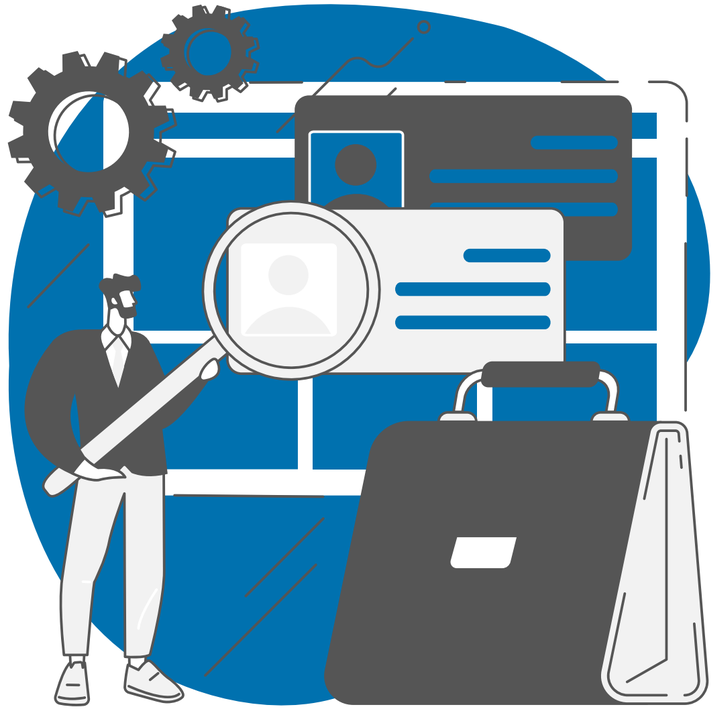
PAYNE & FEARS

Navigating California's Evolving Employment Litigation Landscape



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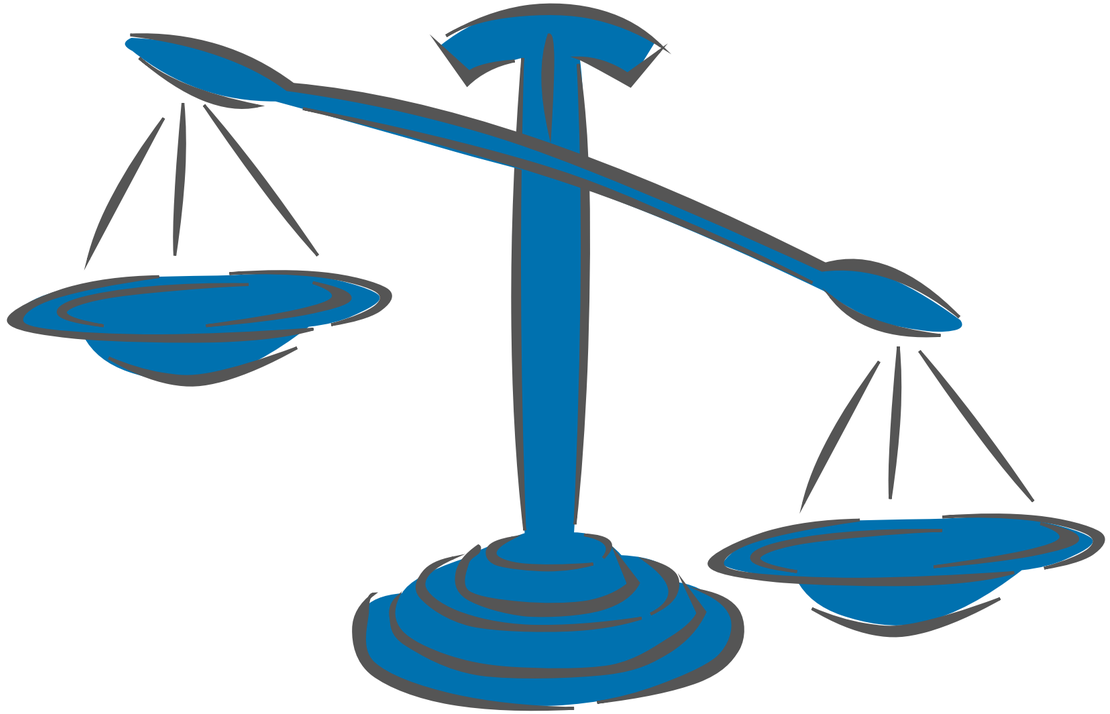
AN EMERGING THREAT – LABOR CODE SECTION 1102.5

- Prohibits retaliation for:
  - Disclosing information that reveals a violation of law
  - Refusing to participate in an activity that would violate law



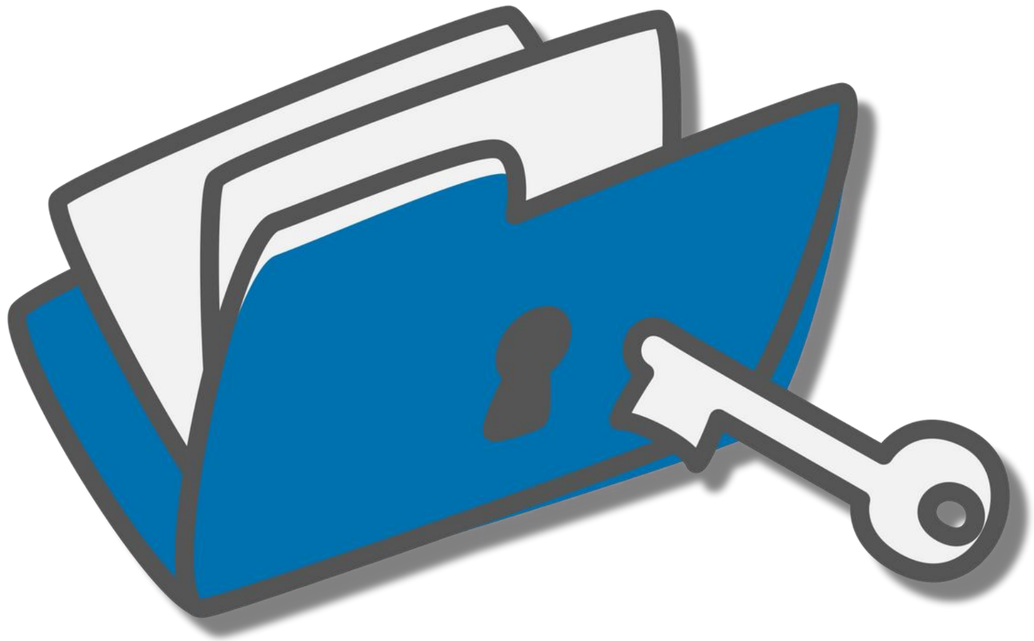
WHY IS THIS A PROBLEM?

- Allows an employee to sue based on internal disclosures
- Protects employee even if he or she is wrong
- Burden of proof – easy to shift the burden to employer

TYPES OF DISCLOSURES COVERED

- To a government or law enforcement agency
- To a person with authority over the employee
- To another employee who has the authority to investigate, discover or correct the violation

Note: The disclosing employee does not need to be the only one with knowledge of the disclosed facts, and the disclosure is protected even if disclosing the information is part of the employee's job duties



DOES THERE NEED TO BE AN ACTUAL VIOLATION?

- No. The disclosure is protected if the employee has “reasonable cause to believe that the information discloses” one of the following:
    - A violation of state or federal statute
    - A violation of or noncompliance with a local, state, or federal rule of regulation

BURDENS OF PROOF

1. The employee makes out a *prima facie* case by showing that retaliation was a “contributing factor” to adverse employment action.

2. The employer then bears the burden of proving “by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged” in the protected conduct

STRATEGIES TO PROTECT YOURSELF

Rigorous documentation of performance or conduct issues

Do not express animus toward internal complaints

Consistency in discipline and termination

COMMUNICATIONS WITH EMPLOYEES, SUPERVISORS, LEADERS

Why Documentation Matters:

- Comprehensive documentation of counseling and investigative efforts, and all related communications, is essential for defending future lawsuits.
- Missing or incomplete records are routinely exploited by plaintiff's counsel as evidence of an alleged failure to engage.
- Even with enterprise HR or CRM systems (Workday, SAP, Salesforce, Oracle), employers rarely capture the full scope of effort and communication.
- Critical details remain undocumented because supervisors and HR teams do the work but fail to thoroughly record it in the system.

Common Litigation Risks:

•Employees often dispute the substance of conversations, challenge the accuracy of notes, or deny altogether that discussions occurred.

•Without contemporaneous notes, reconstructing details is nearly impossible.

Key Takeaway: *If it's not properly documented, it didn't happen. Treat every interaction as if it will be scrutinized in litigation.*

COMMUNICATIONS WITH EMPLOYEES, SUPERVISORS, LEADERS (CONT.)

Why Context Matters: HR Representatives often engage in detailed discussions with supervisors about employee concerns and complaints, yet platform notes frequently omit critical context—creating gaps that undermine defensibility and transparency.

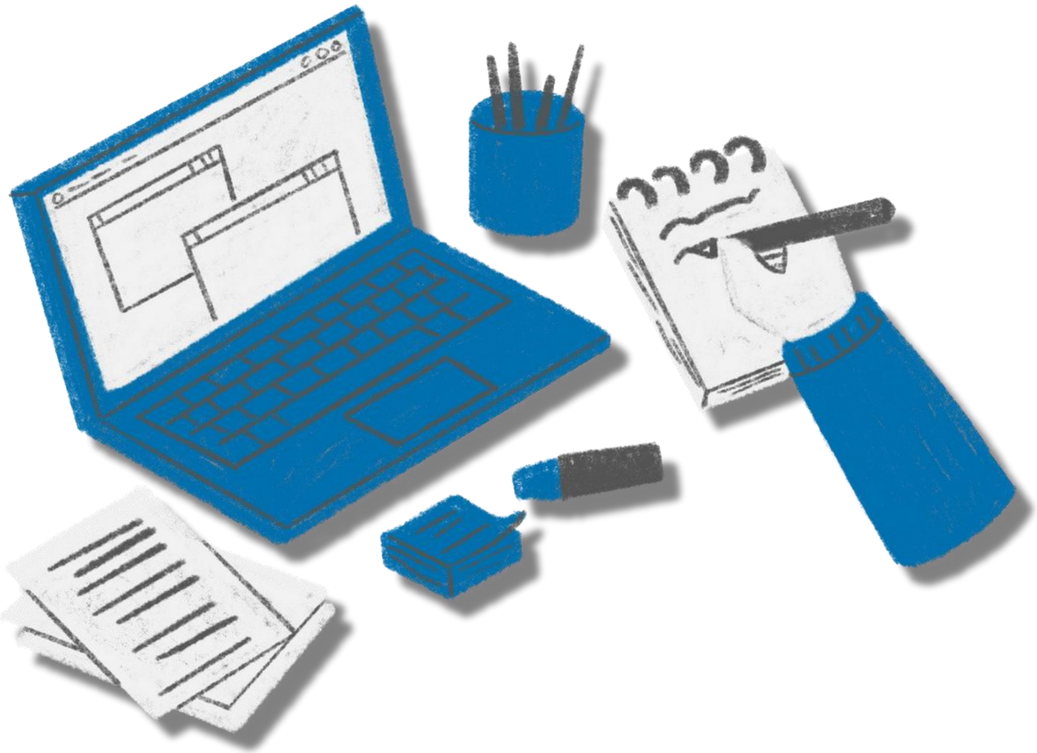
Litigation Risk: Absent context, a supervisor's decision can later be portrayed as callous or insensitive, especially in cases involving performance counseling or termination. Years later, conversation notes may be the only record to refresh recollection, making contemporaneous documentation indispensable.

Key Takeaway: *Document what was discussed, why decisions were made, and the rationale behind actions—not just the outcome.*

COMMUNICATIONS WITH EMPLOYEES, SUPERVISORS, LEADERS (CONT.)

- **Recommendation:** Memorialize conversations in detail in the platform's notes function. Give yourself credit!

  - Summarize calls as specifically as possible
  - Include the play-by-play and utilize "who/what/when" to ensure inclusion of critical (and helpful) details.
  - Include/mode of conversation (phone, email, chat). For example, "spoke with EE on 4/1 via phone."



WRITTEN CONFIRMATION

Subject: Confirmation of Our Recent Discussion

Dear [Employee Name],

On [date], we discussed [brief summary of topic, e.g., your concerns regarding workload and next steps] on the phone.

To confirm, my understanding of our conversation is as follows:

- [Insert 2–3 bullet points summarizing key points or agreements]
- [Include any agreed-upon next steps or timelines]

If this does not accurately reflect our discussion, please contact me at [email address] or [phone number] so we can clarify.

REFERENCING SUPPORTING DOCUMENTATION

- Investigation notes often reference supporting documents without context—missing descriptors, dates, etc. These omissions create ambiguity and weaken defensibility.

- For example, in a recent case, the interactive process timeline was central to a termination decision. However, the investigation records referenced medical documents by file numbers only (e.g., “File 0244”), making their purpose unclear. The record acknowledged receipt of documents but did not include the date of receipt or attach copies—omissions that were later used against the employer in litigation.

- Key Takeaway: Always include descriptive labels, dates, and a summary of key information. Add action items if applicable. If the record lacks clarity, assume it will be used against you.

SAVING AND ORGANIZING DOCUMENTATION

- Always include copies of documents referenced in the case file.
- Use consistent naming conventions.
- Example: *2025-05-26 J. Doe Medical Note*.
- Conduct periodic reviews, check files for completeness and accuracy.
- Missing something? Find it, add it, and note the update.

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT (EFAA)

Notwithstanding any other provision of [the Federal Arbitration Act], at the election of the person alleging conduct constituting a sexual harassment dispute …, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the … sexual harassment dispute.

9 U.S.C. § 402(a).

RECENT CALIFORNIA CASES

CLARIFYING THE SCOPE OF THE EFAA

Recent California Court of Appeal decisions have clarified that:

- The EFAA exempts a plaintiff's entire case from arbitration when the plaintiff alleges at least one sexual harassment claim subject to the Act;
- The EFAA applies to all claims in a lawsuit if the sexual harassment or assault claim arose after March 3, 2022, even if the arbitration agreement was signed before that date; and
- The EFAA applies to all sexual harassment disputes, preempting California arbitration law, and parties cannot contract around the law by way of a California choice-of-law provision.

EFAA – IMPLICATIONS FOR EMPLOYERS

How can employers minimize the effects of the EFAA and the Doe/ Liu decisions?

Keep working to prevent disputes before they happen

Take a fresh look at your arbitration agreements to ensure that they’re up to date

Stay apprised of the law, as the scope and applicability of the EFAA continues to be litigated

ARTIFICIAL INTELLIGENCE IN EMPLOYMENT DECISION-MAKING

As of October 1, 2025, new regulations are in effect that seek to curb the potentially discriminatory impacts of artificial intelligence (AI) and automated decision systems (ADS) in the workplace. These new regulations amend the existing regulatory framework (FEHA) to make the following changes:

- Definitions: ADS is definitely broadly as “[a] computational process that makes a decision or facilitates human decision making regarding an employment benefit,” including processes that “may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques.”
- New affirmative defense in discrimination lawsuits for employers who use automated systems: evidence of bias audits or similar employer efforts to avoid discrimination.
- New data collection and retention requirement, requiring employers to keep records of ADS-related data for at least four years

AI IN THE WORKPLACE – ACTION ITEMS FOR EMPLOYERS

What can employers do to ensure compliance with these new regulations and protect themselves from discrimination lawsuits?

- Conduct bias audits of ADS and AI tools used in recruitment, screening, hiring, promotion, or decisions regarding pay, benefits, or leave;
- Implement bias testing routines;
- Document the results of any anti-bias testing and keep records of ADS and AI-related data for four years;
- Ensure direct human oversight of AI decisions; and
- Provide trainings to HR and management on new legal responsibilities related to ADS and AI under FEHA.

THANK YOU

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