

PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor • San Francisco, CA 94108-4635
Phone: (415) 433-1099 • Fax: (415) 433-9434 • www.sfcounsel.com

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.



Employer Alert: San Francisco's New Paid Parental Leave Ordinance

While the United States remains the only developed country in the world without paid parental leave, California's Paid Family Leave ("PFL") law constitutes one of the most generous parental leave programs in the country. PFL (passed in 2004) offers up to six weeks of paid parental leave at up to fifty-five percent of a worker's wages (although this amount will increase to between sixty and seventy percent of wages in 2018). San Francisco recently passed a Paid Parental Leave Ordinance ("PPLO") which will make it the first jurisdiction within the United States to offer fully paid parental leave for up to six weeks.

The PPLO will require employers with twenty or more employees to make up the difference between the maximum amount available to an employee through PFL, which the PPLO refers to as "Supplemental Compensation." However, the PPLO will take into account the maximum amount of compensation allowed under PFL, therefore limiting the Supplemental Compensation to the employee. By way of example, PFL currently allows an employee to receive up to fifty-five percent of his or her wages for six weeks, but this amount is currently capped at a weekly amount of \$1,129. As \$1,129 is fifty-five percent of \$2,053, the maximum weekly Supplemental Compensation under the PPLO would be \$924 (or forty-five percent of \$2,053). This amount will presumably decrease as the state picks up a bigger portion of paid parental leave as a portion of wages beginning in 2018.

For an employee to be eligible for benefits under the PPLO, he or she must meet four criteria: (1) work an employer with twenty or more employees for at least 180 days prior to the beginning of leave; (2) perform at least eight hours of work per week within the geographic boundaries of San Francisco; (3) perform at least forty percent of his or her total work hours within the geographic limits of San Francisco; and (4) be eligible to receive PFL compensation for the purpose of bonding with a child. The PPLO will be phased in over a full calendar year, with employers with fifty or more employees having to comply by January 1, 2017; employers with thirty-five or more employees having to comply by July 1, 2017; and employers with twenty or more employees having to comply by January 1, 2018. In determining employer size, the PPLO counts all employees, not just those performing work within San Francisco.

Further, in instances where an employee may work for multiple employers that are subject to the PPLO, the employers will split Supplemental Compensation payments to the employee in proportion to the amount earned by the employee from each employer. Where an employee works for one employer that is subject to the PPLO and another that is not, the Supplemental Compensation payments are limited only to the percentage of wages earned by the employee from the employer that is subject to the PPLO.

April 2016

In This Issue

Employer Alert: San Francisco's New Paid Parental Leave Ordinance

Client Alert: Corporate Compliance and Trademark Scam Notices

Time to Update Your Equal Employment Opportunity Policies: New FEHA Regulations

Partner Notes



Bill Scherer

We Need a 21st Century Solution to Our 20th Century Problems

The Bay Area's truly an amazing place. It offers natural beauty and an amazing diversity of people and opinions. It is a cultural and economic center. Bloomberg recently referred to San Francisco as a "credible candidate to be the economic capital of the 21st Century." But OMG it's crowded!

Just recently I set out across the Bay Bridge to visit my father at his retirement community near Walnut Creek. I

As further changes to PFL, including the lengthening of the allowable period of paid, may be forthcoming, all California employers should periodically monitor their leave policies. San Francisco employers should ensure they are in compliance with the PPLO as it takes effect on January 1, 2017.

We at Scherer Smith & Kenny remain available to assist you in complying with these and other laws that impact California employers. Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information.

-Written by Ryan Stahl

Client Alert: Corporate Compliance and Trademark Scam Notices

In my 8-years of practice at Scherer Smith & Kenny LLP, I cannot count the number of times that clients have come to me saying they had received a notice from an apparently legitimate company (or governmental entity), instructing them to complete a form and submit it by a certain deadline with a fee. The notice will involve either corporate compliance issues (namely, updating the officers and directors of the company, or listing the client's business in an online publication), or trademark maintenance issues (advising that there is an upcoming deadline that must be met in order to maintain the trademark).

The notice leads the client to believe that they are not in compliance with either corporate or trademark matters, and are at risk of penalty or forfeiture if they do not immediately rectify the issue by completing the form and paying the fee. These businesses use formal-sounding names like "Patent and Trademark Office," "Corporate Compliance Center," or "Annual Business Renewal Center," they stamp an official-looking seal on the document, and they cite statutes and monetary penalties for lack of compliance.

The notice is intended to cause alarm so that the recipient will be more inclined to act fast and without the input of legal counsel.

In nearly every case, the notice is a scam. With online public access to corporate and trademark records, including owner addresses, it is not a surprise that these types of marketing schemes exist. Small business owners have been plagued by misleading solicitations such as these for years. In fact, laws regulating such notices have been in place since early 2012, requiring that disclaimers be added to third-party mailing for consumer protection, and prohibiting solicitors from using a name that may lead the recipient to believe they are a governmental entity.

Despite regulation, solicitation companies have learned to adapt, and the practice continues in rampant fashion. Disclaimers have been placed in such a way to give them the appearance of generic legalese that an ordinary person would tend to overlook, and the names the companies use are only slightly less deceptive, as noted above.

We encourage our clients to reach out any time they receive a notice that solicits the submission of corporate or trademark information and fees so that we can help assess the validity of the communication. Not only can we advise on the legitimacy of the notice, but it will also be a good time to touch base and let you know of any upcoming filing deadlines or requirements for your entity or trademark that should be on your radar.

In addition to the above, here are some additional tips for identifying fraudulent or misleading practices by third-party solicitors that may be of use:

- Read the company name and address carefully, and if it does not match the address for the government agency online, then it is not official.

- Scan the entire notice for a disclaimer. Specifically, the following disclaimer must be printed on the front and back of every page of the notice, in font that is at least 12-point boldface capital letters and

planned to have take-out with him and his girlfriend. As he's a lot older, we planned to eat about 6 pm, which meant my journey from the City to the East Bay had to begin about 3:30 pm.

Traversing the bridge, navigating the 580-24 interchange, the Caldecott Tunnel and Diablo Valley took over an hour and a half. It has come to the point that I travel from the City at my peril – have you experienced northbound Highway 101 from the Peninsula recently? Or the Livermore Valley and Altamont on any given morning or afternoon? I no longer drive Highway 17 to Santa Cruz, opting instead for the less impacted, longer (and admittedly truly beautiful) Highway 1. And the City is no picnic, either. We have 50,000 new residents since 2010 and a population of over 850,000, making a trip across town a traffic-clogged slog. I map excursions like a general creates a battle plan.

But at the same time I recognize that I am truly very lucky; I live close to my work in San Francisco, I have proximity to public transit, and I am fortunate enough to own my home. I believe most of us have compassion, or even sympathy, for the many in the Bay Area who are distant from public transit, who commute long distances, or are being priced out of the housing market.

Perhaps then, we should not be surprised by the very recent 2016 Bay Area Council Poll that found that one-third of the Bay Area's residents plan to leave within the next 5 years. A large percentage of our working population shouldn't be priced out of their rentals or face

at least 2-point font type sizes larger than the next largest font on the page: "THIS PRODUCT OR SERVICE HAS NOT BEEN APPROVED OR ENDORSED BY ANY GOVERNMENTAL AGENCY, AND THIS OFFER IS NOT BEING MADE BY AN AGENCY OF THE GOVERNMENT." If present, you can safely disregard the notice.

- Read the notice carefully for use of terms such as "solicitation," "subscription," or "offer," none of which would be utilized by an official government entity.

- Periodically review government websites that apply to your entity (such as the California Secretary of State (www.ss.ca.gov) or the United States Patent and Trademark Office (www.uspto.gov)) for updates regarding scam warnings.

We at Scherer Smith & Kenny remain available to assist you with any corporate or trademark-related compliance issues. Please contact Brandon D. Smith (bds@sfcounsel.com) or Heather G. Sapp (hgs@sfcounsel.com) for more information.

- Written by Heather Sapp



Time to Update Your Equal Employment Opportunity Policies: New FEHA Regulations

Even for the most well-meaning and compassionate of employers, legal traps are abound. For example, last year, the Office of the General Counsel for the National Labor Relations Board ("NLRB") issued a memorandum concerning employer rules that implicate (or infringe on) an employee's "Section 7" rights under the National Labor Relations Act to discuss wages, hours, and other terms and conditions of employment with fellow employees and with nonemployees. In the wake of the memorandum, non-union employers found themselves reviewing their employee handbooks and company policies to ensure they complied with controlling law that they once believed only applied to union employers. And, this year, it looks like the head turner is the new regulations that California's Fair Employment & Housing Council promulgated to "interpret" the Fair Employment and Housing Act ("FEHA"), the source for the state's non-discrimination, -harassment, and -retaliation protections for workers in the state (the "FEHA Regulations").

Effective April 1, 2016, employers should review their Equal Employment Opportunity ("EEO") policies because the FEHA Regulations provide for a number of new requirements. For many of you, this translates into a need to update your company's employee handbooks, which is the most common and convenient place for publishing EEO policies to your employees. The notable changes and revisions are discussed here.

Written EEO Policies. The FEHA Regulations require employers to have a written anti-discrimination, -harassment, and -retaliation policy that have the following features:

- **Protected Categories:** List all current protected categories under FEHA: race, religious creed color, national origin, ancestry, mental or physical disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, military and veteran status.
- **Protection from Co-Workers and Third Parties:** Indicate that FEHA not only prohibits unlawful practices from supervisors and managers but

commutes, like one of my firm's associates, totaling up to 3 hours each day (bad enough that our associate now works 3 days each week from home). It really shouldn't take up to 2 hours to travel 20 miles to see my Dad for dinner.

I am struck by the fact that we have actually done this to ourselves. People will continue to want to move to, live and work in, and build their lives in our region. The Bay Area beckons to people who think freely and love the natural, cultural, and intellectual diversity it offers.

The basic fact is that we need to take control of our own destiny and open our minds to the changes that will free us from the overpriced gridlock we experience on a daily basis. What should we open them to? With apologies to (and to paraphrase) Horace Greeley, I say, "Look East, young man."

With over 7.5 million people, the Bay Area needs a New York-style mass transit system that efficiently moves its population among its 9 counties. I believe it also makes imminent sense to further empower regional government at the expense of the authority of local municipalities for the "big things" – like transportation, regional housing, and the environment – that affect all of us here in the Bay Area and that are more effectively dealt with through a regional solution.

Visionaries in the 1950s conceived BART, paid for by a half-penny increase in sales tax, and imagine the gridlock had they not. If you are like me and grew up in the Bay Area, you will remember that BART was under

also prohibits co-workers and third parties from engaging in conduct prohibited by FEHA. Note: FEHA also protects volunteers, unpaid interns, and individuals in apprenticeship training programs from discrimination and harassment. FEHA also prohibits harassment of "persons providing services pursuant to a contract," i.e., independent contractors.

- **Identifying Someone to Report to:** Provide a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor. Options include another company representative, outside counsel, a complaint hotline, the California Department of Fair Employment and Housing, or the U.S. Equal Employment Opportunity Commission.
- **Supervisor's Duty:** Instruct supervisors to report any complaints of misconduct to an employer designee so that the employer can try to resolve the matter internally.
- **Fair, Timely, and Thorough Investigation:** Indicate that when the employer receives allegations of misconduct, the employer will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
- **Confidentiality to the Extent Possible:** State that the employer will keep the investigation as confidential as possible, but the investigation will not be completely confidential.
- **Remedial Measures If Misconduct Found:** Indicate that the employer will take appropriate remedial measures should the employer find misconduct at the end of the investigation.
- **No Retaliation:** Clearly state that employees who lodge a complaint or participate in any workplace investigation will not be subject to retaliation.
- **Dissemination:** The employer must disseminate the EEO policy and ensure its employees acknowledge receipt. Examples of dissemination include: (1) providing a print copy along with an acknowledgment form, (2) emailing an electronic copy along with an acknowledgment return form, (3) posting a copy on the company intranet with a tracking system to ensure all employees have read and acknowledged receipt, or (4) using any other way that ensures employees receive and understand the policies.
- **Language Other Than English:** If 10 percent or more of the employer's workforce speaks a language other than English, the EEO policy needs to be translated into those languages in which at least 10 percent of the workforce speaks.

Sexual Harassment Prevention and Training ("Training") Requirements and Record-Keeping. Employers with 50 or more employees already know that FEHA requires that (a) supervisors must undergo Training once every two years and (b) new supervisors must receive Training within 6 months of being hired or promoted to supervisor.

capacity well into the 1980s and early 1990s. But it is a lifesaver today. It carries 421,000 people each day; it is also falling apart due to overuse and underfunding.

There are scattered examples of good people doing good work to help reduce the pain many people experience here each day, but they are underfunded and insufficient to make any true impact. The SMART light rail system will begin running down the 101 corridor in Marin and Sonoma counties soon...but underfunding means it currently does not serve certain northern communities and ends in San Rafael rather than at the Tiburon ferry terminal. The City is building the "Grand Central Station of the West" downtown for high speed rail and CalTrain, but high speed rail is under attack and not fully funded, and the City is \$1.5 billion short if it hopes to tunnel downtown into the transit center from the existing station at 4th and Townsend. "Grand Central Station" is currently set to be the world's most opulent bus station. BART is expanding to San Jose and Livermore... but it also says it needs \$3 billion to make up for deferred maintenance and system breakdowns.

Here's the thing – we need to be bold and have a vision of what we will need over the next 50 or 60 years to thrive economically and personally. We also need to raise the money necessary to build the infrastructure we envision for the 21st century. We can't meet these needs in fits and starts.

Bay Area residents paid the money to

The FEHA Regulations add several procedural and substantive Training requirements. Anyone who has undergone Training since 2015 should already know that Training must cover “abusive conduct” in the workplace. The FEHA Regulations provide more guidance on the content of the “abusive conduct” module. Additionally, the FEHA Regulations add a number of topics that are now required training modules: (a) supervisors’ obligation to report sexual harassment, discrimination, and retaliation that they become aware of, (b) strategies for preventing harassment, and (c) steps for taking appropriate remedial measures to correct harassing behavior. (As an aside, our Firm’s Trainings already include and exceed all requirements.)

In addition to the substantive content, the FEHA Regulations require trainers and employers to keep written materials and compliance documents for two years. The specific details include that E-learning trainers keep all written questions received and written responses/guidance provided for at least two years. For those employers using a webinar training, the employer must maintain for two years a copy of the webinar, the written materials used by and written questions submitted to the trainer, and all written responses/ guidance that the trainer provided. And for tracking compliance, employers must keep documentation of the training for at least two years where the documentation includes names of supervisors trained, date(s) of training, sign-in sheets, a copy of all certificates of attendance, a copy of all written or recorded materials, and the name of the training provider.

Time to Update. As a best practice, employers should have their employment policies and handbooks annually reviewed by experienced employment counsel. And with the FEHA Regulations requiring specific topics to be included in written EEO policies, this may be the best time to reevaluate your policies. While an employer’s failure to comply with the FEHA Regulations does not, in itself, violate FEHA, as one commentator has noted, an employer’s non-compliance would be evidence of an employer’s failure to take reasonable steps to curb discrimination, harassment, and retaliation in the workplace.

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (nws@sfcounsel.com), or John Lough, Jr. at (jl@sfcounsel.com) for more information on upcoming laws that may affect your workforce, scheduling a mandatory harassment training, or assessing and updating your workplace policies to ensure compliance with controlling law.

- *Written by John Lough, Jr. and Denis Kenny*

- *Written by Ryan Stahl*



Areas of Practice

[Business; Real Estate; Intellectual Property and Employment Law;](#)

[Litigation and Dispute Resolution; Nonprofit; Estates and Trusts](#)

©2007-2016 Scherer Smith & Kenny LLP. All Rights Reserved.

[Disclaimer/Privacy Statement](#)

For more information: www.sfcounsel.com

build some incredible systems after World War II, and it worked for a long time. But the system is now largely inadequate and broken. Building infrastructure now to serve our current and future population will mean increases in taxes. But my firm belief is that those taxes will more than be made up by the benefits of economic development caused by the infrastructure projects themselves, the new housing and robust communities that are made possible by easier commutes, and by the companies who won't move or be scared to open business here due to the problems that currently exist. Importantly, there will also be the intangible benefits that flow from higher quality of life and peoples' ability to spend time together and live their lives more freely.

It won't happen quickly, but it must start now. Some in government are speaking now about a 2nd Bay Tube and expansion of the BART system – I say that this needs to be done immediately. And when I say “immediately,” that is a relative term since building such a system from scratch will likely take much more than a decade.

Stepping back to the present, a very good example of the new “regional” thinking being put into action currently exists: Measure AA on the November ballot is a first-of-its-kind \$12 per lot parcel tax throughout the 9 county Bay Area. It will raise \$25 million per year to restore San Francisco Bay waterfront to restore wildlife habitat and protect against rising seas caused by climate change. It's a tax that benefits anyone living around San Francisco Bay, and it currently polls

above the 2/3 majority
necessary to approve
it. \$12 a year to
safeguard against
rising seas and
improve our
shoreline? Sure, that
sounds like a sound
investment in the
future.

- *Written by William
Scherer*