

# How Calif. Ruling Extends Worker Bias Liability To 3rd Parties

By **Ryan Larocca** (September 15, 2023)

The California Supreme Court's recent unanimous decision in *Raines v. U.S. Healthworks Medical Group* makes clear that when third-party entities, such as background check providers or human resources companies, provide services to employers with California applicants and/or employees, they may be liable to the employers' workers for discrimination and retaliation claims.



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The ruling is significant because now third-party entities with five or more employees may be held directly liable for employment discrimination against another employer's employee when that third-party entity carries out activities regulated by California's Fair Employment and Housing Act on behalf of the employer.

## Employer Liability Under FEHA

California's FEHA prohibits employers from engaging in unlawful discrimination, harassment and retaliation. When such a violation occurs, the FEHA imposes liability on "employers," which "includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly."<sup>[1]</sup> Under the FEHA, "person" includes partnerships, associations, corporations and limited liability companies.

## Who Can Be Held Liable?

Over the last 25 years, the California Supreme Court has clarified that the FEHA does not impose personal liability on individual employees, even if they are considered to be the employer's agent.<sup>[2]</sup>

However, until recently, the court had yet to address whether other types of agents could be held directly liable under the FEHA.

On Aug. 21, the court issued its decision in *Raines v. U.S. Healthworks Medical Group*.<sup>[3]</sup>

The court decided that business-entity agents with five or more employees may be held directly liable as the employer for employment discrimination when that entity carries out FEHA-regulated activities on behalf of the employer. This means businesses that provide employment-related services to California employers can potentially be held liable for FEHA violations.

## The Raines Decision

The Raines case stems from the plaintiffs' receipt of conditional offers of employment, subject to a preemployment medical screening through a third-party vendor.

As part of the screening process, applicants were required to complete a written health history questionnaire prepared by the medical screening company, which included questions unrelated to the job that were about the applicants' private medical history, such as whether the applicants had venereal diseases, cancer or HIV.

Plaintiff Kristina Raines alleged she was ultimately denied the position after she completed the screening questionnaire but refused to answer certain questions.

The plaintiffs filed a lawsuit against the employer and medical screening company asserting claims under the FEHA and other state laws, which was later amended as a class action and then removed to federal court.

Raines settled her claims with her former potential employer but maintained the lawsuit against the third-party medical screening company.

The vendor moved to dismiss the claims against it because it was a third party and thus not covered by the FEHA.

The U.S. District Court for the Southern District of California dismissed the plaintiffs' claims with prejudice, concluding that "the FEHA does not impose liability on the agents of a plaintiff's employer."

The California Supreme Court later granted the U.S. Court of Appeals for the Ninth Circuit's request to resolve the question of whether a business entity may be held directly liable under the FEHA.

The California Supreme Court decided that the medical screening company could be liable under the FEHA. By providing its services to the employer and engaging in FEHA-regulated activity, the screening entity was deemed the employer's agent.

Rather than incorporating the principles of respondeat superior, in which the actual employer would ultimately be held liable for the agent's actions, the court focused on federal anti-discrimination and National Labor Relations Board decisions, in addition to public policy considerations, to conclude that both the employer and the entity most directly responsible for the FEHA violation should each bear direct liability.

The court reasoned that unlike an individual person, a third-party entity employing more than five employees could afford to ensure its own statutory compliance, negotiate with the employer about the employer's statutory compliance and further contract with the employer as to the extent of the entity's role to avoid obligations that may cause the entity to violate the FEHA.

The court refused to address whether the employer's extent of control over the agent's acts affects the agent's liability arising from an FEHA violation.

Instead, the court explained that an agent's independent liability is based on the entity's own engagement in FEHA-regulated activities on the employer's behalf.

### **Effect on Employers**

This decision has a significant impact on third parties providing services to employers with California employees and applicants.

Although the court refused to "identify the specific scenarios in which a business-entity agent will be subject to liability under the FEHA," various circumstances can potentially generate employer-agent liability.

In Raines, the employer's agent was a medical screening vendor, but a variety of business

practices could substitute into that entity's position.

Notably, the California Civil Rights Department — formerly the Department of Fair Employment and Housing — states that California's anti-discrimination laws apply to all business practices, including public agencies.

By way of the Raines decision, this implicates companies offering, among other things, human resources services, advertising services, background checks and screening services, as well as those administering workers' compensation or disability insurance claims.

It is also possible that companies without any California employees may see an influx of FEHA-related claims as well.

In 2016, the FEHA was amended to require employers to consider both out-of-state employees and employees on leave when calculating the threshold requirement of five or more employees.

As a result of these changes, plaintiffs attorneys may make FEHA-based allegations against employers with even a single California employee.

Given the Raines decision and the fact that employees need not be located in California for purposes of counting toward the five-employee threshold, a scenario may arise in which an entity without any California employees is held liable for discrimination under California's FEHA because that company provides employment-related services to an employer with a single California employee.

Even if the third-party entity has five employees all located outside of California, none of whom would be protected by the FEHA, the company could be liable for discrimination against California employees affected by the third-party's services.

### **Impact on Purveyors of Artificial Intelligence**

With the arrival of artificial intelligence and its use among businesses for employment-related services, if an employer relies on AI advice in making employment decisions, the purveyor of that AI service could also be held liable as the agent of the employer.

California's A.B. 331,[4] which is currently before the Assembly Committee on Privacy and Consumer Protection, proposes making the use of an automated decision tool that results in "algorithmic discrimination" an FEHA violation. AI providers should closely monitor this bill and consider the impact of the Raines decision when providing employment-related services to California employers.

### **What's Next**

While the Raines decision expands the list of potential defendants from whom an injured plaintiff may recover, businesses and third-party agents alike can take preventative action to limit their potential liability.

Employers and third-party service providers should ensure their contracts are clear as to indemnity and expectations between the parties.

They should additionally ensure that their policies, practices and procedures are compliant with California's FEHA provisions.

This decision is a warning to both employers and third-party entities to keep one another accountable and compliant with California's FEHA provisions to limit future liability.

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[1] Gov. Code, § 12926 subd. (d) [emphasis added].

[2] *Reno v. Baird* (1998) 18 Cal.4th 640 (Reno); *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 (Jones).

[3] [https://www.cdflaborlaw.com/\\_images/blog\\_files/1713000-1713493-0821califsuprme.pdf](https://www.cdflaborlaw.com/_images/blog_files/1713000-1713493-0821califsuprme.pdf).

[4] [https://www.cdflaborlaw.com/\\_images/content/AB\\_331\\_-\\_Artificial\\_Intelligence.pdf](https://www.cdflaborlaw.com/_images/content/AB_331_-_Artificial_Intelligence.pdf).