

EMPLOYMENT LAW SUMMARY

California: Fair Employment – Age Discrimination Law



Because You're Different

California workers are protected against age discrimination under both federal and state law. While the federal Age Discrimination in Employment Act (ADEA) applies only to employers with 20 or more employees, California's Fair Employment and Housing Act (FEHA) applies to all employers with **five or more employees** in the state. In addition, the FEHA's protections extend to unpaid interns and other participants in any limited-duration program that provides unpaid work experience.

This Employment Law Summary provides an overview of the FEHA's age discrimination protections.

GENERAL AGE DISCRIMINATION PROTECTIONS

The FEHA, which is enforced by the [California Civil Rights Department](#) (CRD) prohibits employers from discriminating against employees or job applicants on the basis of age. This prohibition applies only to discrimination against individuals who are **40 years old or older**.

Under the FEHA, it is illegal for employers to take any of the following actions on the basis of an individual's age:

- Refusing to hire or employ the individual;
- Refusing to select the individual for a training program leading to employment, internship or any limited-duration program for providing unpaid work experience;
- Barring or discharging the individual from employment or from a training program leading to employment, internship or any limited-duration program for providing unpaid work experience; or
- Discriminating against the individual in compensation or in terms, conditions or privileges of employment.

PRE-EMPLOYMENT AGE DISCRIMINATION

California employers must be careful not to discriminate on the basis of age during the hiring process. In general, the FEHA makes it unlawful to refuse to consider an applicant because he or she is over the age of 40.

PRE-EMPLOYMENT INQUIRIES

Employers are prohibited from making pre-employment inquiries that would result in direct or indirect identification of an individual on the basis of his or her age. This prohibition applies to both oral and written inquiries, including application forms and interview questions. For example, the following questions are **illegal** under California law:

- How old are you?
- When did you graduate from high school or college?
- What is your birthday?

However, California law does **not** prevent employers from inquiring whether an applicant meets the legal age requirements for certain positions.

In addition, California employers are not prevented from participating in or establishing recruiting programs with high schools, colleges, universities and trade schools or from utilizing temporary hiring programs directed at youth, even though these programs are likely to provide disproportionately few applicants who are over the age of 40.

JOB ADVERTISING

California employers that publicize job openings must ensure that they do not print or circulate any publication or advertisement that expresses a limitation, specification or discrimination against individuals that are 40 years of age or older. Specifically, it is unlawful for employers to express a preference for individuals under the age of 40 or to include a limitation against individuals over 40 years of age when advertising employment opportunities.

PHYSICAL AND MEDICAL EXAMINATIONS

In general, it is not a violation of the FEHA for employers to require applicants and employees to undergo **job-related** physical or medical examinations to determine whether they meet the physical or medical standards of a position. If employers do institute physical or medical examinations, they must ensure that all tests are **uniformly and equally required** for all applicants, regardless of their ages.

However, employers must be careful not to construct physical or medical examinations standards for applicants or employees over 40 that are higher or more stringent than those they apply to applicants or employees under the age of 40 who are seeking or holding the same job.

HIRING DECISIONS

As long as age is not a factor in the decision, employers are **not** barred from selecting an individual who is more qualified or experienced than other applicants. The FEHA allows employers to give candidates who have a record of seniority or prior service with that employer preference over a candidate who has no such record or less seniority. However, where candidates have an equal record of seniority or time in prior service, employers may not discriminate in hiring on the basis of age.

PROTECTIONS FOR CURRENT EMPLOYEES

California businesses that employ individuals over the age of 40 have a duty not to discriminate against these employees on the basis of age. The FEHA's age discrimination provisions impact various aspects of employment, and employers should be especially mindful of their practices in the categories listed below.

PROMOTIONS

In selecting candidates for promotions, employers may promote a candidate who is under the age of 40 in favor of a candidate over the age of 40 on the basis of superior experience, training or other legitimate reasons, as long as age is not a factor in the decision. However, an employer may not deny an employee the opportunity to gain the experience and training necessary to achieve promotion because he or she is over the age of 40.

TERMINATION AND DISCIPLINARY ACTIONS

As long as performance standards and job requirements do not inherently discriminate against employees over the age of 40, it is not considered age discrimination for an employer to terminate, discharge, dismiss, demote or otherwise discipline an employee who is over the age of 40 if the employee fails to perform the normal functions or requirements of his or her position.

In addition, the FEHA prohibits the use of salary as the basis for differentiating between employees when terminating employment if use of that criterion adversely impacts older workers. Accordingly, California employers conducting reductions in the size of their workforces must exercise caution and not select termination criteria—such as salary—that could have a disproportionate impact on older workers.

HEALTH PLANS AND BENEFITS

FEHA's provisions against age discrimination do not prohibit employers that offer health insurance from providing health benefits or health care reimbursement plans to retired employees that are altered, reduced or eliminated when the person becomes eligible for Medicare health benefits.

MANDATORY RETIREMENT

In general, it is age discrimination under the FEHA for a private employer to discharge or force the retirement of an employee because he or she is age 40 or older. The FEHA requires employers to permit employees to continue working beyond any retirement date contained in a private pension plan, retirement plan, collective bargaining agreement or similar plan if the employee indicates (within a reasonable timeframe) in writing, his or her desire to work beyond the specified retirement date and can demonstrate the ability to continue working. This employment must be allowed to continue for as long as the employee demonstrates the ability to adequately perform the functions of the job and the employer is satisfied with the quality of the work performed.

However, the FEHA does allow mandatory retirement for the following employees:

- Tenured faculty members at institutions of higher education, if the institution permits reemploying of the individual on a year-to-year basis;
- Physicians who are at least 70 years old and are employed by professional medical corporations; and
- Executives or individuals in high-ranking policy positions who have held their position for the past two years and are entitled to immediately receive a non-forfeitable annual retirement benefit of at least \$27,000.

PENALTIES

Individuals who believe they have been discriminated against on the basis of their age may file a complaint with the CRD. Individuals have up to **three years** to file a claim.

Once a complaint is filed, the CRD will investigate and attempt to resolve the dispute. If the CRD finds evidence of age discrimination and settlement efforts fail, it may file a formal accusation or lawsuit against the employer.

The FEHA provides remedies for individuals who experience prohibited discrimination, harassment or retaliation. Remedies may include hiring, promotion, reinstatement, back pay, front pay, cease-and-desist orders, expert witness fees, reasonable attorney's fees and costs, punitive damages and emotional distress damages. In addition, civil courts may order unlimited monetary damages against an employer found guilty of age discrimination.

MORE INFORMATION

For more information on California's fair employment laws, please consult Heffernan Insurance Brokers or visit the CRD's [website](#).

This guide is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. It is provided for general informational purposes only. Readers should contact legal counsel for legal advice. © 2023, 2024 Zywave, Inc. All rights reserved.