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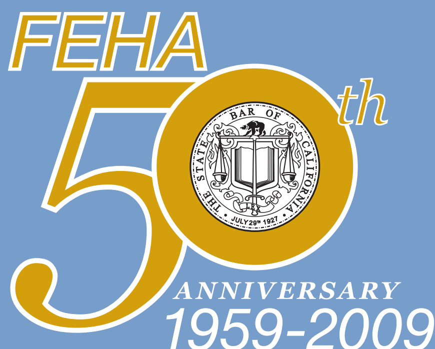
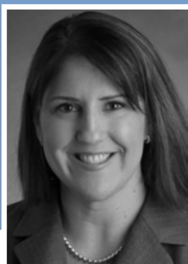


SPECIAL FEHA ANNIVERSARY ISSUE

MCLE Self-Study

Celebrating 50 Years of Fair Employment Laws in California: "The Real and Earnest Journey Into Equality and Freedom for All"[1]

By Nikki Hall



Nikki Hall is Senior Counsel in the San Francisco office of Renne Sloan Holtzman Sakai LLP. Ms. Hall has practiced employment law for the past 13 years, representing both employers and employees in FEHA-related actions. The author thanks Ivan Delventhal, an associate with Renne Sloan Holtzman Sakai LLP, for his research contributions on the early history of the FEPA as well as his creation of the MCLE Self-Assessment Test. She would also like to thank Kerry O'Donnell, Esq. for her editing contributions.

The 50th anniversary of California's fair employment law provides an ideal opportunity to reflect on the manner in which the law has evolved along with society's changing values. In its original incarnation, the Fair Employment Practices Act of 1959 (FEPA)[2] only prohibited an employer from discriminating against an employee based on race, religious creed, color, national origin and ancestry. Now, the Fair Employment and Housing Act (FEHA), the FEPA's successor,[3] has expanded those protections to also prohibit discrimination on the basis of sex (including pregnancy and gender identity), age, physical and mental disabilities, marital status, medical conditions (including genetic characteristics), and sexual orientation.

THE LONG ROAD TO PASSAGE OF THE FEPA

As early as 1945, there were efforts to enact fair employment legislation in

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California.[4] Communities were forced to address problems associated with discrimination and bigotry, as the state's population became increasingly diverse.[5] Despite these changing demographics, efforts to enact fair employment legislation floundered for years.[6]

That all changed when Governor Edmund G. Brown took office in January 1959, backed by a Democratic majority in the Legislature.[7] In his inaugural address before a joint session of the Legislature, the Governor urged legislators to pass fair employment legislation, stating that "discrimination in employment is a stain upon the image of California."[8] Governor Brown introduced a fair employment measure in the Legislature during his second week in office.[9] On April 16, 1959, he signed the FEPA into law, proclaiming it "a great moment in the history of California" and "a milestone in the long fight for equal opportunity and freedom from poverty."[10] During a ceremony marking the first anniversary of the law, Governor Brown noted that the FEPA, although a significant legislative accomplishment, marked only the beginning of "the real and earnest journey into equality and freedom for all."[11] The first Chairman of the Fair Employment Practices Commission echoed the Governor's sentiments when he stated that "prejudice persists, and much enforcement and educational work must be done before the ideal of equal opportunity for all is realized."[12]

THE JOURNEY FROM THE FEPA TO TODAY'S FEHA

In the 50 years following the FEPA's enactment, California's fair employment law has been repeatedly amended to broaden the scope of its protections, so that today, it provides more protections to employees than do the federal civil rights laws. The following are the most significant of these amendments.

1970 – 1978: Sex, Marital Status and Pregnancy Become Protected Traits

In 1970, a little over a decade after the FEPA's passage into law, it was amended to prohibit employment discrimination on the basis of sex.[13] In a letter urging Governor Reagan's support of the amendment, Assembly member Charles Warren wrote that the bill "will help to bring about a greater utilization of the talents and skills of all Californians."[14]

The FEPA was again amended in 1976, to prohibit discrimination against an employee on the basis of his or her marital status.[15] Analyzing the need for the change, the Legislature noted that "unmarried men often find it hard to secure promotions; unmarried women may find it hard to find jobs as they are deemed less stable; and married women are discriminated against as they are deemed temporary employees."[16] Therefore, the amendment was needed to "[e]nsure that no individual be discriminated against either because they are or are not married."[17]

Although sex was added as a legally protected trait in 1970, specific protections for pregnant employees were not added to the FEPA until the mid-1970's. Even then, only pregnant women who worked for, or sought employment from, school districts were protected from discrimination based upon pregnancy.[18] In 1978, however, the Legislature amended the law to protect employees from being discriminated against by *any* employer due to pregnancy, childbirth, or a related medical condition.[19] The amended law also required employers to offer up to six weeks of leave "on account of normal pregnancy," and allowed an employee to take up to four months of pregnancy disability leave.[20]

Currently, the FEHA requires an employer to allow an employee disabled by pregnancy, childbirth, or a related medical condition to take up to four months of pregnancy disability leave.[21] Moreover, an employer must provide reasonable accommodation to an employee for conditions caused by pregnancy, childbirth, or a related medical condition.[22]

1972 – 2002: Age as a Protected Trait

The FEPA was amended in 1972 to make it an unlawful employment practice to discriminate against an employee *between the ages of forty and sixty-four* on the basis of age.[23] However, the Legislature carved out an exception in circumstances where the employee "failed to meet bona fide requirements" for the job or position sought or held.[24] The Legislature also made clear that this new protection was not to be construed to affect bona fide retirement or pension plans, or to preclude physical and medical examinations of applicants and employees to determine fitness for the job.[25]

In 1977, the upper age limit of sixty-four was removed when the Legislature amended former Labor Code section 1420.1 to prohibit employment discrimination against those over the age of forty.[26] The amendment was enacted in response to the practice of employers requiring employees to retire at the age of fifty-five. According to the Legislature, the "[u]se of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement … are obsolete and cruel practices."[27]

More recently, the FEHA was amended to address certain court decisions that undermined the prohibition on age discrimination.

1999: S.B. 26 – Rejection of Marks v. Loral Corp.

In 1999, S.B. 26 was enacted to explicitly reject *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), in which the court of appeal held that, in determining which employees to lay off, an employer may "[p]refer workers with lower salaries to workers with higher ones, even if the preference falls disproportionately on older, generally higher paid workers."[28] With S.B. 26, the Legislature both overturned *Marks* and instructed courts to interpret the state's statutes prohibiting age discrimination "broadly and vigorously," with the "[g]oal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers."[29]

2002: A.B. 1599 – Rejection of Esberg v. Union Oil Co.

A few years after enacting S.B. 26, the Legislature rejected another court of appeal decision narrowly interpreting the FEHA's prohibition on age discrimination. In 2002, the Legislature passed A.B. 1599,[30] which overturned the decision of *Esberg v. Union Oil Co.*, 87 Cal. App. 4th 378 (2001). In *Esberg*, an employer refused to pay for a master's