



AGE DISCRIMINATION LAWS IN THE CALIFORNIA WORKPLACE

California's FEHA and the federal ADEA protect workers and applicants 40 and older from age discrimination. This guide explains who is covered, what employers cannot do, the narrow exceptions, and how to enforce those rights.

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He writes these guides to put the state's labor laws into plain English, in neutral terms, with a citation for every claim.



Age discrimination occurs when an employee or job applicant who is 40 or older receives less favorable treatment because of their age. In California, both state and federal law prohibit most employers from engaging in age discrimination.¹

Age-based discrimination can take many forms. Common examples include:

-  Refusing to hire older workers, despite being equally or more qualified than other candidates.
-  Refusing to promote existing employees because of their age.
-  Firing employees once they reach a certain age.
-  Frequent and severe age-related harassment in the workplace.

This article explores these concepts further and explains age discrimination under California state and federal laws.

Legal Background



In California, employees are protected against age discrimination by two main sets of laws:

- 📖 The federal Age Discrimination in Employment Act (ADEA),² and
- 📖 California's Fair Employment and Housing Act (FEHA).³

Both sets of laws apply to California employers, although they sometimes differ in the scope of protections they provide to employees. The ADEA, for example, only covers employers who have at least 20 employees.⁴ FEHA, on the other hand, applies to employers with a minimum of 5 employees.⁵

Courts often use the ADEA to interpret FEHA, because the legislative intent behind the two statutes is largely the same.⁶ But, when the two sets of laws differ, employers will usually be bound by the law that provides the highest standard of protection for the employee.⁷

In general, FEHA is more protective of employee rights than the ADEA and courts are required to interpret it broadly and vigorously to protect older workers.⁸ As such, it is often advisable for employees to pursue relief under FEHA instead of the ADEA.

This article will focus on the rules applicable under FEHA because FEHA provides greater protections to most California employees than does the ADEA. So, unless federal law is specifically mentioned, the law being discussed is FEHA.

The Rule Against Age Discrimination



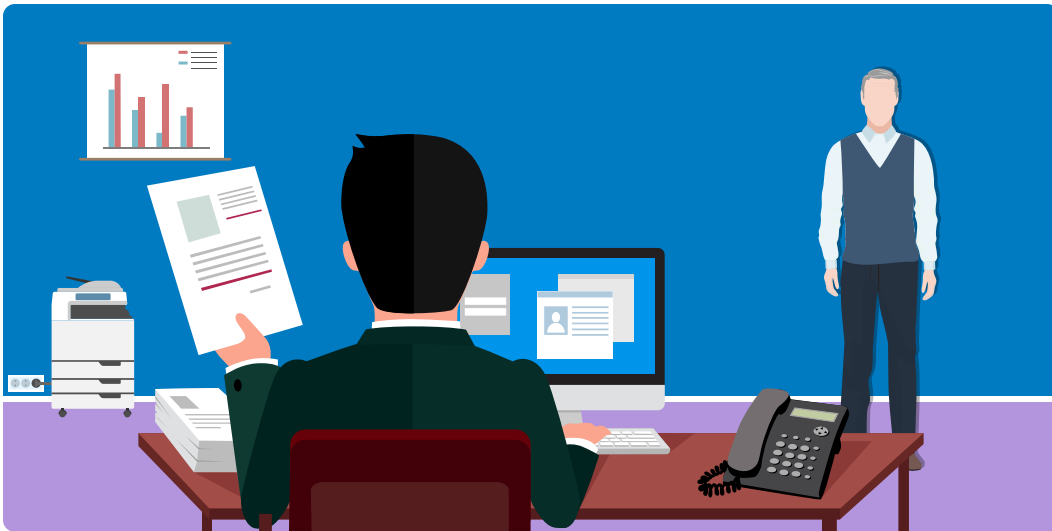
As mentioned above, *age discrimination* occurs when an employee or job applicant receives less favorable treatment because of their age. But not all types of age discrimination are prohibited.

To prove age discrimination, one must first show that:

-  The employer was an entity covered by applicable age discrimination laws;
-  The employee or job applicant was 40 years old or older;⁹
-  The employee or job applicant was adversely affected by an employment action; and
-  The employer took that action because of the employee's age.¹⁰

The next few sections will take a closer look at each of these elements.

Which Employers Can Be Held Responsible



California's anti-discrimination laws apply to several categories of employers.¹¹ Those include:

-  People or businesses that regularly employ five or more persons,
-  People or businesses that act as an agent of a covered employer, and
-  State or local governmental entities.¹²

There are important exceptions to each of these categories. For example, California's ban on age-based harassment applies to employers of *any* size, even those that employ fewer than five people.¹³

Several other caveats are explained below.

3.1 Employers with Five or More Employees

Under California law, the definition of *employer* includes individuals, corporations, partnerships, trusts, or other types of businesses.¹⁴

But certain small businesses are exempt from some of California's anti-discrimination laws. Specifically, California's anti-discrimination protections do not apply to businesses that regularly employ fewer than five people.¹⁵

California regulations explain what it means to *regularly* employ five or more people. An employer meets the threshold if it employs five or more individuals for any part of the day on which the alleged discrimination occurred, or if it employs five or more people on a regular basis.¹⁶ A “regular basis” refers to a business that is recurring rather than constant, so a seasonal business that has five or more workers during its season qualifies even if it does not have five employees year-round.¹⁷

When counting toward that five-employee threshold, part-time employees count the same as full-time employees, and employees who are out on leave, such as California Family Rights Act leave, parenting or pregnancy leave, a leave of absence, or a disciplinary suspension, are counted as well.¹⁸

The employees counted toward coverage do *not* all need to work at the same location, or even inside of California. Workers located both inside and outside the state count toward whether an employer is covered, though workers located outside California are not themselves protected unless the discrimination occurred in California or was ratified by decision-makers in the state.¹⁹

3.2 Religious Organizations

Certain religious nonprofit associations and corporations are *not* considered “employers” for these purposes. Those religious employers are thus not subject to many of California's anti-discrimination laws.²⁰

But, if the religious organization has a subdivision that is for-profit (meaning, it is subject to state or federal income taxes), that subdivision would *not* be exempt from California's anti-discrimination laws.²¹

Likewise, religious nonprofits that provide certain educational or health care services can sometimes be held liable as “employers” under California law.²²

This exception does not apply to non-religious entities, even if they are nonprofit. So, most nonprofit corporations and nonprofit associations are considered “employers”

under California law.²³

3.3 Agents of Covered Employers

California law includes *agents* within its definition of “employer” for the purposes of its anti-discrimination laws.²⁴ As such, agents of an employer can be held responsible for their acts of age discrimination or retaliation.²⁵

An *agent* is a person who acts on behalf of an employer.²⁶ The employer must agree to have the agent act on its behalf for this type of relationship to exist.²⁷

To determine whether someone is an agent of an employer, courts look at the amount of control the employer exercises over them.²⁸ If the employer controls *the way* a person or business accomplishes its tasks, a court might find them to be an agent of the employer.²⁹

Of note, a franchisor is usually not considered an employer or an agent under California law. But a franchisor can be held liable for unlawful activities if they exercise control over the day-to-day operations of the franchised location.³⁰

California also recognizes that some outside businesses acting as an employer's agent can be sued directly for discrimination. In 2023, the California Supreme Court held that a business that carries out FEHA-regulated work for an employer, such as a company hired to screen or medically examine job applicants, can itself be liable under FEHA if it has five or more employees.³¹ This does not change the general rule, discussed next, that individual supervisors and coworkers usually cannot be sued personally for discrimination.

3.4 Supervisors Usually Not Liable

Many supervisors and coworkers are technically “agents” of an employer. But, in general, employees cannot file a lawsuit directly against their supervisors or coworkers for discrimination or retaliation.³²

Importantly though, California law still protects older employees who have been victimized by coworkers and supervisors. Employers can often be held liable for the actions of their employees.³³

So, even though the employee cannot sue the supervisors personally for their discriminatory and retaliatory conduct, they can often still sue their employer.

Also, in the context of age-related *harassment*, employees can file a lawsuit directly against their supervisors, coworkers, and often their employer.³⁴

3.5 State and Local Governments

The State of California is an “employer” for the purposes of California's anti-discrimination laws. This means that people who work for the state can sue for any unlawful age-based discrimination or retaliation they suffer.³⁵

Along these same lines, the word “employer” includes any subdivisions of the State of California, county governments, city governments, local agencies, and special districts.³⁶

Which Workers Receive Protections



The California Fair Employment and Housing Act (FEHA) states that it is unlawful to discriminate against “any person” over the age of 40 because of their age.³⁷ In reality though, the actions prohibited by FEHA are limited to the employment context.³⁸ The result is that only certain groups of workers can benefit from California's legal protections.

4.1 Traditional Employees

For the most part, a person must be an *employee* to be protected against age discrimination under California law.³⁹ An *employee* is someone who is both:

-  A person who works under the direction and control of the employer, and
-  A person whom the employer has agreed to hire.⁴⁰

The employer's agreement to hire the employee does *not* necessarily need to be made in writing (although that often helps). It can be made orally, or even just implied by the actions of the employer and worker.⁴¹

If the employer has not agreed to hire the person, they might still be considered an “employee” if they are working under an *appointment* or as an *apprentice*.⁴²

4.2 Job Applicants

California law expressly extends its anti-discrimination protections to applicants for employment positions.⁴³ Specifically, California makes it unlawful for an employer to refuse to hire a person or refuse to select the person for training that might lead to employment based on their age.⁴⁴

An *applicant* is someone who files a written application with an employer. If the employer does not provide a written application form, then a person is an applicant if they express a specific desire to the employer to be considered for employment.⁴⁵

In some cases, a person can be considered an “applicant” even if they haven't actually applied for a job. If they were deterred from applying for the position because of the employer's discriminatory practices, they may still have rights under California law.⁴⁶

Importantly, California's protections do not extend to under-qualified applicants. An employer has the right to reject an applicant if they are less qualified for a position than the person ultimately selected.⁴⁷

4.3 Independent Contractors

Independent contractors are generally *not* protected by California's anti-discrimination laws.⁴⁸ They are, however, protected by California's provisions that prohibit age-based harassment.⁴⁹

Under California law, an *independent contractor* is someone who performs a specific service for a specific price.⁵⁰ The person or business paying the independent contractor can control the result they want, but generally has no authority to control *the way* the independent contractor achieves the result.⁵¹

4.4 Immediate Family Members

Individuals employed by their parents, spouse, or child are *not* protected by California's anti-discrimination laws.⁵²

4.5 Temporary Employees (Temps)

Temporary employees (sometimes called *temps*) are generally protected by California's anti-discrimination and anti-harassment laws.⁵³

If the temp was hired by an agency and the agency assigned them to work for a business, the temp will sometimes be an employee of *both* the agency and business. Meaning, they can hold both the temp agency and the business responsible for unlawful age discrimination.⁵⁴

A temp does *not* have to be compensated directly by a temp agency or a business to be considered an employee. Rather, courts look at the amount of control the temp agency or business exercises over the worker.⁵⁵

4.6 Unpaid Interns

Unpaid interns are generally *not* considered employees because the employer has not agreed to hire them.⁵⁶ In 2015, however, California law was extended to include unpaid interns under the Fair Employment and Housing Act.⁵⁷

Thus, the law now protects unpaid interns from age discrimination and age-based harassment.⁵⁸

Unpaid interns represent one of the few positions in which a worker will have the right to be free from age discrimination despite not being an employee.

4.7 Volunteers

Volunteers are *not* employees and are generally *not* protected from age discrimination in California.⁵⁹

It used to be that volunteers were also not protected against age-based harassment. But, beginning in 2015, the law was changed to protect volunteers from harassment.⁶⁰

Which Actions Are Prohibited



In general, it is unlawful for employers to discriminate against employees over the age of 40 on the basis of their age. Discrimination includes treating individuals differently, due to age, with respect to:

- ✓ Their compensation,
- ✓ The terms or privileges of their employment,
- ✓ Work conditions, and
- ✓ Job assignments.⁶¹

Importantly, age discrimination is illegal at almost any stage of employment, including:

- 💬 During hiring (or before taking applications if recruiting materials state that a certain age is preferred),⁶²
- 💬 While considering promotions,
- 💬 When making raise determinations,
- 💬 When making determinations about laying off or firing employees,

-  While considering training opportunities or by setting age limits for training programs,
-  When setting retirement requirements,
-  When determining employee benefits, and
-  During apprentice programs.⁶³

5.1 Examples of Age Discrimination

Age discrimination can take many shapes, so it is important to be aware of subtle and not so subtle ways an employer might be harassing or discriminating against their older employees. Several common examples of potentially-actionable claims of age discrimination include the following:

-  An employer rewards younger, less-experienced employees with promotions and work opportunities instead of older ones, despite high performance and expertise.
-  An employee older than 40 receives an unexpected demotion for no apparent reason.
-  An employee older than 40 loses a job for no apparent reason.
-  An employee older than 40 is not hired because the employer wanted a younger-looking person to fulfill the job duties.
-  An employee older than 40 is turned down for a promotion because the company wanted to hire someone younger from outside the company.
-  Company layoffs where only older individuals are let go.
-  An employee older than 40 receives a negative job evaluation for fabricated reasons.
-  An employee older than 40 is constantly harassed by their supervisors and coworkers about their age in such a way that creates a hostile work environment.

5.2 Age-Related Policies and Practices

Both state and federal laws prohibit these kinds of policies and practices if they have a “disparate impact” on applicants or employees age 40 or older if the policy is unrelated to the job's requirements.⁶⁴ These kinds of policies can be unlawful even if

the policy was adopted *without* a deliberately discriminatory motive.⁶⁵ The federal Age Discrimination in Employment Act also allows disparate-impact claims, but they are narrower than under some other discrimination statutes: an employer can defeat such a claim by showing that the challenged practice was based on a reasonable factor other than age.⁶⁶

In most cases, the elements of a disparate impact claim based on age discrimination are as follows:

-  The worker was an employee or applicant of a covered employer,
-  The employer adopted a practice or policy that had a disproportionately-adverse effect on workers age 40 or over,
-  The practice or policy had no clear relationship to the job's requirements,⁶⁷ and
-  The worker was harmed by the policy.⁶⁸

If the employee meets these elements, the employer then must show evidence of a business justification for the employment practice. An employer can satisfy this by showing that the challenged action is related to safe and efficient job performance and is consistent with business necessity.⁶⁹

Put simply, policies that appear to be age neutral but apply more harshly to older workers are unlawful unless the employer can prove they are based on safety or a reasonable factor other than age.

EXAMPLE

A company that announces it will not hire managers with more than 25 years of experience. Although this policy is not discriminatory on its face, it has a disparate impact on older employees. It would likely constitute unlawful age-based discrimination.

5.3 Age Discrimination and Benefits Protections

Federal law specifically protects employee benefit plans under the Age Discrimination in Employment Act (ADEA).⁷⁰ Generally, employers cannot reduce benefits based on age.

There is, however, an exception to this rule if the cost of providing the benefit increases with age. In that case, the employer must incur the same cost for providing the benefits to older workers as it does for younger workers in order to comply with the law.⁷¹

EXAMPLE

An employer spends the same amount of money to buy life insurance for younger and older workers. The younger workers receive greater coverage for the same premium due to the insurance company's pricing arrangement. The employer does *not* violate ADEA because the cost of life insurance tends to increase with age.

5.4 Age-Based Harassment

Harassing employees in the workplace on the basis of age can constitute unlawful discrimination.⁷² Harassment is unlawful when it is severe or pervasive enough to create a working environment that a reasonable person would find hostile, intimidating, or offensive, or when it results in an adverse employment decision.⁷³

California law is especially protective of employees on this point. A victim does not have to prove that their productivity declined; it is enough that a reasonable person subjected to the conduct would find that it made the job more difficult to do.⁷⁴

Whether the environment is hostile is judged from the totality of the circumstances, and even a *single* incident of harassment can be enough to support a claim if it unreasonably interfered with the employee's work or created an intimidating, hostile, or offensive working environment.⁷⁵

A harassment claim does not require the employee to show that they lost any tangible job benefit; the harassment itself is the wrong.⁷⁶ Even so, not every offhand or trivial remark is actionable; the conduct must be serious enough, considered in context, to alter the conditions of the person's employment.⁷⁷

 EXAMPLE

A supervisor who repeatedly makes derogatory remarks about an employee's age can create a hostile work environment. So can a single incident that is severe enough on its own, such as a hostile, age-based threat.

Exceptions to Age Discrimination Rules



6.1 Bona Fide Occupational Qualifications (BFOQ)

An employer has the right to discriminate against an employee over the age of 40 if that decision is based on a *bona fide occupational qualification* (sometimes abbreviated “BFOQ”).⁷⁸

A *bona fide occupational qualification* is an employment practice that:

-  Excludes a group of individuals on the basis of their age,⁷⁹
-  Is justified because nearly all of the people excluded are unable to safely and efficiently perform the job,⁸⁰ and
-  Without the requirement, the employer's business operations would be undermined.⁸¹

If these requirements are met, the employer has a right to exclude all persons within the particular group. That is true even if a particular employee or applicant is capable of safely and efficiently performing the job.⁸²

EXAMPLE

The mandatory retirement age for commercial airline pilots is 65. Although this number is set by law, it is essentially the same as a determination that age can be a BFOQ.

Employers should be careful before using a bona fide occupational qualification as an excuse to discriminate against employees over the age of 40. Some courts have treated the BFOQ excuse as a very narrow one that should rarely be used.⁸³ If a court rejects an employer's proposed BFOQ, the consequences can be costly.

6.2 Certain Educators

Tenured faculty members at certain qualified institutions of higher learning can be forced to retire. The institution's retirement policy, however, must permit reemployment of those faculty members on a year-to-year basis.⁸⁴

6.3 Physicians

Physicians who work for a professional medical corporation and are at least 70 years of age may be forced to retire.⁸⁵ This exception to California's anti-discrimination laws only applies if the bylaws or articles of the professional medical corporation provide for compulsory retirement.⁸⁶

6.4 Bona Fide Executives and High Policymakers

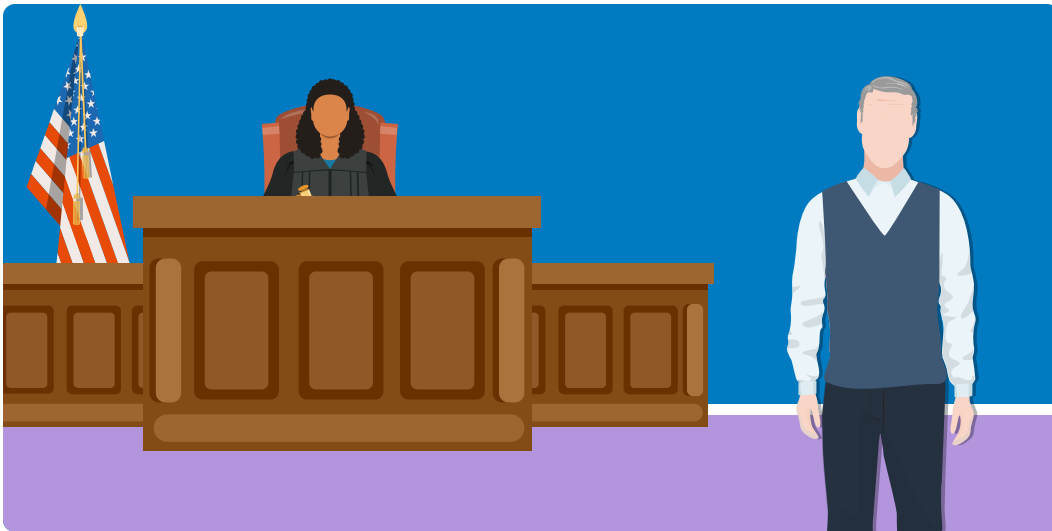
Good-faith age limitations are allowable when private employers impose mandatory retirement ages for certain executives or high policymaking employees.⁸⁷ Under California law, those employees must be at least 65 years of age and entitled to annual retirement benefits of at least \$27,000.00.⁸⁸ The federal exemption uses a higher dollar threshold, requiring an immediate, nonforfeitable annual retirement benefit of at least \$44,000.⁸⁹

6.5 Bona Fide Seniority System

Under federal law, it is not unlawful for an employer to observe the terms of a bona fide, good faith seniority system.⁹⁰ A good faith seniority system is one that recognizes job tenure and allocates employment rights, benefits and wages on that basis, but was not created with the intent to discriminate.

A good faith seniority system *cannot* require or permit the involuntary retirement of employees based on age.⁹¹

Enforcing a Worker's Rights: Filing a Claim



7.1 Do Older Employees Need a Lawyer?

Employees are *not* required to have a lawyer to file a claim against their employer. But it is often a good idea to have one.

The law can be complex and very few cases are straightforward. Even if the facts are strong in an employee's case, an experienced employment law attorney can sometimes help by:

-  Collecting all legally-relevant information,
-  Applying the law to the evidence and related facts in a compelling way,
-  Avoiding the strategic pitfalls many nonlawyers are unfamiliar with, and
-  Maximizing the financial damages the employee receives.

Of course, there is no guarantee that a lawyer will be able to accomplish these things. But, when employees handle their legal disputes without representation, there is

sometimes an increased risk that they will lose or severely harm their case due to legal missteps that a lawyer would have avoided.

If the employer contests the employee's claim, which happens often, legal arguments will have to be made and evidence might need to be presented. This might occur in court or with an administrative agency, sometimes according to complicated legal procedures. It can be a good idea to have a lawyer who is familiar with doing those things.

In many cases, attorneys are willing to work with *no upfront costs* on the part of the employee. Instead, they will take a percentage of what the employee wins at the end of the case.

It is also possible that the employer will be required to pay the employee's legal fees at the end of the case. Some laws place the burden of those expenses on the employer because it is easier for them to afford it.⁹²

So, although there is no legal requirement that an employee must have an attorney, navigating the claims process can be much easier if the employee has one.

7.2 Claims Start with a Government Agency

When an employee decides to sue their employer, they must first file a written complaint with an administrative agency.⁹³ Employees pursuing an age discrimination claim *cannot* go straight to court with a lawsuit.⁹⁴ This process is referred to as “exhausting” the employee's administrative remedies.

If the employee is bringing claims under state law only, the complaint should be filed with California's Civil Rights Department (CRD), formerly the Department of Fair Employment and Housing (DFEH).⁹⁵ The CRD complaint process is explained in our article: *How to File a Work Discrimination Complaint with California's CRD*.

If the employee is bringing claims under federal law, the complaint can be filed with either the CRD or the U.S. Equal Employment Opportunity Commission (the EEOC). When a complaint is filed with the CRD, courts consider it to have also been filed with the EEOC.⁹⁶

So, filing the complaint in either agency satisfies the employee's obligations in this regard. If the employee chooses to file with the EEOC, they can find more information about the process [here](#).

If, after a complaint is filed with the appropriate administrative agency, the claim is not resolved by either the EEOC or the CRD, the employee will be issued a document called a right-to-sue letter.⁹⁷ The employee may then pursue their case by bringing a lawsuit in court.

7.3 The Deadline to File (Statute of Limitations)

Employees are up against strict deadlines when pursuing relief for age discrimination. If the employee is bringing claims under state law, they must file a complaint against the employer with California's Civil Rights Department (the CRD) no later than **three years** from the date of the alleged discriminatory act.⁹⁸

If the employee has gone through the administrative process and has been issued a right-to-sue letter from the CRD, the employee will then have **one year** to file a lawsuit in civil court against the employer.⁹⁹ This one-year clock starts ticking on the date the right-to-sue letter is issued.

If the employee is pursuing federal relief, they must file a complaint with either the CRD or the U.S. Equal Employment Opportunity Commission (the EEOC) within **300 days** of the alleged discriminatory act.¹⁰⁰ If either agency issues a right-to-sue letter, the employee will have **90 days** to file a lawsuit in court based on federal claims.¹⁰¹

There are, of course, exceptions to these time limits. You should speak with a lawyer immediately if you are unsure whether your claim is time-barred.

7.4 Retaliation is Prohibited

Employees are often worried about the consequences of pursuing an age discrimination claim against their employer. But it is important to understand that employers may *not* terminate or take adverse employment actions against their older employees simply because the employee opposed the employer's age-based discrimination policies.¹⁰²

Similarly, an employee who has suffered age discrimination has a right to file a complaint, testify, or assist in any proceeding in an age discrimination claim against their employer. The employer may not retaliate against them for doing so.¹⁰³

7.5 Settling an Age Discrimination Claim

An employee can waive their rights in a settlement agreement. They can also waive their rights when participating in an employment termination program or an exit incentive program.¹⁰⁴ The waiver is only valid if it was entered into *knowingly* and voluntarily by the employee.¹⁰⁵

In this kind of situation, the waiver or release agreement will provide that the employee agrees to drop their legal action against the employer (or to not take one if none has been initiated). In return for signing the waiver, the employer will normally give the employee an incentive to leave voluntarily, such as a severance pay package that exceeds the company's standard policy.

Importantly, however, federal law provides specific minimum standards that must be met for a waiver to be considered *knowing* and *voluntary* and, therefore, valid.

Among other requirements, a valid waiver must:

-  Be in writing and with understandable language;
-  Refer specifically to the Age Discrimination in Employment Act (ADEA) claims and rights;
-  Be given in exchange for something valuable that the worker is not already entitled to receiving;
-  Advise the worker to consult with an attorney before signing the waiver; and
-  Give the worker at least 21 days to think about the waiver and at least 7 days to revoke it after signing it.¹⁰⁶

References

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- 1 29 U.S.C. §§ 623, 631(a); Gov. Code, §§ 12926, subd. (b) [“‘Age’ refers to the chronological age of any individual who has reached a 40th birthday.”], 12940, subd. (a) [unlawful for a covered employer to refuse to hire, or to discriminate against, a person because of protected characteristics including age]; *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762, 766 [“Both California and federal law prohibit employers from unlawfully discriminating against employees on the basis of their age.”].
 - 2 29 U.S.C. §§ 621–634.
 - 3 Gov. Code, § 12900 et seq.
 - 4 29 U.S.C. § 630(b).
 - 5 Gov. Code, § 12926, subd. (d).
 - 6 *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762, 766.
 - 7 *Peatros v. Bank of America* (2000) 22 Cal.4th 147, 165 [“[T]he ADEA generally disclaims any preemptive effect on state law by impliedly preserving such law.”]; 29 U.S.C. § 633(a); *Simpson v. Providence Washington Ins. Group* (9th Cir. 1979) 608 F.2d 1171, 1175, citing *Simpson v. Alaska State Com. for Human Rights* (D.Alaska 1976) 423 F.Supp. 552, 556 [“Congress intended only to establish ‘minimum’ standards in the [ADEA]”].
 - 8 Gov. Code, § 12941 [“The Legislature further reaffirms and declares its intent that the courts interpret the state’s statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers.”].
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- 9 Gov. Code, § 12926, subd. (b).
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- 10 Gov. Code, § 12940, subd. (a); 29 U.S.C. § 631(a); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.
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- 11 Gov. Code, §§ 12926, subd. (d), 12940, subd. (a).
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- 12 Gov. Code, §§ 12926, subd. (d), 12940, subd. (a); Cal. Code of Regs., tit. 2, § 11008, subds. (a), (e).
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- 13 Gov. Code, § 12940, subd. (j)(4)(A) [defining “employer” to include “any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract,” for the purposes of harassment]; *Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1217 [“FEHA’s prohibition against harassment is not limited to employers of five or more persons. Rather, FEHA expressly makes the harassment prohibition applicable to employers of ‘one or more persons.’”].
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- 14 Gov. Code, §§ 12925, subd. (d) [“‘Person’ includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.”], 12926, subd. (d) [“‘Employer’ includes any person regularly employing five or more persons . . .”].
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- 15 See, e.g., *Jennings v. Marralle* (1994) 8 Cal.4th 121, 130 [“Thus, while the Legislature has made a broad statement of policy, it has not extended that policy to small employers. The FEHA gives plaintiff no remedy as defendant does not regularly employ five or more persons.”].
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- 16 Cal. Code of Regs., tit. 2, § 11008, subd. (e)(1) [“‘Regularly employing’ means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.”].
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- 17 Cal. Code of Regs., tit. 2, § 11008, subd. (e)(1)(A).
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- 18 Cal. Code of Regs., tit. 2, § 11008, subd. (e)(1)(B) [“Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. . . . Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of

absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.”].

- 19 Cal. Code of Regs., tit. 2, § 11008, subd. (e)(1)(C) [“Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.”].
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- 20 Gov. Code, § 12926, subd. (d).
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- 21 Cal. Code of Regs., tit. 2, § 11008, subd. (e)(5) [“A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.”].
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- 22 See Gov. Code, § 12926.2.
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- 23 Cal. Code of Regs., tit. 2, § 11008, subd. (e)(6) [“‘Employer’ includes any non-profit corporation or non-profit association other than that defined in subsection (5).”].
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- 24 Gov. Code, § 12926, subd. (d) [“‘Employer’ includes . . . any person acting as an agent of an employer”]; Cal. Code of Regs., tit. 2, § 11008, subd. (e)(3) [“Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.”].
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- 25 Gov. Code, § 12940, subd. (a).
-
- 26 Civ. Code, § 2295.
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- 27 *Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 91 [“An agency relationship is a *bilateral* matter created through *mutual* consent.”].
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- 28 *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 492 [“The Court of Appeal in *Nichols* identified the 'right to control' as a significant factor in defining an agency relationship.”]; see also *Laird v. Capital Cities/ABC* (1998) 68 Cal.App.4th 727, 741.
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- 29 *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 493 [“[A]n agency relationship exists where the principal dictates, not just the desired result of the enterprise, but also 'the manner and means' by which such result is achieved”].
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- 30 *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 503 [“A franchisor will be liable if it has retained or assumed the right of general control over the relevant day-to-day operations at its franchised locations that we have described, and cannot escape liability in such a case merely because it failed or declined to establish a policy with regard to that particular conduct.”].
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- 31 *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268; see also Cal. Code of Regs., tit. 2, § 11008, subd. (a) [an agent who performs “a function traditionally exercised by the employer” is “also an 'employer' for purposes of the Act”].
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- 32 *Reno v. Baird* (1998) 18 Cal.4th 640, 645 [holding that only the employer, and not individual supervisors, may be sued and held liable under FEHA's prohibition against discriminatory hiring, firing, and personnel practices]; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [“[T]he employer is liable for retaliation . . . but nonemployer individuals are not personally liable for their role in that retaliation.”]; *Le Bourgeois v. Fireplace Mfg.* (1998) 68 Cal.App.4th 1049, 1054–1055 [“[D]iscrimination claims under the FEHA . . . may be maintained against employers, but not against supervisors individually.”].
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- 33 *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 77 [“The fact that the employer is liable via the respondeat superior effect of the 'agent' language provides protection to employees even if individual supervisors are not personally liable. Hence we do not find this consideration to compel a conclusion that the Legislature must have intended to impose personal liability on individual supervisory employees.”].
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- 34 Gov. Code, § 12940, subd. (j)(3) [“An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”]; see also *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [“When the harasser is a supervisor, the employer is strictly liable for the supervisor's actions. [Citation.] When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).”].
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- 35 Gov. Code, §§ 12926, subd. (d), 12940, subd. (a); Cal. Code of Regs., tit. 2, § 11008, subd. (e)(4).
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- 36 Gov. Code, §§ 12926, subd. (d), 12940, subd. (a); Cal. Code of Regs., tit. 2, § 11008, subd. (e)(4) [“‘Employer’ includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.”].
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- 37 Gov. Code, § 12940, subd. (a).
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- 38 See generally Gov. Code, § 12940.
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- 39 *Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 842 [“In order to recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee.”].
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- 40 Gov. Code, § 12926, subd. (c); Cal. Code of Regs., tit. 2, § 11008, subd. (d) [“‘Employee.’ Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.”]; but see *Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 842 [“[T]he FEHA does not define an employer, employee, or what constitutes employment.”].
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- 41 Cal. Code of Regs., tit. 2, § 11008, subd. (d).
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- 42 Cal. Code of Regs., tit. 2, § 11008, subd. (d); *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 633 [“[T]he FEHA confers employee status on those individuals who have been appointed, who are hired under express or implied contract, or who serve as apprentices.”]; but see

Estrada v. City of Los Angeles (2013) 218 Cal.App.4th 143, 155 [person appointed to a volunteer position by a city was not an “employee” because he served without pay].

43 Gov. Code, § 12940; *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 Cal.App.4th 138, 144.

44 Gov. Code, § 12940, subd. (a).

45 Cal. Code of Regs., tit. 2, § 11008, subd. (b) [“Applicant.’ Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment.”].

46 Cal. Code of Regs., tit. 2, § 11008, subd. (b) [“Except for recordkeeping purposes, ‘Applicant’ is also an individual who can prove that they have been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice.”].

47 *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 Cal.App.4th 138, 153 [“The Act does not prohibit an employer from rejecting a job applicant because she is less qualified than the person selected.”].

48 Cal. Code of Regs., tit. 2, § 11008, subd. (d)(1) [“‘Employee’ does not include an independent contractor as defined in Labor Code section 3353.”].

49 Gov. Code, § 12940, subs. (j)(1) [“It is an unlawful employment practice . . . [f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because . . . age . . . to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract”], (j)(5).

50 Labor Code, § 3353.

51 Labor Code, § 3353.

52 Gov. Code, § 12926, subd. (c) [“Except as provided by Section 12926.05, ‘employee’ does not include any individual employed by that person’s parent, spouse, or child”]; *Mendoza v. Town of Ross* (2005) 128

Cal.App.4th 625, 632 [noting that FEHA excludes persons employed by close relatives].

- 53 Cal. Code of Regs., tit. 2, § 11008, subd. (d)(5) [“An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.”].
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- 54 Cal. Code of Regs., tit. 2, § 11008, subd. (d)(5); see also *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174 [“The possibility of dual employment is well recognized in the case law. 'Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers — his original or “general” employer and a second, the “special” employer.’”], quoting *Miller v. Long Beach Oil Dev. Co.* (1959) 167 Cal.App.2d 546, 549.
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- 55 *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1625–1626 [“[T]he employment relationship for FEHA purposes must be tied directly to the amount of control exercised over the employee. . . . The law has long recognized that a contracting employer acts as an 'employer' for purposes of applying state and federal antidiscrimination laws.”].
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- 56 See Gov. Code, § 12926, subd. (c); Cal. Code of Regs., tit. 2, § 11008, subd. (d); but see Cal. Code of Regs., tit. 2, § 11008, subd. (m) [“Unpaid interns and volunteers may or may not be employees.”].
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- 57 Gov. Code, § 12940, subs. (c), (j), & (l), as amended by Stats. 2014, ch. 302, § 1, eff. Jan. 1, 2015.
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- 58 Gov. Code, § 12940, subs. (c), (j), & (l).
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- 59 See *Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 155 [unpaid volunteer found to not be an employee within the meaning of FEHA].
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60	Gov. Code, § 12940, subd. (j), as amended by Stats. 2014, ch. 302, § 1, eff. Jan. 1, 2015.
61	29 U.S.C. § 631(a); Gov. Code, § 12940, subd. (a).
62	29 U.S.C. § 623(e); Gov. Code, § 12940, subd. (a).
63	29 U.S.C. §§ 623, 626, 630; Gov. Code, § 12940.
64	Gov. Code, § 12941; 29 U.S.C. § 623(f)(1); <i>Griggs v. Duke Power Co.</i> (1971) 401 U.S. 424; <i>Scotch v. Art Inst. of California</i> (2009) 173 Cal.App.4th 986, 1002.
65	<i>Int'l Bhd. of Teamsters v. United States</i> (1977) 431 U.S. 324, 335, fn. 15 [97 S.Ct. 1843, 1854].
66	<i>Smith v. City of Jackson</i> (2005) 544 U.S. 228; 29 U.S.C. § 623(f)(1).
67	<i>Guz v. Bechtel National, Inc.</i> (2000) 24 Cal.4th 317, 354, fn. 20 [“Prohibited discrimination may . . . be found on a theory of disparate impact, i.e., that regardless of motive, a <i>facially neutral</i> employer practice or policy, bearing no manifest relationship to job requirements, <i>in fact</i> had a disproportionate adverse effect on members of the protected class.”].
68	CACI No. 2502.
69	<i>Knight v. Hayward Unified School Dist.</i> (2005) 132 Cal.App.4th 121, 129.
70	29 U.S.C. § 630(l) [“The term ‘compensation, terms, conditions, or privileges of employment’ encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.”].
71	29 U.S.C. § 623(f)(2)(B).
72	<i>Yurick v. Superior Court</i> (1989) 209 Cal.App.3d 1116, 1121 [“Under the FEHA it is an unlawful employment practice for an employer or the agent of an employer to harass an employee because of age.”]; Gov. Code, § 12940, subd. (j)(1).
73	Gov. Code, § 12923, subd. (b); see <i>McGinest v. GTE Serv. Corp.</i> (9th Cir. 2004) 360 F.3d 1103, 1113 [relevant factors include the “frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably

interferes with an employee's work performance"], quoting *Nichols v. Azteca Rest. Enters.* (9th Cir. 2001) 256 F.3d 864, 872.

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- 74 Gov. Code, § 12923, subd. (a) [adopting the standard from Justice Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17].
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- 75 Gov. Code, § 12923, subds. (b), (c) ["A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."]; the Legislature expressly rejected the contrary rule of *Brooks v. City of San Mateo* (2000) 229 F.3d 917.
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- 76 *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1352 ["for FEHA purposes, no loss of tangible job benefits is necessary to establish harassment."].
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- 77 Gov. Code, § 12923, subds. (a)–(c).
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- 78 Gov. Code, § 12940 ["It is an unlawful employment practice, unless based upon a bona fide occupational qualification"]; 29 U.S.C. § 623(f)(1).
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- 79 Or other basis protected by FEHA.
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- 80 *Green v. State of California* (2005) 132 Cal.App.4th 97, 115 ["[D]efendant must show that all or substantially all disabled persons are unable to perform the job duties . . . safely and efficiently."].
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- 81 Title 2, Section 11010, of the California Code of Regulations provides: "Bona Fide Occupational Qualification (BFOQ). Where an employer or other covered entity has a practice that on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Cal. Code of Regs., tit. 2, § 11010, subd. (a); see also *Green v. State of California* (2007) 42 Cal.4th 254, 274, fn. 4.)
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- 82 *Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 796 [“If the employer carries his burden of proof all persons within an otherwise protected class may be excluded from employment without inquiry as to whether certain members of the class may, in fact, be capable of safe and efficient job performance.”].
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- 83 See, e.g., *Johnson Controls v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 541 [“The availability of a BFOQ defense is ‘an extremely narrow exception to the general prohibition of discrimination . . .’ [Citations.]”]; *Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [same].
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- 84 Gov. Code, § 12942, subd. (c)(1).
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- 85 Gov. Code, § 12942, subd. (c)(2).
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- 86 Gov. Code, § 12942, subd. (c)(2).
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- 87 29 U.S.C. § 631(c).
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- 88 Gov. Code, § 12942, subd. (c)(3).
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- 89 29 U.S.C. § 631(c)(1); 29 C.F.R. § 1625.12.
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- 90 29 U.S.C. § 623(f)(2)(A); see also Gov. Code, § 12940, subd. (a)(5)(A) [permitting “rehiring on the basis of seniority”].
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- 91 29 U.S.C. § 623(f)(2)(A).
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- 92 Gov. Code, § 12965, subd. (c)(6) [“In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney’s fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.”].
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- 93 Gov. Code, § 12960.
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- 94 *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 [“Under California law ‘an employee must exhaust the . . . administrative remedy’ provided by the Fair Employment and Housing Act, by filing an administrative complaint with the California Department of Fair Employment and Housing (DFEH) . . .”]; *Williams v.*

City of Belvedere (1999) 72 Cal.App.4th 84, 90 [“Before a person may file a civil complaint alleging a violation of this statute, he or she must first file an administrative claim with the DFEH.”].

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- 95 Gov. Code, § 12960.
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- 96 *Surrell v. Cal. Water Serv.* (9th Cir. 2008) 518 F.3d 1097, 1104 [“Although Surrell never filed a charge directly with the EEOC, her charge filed with the State Employment Department is deemed filed with the EEOC pursuant to a worksharing agreement between the two entities.”].
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- 97 Gov. Code, § 12965, subd. (c)(1)(A) [“[I]f a civil action is not brought by the department . . . within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought . . . , the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice.”].
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- 98 Gov. Code, § 12960, subd. (e)(5).
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- 99 Gov. Code, § 12965, subd. (c)(1)(C).
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- 100 29 U.S.C. § 626(d)(1).
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- 101 29 U.S.C. § 626(e).
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- 102 Gov. Code, § 12940, subd. (h).
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- 103 Gov. Code, § 12940, subd. (h).
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- 104 See 29 U.S.C. § 626(f).
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- 105 See 29 U.S.C. § 626(f)(1).
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- 106 See 29 U.S.C. § 626(f).
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