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Strategies for EEO Compliance with a Remote Workforce

Melissa Whitehead, Esq.

2023 California

STATE HR ADVOCACY & LEGISLATIVE CONFERENCE





STRATEGIES FOR EEO COMPLIANCE WITH A REMOTE WORKFORCE

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Melissa Whitehead, Esq. Of Counsel Shaw Law Group, PC.

Melissa draws on her years of experience defending employers in litigation to provide sound, practical advice on a wide variety of issues that face employers on a daily basis – on subjects ranging from personnel decisions, navigating leaves of absences and accommodation requests, wage and hour issues – and creating policies and templates that will benefit clients on an ongoing basis. Melissa loves getting to know clients and their businesses, which enables her to provide practical and insightful guidance.

Melissa also regularly conducts impartial workplace investigations involving complex issues, including claims of sexual harassment, hostile work environment, racial discrimination, and retaliation. Melissa's expertise in this area is appreciated by public and private sector employers.

Among Melissa's other passions, she relishes training employees of all levels on topics such as EEO compliance, effectively managing accommodations, and the legal implications of COVID-19. Her humor and real-life case studies bring these subjects to life and keep participants engaged.

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Please Note...

- This program is intended to be a general overview, and should not be considered legal advice regarding your specific situation
- Consult with your regular employment law counsel before making any changes to your practices

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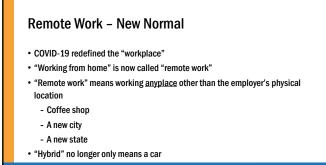
Agenda

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- Current landscape
- Applicable Policies/Procedures
- EEO compliance and remote workers
- Other practical issues with remote work

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Legal Issues

- Recording all hours worked, overtime, rest breaks and meal periods for nonexempt employees
- · Monitoring productivity
- Managing performance
- Reasonable accommodation requests
- Remote work agreements

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• EEO and respectful workplaces

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Applicable Policies/Procedures STATE HR ADVOCACY & California

EEO Policies

- Ensure language applies to new workplace model
- Ensure complaint/reporting procedures are effective for remote workers
- When training, include examples of how EEO violations occur in the remote work environment

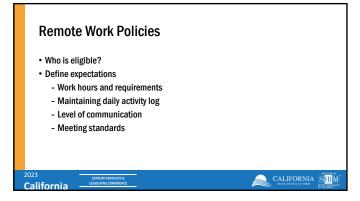
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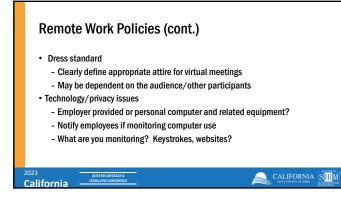
Importance of Remote Work Policies

- Consistent application reduces risk of EEO violations/claims
- Serves as organization's "roadmap"
- Critical with remote work arrangements
- Consider:

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- Bring Your Own Device policy if employees using personal computers, cell phones
- Computer use policy reinforcing employee's right to monitor communication and limit personal use





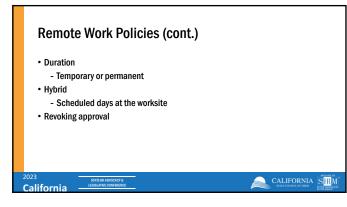
Remote Work Policies (cont.)

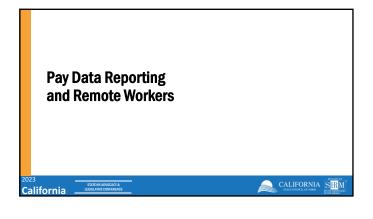
Legal issues

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- Timekeeping requirements
- Leaves of absence requests
- Reasonable accommodation requests
- Designated workspace
 - Consider requiring employees to define a designated workspace
 - $\operatorname{Minimum}$ require workspaces that are safe and free from any hazards that may cause injury

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California Pay Data Reporting: The Basics

- Applies to private sector employers with 100 or more employees, and/or 100 or more workers hired through labor contractors
- Requires annual reporting of the number of employees by race, ethnicity, and sex in specified job categories, with pay data
- Employers with multiple "establishments" must submit only a "consolidated" report
- Government Code §12999

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Resources available at: <u>https://calcivilrights.ca.gov/paydatareporting/</u>

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California Pay Data Reporting: Which Employees Are Included?

- All employees assigned to California establishments and/or working within California (including part-time employees)
- Employers may no longer report employees who work outside of California and who are assigned to an establishment outside of California

California Pay Data Reporting: Which Employees Are Included? (cont.)

Example 1: If an employer has a single establishment in Riverside, California with 500 employees working from that location, the employer would submit a report covering all 500 employees. If 25 of these employees were working remotely (in California or beyond), the employer's report would still cover all 500 employees.

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California Pay Data Reporting: Which Employees Are Included? (cont.)

Example 2: If an employer has 5,000 employees working across 10 establishments in California, the employer's report would cover all 5,000 employees, reported by establishment. If 100 of these employees were working remotely (in California or beyond), the employer's report would still cover all 5,000 employees, and the 100 remote employees would be assigned by the employer to their associated establishment.

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California Pay Data Reporting: Which Employees Are Included? (cont.)

Example 3: If an employer has one establishment in California with 50 employees (with three workers teleworking from Nevada during the Snapshot Period) and one establishment in Nevada with 50 employees (with three workers teleworking from California during the Snapshot Period), the employer would submit a report with (1) establishment-level data for their California establishment that covers all 50 employees, including those teleworking from Nevada; and (2) establishment-level data for their Nevada establishment that covers only the three employees teleworking from California. Employers may not report on the 47 employees assigned to the Nevada establishment and working from Nevada.

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EEO-1 Reporting: The Basics

- Applies to employers with 100 or more employees, and/or federal contractors who have at least 50 employees
- Requires annual reporting of the number of employees by race, ethnicity, and sex in specified job categories, by "establishment"
- Resources available at: <u>https://www.eeoc.gov/data/eeo-1-data-collection</u>

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EEO-1 Reporting: Which Employees Are Included?

- All "active employees" during a "workforce snapshot period"
- Remote workers must be included on the report for the location to which they report
- Employees who exclusively work remotely generally report to a local or regional office, or a central headquarters. They will be included in the report for the location from which they are managed

Acce and Ethnicity Imployers should follow the EEOC's instructions for race and ethnicity identification available in the EEO-1 Instruction Booklet Race/ethnicity categories: Hispanic or Latino, White (Not Hispanic or Latino), Back or African American (Not Hispanic or Latino), Native Hawaiian or Pacific Islander, Asian, Native American or Alaska Native, Two or More Races

Sex

- California recognizes three genders: female, male, and nonbinary
- Employers should report employees' sex according to the above categories
- This may be new for employers outside of California, and differs from the EE0-1
- · Employee "self-identification" is the preferred method of identifying "sex"

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Collecting Sex and Race/Ethnicity Data of Employees

- Preferred method: Employee Self-Identification - Must be voluntary
- If employee declines self-identification, look to (in the following order):
 - Current employment records,

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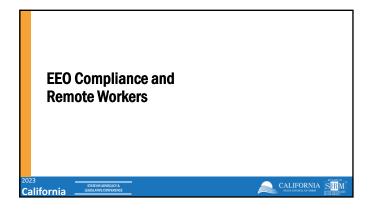
- Other reliable records or information, or
- Race/ethnicity ONLY: Observer perception (only after making a good faith effort to obtain race/ethnicity information from the employee or reliable records)

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A Note on Getting Information from Labor Contractors

- 2022 Reporting Year ONLY employers may report "unknown " race/ethnicity for a labor contractor employee where that information is unknown and not reasonable obtainable before the filing deadline
- Must implement plans with labor contractors to obtain that information in the future and for 2023 reporting year

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Discrimination, Harassment and Retaliation Prevention

- Obligation remains on employer
- · Fewer in-person and more "virtual" and "digital" based complaints
- Inappropriate comments or images during Zoom meetings
- · Misinterpreted emails

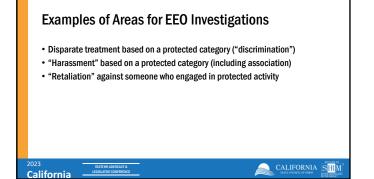
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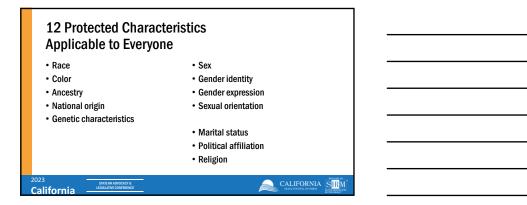
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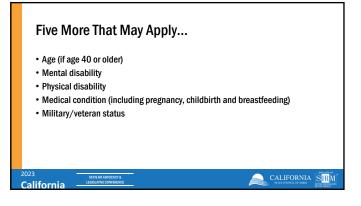
- · Disrespectful emails and chats
- "Diversity, Equity, Inclusion (and Belonging)!"

Legal Obligation to Investigate EEO Concerns

- Once employers are on notice of potentially inappropriate work-related conduct, they have an obligation to take "prompt" and "effective" corrective action
- $\ensuremath{\cdot}$ The failure to promptly investigate can form a basis for a legal claim
- Investigations may be "formal" or "informal







Some Examples of Non-EEO Issues an Employer Might Investigate

- Performance/attendance issues
- Wage theft
- Bullying

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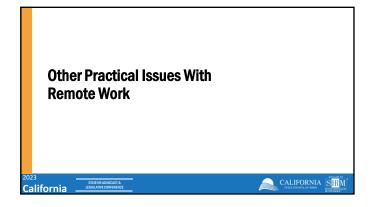
- Interpersonal conflicts
- Workplace violence
- · Reimbursement requests
- Security breaches

Leaves of Absence

- Employees working remotely are entitled to the same rights as employees working onsite
- CFRA/FMLA/PDL all still apply
- Critical for managers and supervisors to know:
 - When employees are "off-limits" due to a protected leave
 - When an request for time off may qualify for a protected leave

Reasonable Accommodation Tips

- May be telework, intermittent leave or reduced schedule leave, equipment, transfer, change in schedule, etc.
- Engage in the interactive process EVERY TIME
- Evaluate each accommodation request on a case-by-case basis
- · Important to communicate with managers and staff
- Remember: remote work as an accommodation is different than remote work by policy or agreement

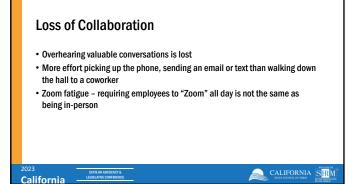


Employee Morale

- Remote work is not for everyone
- Many employees feel isolated from their peers
- Less in-person communication leads to more misunderstood emails, text
- messages

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• Easy to "ice" someone out



Flexibility

- For some, greater work-life-balance
- Depending upon the job, employees can "work" during optimal times for them, which may be outside of "traditional" working hours
- No commute = more personal time
- For others, blurred line between work and play

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Supervision

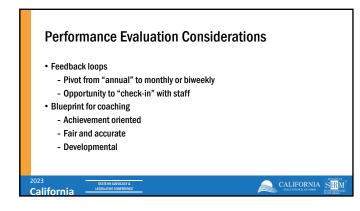
- Not "survival of the fittest"; survival of the most adaptable
 It all starts with communication
 - Determine the best platform for remote employees (and how to integrate
 - on-site employees)
 - Provide training
 - Set a schedule (every morning, twice a day, etc.)
 - Set guidelines for remote meetings
 - Set "office hours"

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Supervision (cont.)

- · Focus on productivity
 - Clearly communicate priorities and expectations
- Set appropriate deadlines
- Ensure two-way communication regarding challenges
- Don't micromanage; set regular check-in milestones
- Ensure safety compliance
 - The dining room or lounge chair may no longer be "acceptable"
 - Expectation that employee has a designated workspace

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Performance Evaluation Considerations (cont.)

· Identify what is and is not working

- Set realistic goals

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- Identify factors hindering performance









Our Partnership With the California Civil Rights Department

"Workplace Insights with Shaw Law and the CRD!"

Every month, SLG's Melissa Whitehead and Rashida Harmon, Senior Counsel of the CRD's Outreach and Education Unit, cover a key employment law topic and answer your questions! Topics TBA as developments dictate.

Check out dates and topics here:

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https://shawlawgroup.com/employment-law-training-calendar/

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Shaw Law Group, PC is a woman-owned employment law firm with a 10-year track record. The firm's namesake, Jennifer Brown Shaw, has almost 25 years of experience in workplace law. Shaw Law Group is small to ensure the firm's leadership is involved in every matter.

Our professionals focus on what clients want the most: timely advice, expert training, and thorough, independent investigations.

Below are some of the services Shaw Law Group offers:

Advice

- Policy development
- Handbooks
- Employee agreements
- Compensation, commission and bonus plans
- Exempt/non-exempt classification analysis
- Layoffs/RIFS/WARN
- Releases/Separation Agreements
- Leave of absence/reasonable accommodation management

Investigations

- Public and private sector
- All workplace complaints, including EEO, whistleblower, and workplace violence claims
- High-level executives
- Witness preparation and defense
- Defending investigations in court
- Assessment and review of others' investigations

Training

- Public and private sector
- Group and individual
- Live and webinar
- Key employment law topics
- AB 1825/AB 1234 compliance
- Leaves of absence/reasonable accommodation
- Conducting effective investigations
- Workplace violence prevention
- Social media/privacy
- Lawful hiring and firing

Auditing

- Culture audit
- Wage-hour compliance
- Preparation for agency investigation
- Vulnerability assessments
- PAGA claim evaluation



Litigation Monitoring and Support

- Objective assessment of defense counsel's work
- Billing analysis
- Oversight of legal representation as "in-house" lawyer would do
- Review of motion papers, discovery, depositions
- Summary judgment assessment
- Mediation assistance
- Trial themes and preparation

Agency Work

- Position statements
- Representation at informal conferences and hearings
- Agency audit defense
- Mediation and settlement

Expert Witness Testimony

- Investigation adequacy
- Wage-hour policy
- Handbook analysis
- AB 1825 compliance
- Training evaluation
- HR competence regarding discharge, discipline and policy implementation
- Interactive process and accommodation evaluation
- Skelly risk analysis
- Legal malpractice
- Attorney's fees motions

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