

PUBLIC
LAW

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ASSOCIATION

presents

Public Law 101 Conference

Labor & Employment

Wednesday, November 15, 2023
10:45 a.m. – 11:45 a.m.

Speakers:

Kate Stanford, Deputy County Counsel
County of Marin

Sarah Anker, Deputy County Counsel
County of Marin

Conference Reference Materials

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Kate Stanford is a Deputy County Counsel with the County of Marin, where she has worked since 2019. Kate provides advice and counsel in the areas of general government law, health law, and employment law. Kate previously worked with the Legal Aid Society of San Mateo County practicing health law and the Children’s Law Center in Washington, DC practicing youth law. Kate earned her J.D. from the New York University School of Law and her undergraduate degree from Stanford University.

Sarah Anker joined the County of Marin as a Deputy County Counsel in 2017. She currently provides advice and counsel to the County’s Human Resource Department, the Probation Department, and numerous special districts. Sarah served as the Interim Director of Human Resources for the County from 2022-23 and has extensive human resources experience. Prior to joining the County, Sarah practiced civil litigation. Sarah earned her J.D. from the UC Davis School of Law and her undergraduate degree from UC Berkeley.



PUBLIC SECTOR LABOR AND EMPLOYMENT LAW: INTRODUCTION

Photo Credit: Jeff Wong

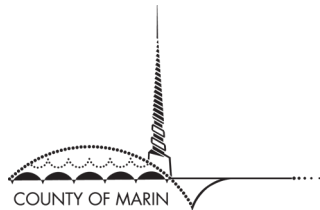
AGENDA

- Wage and Hour
- Free Speech
- Investigations, Discipline, and Due Process
- Collective Bargaining Laws
- Protected Leaves
- Anti-Discrimination, Harassment, Retaliation, and Reasonable Accommodation

CONTEXT OF PUBLIC EMPLOYMENT

- Government actor is the employer, which creates additional obligations and duties.
- Government has obligations to the public (services, transparency), which affect their obligations as an employer.
- Government entities are exempt from certain laws, including certain employment laws.
- Take-away → While there is much overlap in the employment law that applies to public and private employers, there are some unique considerations for public employers.

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WAGE AND HOUR

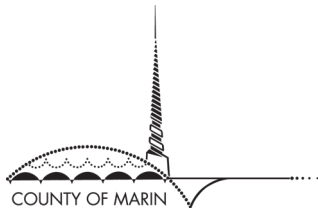
A large graphic design on a gold background. It features a stylized mountain range with a vertical line representing a peak, and the text "COUNTY OF MARIN" below it. The design is composed of dotted lines and solid lines, creating a modern, abstract look.

COUNTY OF MARIN

WAGE AND HOUR

FAIR LABOR STANDARDS ACT (FLSA) - 29 USC § 201

- FLSA addresses
 - Federal minimum wage - \$7.25 (make sure to look at state and local minimum wage laws as they tend to be higher) (29 U.S.C. § 206)
 - Maximum hours that can be worked in a “workweek” without overtime (29 U.S.C. § 207(a)).
 - Nonexempt – 40 hours
 - Rate of pay for overtime – 1.5 times regular rate of pay (includes all payments made to ee except statutory exclusions) (29 U.S.C. § 207(e)).
 - Reasonable break time for nursing mothers (29 U.S.C. § 207(r)).
 - Child labor laws (29 U.S.C. § 212).
 - Exemptions from FLSA requirements (29 U.S.C. § 213).



WAGE AND HOUR

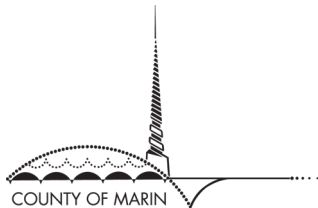
FLSA CONT'D

- FLSA does not require:
 - vacation, holiday, severance, or sick pay;
 - meal or rest periods, holidays off, or vacations;
 - premium pay for weekend or holiday work;
 - pay raises or fringe benefits; or
 - a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

WAGE AND HOUR

FLSA CONT'D

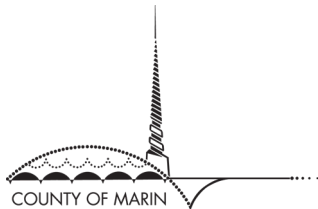
- FLSA provisions specific to public agencies:
 - Maximum hours before overtime pay is owed for fire protection and law enforcement (29 U.S.C. § 207(k)); and
 - Compensatory time in lieu of paid overtime (29 U.S.C. § 207(o).)
- FLSA Regulations specific to public agencies:
 - 29 C.F.R. § 553.1, et seq.
 - 29 C.F.R. § 541.710 (Allowing pay reductions for exempt employees for certain partial-day leaves and furloughs).



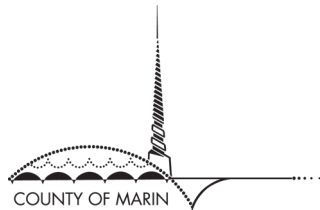
WAGE AND HOUR

STATE LAWS

- Only certain California Labor Code wage and hour provisions apply.
 - Public entities generally are not required to comply with Labor Code wage and hour provisions that do not specifically say they apply. (Johnson v. Arvin-Edison Water Storage Dist. (2009) 174 Cal.App.4th 729.)
 - Public entities are explicitly excluded by statute from some Labor Code provisions. (Labor Code § 220(b).)
 - Almost all the IWC Wage Orders specifically address which sections do/do not apply to public entities . (See, e.g., I.W.C. Wage Order 4, § 1(B).)
 - In essence, only the minimum wage (and related) provisions apply.



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FREE SPEECH

A large, stylized graphic of the Golden Gate Bridge, rendered in a light yellow color, set against a solid yellow background. The bridge's towers and suspension cables are clearly visible, and the text "COUNTY OF MARIN" is overlaid at the bottom in a light yellow, sans-serif font.

COUNTY OF MARIN

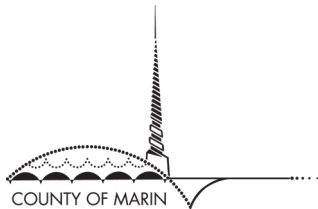
FREE SPEECH

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment to the U.S. Constitution

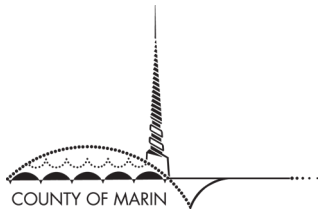
FREE SPEECH

- *Pickering* Balancing Test
 - Balance the employee's interest as a private citizen speaking on matters of public concern against the public employer's interest in providing a particular public services efficiently
 - (1) Did the employee speak as a private citizen on a matter of public concern?
 - (2) If yes, did the government employer have an adequate justification for treating the employee differently from any other member of the general public?



FREE SPEECH

- Generally, the First Amendment limits the restrictions that public entities may put on speech.
 - "[P]ublic employees do not surrender their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 417, citing *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty* (1968) 391 U.S. 563, 568.)
- However, the public agency has greater latitude to restrict the speech of its employees when acting in its capacity as employer.
 - Employer may limit speech when a public employee is speaking in their official capacity.
 - May not limit speech when a public employee is speaking as a *private citizen on a matter of public concern*.



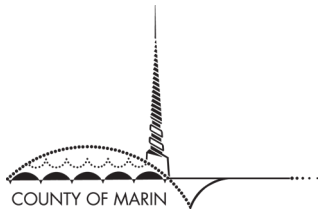
FREE SPEECH

- When an employee “begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.” (*Waters v. Churchill* (1994) 511 U.S. 661, 675.)
- But employee's have the right "to bring to light actual or potential wrongdoing or breach of public trust within their agencies." (*Connick v. Myers* (1983) 461 U.S. 138, 148.)
- Matter of Public Concern = any matter of political, social, or other concern to the community (*Connick*).
- Not a Matter of Public Concern = matters only of personal interest such as personal employment dispute or complaints over internal office affairs (*Connick*).

FREE SPEECH

- Recent 9th Circuit Case
 - Police officer's off-duty social media posts with the headline "Military Pensions Cut, Muslim Mortgages Paid by US!", criticizing British media for the way it identified men convicted of rape, describing an encounter between a "devout Muslim" and a cab driver in London, and mocking supposed contributions to science made by "Islamic" scholars or scientists all qualified as speech on a matter of public concern. (*Hernandez v. City of Phoenix* (2022) 43 F.4th 966.)
 - 9th circuit overturned district court's decision granting motion to dismiss, but noted, "In remanding the case, we do not mean to suggest that the Department will face a particularly onerous burden to justify disciplining [the police officer] for his posts, given the comparatively low value of his speech." (*Id.* at p. 989.)

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EMPLOYEE DISCIPLINE

COUNTY OF MARIN

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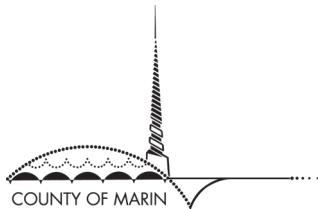
EMPLOYEE DISCIPLINE

- Civil service employees have a property interest in their employment and therefore can only be disciplined for just cause and are entitled to due process prior to the imposition of discipline. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194).
 - Look at local policies, MOUs, ordinances, etc.
- What is “just cause”?
 - Check policies, MOU’s etc.
 - Past practice.
 - Court Definition: “[F]air and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.” (*Cotran v. Rollins Hudig Hall International* (1998) 17 Cal.4th 93, 108; see, also, *Pugh v. See’s Candies* (1981) 116 Cal. App. 3d 311.)

EMPLOYEE DISCIPLINE

PRE-DEPRIVATION RIGHTS

- At a minimum, pre-disciplinary safeguards must include:
 - Notice of proposed action;
 - The reasons for the proposed action;
 - A copy of the charges and materials upon which the action is based,
 - And the right to respond, either orally or in writing, to refute the allegations prior to the imposition of discipline – *Skelly* hearing
- The focus is whether the proposed discipline should be sustained, modified, or rejected.
- A relatively disinterested person – not ordinarily the person who proposed the discipline—serves as the *Skelly* officer.
 - Are there reasonable grounds for the discipline?
- Employee has the right to have a representative present at the “hearing”.
- Not an evidentiary hearing.



EMPLOYEE DISCIPLINE

S K E L L Y

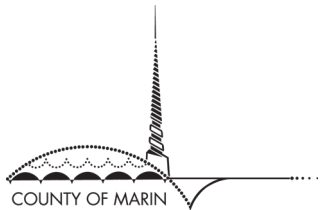
Skelly Applies

- Suspensions (typically 5 days or more)
- Demotions
- Reductions in pay
- Terminations
- AWOL/automatic resignation cases
- Layoffs in certain circumstances
- Before placement on administrative leave *without pay*
- Terminations due to disability – medical separations
- Forced disability retirements

Skelly Does Not Apply

- At-will employment
- Probationary employment
- Written reprimands
- Transfers and reassignments
- Negative evaluations
- Short suspensions or lesser discipline
- Layoffs in certain circumstances

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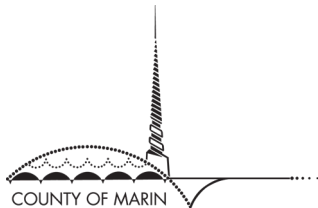
PROTECTED LEAVES

A large graphic on a gold background. It features a stylized mountain range with a vertical line representing a peak, and the text "COUNTY OF MARIN" below it.

COUNTY OF MARIN

PROTECTED LEAVES

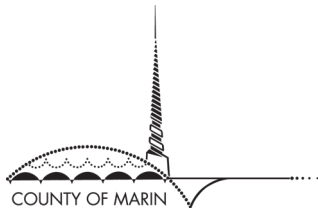
- Family and Medical Leave Act (“FMLA”) (29 U.S.C. § 2601, et seq.)
 - 12 weeks (in a 12-month period) of job protected leave with benefits for the employee’s own serious health condition, leave to care for specified family members with a serious health condition, and baby bonding.
 - Allows up to 26 weeks of job protected leave with benefits for specified family members to care for a servicemember.
- California Family Rights Act (“CFRA”) (Government Code § 12945.2.) - 12 weeks (in a 12-month period) of job protected leave with benefits for the employee’s own serious health condition, leave to care for specified family members with a serious health condition, baby bonding, and military exigency leave.
- Pregnancy Disability Leave (“PDL”) (Government Code § 12945(a)(1).) - Four (4) months of job protected leave with benefits for an employee disabled by pregnancy, childbirth, or a related medical condition.
- Labor Code § 4850 (State Workers’ Compensation for safety employees) - One (1) year of fully paid leave (with tax advantages) with benefits for certain public safety employees injured on the job.
- Leave as a form of Reasonable Accommodation under the ADA and FEHA.



PROTECTED LEAVES

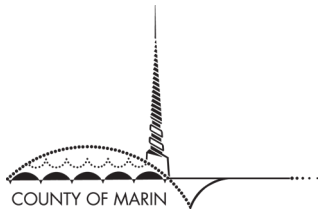
OTHER PROTECTED LEAVES

- Statutory paid sick leave (Labor Code § 245, et seq.) – just amended to increase amount, effective January 1, 2024.
- Bereavement leave (Government Code § 12945.7).
- Kin care (Labor Code § 233).
- Jury duty and subpoenaed leave (Labor Code § 230(a) and (b)).
- Domestic violence leave (Labor Code § 230(c)).
- Crime victim leave (Labor Code § 230.5).
- Voting leave (Election Code § 14000).
- School activity leave (Labor Code § 230.8).
- Other leaves provided by MOU/MOA, charter, ordinance, policies, etc.

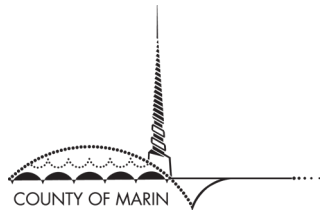


PROTECTED LEAVES

- Coverage
 - FMLA applies to public entities regardless of size.
 - BUT employees are only eligible for leave if the employer employs 50+ employees in a 75-mile radius (29 C.F.R. § 825.104(a); 29 C.F.R. § 825.108.)
 - CFRA applies to public entities regardless of size, AND eligible employees can receive leave irrespective of the number of employees (Gov. Code § 12945.2(3)(B).)
 - PDL applies to counties regardless of size. (Gov. Code § 12926(d).)



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PUBLIC SECTOR COLLECTIVE BARGAINING LAWS

CALIFORNIA

A large, stylized graphic of a bridge or arch structure, rendered in a light yellow color, spanning across the bottom of the slide. It features a central vertical tower and several arches along its base.

COUNTY OF MARIN

COLLECTIVE BARGAINING PROCESSES ESTABLISHED UNDER STATE LAW

In California, public sector collective bargaining was established by a series of statutes, each pertaining to a specific type of public employee. The first of these statutes was the Meyers-Milias-Brown Act (MMBA) in 1968, which made California the second state in the country to allow public sector collective bargaining. The MMBA authorized collective bargaining between municipal and county governmental employers and their employees. By the late 1970s, collective bargaining had been extended to the vast majority of public employees in California. Specifically, collective bargaining was extended to K-12 school district and community college school district employees under the Educational Employment Relations Act of 1975, state employees under the Ralph C. Dills Act of 1978, and the employees of UC and CSU systems under the Higher Education Employer-Employee Relations Act of 1979. Over the ensuing decades, additional statutes were adopted related to collective bargaining for employees of specific transit districts and employees of the judicial branch.

MEYERS-MILIAS-BROWN ACT

GOVERNMENT CODE SECTION 3500, ET. SEQ.

- Employees “have the right to form, join, and participate in employee organizations of their choosing for the purpose of representation on all matters of employer-employee relations.” (Gov. Code § 3502.)
- Unions have the right to represent their members in employment relations with the employer.
- Employers are required to provide notice and the opportunity to meet and confer in good faith with unions over matters within the scope of representation. (Gov. Code §§ 3504.5 and 3505.)
 - “Scope of Representation” – “The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.” (Gov. Code § 3504.)

MMBA CONT'D

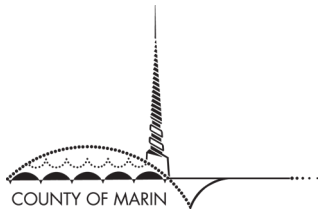
- What does it mean to “meet and confer in good faith”?
 - “Meet and confer promptly” (Gov. Code § 3505.)
 - “Continue for a reasonable period of time” (Gov. Code § 3505.)
 - “[E]xchange freely information, opinions, and proposals” (Gov. Code § 3505) and
 - “Endeavor to reach agreement” (Gov. Code § 3505.)

MMBA CONT'D

- Public agencies have the right to create rules and regulations (“Local Rules”). (Gov. Code § 3507.) Local Rules govern areas such as:
 - The processes for recognizing unions;
 - Impasse resolution procedures;
 - Union access to work locations;
 - Union use of bulletin boards and other means of communication; and
 - Providing information to unions.
- Look for your agency’s Local Rules, which may be in your Ordinance Code.
- If you don’t have Local Rules about recognition, PERB’s regulations apply. (PERB Regulation 61000, et seq.)

PUBLIC EMPLOYMENT RELATIONS BOARD

PERB is a quasi-judicial administrative agency charged with administering the statutes that establish public sector collective bargaining in California. In its role, PERB (1) ensures these laws are implemented and applied consistently and (2) mediates and adjudicates contract disputes between public employers and employees. For example, a union or employer that thinks the other is not meeting in good faith may bring the issue to PERB for adjudication. (PERB Regulation 61000, et seq.)



PUBLIC EMPLOYEE COMMUNICATION CHAPTER

GOVERNMENT CODE § 3555, ET SEQ.

Requires that public agencies provide to unions:

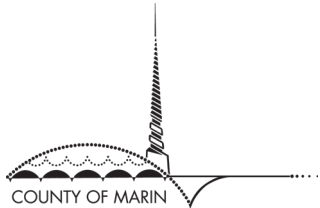
- The “name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire.” (Gov. Code § 3558.)
- Provide the same information for all existing employees in the bargaining unit at least every 120 days. (Gov. Code § 3558.)
- NOTE: As of July 1, 2022, violation of this section can result in an award of up to **\$10,000 plus attorney’s fees and costs**. (Gov. Code § 3558(b)-(d).)

DUES DEDUCTIONS

GOVERNMENT CODE § 1157.12

- After Janus v. AFSCME, Council 31 (2018) 138 S. Ct. 2448, the Legislature enacted new dues deduction statutes that mostly removed public agencies from assisting employees with starting or stopping dues deductions.
- Gov. Code § 1157.12 requires that public employers:
 - Rely on the union’s certification that it has and will maintain dues deduction authorization from the employees (Gov. Code § 1157.12(a))
 - Cannot require that the union provide a copy of the authorization unless a dispute arises (Gov. Code § 1157.12(a))
 - “Direct employee requests to cancel or change deduction for employee organizations to the employee organization, rather than to the public employer” (Gov. Code § 1157.12(b))

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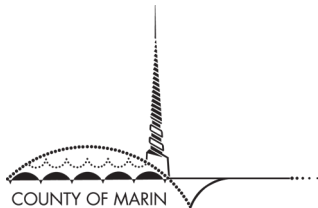


ANTI-DISCRIMINATION, HARASSMENT, RETALIATION, AND REASONABLE ACCOMMODATION

COUNTY OF MARIN

RELEVANT LAWS

- Anti-Discrimination, Harassment, Retaliation, and Reasonable Accommodation Laws
 - Federal laws:
 - Title VII, Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA)
 - State Laws:
 - Fair Employment & Housing Act (FEHA)



FAIR EMPLOYMENT AND HOUSING ACT

- Protects individuals from illegal discrimination by employers based on the following:
 - Race, color
 - Ancestry, national origin
 - Religion, creed
 - Age (40 and over)
 - Disability, mental and physical
 - Sex, gender (including pregnancy, childbirth, breastfeeding or related medical conditions)
 - Sexual orientation
 - Gender identity, gender expression
 - Medical condition
 - Genetic information
 - Marital status
 - Military or veteran status

FAIR EMPLOYMENT AND HOUSING ACT

- Requires employers to take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Gov't Code sec. 12940(k).)
 - All employers should have an anti-discrimination, anti-harassment policy
 - All employers should ensure a prompt investigation of complaints of discrimination, harassment, retaliation.

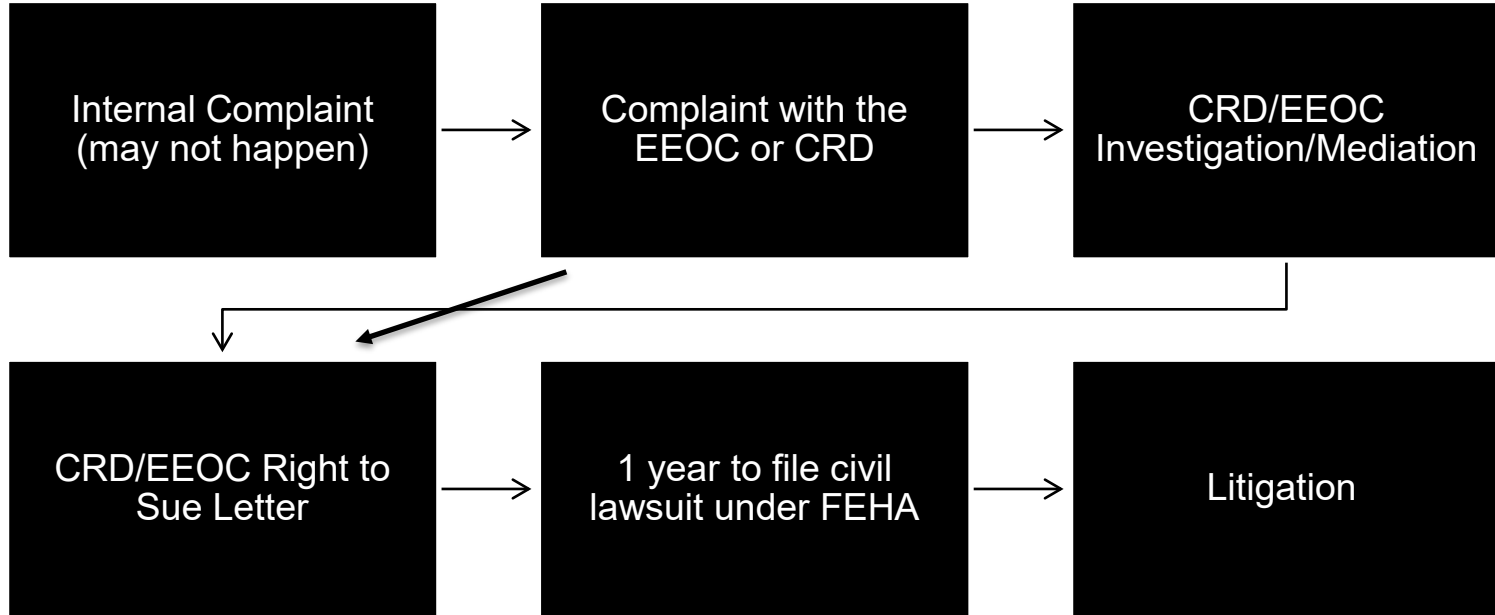
FAIR EMPLOYMENT AND HOUSING ACT

- Discrimination Elements: (1) Member of a protected class; (2) Subjected to *adverse employment action*; (3) discriminatory motive/intent (causal connection btw membership in protected class and adverse employment action).
- Retaliation Elements: (1) Engagement in protected activity (e.g., complaining about discrimination/harassment); (2) subjected to adverse employment action; (3) causation.
- Adverse Employment Action = Explicit change in the terms, conditions, or privileges of employment; official action by employer such as failing to hire/promote, demotion, constructive discharge, etc.

FAIR EMPLOYMENT AND HOUSING ACT

- Harassment Elements: (1) Member of a protected class; (2) Subjected to *unwelcome harassment*; (3) harassment was based on protected status; and (4) harassment unreasonably interferes with work performance by creating an intimidating, hostile, or offensive work environment.
- Workplace is permeated with "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263-64.)

LIFE CYCLE OF A DISCRIMINATION/HARASSMENT/RETALIATION CASE



REASONABLE ACCOMMODATION

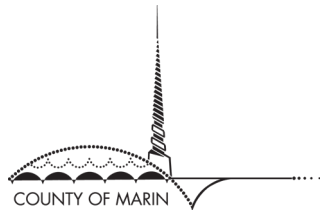
- Federal and state law requires that employers engage in the interactive process and provide reasonable accommodations to enable those with disabilities to perform the essential functions of their job.
- Employers have an affirmative obligation to engage in the interactive process to provide reasonable accommodation to qualified individuals, unless doing so would cause an undue hardship.
- Failure to timely engage in the interactive process can lead to liability under FEHA and/or Title VII.
- Qualified individuals – physical or mental disability - physical or mental impairment that limits a major life function, such as working.
 - Covers anxiety, stress, arthritis, irritable bowel syndrome, depression, PTSD, etc.

INTERACTIVE PROCESS

- Recognize the Accommodation Request
- Collect Necessary Information
- Brainstorm Possible Accommodations
- Select Reasonable Accommodation(s)
- Monitor and Adapt
- Examples:
 - Cubicle covers for employees who struggle with social anxiety
 - Shift in work hours (e.g., late start time) for employee with sleep disorder
 - Preferred parking and desk location for employee with mobility limitations

Potential liability for failing to engage in a timely interaction process and provide reasonable accommodation

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HYPOTHETICAL

A stylized graphic in shades of gold and yellow, depicting a tall, thin building with a pointed top, set against a background of a landscape with hills and a horizon line. The building is composed of vertical lines and dots, and the landscape features a series of semi-circular shapes representing hills or a bridge structure.

COUNTY OF MARIN

HYPOTHETICAL

- Female employee, "Jane," recently transferred from a different department.
- Three weeks into her employment in the new department, Jane comes to supervisor and complains that a male co-worker, "Bob," walked behind her and without asking permission began to massage her neck/shoulders. At the time of the incident Jane and Bob were in a file storage room with an open door but no windows.
- Jane removed herself from Bob's touch, told him she didn't want a massage, and left the file room.
- After reporting the incident to her supervisor, the HR department opened an investigation. The investigator finds that Bob engaged in an unwelcome physical touching of Jane, which was most likely motivated by Jane's gender.

HYPOTHETICAL

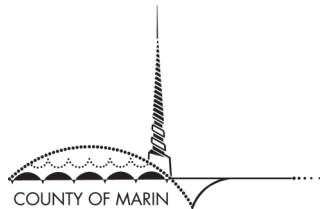
- Department has an employee code of conduct which requires employees to be respectful, courteous, cooperative, and to abide by all rules, policies, etc.
- Department's anti-harassment policy prohibits any unwelcome physical contact based on a person's membership in a protected class
- Hypo: Did Bob's conduct violate department policy?
- Hypo: What is an appropriate level of discipline for Bob?
 - Termination
 - Suspension (how many days)
 - Written Warning
 - Oral Warning

HYPOTHETICAL

- Department head issues discipline
- Skelly hearing before a manager from a different department
- Bob produces the following evidence:
 - He routinely gave massages in the workplace, to female and male employees, and has never been reprimanded in the past
 - He thinks a supervisor witnessed the behavior on another occasion
 - He has never been the subject of any discipline except a written warning for tardiness 10 years prior.
- Hypo: What should the Skelly officer do? What would you do?

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