

## Update re: Age Discrimination

(Adverse Impact analysis reinstated; Marks v. Loral rejected; August 1999)

Existing law makes it an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, under specified circumstances. In Marks v. Loral Corp. (1997) 57 Cal.App.4th 30, the court held that existing law permits an employer to choose employees with lower salaries, even though this may result in choosing younger employees.

This bill would declare the Legislature's rejection of the opinion in Marks v. Loral Corp., supra, and state that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The bill would also declare the intent of the Legislature that, among other things, the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of this criterion disproportionately affects older workers as a group.

SEC. 2. Section 12941.1 is added to the Government Code [in FEHA], to read:

12941.1. The Legislature hereby declares its rejection of the court of appeal opinion in Marks v. Loral Corp. (1997) 57 Cal.App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal 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. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations.