# Employment Documents and Recent Developments In Discrimination Law: Piloting Through The New Normal

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# Today's Presenters

Michele Ballard Miller

Walter Stella

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# Boilerplate:

***noun*** **boil·er·plate \-ˌplāt**

- Content that is made to fit many uses. 2. a legal language institutions use printed on the back of a contract or bill. Big law firms write them and they are nonnegotiable. Refer to adhesion contract and template [thelegaldictionary.org]
- The standardized, non-specific parts of a contract; the fine print that gets tacked on by lawyers to protect themselves and their clients [urbandictionary.com]

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# Discrimination and Bias:

***noun* discrimination /**dəˌskrimәˈnāSH(ə)n/***:***

- The unfair or prejudicial treatment of people and groups based on characteristics such race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, disability, age (age 40 or older), etc.
- EEOC: To "discriminate" against someone means to treat that person differently, or less favorably, for some reason .” to be prejudiced “in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

***noun* bias**

- prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

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# Bias:

- **Implicit Bias**:
  - The Kirwan Institute for the Study of Race and Ethnicity defines implicit bias as: "the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection. (tinyurl.com/mpyvyd9)"
  - The EEOC addresses implicit bias through guidance defining "intentional discrimination" to include unconscious stereotypes regarding the abilities, traits or performance of individuals belonging to certain racial groups.

- **Microaggressions**: "Microaggressions are the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership" (Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation, 2010).

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# Language and Bias:

- Biased language contains words or phrases that are offensive, prejudiced, excluding, or hurtful. It makes certain people or groups feel misunderstood, cast out, or misrepresented.
  - **Race:** Avoid using words that could associate race with negative or positive terminology. For example, instead of “blacklisted” (traditionally negative) or “whitelisted” (traditionally positive), use terms like “blocked list” and “approved list.”
  - **Age:** Avoid condescending descriptions associated with age: “Young man” or “Young woman”, “Girl”, “Kiddo”, “Young at heart”, “Ok, boomer”
  - **Gender:** Remove traditional binary language from agreements and policies
    - California recognizes three genders: male, female and nonbinary
    - Revise he/she and him/his/her language in agreements to “Employee” or “Employee’s”

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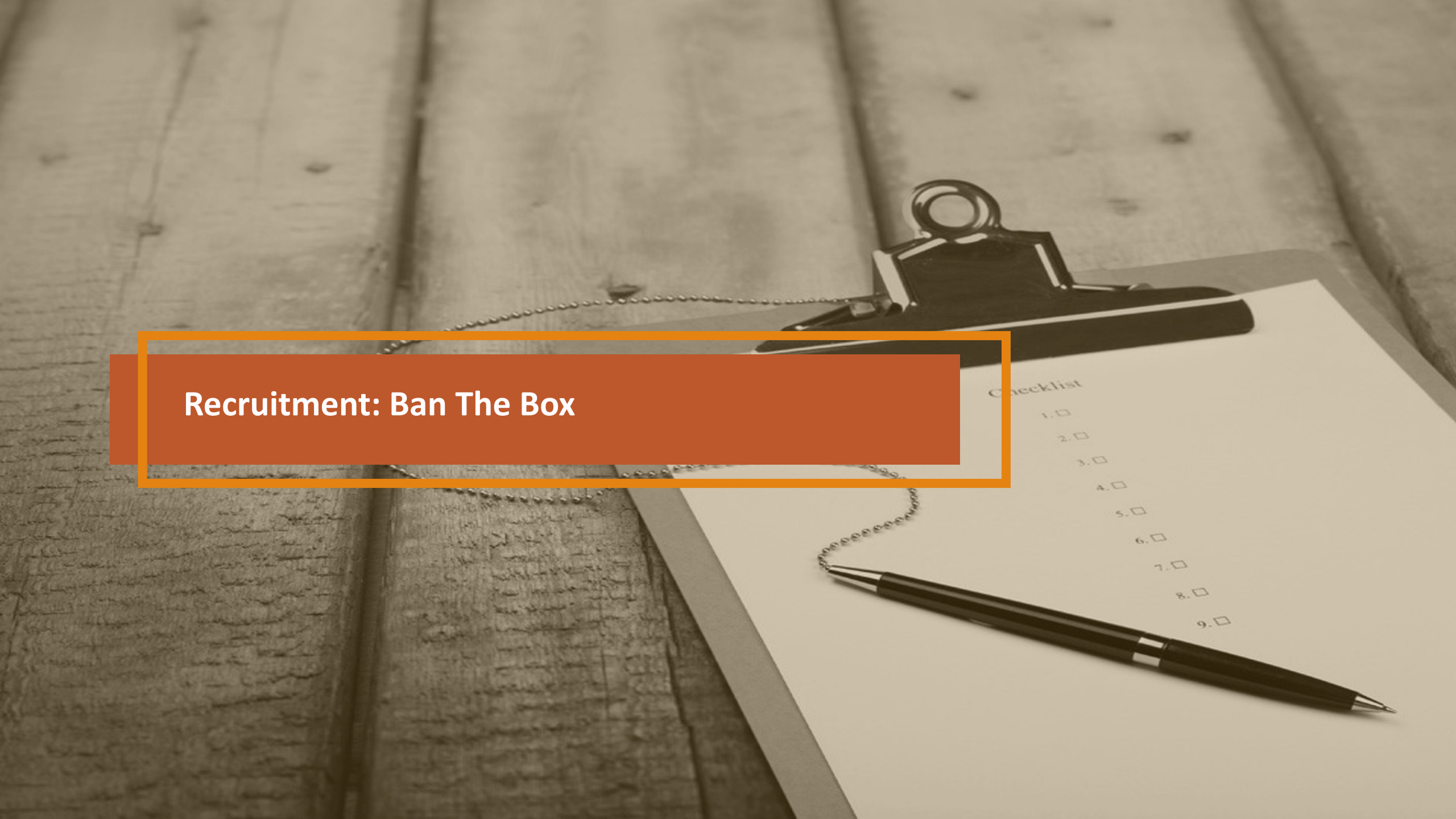


# Recruitment: Ban The Box

# Ban-the Box

- A.B. 1008 – effective Jan. 1, 2018:  Amends FEHA to create statewide "Ban-the-Box" law that prohibits public and private employers (with 5+ employees) from asking about criminal convictions on any application for employment
- Cannot inquire about conviction history prior to extending conditional job offer
- Cannot consider, distribute, or disseminate information related to arrests that did not result in convictions, diversion program participation, and/or convictions that were sealed, dismissed, expunged or eradicated
- Must conduct individualized assessment if intend to deny hire solely or in part due to conviction history
- Must follow fair chance process if individualized assessment leads to decision that conviction is disqualifying.
- Must comply with applicable local Fair Chance Ordinances as well (San Francisco, Los Angeles)

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# Background Checks and References

- Legal limits:
  - Federal Fair Credit Reporting Act (FCRA) and California consumer report laws
  - California
    - Investigative Consumer Reporting Agencies Act (ICRAA)
  - Consumer Credit Reporting Agencies Act
    - Credit checks
    - Can only be ordered if employees works in certain positions
  - Megan's law database
- References: Consumer report rules do not apply when checked by employer.
- New cautions: social media

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# Arrests and Convictions

- Pre-employment inquiries (on applications, interviews, background checks, etc.) do not per se violate Title VII, but USE of criminal record information may violate Title VII.
- Distinction between arrests and convictions
- http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- Be careful - - "**Ban the Box**" laws!

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# Recruitment: Avoiding Bias

# Employer Uses of Artificial Intelligence

- Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias.

  Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test.

- Employers must take care that their AI does not run afoul of federal, state, or local employment laws.

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# Title VII

- Title VII prohibits employment (which includes preemployment) discrimination based on race, color, religion, sex and national origin.
- Title VII claims range from allegations of intentional discrimination against individuals because they are members of a specified protected class, to disparate impact discrimination, which is when facially-neutral policies affect members of a protected class disproportionately.
- Anti-discrimination laws apply regardless of whether an employer's tasks are performed by human employees or an AI-powered tool. Further, even if employers work with AI vendors and their contracts contain indemnification clauses, it is unlikely that employers will be able to avoid any associated litigation.
- The most likely type of claim involving AI-powered decisions are disparate-impact claims, particularly because it is difficult to show that an AI powered decision was made with intent.

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# Artificial Intelligence & Title VII

- It is important for employers to carefully consider their AI-tools, including what types of decisions they are used for, and what type of data is relied on.
- In theory, AI can help reduce or eliminate unconscious bias. However, AI tools can also have the opposite effect. This is because AI tools are only as good as the data they are fed.
- For example, if an AI tool searches for candidates by using the characteristic of a company's current highest-performing employees as the "desired characteristics," then the tool would just be looking for more of the same—which can translate to less diversity in that workplace. In other words, if past hiring practices and trends are used as the data powering AI-decisions for the future, you would just "bake in" past results—which could have been historically biased or discriminatory.
- Thus, employers must take care to ensure that they are using proper parameters for any AI-powered decisions, but importantly, it is recommended that human resources professionals monitor AI results consistently.

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# Real Life Considerations


Here are some examples of how this *may* come into play:

- an algorithm may display certain job advertisements disproportionately to one sex over another—like pilot positions to males, and teaching positions to females.
- an algorithm may favor candidates who attended certain colleges or universities, but it turns out that those institutions are historically not diverse.
- an algorithm may screen out employees with gaps in their employment, which may disadvantage women who may have taken time off to raise children.
- an AI-tool results in a job position being posted on TikTok only, which has a young demographic and thus precludes older applicants from even seeing the position.

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# How to Avoid Issues…


In disparate impact claims, a plaintiff must identify a policy or practice that has a disproportionately harmful effect on a protected class.

If the plaintiff meets this initial burden, the burden of persuasion then shifts to the employer to show both that 1) the policy or practice is "job related for the position in question and consistent with business necessity; and 2) no other alternative employment requirement suffices."

Thus, ***employers should ensure that whatever parameters they set for their A.I. tools meets these two criteria.***

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# Artificial Intelligence and the ADA


The most common ways that an employer's use of algorithmic decision-making tools could violate the ADA are:

- The employer does not provide a **"reasonable accommodation"**
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally **"screens out"** an individual with a disability, even though that individual is able to do the job with a reasonable accommodation
- The employer adopts an algorithmic decision-making tool that violates the ADA's restrictions on **disability-related inquiries and medical examinations**.

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# EEOC Guidance

On May 12, 2022, the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice released technical guidance entitled *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.*


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# EEOC Recommendations


- Employment technology should provide clear instructions for requesting accommodations
- Employment technology should ensure that requesting a reasonable accommodation does not diminish the applicant's opportunities
- Provide staff training
- Ensure the vendor complies with applicable regulations

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# Avoiding Bias


- All requests for information should be **related to the job(s)** for which the applicant is applying
  - Employers should not request information that is **likely to elicit** information about protected characteristics -- on application forms, job interviews, or in background or reference checks
  - Employers should not ask for a **photograph** of an applicant (If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.)
- Whenever possible, ask all applicants the same questions to **standardize** the interviewing process
- If the applicant volunteers information which would be illegal to request, the employer may not use that information as a basis for rejecting the applicant
- **Liability** for discrimination exists, regardless of whether the information was unlawfully solicited or volunteered!

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# Recruitment: Job Postings

# Pay Transparency

## Salary History Bans:

- California employers cannot:
  - seek an applicant's salary history information personally or through an agent, including compensation and benefits
  - rely on an applicant's salary history information as a factor in determining
    - whether to offer employment to an applicant or
    - what salary to offer an applicant

- Exceptions:
  - Employers may consider or rely on voluntarily disclosed salary history information
  - Employers may inquire about the applicant's expected salary in determining the applicant's salary

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# Pay Transparency

- Employees cannot be retaliated against for:
  - Disclosing their own wages
  - Discussing the wages of others
  - Inquiring about another employee's wages
- Employers are prohibited from forbidding employees from discussing or disclosing wages.

**California Fair Pay Act (Cal Labor Code 1197.5)**

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# Pay Transparency: Affirmative Disclosure

**SB 1162, effective January 1, 2023**

- Changes to the "Salary History Ban" law:
  - Employers with 15 or more employees must include a pay scale in all job postings (and must provide that information to third parties who post those jobs)
    - All employers, regardless of size, must provide a pay scale for a current employee's position at the employee's request.
    - Employers must maintain records of a job title and wage rate history for each employee for the duration of employment plus three years.
    - Language qualifying which applicants can seek pay information has been removed.
    - Open question: Does SB 1162 require pay scale information for remote job postings?

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# California Pay Data Reporting Requirements

**SB 1162, effective January 1, 2023**

- Revises reporting deadline to the second Wednesday of May 2023, and annually thereafter
- Within each job category, requires employers to also report the median and mean hourly rate by each combination of race, ethnicity and sex.
- Applies to all private employers with 100 or more employees, even those not required to file EEO-1 reports.
- Requires separate pay data report from employers w/ 100 or more e’es hired through labor contractors

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# Workplace Policies and Procedures

# EEO and Harassment Policies

- Are the organization's EEO and Harassment Policies updated?
- FEHA Requirements:
  - Prohibit discrimination based on breastfeeding and related medical conditions and, effective January 1, 2023, reproductive health decision-making
  - Add military and veteran status to list of protected characteristics
  - 2017- gender identity and expression added to list of protected characteristics
  - *Bostock v. Clayton County*: 2020 U.S. Supreme Court decision (Title VII protects individuals from discrimination on the basis of sexual orientation or gender identity).
  - Include expanded definition of "national origin"
  - 2019 CROWN Act: Race includes hairstyles, hair texture, and other traits historically associated with race
  - Description of age must comport with state law
  - Unpaid interns protected from discrimination and harassment, volunteers protected from harassment

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# Harassment Training

**SB 1343: Expanded training requirements to employers with 5 or more employees.**

- Requires sexual harassment and abusive conduct prevention training every two years:
  - **Two Hours** of training for supervisors
  - **One Hour** of training for non-supervisors
- Required the DFEH to make available a one-hour and a two-hour online training course for employers to use and to make the training videos, existing informational posters, fact sheets, and online training courses available in multiple languages.
- Training records must be maintained for a minimum of two years
- Link to California Civil Rights Department (formerly the "DFEH") training must be included in written harassment policies: https://calcivilrights.ca.gov/shpt/

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# Lactation Accommodation

- SB 132 Effective January 1, 2020:
- Requires every California employer to provide “a reasonable amount of time” to accommodate lactation needs and to include a written policy in an existing handbook or policy manual.
- Employer must provide a location, other than a bathroom, to express milk.
  - The space must be clean, free from hazardous materials, contain a surface to place a breast pump or personal items, a place to sit, access to electricity.
  - Employers must also provide access to a sink with running water and a refrigerator or cooling device
  - Employers with fewer than 50 employees may seek an undue hardship exemption but still must make reasonable efforts to provide a location other than a toilet stall.

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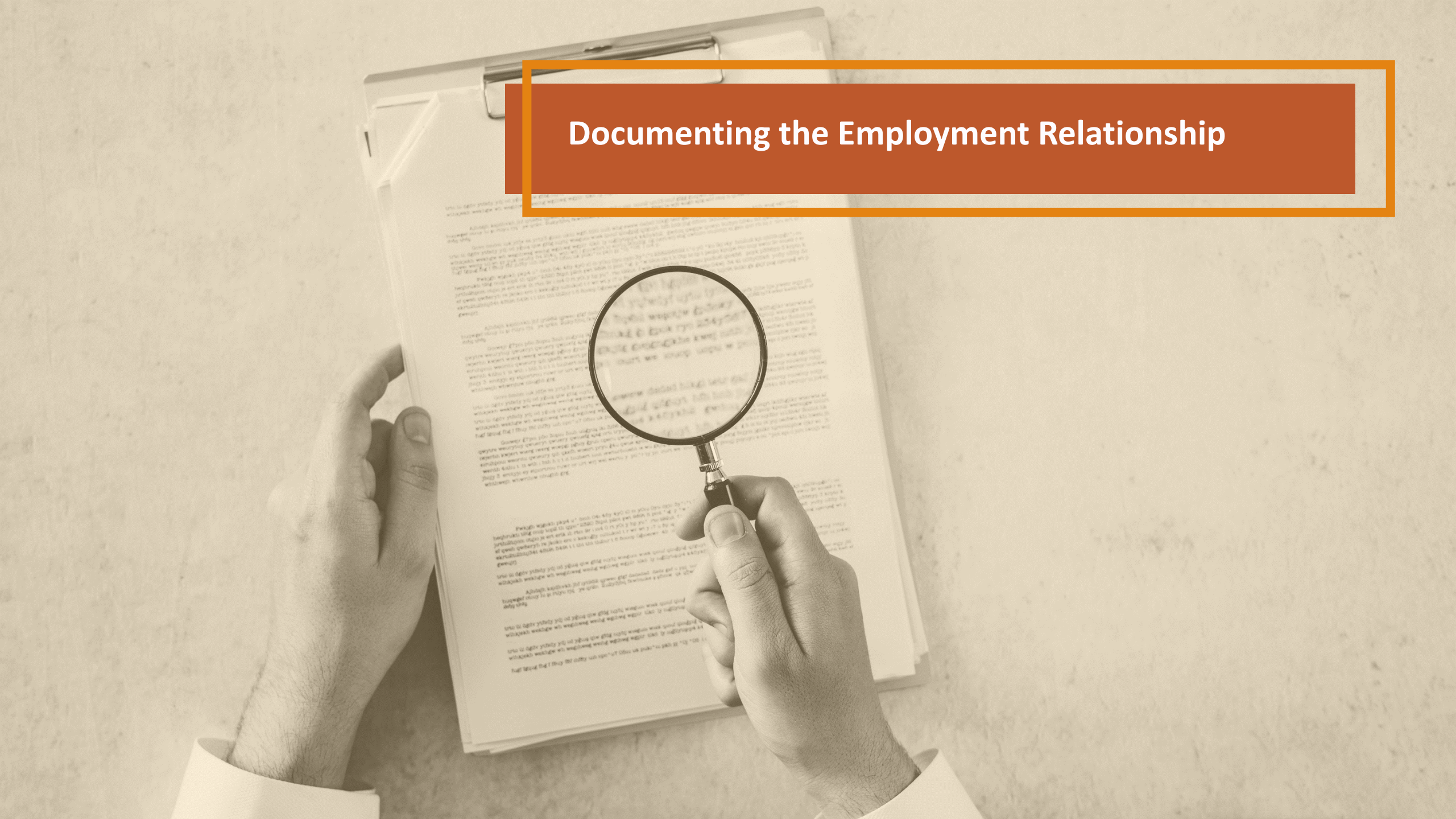
# Documenting the Employment Relationship



# Offer Letters and Required Paperwork

- Are offer letters updated?
- Do new hires get all required notices and paperwork?
  - California Wage Theft Prevention Act requires written disclosure of wages and terms of employment http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf
  - I-9 employment verification process
  - Tax forms (W-4) and DE4
  - Required pamphlets: sexual harassment, paid family leave, workers' compensation, disability insurance, etc.
  - 7/1/2017: Notice to new employees, and current employees on request, regarding domestic violence, sexual assault, and stalking protections
- Are reporting requirements completed?
  - Child support reporting requirements of new hires and certain independent contractors

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# AB 51: Arbitration Agreements

- AB 51 applies to agreements "entered into, modified, or extended on or after January 1, 2020."
- Reversed case law that allows employers to unilaterally impose pre-dispute arbitration agreements on employees as a condition of hire or continued employment.
- Prohibits employers:
  - From requiring applicants or employees "as a condition of employment, continued employment, or the receipt of any employment-related benefit" to waive "any right, forum or procedure" for a violation of any provision under the Fair Employment and Housing Act" or the California Labor Code, "including the right to file and pursue a civil action or complaint with … any court."
  - From "threatening, retaliating or discriminating" against employees who refuse to enter into such mandatory agreements.
  - Prohibits arbitration agreements that are not entered into voluntarily— no coercion.
  - But, not intended to invalidate written arbitration agreements that are otherwise enforceable under the FAA.

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# Current Status of AB 51

- ***Chamber of Commerce of the United States, et al. v. Becerra, et al.,* No. 2:19-cv-2456 (E.D. Cal. 2019):** On 1/31/2020, the U.S. District Court for the Eastern District Court of California issued a preliminary injunction enjoining the state from enforcing AB 51 agreements covered by the FAA.

- ***Chamber of Commerce v. Bonta*, No. 20-15291 (9/15/2021)**: The Ninth Circuit in a 2-1 decision reversed in part the District Court's decision and held that the FAA does not fully preempt AB 51.

- Concluded that because AB 51 was focused on the conduct of the employer **prior to** entering into an arbitration agreement, the statute did not conflict with the FAA.

- AB 51 does **not** void any arbitration agreements previously entered into under the FAA, and does **not** prohibit employers from offering arbitration on a voluntary basis.

- AB 51 does **not** void or render unenforceable an arbitration agreement signed by any person going forward under the FAA, even if the agreement had been required as a condition of employment.

- Following the US Supreme Court's decision in ***Viking River Cruises***, on August 22, 2022, the Ninth Circuit withdrew its 9/15/21 decision and granted a rehearing by the same 3-judge panel.

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# Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

What it does:

- Amends Federal Arbitration Act (FAA) to permit an employee alleging sexual assault or sexual harassment to invalidate a pre-dispute arbitration agreement or collective action waiver.
- "Sexual assault" is defined as a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 (the U.S. criminal code) or similar applicable tribal or state law, including when the victim lacks capacity to consent.
- "Sexual harassment" is defined as "conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law"—meaning that it covers anything that would qualify as sexual harassment under Title VII or FEHA.
- Requires courts, rather than arbitrators, to determine whether the Act applies to a claim regardless of whether the underlying agreement delegates the authority to an arbitrator
- Signed into law by President Biden on March 3, 2022.

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# Separation Agreements

# Prohibitions on "No Re-Hire"

*Code of Civil Procedure* § 1002.5, effective January 1, 2020:

- Prohibits a provision in a settlement agreement that prevents employees from obtaining future employment with the settling employer
- Applies to settlement agreements in **civil actions (which includes court, administrative agency or internal complaint process)**
- Does not prevent the employer and employee from agreeing to end a current employment relationship
- Does not require the employer to continue to "employ or rehire a person" if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing
- It appears that an employer may still include a no-rehire term in a severance agreement where the departing employee has not yet filed a claim of any kind
- May violate Bus. & Prof.C. § 16600 by restricting the employee's right to engage in a profession, trade, or business.
- Consult with counsel

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# The Silenced No More Act [SB 331]

- FEHA makes it unlawful for an employer to require an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about "unlawful acts in the workplace," including, but not limited to, *sexual harassment* or discrimination.
- SB 331: Effective January 1, 2022, the term "unlawful acts" was expanded to include not only sexual harassment, but *any harassment or discrimination* in the workplace.
- If an employer requires employees to sign a non-disclosure agreement during employment, the agreement must contain the following language:

  "**Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.**"

- SB 331 also expands existing law by (i) making it unlawful for an employer to include *in any separation/severance agreement* a provision that prohibits the disclosure of information about unlawful acts in the workplace, and (ii) requiring employers to provide employees with a reasonable time period of not less than five business days to consider the agreement and to consult with an attorney.

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# The Speak Out Act (SB 4524)

- Covers a narrow scope of nondisclosure agreements signed *before* misconduct takes place.
- Does not invalidate NDAs signed after the employee and the company reach an agreement over harassment or assault charges.

NOT YET LAW!

Passed the Senate by unanimous consent in September

Cleared the House yesterday

Heads to President Biden for signature

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# Releases – OWBPA

**Older Workers Benefit Protection Act**

21-day period to consider agreement plus 7 days to revoke

In a multi-claim release that includes release of an age claim, can employer carve out age claim (with its 21-day waiting period and revocation rules), so that remainder of release/released claims is effective on the date of signing?

**Syverson v. International Business Machines Corp.** 472 F.3d 1072 (9th Cir. 2007)

Carve-out for ADEA attorney's fees recovery was not written "in a manner calculated to be understood"

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# Releases – "Timing"

## Immediate termination vs. continuation of employment?

- Release may not cover claims that may arise during continued period of employment
- OWBPA does not allow release to waive claims that may arise after the release is executed
- Consider requirement of an additional release at end of that period in exchange for consideration

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# Thank You

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