fair Employment Practices Act—Scope) (8th ed. 1973).

### **Employment Practices; state civil service—affirmative action**

Government Code §§19790, 19791, 19792, 19793, 19794, 19795, 19796, 19797 (new).

AB 1350 (Alatorre); STATS 1977, Ch 943

It is the policy of this state not to discriminate in the hiring of state civil service employees on the basis of sex, race, religion, color, national origin, ancestry, or marital status [CAL. GOV'T CODE §19702]. In furtherance of this policy, the State Personnel Board is required to submit annual statistical surveys to the Fair Employment Practice Commission on the employment status of each state agency, department, office, or commission [CAL. GOV'T CODE §19702.5(b)]. Section 19702.5 of the Government Code requires this survey to include the sex, age, ethnic origin, and various employment classifications of all state civil service employees. Prior to the enactment of Chapter 943, however, the State Personnel Board had provided guidelines to state departments to aid them in preparing equal opportunity policies and affirmative action plans, which were required to include goals and timetables to overcome discrimination in state employment [Guidelines For Developing Affirmative Action Plans, State Personnel Board Memorandum, undated (copy on file at *Pacific Law Journal*)]. In light of these guidelines, Chapter 943 has been enacted to maintain and to expand positive programs that will ensure that the policy of nondiscrimination and equal employment opportunity to all persons in this state is strengthened.

Section 19790 of the Government Code requires all state agencies and

departments to establish affirmative action programs and each such agency or department to develop, to annually update, and to implement an affirmative action plan that must identify the areas within each department by job category and level in which minorities and women are being underutilized and specify actions for improving the representation of these underutilized groups [CAL. GOV'T CODE §19797]. Furthermore, beginning on June 1, 1978, each agency and department must establish annual goals and timetables to overcome any identified underutilization and submit such goals and timetables to the State Personnel Board for review and approval or modification by July 1 of each year [CAL. GOV'T CODE §19790]. All management levels within an agency or department are required to take actions to ensure and advance equal employment opportunity at their respective levels, and bureau or division chiefs are accountable to the department director for the effectiveness of the affirmative action program within his or her bureau or division [CAL. GOV'T CODE §19796]. Additionally, the secretary of each state agency and the director of each state department is required to appoint an affirmative action officer who, with the assistance of any equal employment opportunity committee established by his or her department, must, *inter alia*, develop, implement, coordinate, and monitor the agency or departmental affirmative action program [CAL. GOV'T CODE §19795]. The major responsibility for monitoring the effectiveness of the program of a department, however, lies with the department director in cooperation with the State Personnel Board [CAL. GOV'T CODE §19794].

Chapter 943 also establishes specific duties for the State Personnel Board in the implementation of statewide affirmative action programs [CAL. GOV'T CODE §§19790, 19792]. Section 19790 requires the Board to provide advocacy, coordination, enforcement, and monitoring of agency and departmental affirmative action programs. Beyond this, the State Personnel Board is required to, *inter alia*: (1) provide statewide leadership in achieving and continuing affirmative action programs [CAL. GOV'T CODE §19792(a)]; (2) develop, implement, and monitor affirmative action and equal employment guidelines [CAL. GOV'T CODE §19792(b)]; (3) provide technical assistance to agencies and departments [CAL. GOV'T CODE §19792(c)]; (4) review and evaluate such programs to ensure compliance with federal law [CAL. GOV'T CODE §19792(d)]; (5) establish requirements to eliminate underutilization of minorities and women [CAL. GOV'T CODE §19792(e)]; (6) provide statewide training to departmental affirmative action officers [CAL. GOV'T CODE §19792(f)]; (7) review and update qualification standards and selection devices [CAL. GOV'T CODE §19792(g)]; (8) maintain a statistical information system to analyze the progress of the states' affirmative action programs [CAL. GOV'T CODE §19792(h)]. Finally, commencing in 1978, the State Personnel Board is required, by November 15 of each year, to report to the

Governor, the legislature, and the Department of Finance on the accomplishment of each state agency and department in meeting its stated affirmative action goals for the past fiscal year [CAL. GOV'T CODE §19793]. Thus, by establishing guidelines for, and controls over, the institution of affirmative action programs within the state, Chapter 943 could, if administered properly, provide positive action toward equal employment opportunity and the elimination of discrimination within the state civil service.

*COMMENT*

Since Chapter 943 specifically requires each state agency and department to "establish goals and timetables designed to overcome any identified underutilization of minorities and women" [CAL. GOV'T CODE §19790], it would appear that the administration of such programs may be governed by the recent controversial California Supreme Court decision in *Bakke v. Board of Regents* [18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 429 U.S. 1090 (1977)]. In *Bakke*, the court found that the University of California at Davis Medical School's special minority admission program discriminated against a caucasian plaintiff because of his race and that he was entitled to have his application evaluated without regard to his race or the race of any other applicant [*See id.* at 39, 64, 553 P.2d at 1156, 1172, 132 Cal. Rptr. at 684, 700]. The issue in *Bakke* was "whether a racial classification which is intended to assist minorities, but which also has the effect of depriving those who are not so classified of benefits they would enjoy but for their race, violates the constitutional rights of the majority" [*Id.* at 48, 553 P.2d at 1162, 132 Cal. Rptr. at 690]. The court was persuaded by the fact that the university's special admission program had the effect of depriving persons who were not members of a minority group of benefits that they might otherwise have enjoyed [*See id.* at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688]. Furthermore, the court noted that it is unconstitutional reverse discrimination to grant preference to a minority employee in the absence of a showing of prior discrimination by the particular employer [*Id.* at 58-59, 553 P.2d at 1169, 132 Cal. Rptr. at 697]. Under the reasoning of *Bakke*, therefore, it would appear that a state-implemented hiring program under Chapter 943 that established goals in minority hiring, which had the effect of hiring less qualified minorities to the exclusion of more qualified nonminorities could be found unconstitutional. The affirmative action guidelines of the State Personnel Board, however, specifically distinguish between "goals" and "quotas" [Guidelines For Developing Affirmative Action Plans, State Personnel Board Memorandum, at 3, 4, undated, (copy on file at *Pacific Law Journal*)] and indicate that "quota systems" are incompatible with goals that are used in a merit system of employment [*Id.*]. Thus, in preparing their

goals and timetables, the various state agencies should be able to comply with *Bakke* as long as each agency continues to follow the guidelines established by the State Personnel Board.

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See Generally:

- 1) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §422 (state legislation protecting civil rights) (1973).
- 2) 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 527 (curtailment of state funds for unlawful discrimination)(1978).
- 3) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 479 (discrimination based on age) (1973).
- 4) *Symposium: Bakke v. Board of Regents*, 17 SANTA CLARA L. REV. 271 (1977).

## **Employment Practices; employment of minors**

Labor Code §1391.2 (new).

SB 93 (Nejedly); STATS 1977, Ch 765

Support: California Department of Industrial Relations

Pursuant to Section 1391 of the Labor Code, no minor may work more than eight hours in a day or more than 48 hours in a week. Furthermore, he or she may not work before 5:00 a.m. or after 10:00 p.m. except that, preceding a nonschool day, a minor may work until 12:30 a.m. [CAL. LAB. CODE §1391]. The Industrial Welfare Commission has established a minimum wage for minors of \$2.15 per hour [*E.g.*, 8 CAL. ADM. CODE §§11460(4)(A)(2), 11500(4)(A)(2)]. Subject to certain limitations, however, a minor between the ages of 16 and 18 years of age who is enrolled in a work experience education program is allowed to work from 10:00 p.m. until 12:30 a.m. preceding a school day, but he or she must be paid the adult minimum wage during these hours [*See* CAL. LAB. CODE §1391.1]. Unless otherwise provided by statute, these child labor laws apply to all minors employed in California [*See* CAL. LAB. CODE §1391; *see generally* CAL. LAB. CODE §§1297 (messengers), 1298 (street occupations), 1394 (agricultural, horticultural, viticultural, domestic and survey crew workers)].

Chapter 765 has added Section 1391.2 to the Labor Code to exempt from the restrictions of Sections 1391 and 1391.1 any minor who has graduated from a four-year high school, or its equivalent, or has been awarded a certificate of proficiency pursuant to Education Code Section 48412 [CAL. LAB. CODE §1391.2(a)]. Furthermore, Section 1391.2 requires that any minor so exempted must be employed at the same rate of pay as an adult employee in the same establishment for the same quantity and quality of the same classification of work [CAL. LAB. CODE §1391.2(b)]. Section 1391.2(b) does not, however, prohibit wage rate differences based on seniority, length of service, skill, ability, difference in duties or services performed, differences in time of day worked, hours of work, or other reasonable differences. Nonetheless, Chapter 765 should allow duly qual-

ified minors better to compete in the job market despite the fact that they have not yet attained the age of majority.

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See Generally:

- 1) I. B. WITKIN, *SUMMARY OF CALIFORNIA LAW, Agency and Employment* §44 (minors) (1973).
- 2) CONTINUING EDUCATION OF THE BAR, *ADVISING CALIFORNIA BUSINESS ENTERPRISES*, §§19-21 (employment of minors) (1958).

### **Employment Practices; occupational safety and health—prosecution and citation**

Labor Code §§6311, 6355 (amended).

AB 82 (Fenton); *STATS* 1977, Ch 460

Support: Associated General Contractors of California, Inc.; Bethlehem Steel Corporation; California Food Producers, Inc.; Engineering and Grading Contractors Association; Governmental Relations Association; North Coast Builders Exchange

Chapter 460 has amended Sections 6310 and 6355 of the Labor Code in an apparent attempt to provide further protection to both employees and employers who attempt to establish and maintain a safe working environment. Prior to the enactment of Chapter 460, no employer was allowed to discharge or discriminate against an employee to retaliate for a complaint instituted or caused to be instituted by the employee in an attempt to exercise or protect his or her rights or the rights of others [*CAL. STATS.* 1973, c. 993, §59, at 1930]. Any employee so discharged or discriminated against was entitled to reinstatement and reimbursement for lost wages and benefits and should the employer refuse to rehire an employee, he or she was guilty of a misdemeanor [*CAL. STATS.* 1973, c. 993, §59, at 1930].

Chapter 460 has amended Section 6310 to give employees these same rights and remedies if he or she makes an oral or written complaint to the Department of Industrial Relations Division of Industrial Safety, any other governmental agency statutorily responsible to assist the division with respect to employee safety or health, his or her employer, or his or her representative in an attempt to rectify any unsafe working conditions or practices [*CAL. LAB. CODE* §6310(a)].

Section 6354 of the Labor Code requires the Division of Industrial Safety to provide a safety consulting service to any employer who seeks help in maintaining a safe place of employment. Chapter 460 has amended Section 6355 of the Labor Code to diminish the risk of prosecution or citation for an employer who seeks the aid of the consulting service. Prior to the enactment of Chapter 460, if an employer used the consulting service and the consultant discovered, at the place of employment, any equipment or facility

constituting an imminent hazard to the lives or safety of the employees, the consulting service was empowered to institute prosecution or issue citations against the employer [CAL. STATS. 1973, c. 993, §94, at 1938].

Chapter 460 has amended Section 6355 to delete these punitive provisions and empowers the Division of Industrial Safety to issue prohibitory orders preventing any entry into the facilities, use of equipment, or continuation of work procedures found to constitute an imminent hazard to life, health, or safety. The Division of Industrial Safety retains the power to institute prosecutions or issue citations only if an employer fails to comply with a prohibitory order issued by the division pursuant to either Section 6325 or 6355 of the Labor Code [CAL. LAB. CODE §§6326, 6355]. In addition, Section 6355 now permits the Division of Industrial Safety to issue prohibitory orders for hazards to *health*, as well as life or safety—an extension of the powers previously granted that were limited to instituting prosecutions and issuing citations for hazards to life or safety [CAL. STATS. 1973, c. 993, §94, at 1938]. Although, under prior law, the Division of Industrial Safety issued citations for imminent hazards to health [*E.g.*, *In re* R.G. Circuits Co., CAL. OCCUP'L SAFETY & HEALTH APP. BD. DEC., No. 75-R5D1-423 (March 29, 1976) (cyanide poisoning); *In re* John Hernstedt Farms, CAL. OCCUP'L SAFETY & HEALTH APP. BD. DEC., No. 75-R3D2-437 (Feb. 25, 1976) (toxic substances)], it is arguable that the division had no statutory authority to do so [*See* CAL. STATS. 1973, c. 993, §94, at 1938]. Section 6355 now makes it clear that the Division of Industrial Safety has authority to issue prohibitory orders to protect employees from imminent hazards to health. Thus, limitations on the prosecution and citation of employers would appear to provide an incentive for wider use of the consulting service. Furthermore, since the consulting service provides the employer with information, advice, and recommendations on maintaining a safe place of employment [CAL. LAB. CODE §6354], the increased use of the service should reduce the hazards to health and safety for employees.

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See Generally:

- 1) I B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §42B(c) (enforcement of OSHA standards) (Supp. 1973).
- 2) 6 PAC. L.J., REVIEW OF SELECTED 1974 LEGISLATION 227 (enforcement of OSHA civil penalties) (1975).