

Sexual Orientation Discrimination

YOUR LEGAL RIGHTS

1. In California, is it legal for an employer to discriminate against me because of my sexual orientation?

California's Fair Employment and Housing Act (Gov. Code §12940 et seq.), also known as "FEHA," makes it illegal for an employer to fire, fail to hire, or discriminate in any way against you because of your sexual orientation.

FEHA also prohibits sexual-orientation-based "harassment." Harassment is a form of discrimination that occurs when a boss, supervisor, or co-worker subjects you to hostile, offensive or intimidating behavior because of your sexual orientation. To be illegal, the behavior must be so "severe or pervasive" that it interferes with your ability to perform your job. For example, one homophobic slur or joke might be rude and unfair, but might not be enough to be harassment. On the other hand, if you are subjected to such comments on a regular basis, the conduct may be pervasive enough to constitute harassment. Likewise, if one of your co-workers attacks you based on your sexual orientation it will be considered harassment because it is so severe, even if it only happens once.

2. Do any other laws protect me from sexual orientation discrimination at work?

Local Law

Many local areas in California also have passed laws that prohibit sexual orientation discrimination in employment. Usually, these ordinances cover only employees who work within the locality. Some of the localities that have adopted such laws have agencies that investigate complaints of gender identity discrimination. For example, in San Francisco, the Human Rights Commission can investigate your complaint of discrimination and mediate a settlement between you and your employer. Other localities may have similar commissions, civil rights offices or equal employment officers who may assist you with a complaint under the local ordinance – check with your City or County Clerk.

These local laws are of limited value to employees because California law bars you from actually bringing a lawsuit under local law. Therefore, if mediation does not result in a satisfactory resolution, the human rights commission or similar agency can't do anything more to enforce the law. Instead, you must pursue your complaint with the appropriate state or federal agency (see below).

Federal Law

Currently, no federal law protects all workers in the United States from sexual orientation discrimination in the workplace. However, Executive Order 13087 (issued by President Clinton on May 28, 1998) prohibits sexual orientation discrimination against civilian employees working in the Executive Branch. Executive Branch employees must pursue any complaints made under the Order through their Equal Employment Opportunity Counselor.

3. Which employees are covered by sexual orientation anti-discrimination laws?

FEHA defines sexual orientation as “homosexual, bisexual or heterosexual.” The law prohibits discrimination based on “actual or perceived” sexual orientation, which means that you are protected from sexual-orientation-based harassment or discrimination even if your employer is mistaken about your sexual orientation.

4. Do anti-discrimination laws apply to all employers?

FEHA applies to employers who have 5 or more employees (except in cases of harassment, in which case there is no minimum employer size). The law also applies to employment agencies, labor unions, state licensing boards and state and local governments. However, FEHA provides no protection for federal employees.

Local laws also may have employer-size restrictions. For example, the San Francisco law applies only to workplaces where there are 6 or more employees. Be sure to check what restrictions apply to local laws where you work prohibiting sexual orientation discrimination.

5. What if my co-workers discriminate against or harass me?

The state and most local anti-discrimination laws protect individuals from acts of discrimination committed by the employer or the employer’s “agents,” which includes other employees. Therefore, discrimination or harassment by your supervisor or co-workers is prohibited under these laws.

6. What about discrimination based on gender identity?

FEHA also makes it illegal for your employer to discriminate against you or harass you because you are or are perceived to be transgender or gender non-conforming. For more information, see our Fact Sheet titled "**Gender Identity Discrimination: Employment Rights for Transgender Workers.**"

7. What to do if you are being discriminated against or harassed:

Speak to a supervisor or manager or to your employer’s human resources or personnel department

- For all cases, you should try to resolve the situation informally by first speaking with a supervisor, manager or someone in your employer’s human resources or personnel office.
- In cases of harassment, promptly notify a manager or supervisor (unless that person is the harasser). Follow up with a written complaint, and keep a copy of it for yourself. If you do not complain, the employer might later avoid liability by saying that it did not know about the harassment.

Document the discrimination or harassment

- Keep a journal (preferably at home) recording incidents of suspected discrimination or harassment. Write down dates, times, and witnesses to any such incidents.
- Keep copies of all important letters and documents that you send to your employer or that your employer sends to you.
- If in doubt, do not sign anything without legal advice, especially documents that require you to agree to waive your right to bring a complaint, or require you to arbitrate disputes with an employer.

Filing a complaint

If you are not able to resolve your situation informally, you can:

- Follow your employer's grievance procedure, if your employer has one. If you belong to a union, talk with your union representative.
- You also can choose to file an employment discrimination complaint with the **Department of Fair Employment and Housing (DFEH)**, which may investigate your complaint and try to resolve the problem. There is no charge to file a DFEH complaint, and you can do so without an attorney. You must file a complaint with the DFEH within one year of the last act of discrimination or harassment (except employees of the federal government, who have no recourse under FEHA). If you do not file a complaint within these time limits, you may lose your right to legal protection from the discrimination or harassment.
- If the DFEH finds evidence of discrimination and is not able to reach a settlement between you and the employer, the agency may in rare occasions "prosecute" your case by holding a formal hearing or filing a lawsuit on your behalf. If the DFEH chooses not to prosecute your case, you will receive a "right to sue" notice from the DFEH. (You also can request a right to sue notice at any point in the agency's investigation process, which will stop the agency's investigation and enable you to proceed directly with a lawsuit). Only after you receive a right to sue letter can you file your own lawsuit in court.
- If you get a right to sue notice from the DFEH, you must file a lawsuit within one year of the date of the notice. If you do not file a lawsuit within this time limit, you may lose your legal right to file a lawsuit regarding the discrimination or harassment.
- If you live in an area with a local anti-discrimination law, you can file a complaint with the local agency, such as the Human Rights Commission in San Francisco, which may investigate and mediate your complaint.

Where to file a complaint:

- **DFEH:** To file a complaint with the DFEH, call the Communication Center at (800) 884-1684 to make an appointment. DFEH website: <http://www.dfeh.ca.gov/>.
- **Local:** To file a complaint under a local anti-discrimination law, contact the local human rights commission or similar organization (if one exists – check with the City or County Clerk). In San Francisco, contact the Human Rights Commission, 25 Van Ness Ave., Suite 800, 94102; (415) 252-2500; website: <http://www.ci.sf.ca.us/sfhumanrights/>.

8. What if I am fired, disciplined or treated worse after complaining about discrimination or harassment?

Under state law, it is illegal for a person or company to *retaliate* against someone who complains about discrimination or harassment in the workplace. Retaliation may include actions such as terminating you, moving you to less favorable assignments or shifts, making undeserved negative evaluations, or intensifying the original harassment. If anyone (including a co-worker or supervisor) retaliates against you for complaining about unlawful discrimination at your workplace, you can file a retaliation complaint with the DFEH. That complaint is separate from the original sexual orientation complaint, if any, you made with the DFEH or EEOC.

This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.

For further information about your employment rights, please call:

The Workers' Rights Clinic

415-864-8208 (SF Bay Area) or **866-864-8208** (Toll Free in CA)

The Workers' Rights Clinic is a project of The Legal Aid Society - Employment Law Center, a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems.