

April 14, 2023

# Strategies for EEO Compliance with a Remote Workforce

Melissa Whitehead, Esq.

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# STRATEGIES FOR EEO COMPLIANCE WITH A REMOTE WORKFORCE

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## Table of Contents

	<u>Page No.</u>
Please Note .....	1
Agenda .....	1
<b>Current Landscape</b> .....	<b>1</b>
Remote Work – New Normal .....	2
Legal Issues .....	2
<b>Applicable Policies/Procedures</b> .....	<b>2</b>
EEO Policies .....	3
Importance of Remote Work Policies .....	3
Remote Work Policies .....	3
<b>Pay Data Reporting and Remote Workers</b> .....	<b>5</b>
California Pay Data Reporting: The Basics .....	5
California Pay Data Reporting: Which Employees Are Included? .....	5
EEO-1 Reporting: The Basics .....	7
EEO-1 Reporting: Which Employees Are Included? .....	7
Race and Ethnicity .....	7
Sex .....	8
Collecting Sex and Race/Ethnicity Data of Employees .....	8
A Note on Getting Information from Labor Contractors .....	8
<b>EEO Compliance and Remote Workers</b> .....	<b>9</b>
Discrimination, Harassment and Retaliation Prevention .....	9
Legal Obligation to Investigate EEO Concerns .....	9
Examples of Areas for EEO Investigations .....	10
12 Protected Characteristics Applicable to Everyone .....	10
Five More That May Apply .....	10
Some Examples of Non-EEO Issues an Employer Might Investigate .....	11
Leaves of Absence .....	11
Reasonable Accommodation Tips .....	11
<b>Other Practical Issues With Remote Work</b> .....	<b>12</b>
Employee Morale .....	12
Loss of Collaboration .....	12
Flexibility .....	13
Supervision .....	13
Performance Evaluation Considerations .....	14
<b>Questions/Comments?</b> .....	<b>14</b>

**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

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

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## Current Landscape

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## Remote Work – New Normal

- COVID-19 redefined the “workplace”
- “Working from home” is now called “remote work”
- “Remote work” means working anyplace other than the employer’s physical location
  - Coffee shop
  - A new city
  - A new state
- “Hybrid” no longer only means a car

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## Legal Issues

- Recording all hours worked, overtime, rest breaks and meal periods for non-exempt employees
- Monitoring productivity
- Managing performance
- Reasonable accommodation requests
- Remote work agreements
- EEO and respectful workplaces

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## Applicable Policies/Procedures

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## 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:
  - 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

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## Remote Work Policies

- Who is eligible?
- Define expectations
  - Work hours and requirements
  - Maintaining daily activity log
  - Level of communication
  - Meeting standards

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## Remote Work Policies (cont.)

- Dress standard
  - Clearly define appropriate attire for virtual meetings
  - May be dependent on the audience/other participants
- Technology/privacy issues
  - Employer provided or personal computer and related equipment?
  - Notify employees if monitoring computer use
  - What are you monitoring? Keystrokes, websites?

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## Remote Work Policies (cont.)

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

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## Remote Work Policies (cont.)

- Duration
  - Temporary or permanent
- Hybrid
  - Scheduled days at the worksite
- Revoking approval

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# Pay Data Reporting and Remote Workers

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

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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

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## 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: <https://www.eeoc.gov/data/eo-1-data-collection>

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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

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## Race and Ethnicity

- Employers 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), Black or African American (Not Hispanic or Latino), Native Hawaiian or Pacific Islander, Asian, Native American or Alaska Native, Two or More Races

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## 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 EEO-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,
  - 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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EEO Compliance and Remote Workers

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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
- Disrespectful emails and chats
- “Diversity, Equity, Inclusion (and Belonging)!”

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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
- The failure to promptly investigate can form a basis for a legal claim
- Investigations may be “formal” or “informal”

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## Examples of Areas for EEO Investigations

- Disparate treatment based on a protected category ("discrimination")
- "Harassment" based on a protected category (including association)
- "Retaliation" against someone who engaged in protected activity

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## 12 Protected Characteristics Applicable to Everyone

- |                           |                         |
|---------------------------|-------------------------|
| • Race                    | • Sex                   |
| • Color                   | • Gender identity       |
| • Ancestry                | • Gender expression     |
| • National origin         | • Sexual orientation    |
| • Genetic characteristics |                         |
|                           | • Marital status        |
|                           | • Political affiliation |
|                           | • Religion              |

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## Five More That May Apply...

- Age (if age 40 or older)
- Mental disability
- Physical disability
- Medical condition (including pregnancy, childbirth and breastfeeding)
- Military/veteran status

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## Some Examples of Non-EEO Issues an Employer Might Investigate

- Performance/attendance issues
- Wage theft
- Bullying
- Interpersonal conflicts
- Workplace violence
- Reimbursement requests
- Security breaches

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## 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

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## 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

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## Other Practical Issues With Remote Work

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## 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
- Easy to “ice” someone out

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## Loss of Collaboration

- Overhearing valuable conversations is lost
- More effort picking up the phone, sending an email or text than walking down the hall to a coworker
- Zoom fatigue – requiring employees to “Zoom” all day is not the same as being in-person

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## 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

- Feedback loops
  - Pivot from “annual” to monthly or biweekly
  - Opportunity to “check-in” with staff
- Blueprint for coaching
  - Achievement oriented
  - Fair and accurate
  - Developmental

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## Performance Evaluation Considerations (cont.)

- Identify what is and is not working
  - Set realistic goals
  - Identify factors hindering performance

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## Questions/Comments

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## 2023 Upcoming Webinars

### **Mandated Reporter Training for HR Professionals and Leaders (AB 1963 Compliance)**

May 3  
August 10  
October 24

### **Sexual Harassment Prevention and Other EEO Issues (SB 1343 Compliance Training for Staff)**

May 4  
August 8  
October 11  
December 5

### **Sexual Harassment Prevention and Other EEO Issues (AB 1825/SB 1343 Compliance Training for "Supervisors"/All Employees)**

August 1  
October 17  
December 7

### **Intensive Workshop: Effectively Managing Leaves of Absence and Reasonable Accommodations (Advanced Topics)**

August 15 (Day 1)  
August 22 (Day 2)

### **HR 101 for Leaders and HR Professionals**

September 26

### **Intensive Workshop: Conducting Effective Internal Investigations**

October 12 (The Fundamentals)  
October 19 (All-Day Mock Investigation)  
October 26 (How to Draft Effective Investigation Reports)

### **California Employee Handbook Update (2024)**

November 14

### **Annual Employment Law Update (2024)**

November 30  
December 12  
January 9, 2024



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### **“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:**

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

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# Thank You





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#### 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

#### 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

#### 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

#### 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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