

The Top 10 Ways California Employers Get Sued

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10. Telling Workers They Are “Permanent” Employees

- Preserve the “At Will” Relationship
- Avoid Assurances of Job Security
 - So Long as You Do a Good Job ...
- Re-enforce Policy in Writing
- Train Managers

9. Indirectly Punishing An Employee For A Workers Compensation Claim

- CLC § 132a Prohibits Retaliation
 - Filing a Workers Compensation Claim
 - Stating an Intention to File a Claim
 - Complaining About a Compensable Injury
- Can Increase W/C Award by Up to \$10K
- In Addition to Lost Wages/Benefits
 - Possible Reinstatement
- Caution: Any adverse action involving W/C Claimant

8. Allowing Employees to Discuss the Termination of Former Co-Workers

- Defamation *per se* to publish a false statement that injures an individual in his/her occupation
- Examples: Statements to prospective employers, former co-workers, customers/vendors, etc.
- Problem: Explaining to former co-workers, customers, etc. why an employee no longer works there.

8. Allowing Employees to Discuss the Termination of Former Co-Workers (Cont.)

- Aggravates the harm of a termination.
- Prevention techniques.
 - Clear HR/Manager Policy re: Responding to outside inquiries.
 - Current Employees advised on a need-to-know basis (conditionally privileged).
 - Avoid announcement in group meetings.
 - Label sensitive personnel file documents as “confidential.”

7. Failing to Properly Manage Discipline / Discharge

- Discharge creates an increased risk situation
- Disgruntled former employees more likely to sue
- Caveats: Long-term Employees, Protected Classifications, Recent Health Safety Complaints

7. Effective Management of Discipline and Discharge Should Include:

- Adequate Notice
- Appropriate Investigation
- A Business-Related Rationale
- “Punishment” Fitting the “Crime”
- Knowledge and Application of Company Policies
- Consistency
- HR Involvement
- Adequate Documentation

6. Failing to Properly Manage Leave Requests

- Family Medical Leave Act (FMLA)
- California Family Rights Act (CFRA)
- Americans with Disabilities Act (ADA), (FEHA)
- Pregnancy Disability Leave (PDL)
- Workers Compensation Act
- San Francisco Paid Sick Leave Ordinance

6. Failing to Properly Manage Leave Requests (Continued)

- New Regulations – Employer Notice Obligations
 1. General notice in the workplace
 2. Issue personalized eligibility notice within 5 days of leave request;
 3. Issue “Rights and Responsibilities Notice” at the same time;
 4. Issue “Designation Notice” within 5 days of receiving sufficient information to make determination.

6. Failing to Properly Manage Leave Requests (Continued)

- Not “engaging in interactive process” with employee before making a determination.
- Not evaluating whether the employee may be entitled to additional leave;
- Not reconsidering decision to terminate.

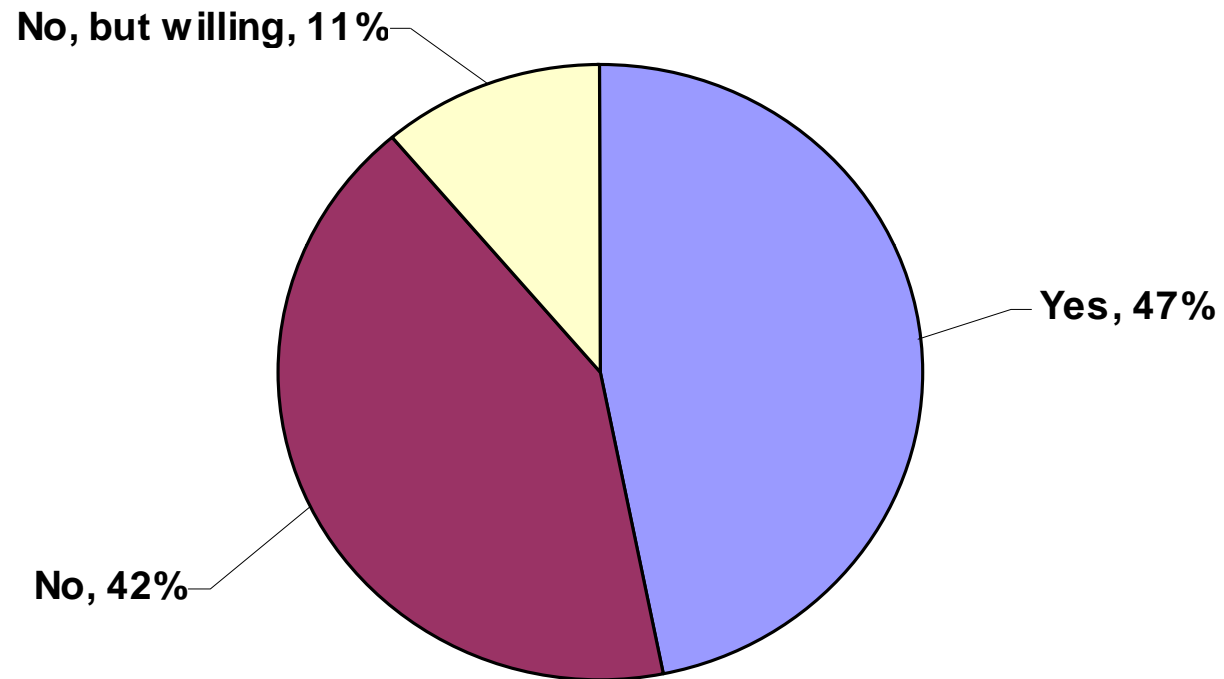
5. Failing to Implement Their Sexual Harassment Policy

California Law:

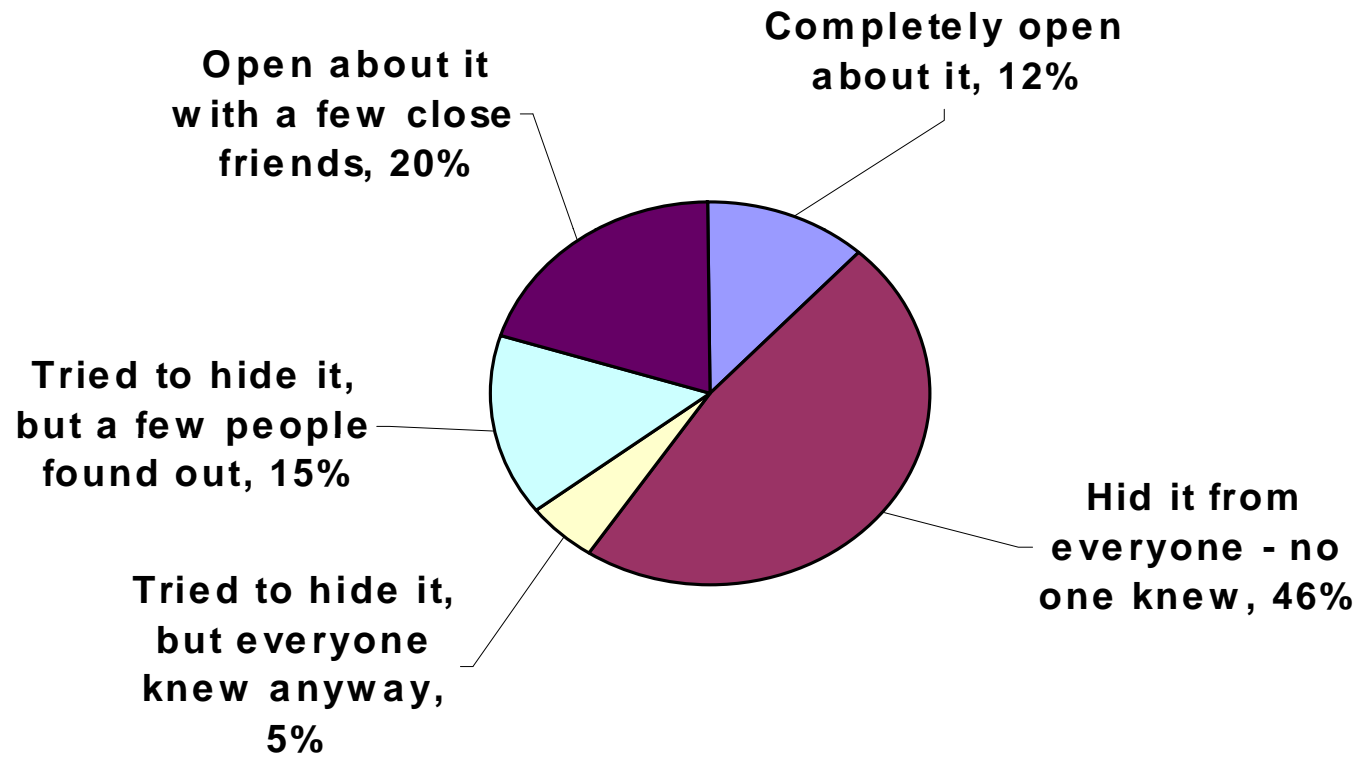
Fair Employment and Housing Act – FEHA

- Prohibits harassment based on sex or of a sexual nature
- Employer must take reasonable steps necessary to prevent harassment
- Mandatory supervisor training
- Employer must take remedial action to maintain harassment-free environment
- Prohibits retaliation

Have you ever been involved in an office romance?



Did you try to hide your workplace romance or keep it completely open?



5. Failing to Implement Their Sexual Harassment Policy

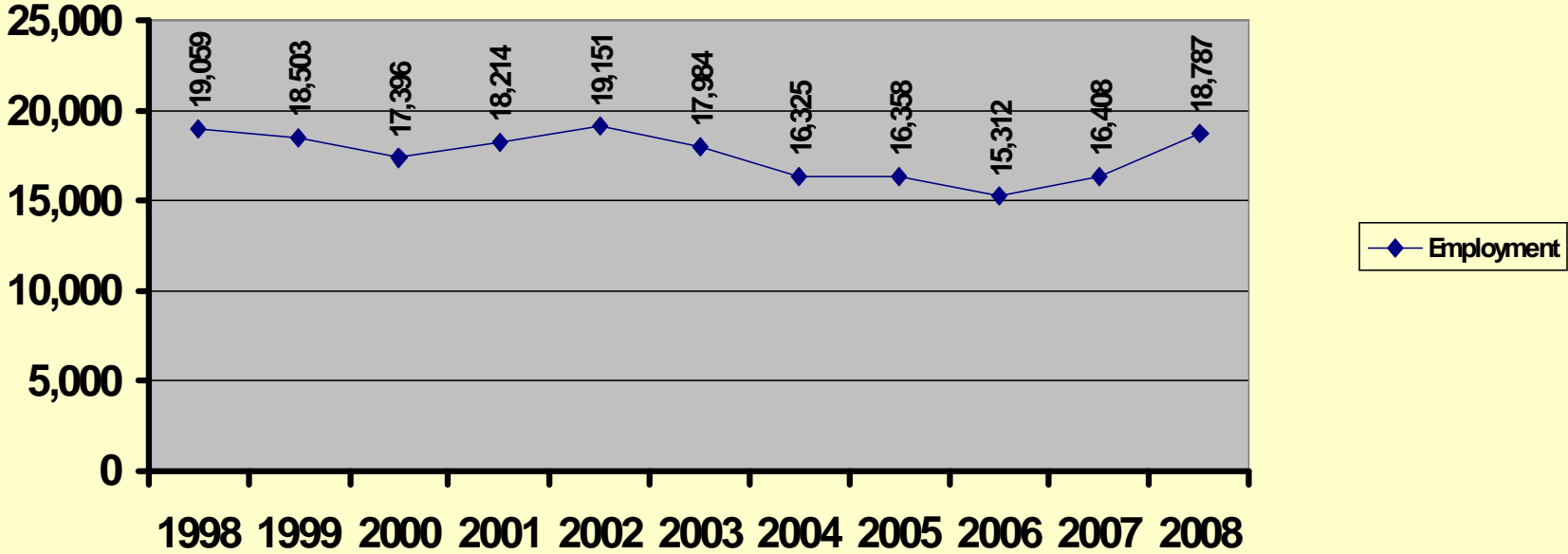
- Internet
 - Pornographic websites
- E-Mail -
 - Even if you're not offended, someone else may be
 - Don't send any e-mail that you would not put on company letterhead

5. Failing to Implement Their Sexual Harassment Policy (Cont.)

- Not investigating anonymous complaints
- Not having clear understanding of what to do when you become aware of possible harassment or complaint
- Not creating a track record of responding appropriately to complaints

- Federal Law: Complete defense
- California Law: Limits damages

COMPLAINTS BY TYPE PER YEAR, 1998 - 2008



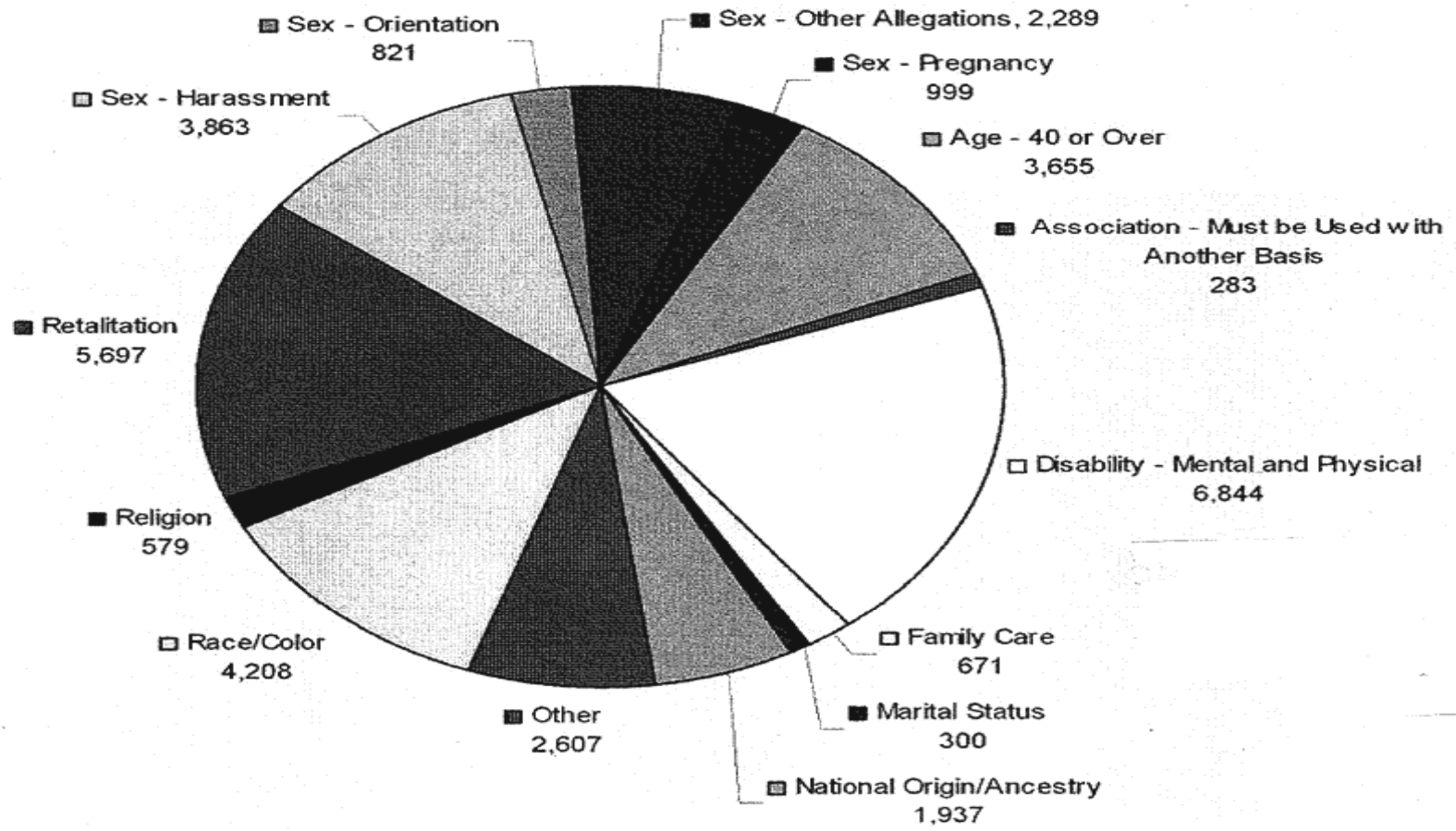
Total # of Complaints from 1998 - 2008: 193,497

4. Failing to Adequately Respond To A Claim of Discrimination

- Take Seriously Complaints re: Different / Harassing Treatment of Protected Classes

- Race
- National Origin
- Gender
- Sexual Orientation
- Transsexuals
- Age
- Disability
- Marital Status
- Religion
- Domestic Partners

**California Department of Fair Employment and Housing
Calendar Year: 2008
Cases Filed: by Bases (18,785 Employment Cases)**



2008 Statistics	California Charges	EEOC Charges	California Ratio
Total Charges	18,785	95,402	20%
Race	4,208	33,937	12%
Sex harassment	3,863	13,867	28%
Sex Discrimination	2,289	28,372	8%
Pregnancy	999	6,285	16%
National Origin	1,937	10,601	18%
Religion	579	3,273	18%
Retaliation	5,697	28,698	20%
Age	3,655	24,582	15%
Disability	6,844	19,453	35%

4. Failing to Adequately Respond to A Claim of Discrimination (Continued)

Additional California Protected Classes:

- Veteran status (Military & Veterans Code Section 394)
- Testing positive for HIV (Health & Safety Code Section 199.21(f))
- Political affiliations (Labor Code Section 1101, 1102)

4. Failing to Adequately Respond to A Claim of Discrimination (Continued)

In California ... Transgender and Transvestite Protection

Gender includes a “person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with person’s assigned sex at birth” Gov’t Code § 12926(p) and Penal Code § 422.56

4. Failing to Adequately Respond to A Claim of Discrimination (Continued)

- Consider More Subtle Implications of Harassment
 - Noose
 - Bathroom Graffiti
 - Jokes/Cartoons
 - Confederate Flag
 - Swastika

4. Failing to Adequately Respond to A Claim of Discrimination (Continued)

- Define the Conduct
- Determine the Current Situation
- What Would Victim Like to See Happen?
- Consult HR
- Follow Up with Complainant
- Deter Retaliation

3. Failing to Watch the “Aftermath” of an Employee Complaint

- Retaliation:
 - Engaging in Protected Activity
 - Followed by Adverse Employment Action
 - Causal Relationship

3. Failing to Watch the “Aftermath” of an Employee Complaint (continued)

- For performing statutory duty
- For refusing to break the law
- For exercising a statutory right
- For reporting, in good faith, a violation of a statute of public importance

3. Failing to Watch the “Aftermath” of an Employee Complaint (continued)

- Make sure employee is advised, in writing, to immediately report any perceived retaliatory acts
- Evaluate whether to change reporting lines
- Review negative employee evaluations
- Independently confirm disciplinary grounds
- Advise all potential retaliators against retaliation

3. Failing to Watch the “Aftermath” of an Employee Complaint (continued)

California: No individual managerial liability for retaliation.

2. Not Making Available Meal/Rest Breaks

- Non-Exempt Employees Must Be Provided:
 - (1) Unpaid Meal Breaks;
 - (2) Paid Rest Breaks.

2. Not Making Available Meal/Rest Breaks (Continued)

- Penalties
 - One Hour/Day for Meal Break Violations
 - One Hour/Day for Rest Break Violations
 - Up to 30 Days Pay for Delayed Payments
- Enforcement Tools
 - Meals – Timecards
 - Written Agreements
 - Manager Training
 - Employee Census/Questionnaires

2. Not Making Available Meal/Rest Breaks (Continued)

- One of the Most Common/Expensive Mistakes – Unrecorded Meal Breaks
 - Burden of Proof on Employer
 - Relieved of All Duties
 - 30 Minute Meal Break
 - Two 10-Minute Rest Breaks per 8-Hour Shift

1. Misclassifying Non-Exempt Employees

- Misclassification Most Common
 - Most Innocent
 - Most Expensive
- Only Exempt Employees Don't Get O/T
 - Executive
 - Administrative
 - Professional
- O/T Entitlement Cannot Be Waived

1. Misclassification: What Are the Risks? (Continued)

- Four Years of Past Due Wages
- Statutory Penalties & Interest
- Attorneys' Fees
- Government Audits
- Class Action Lawsuits

Exempt Or Nonexempt ...?

That Is the Question

- Exemptions are Narrowly Construed
- Determination Based on Actual Job Duties, Not Titles (*Bell v. Farmers Insurance*)
- Paying a Salary Does Not Create Exemption
- If all Exemption Tests Not Met, the Employee Remains Non-exempt = O/T Required
- Burden of Proof Is on the Employer

1. Misclassifying Employees As Independent Contractors

- High-Exposure Risk
 - No W/C Insurance
 - Past-Due Insurance Premiums & Penalties
 - No Defense to Injury Claims
 - Tax Withholding Violations
 - Overtime Violations
 - Meal/Rest Break Violations
 - Employee Benefit Denial

1. Misclassifying Employees As Independent Contractors (Cont'd)

- Common Misconceptions
 - Worker Wants to be Treated as I/C
 - Signs Written Agreement
 - Paid Commission Only
 - Has No Supervisor
 - Does Work for More Than One Company

1. Misclassifying Employees As Independent Contractors (Cont'd)

- What Is an Independent Contractor?
 - Primarily Degree of Control Over Manner/Means of Work
 - Where Work Done
 - When Work Done
 - Who Supplies Tools/Equipment
 - Supervisory Control
 - Doesn't Perform Regular Business of Company
 - E.g., Computer Upgrade v. Installer
 - Running Independent Business
 - W/Other Clients

1. Allowing Employees to Adjust Their Work Hours/Days

(E.g., Work late tonight; come in late tomorrow; take Friday off; make up next Saturday)

- Potential Overtime Violations – Non-exempt employees
 - O/T Due for Over 8 Hours/Day; 40 Hours/Week
- Two Ways for Employees to Work More Than 8 Hours/Day; without O/T
 - Make Up Time
 - Alternative Work Week Agreements

1. Allowing Employees to Adjust Their Work Hours/Days (Cont'd)

- Make Up Time If
 - Signed Written Agreement
 - Time Made Up Within the Same Week
 - No More Than 11 Hours/Day; 40 Hours/Week
 - Employer May Not Encourage/Solicit
- Alternative Work Week Agreements
 - All Employees in “Work Unit” Can Work a 4/10, 9/80, etc. Schedule
 - Employee Meetings
 - Secret Ballots
 - Formal Agreement
 - Filing With the State Labor Commissioner

1. Allowing Employees to Adjust Their Work Hours/Days (Cont'd)

- Caveat: High Potential Risk If Technically Defective
- If Wrong: For All Employees Under Agreement
 - Overtime
 - Penalties
 - Interest
 - Attorneys Fees