Recognition and Elimination of Bias

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Federal Laws

California Laws – Retaliation/Discrimination

10 Common Types of Bias – Re: Trading/Business

Why Marijuana Bans are Racist

Battling Cannabusiness Sexism

Recognition and Elimination of Bias

Federal Laws

A. The Civil Rights Act

The Civil Rights Act of 1964, Title VII, Equal Employment Opportunity (Title 42 United States Code, Sections 2000e and following sections) created the Equal Employment Opportunity Commission (EEOC). That commission administers the Act, which is applicable to any employer engaged in interstate commerce who employs 15 or more persons for each working day in each of 20 or more calendar weeks. Most California employers are considered to be engaged in interstate commerce; a telephone or use of the Postal Service is sufficient to bring the employer within the definition.

The Act, and its amendments, provide that it is an unlawful employment practice for an employer, because of the person's:

- Race,
- Color,
- Religion,
- Sex, or
- National origin.

To:

- Fail to hire,
- Refuse to hire,
- Discharge an employee,
- Or otherwise to discriminate against any person
- With respect to compensation, terms, conditions, or privileges of employment, including limiting, segregating, or classifying employees or applicants so as to affect status as an employee.

Comparable prohibitions apply to employment agencies, labor unions, and apprenticeship committees. exceptions to the rule apply:

- When religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the business, or
- When the religion or religious corporation, wholly or in substantial part, owns, supports, controls, or manages the institution, or the curriculum is directed toward the propagation of a particular religion.
- When there is a bona fide national security reason for refusing to hire or denying access to the premises, administered under a federal statute or Presidential (executive) order.

The 1964 Act also provides that an employer cannot discriminate against an employee "because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing. . . ." The same section also provides that notices or advertisements may not provide for classification, preference, limitation, or discrimination based on race, color, religion, sex, or national origin, unless to meet a bona fide occupational qualification for employment.

The Civil Rights Act of 1991 added a subsection to Title VII, making it unlawful for an employer, in hiring or promoting, to adjust employment-related test scores on the basis of race, color, religion, sex, or national origin. The 1991 Act also expanded the definition of "employee" to U.S. citizens employed in a foreign country, provided that compliance with the Act would not cause an employer to violate the law of the foreign country in which the worksite is located.

B. The Americans With Disabilities Act (ADA)

The Americans With Disabilities Act (ADA) became effective on July 26, 1992, for all employers, whether governmental or private, with 25 or more employees. The Act will be extended on July 26, 1994, to employers with 15-24 employees. It is a counterpart to Title VII (see A., above), addressing a discrete group of employees or potential employees - persons with disabilities - that were not covered in the earlier Civil Rights legislation. The ADA prohibits workplace and employment discrimination against individuals with disabilities, as defined below, and covers approximately 43,000,000 American workers with disabilities. The ADA is also administered by the Equal Employment Opportunity Commission (EEOC).

- The term "Americans" refers to all qualified individuals ("qualified" as defined in 2., below) with disabilities, regardless of their citizenship status or nationality.
- "Disability" reflects the most current terminology in use at this time; the term is synonymous with "handicap," as that term is used in the Rehabilitation Act of 1973.

1. Basic Discrimination Rules

Purpose of the ADA: The ADA’s purpose is expressed in Section 12101 of Title 42 of the United States Code:

(1) To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) To ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) To invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by People with disabilities.

The ADA prohibits discrimination against a qualified individual based on a disability in the application, hiring, advancement, compensation, training, discharge, or other terms and conditions of employment. The Act governs:

- Recruitment and job application procedures;
- Hiring, promotion, transfer, termination, layoff, and similar status changes;
- Rates of, and changes in, compensation
- Job assignments and classifications, organizational structures, position descriptions, and seniority;
- Leaves of absence, sick leave, or other leave;
- Fringe benefits, whether or not the employer actually administers them;
- Selection and financial support for training procedures and programs;
- Activities sponsored by an employer, including social and recreational programs;
- Any other term, condition, or privilege of employment;
- Limiting, segregating, and classifying disabled applicants or employees in ways that adversely affect employment opportunities; and
- Making contractual or other arrangements that have the effect of subjecting disabled applicants or employees to prohibited forms of discrimination.

2. "Disabled," Defined

Under the ADA, "disability" is defined as:

- A physical or mental impairment that substantially limits one or more of the major life activities of the employee;
- A record of such an impairment; or
- The perception that one has such an impairment.

a. Physical or Mental Impairment

"Physical or mental impairment" is defined as: 1) any physiological disorder or cosmetic disfigurement, or anatomical loss affecting a major body system, or 2) any mental or psychological disorder such as mental retardation, emotional illness, or specific learning disabilities.

By regulation, "anatomical loss affecting a major body system" is a disability that affects one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

What a Disability Is Not:

NOT INCLUDED in the definition of "disability" are:

- Pregnancy;
- A predisposition to illness or disease; and

- Such temporary and non chronic impairments of short duration such as broken limbs, sprained joints, concussions, appendicitis. and flu.

Also EXCLUDED by statute (Title 42, United States Code, Section 12211) are:

- Homosexuality, bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders not resulting from physical impairments;
- Compulsive gambling;
- Kleptomania;
- Pyromania; or
- Psychoactive substance use disorders resulting from current illegal use of drugs.

Also excluded are physical characteristics such as eye color, hair color, left-handedness, height, weight, and muscle tone that are within the "normal" range and are not the result of a physiological disorder; personality traits such as poor judgment or a quick temper that are not a symptom of a mental or physiological disorder; and environmental, cultural, or economic disadvantages, such as poverty, lack of education or a prison record. The regulations illustrate a distinction, for instance, between persons who are unable to read because they were never taught to read, and those who are unable to read because of dyslexia; the former is not an impairment, while the latter (a learning disability) is considered an impairment. Advanced age, in and of itself, is not an impairment, but various medical condition associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments.

b. "Perception" of Impairment

There are three ways in which a person may be perceived as being impaired:

- The person’s impairment, which is not substantially limiting, is seen by the employer as being substantially limiting;
- The person’s impairment, is only substantially limiting because of the attitudes of others toward the impairment; or
- The individual has no impairment at all, but is regarded by the employer as having a substantially limiting impairment.

A perception of impairment may arise through stereotyping and prejudice. Although persons with severe burn scarring, cerebral palsy, muscular dystrophy, multiple sclerosis, infection with HIV, cancer, heart disease, and certain diabetics and epileptics may not have an actual impairment, the ADA protects such persons because they may face discrimination by those who consider them to be impaired. The name of the impairment or its diagnosis is not determining; the determining factor is the effect of the impairment on the life of the individual. Even if the impairment is kept completely in check with medication or, for instance, a hearing aid, the impairment still exists.

In *School Board of Nassau County v. Arline*, a 1987 U.S. Supreme Court case, the court pointed out that a person may have a qualifying impairment that does not, in fact, substantially limit a major life activity (Ms. Arline was a school teacher with susceptibility to tuberculosis, which is

contagious). "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment," the court stated. "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."

Common attitudinal barriers that frequently result in employers excluding individuals with disabilities include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by co-workers and customers.

c. Record of Impairment

The intent of this provision is, in part, to ensure that people are not discriminated against because of a history of disability (e.g., former cancer patients), or because they have been mis classified as disabled (e.g., learning disabled). Records on which an employer could rely to determine disability are education, medical, or employment records.

The fact that the person is a disabled veteran, or is on disability retirement, or is classified as disabled for other purposes, does not mean the person is disabled for purposes of the ADA (or for purposes of unemployment insurance).

d. Substantial Limitation of One or More Major Life Activities

A physical or mental impairment does not constitute a disability unless it is so severe that it results in a substantial limitation of one or more major life activities.

A "substantial limitation" is one in which the employee or prospective employee is unable to perform that activity, or is significantly restricted in performing it because of the condition, manner, or duration of the activity. The person's level of disability is measured against that of an average person performing the same activity: a significant restriction is an inability to perform either a class of jobs or a broad range of jobs in various classes as compared to an average person.

Example 1:

A claimant was a commercial airline pilot, but had to give up his employment because of a minor vision impairment. He is still able to work as a commercial airline co-pilot or a pilot for a courier or charter service. He is not "substantially limited" because of his impairment.

Example 2:

The claimant, a professional baseball pitcher, developed an arthritic elbow and can no longer throw a baseball. He is, however, not substantially limited in the ability to perform other work.

In Examples 1 and 2, the claimants are not substantially limited in the ability to perform any other major life activity, and are only unable to perform either a particular specialized job or a narrow range of jobs.

In contrast:

Example 3:

The claimant, a construction worker, has a back condition that prevents him from performing any heavy labor job; he is substantially limited because the impairment eliminates the ability to perform a class of jobs.

Factors to consider in determining whether the impairment is substantial include:

- The geographical area to which the person has reasonable access;
- The job from which the person has been disqualified because of the impairment; and other similar jobs, using similar skills, knowledge, and abilities, from which he is also disqualified because of the impairment class of jobs);
- The number of types of jobs not using similar skills, knowledge, and ability, and from which the claimant is also disqualified because of the impairment (broad range of jobs in various classes.)

A "major life activity" encompasses those basic activities that the average person in the general population can perform with little or no difficulty. They consist of functions such as caring for oneself; performing manual tasks such as sitting, standing, lifting, and reaching; walking; seeing; hearing; speaking; breathing; learning; and working. While a paraplegic will have difficulty in the major life activity of walking and a deaf person will have substantial difficulty in hearing, persons with an infected finger are not impaired in a major life activity and are not considered "disabled."

e. "Qualified" Individual

Before the employer can be found to be discriminating against an employee, the employee must be determined to be qualified for the denied job or benefit. Title 42 United States Code, Section 12111(8), provides:

Qualified individual with a disability. - The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires .

Commentary to Title 29 of the Code of Federal Regulations, Section 1630.2(m), provides guidance in determining whether the person with a disability is qualified. It is a two-step process:

(1) Does the individual satisfy the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.? The answer

to this question will indicate whether the employee or prospective employee is "otherwise qualified" for the job in the first place.

(2) Can the individual perform the essential functions of the position held or desired, with or without reasonable accommodation? The employment decision should be based on the capabilities of the person at the time of the employment decision, and not on speculation that the employee may become unable in the future to do the job, or will increase health insurance or workers' compensation costs.

f. "Essential Functions of the Position"

Critical to a determination of whether the individual is qualified for the job is the recognition of which functions of the job are essential to it. "Essential functions" are those that the person holding the position m ust be able to perform unaided, or with the assistance of a reasonable accommodation. Questions to ask include:

(1) Does the employer actually require employees in the position to perform the functions that the employer contends are essential?

(2) If the person holding the position is actually required to perform the function, would removing the function fundamentally alter the Position?

(3) Does the position exist to perform a particular function? (e.g., the ability to read is essential to a person hired to proofread documents.)

(4) Are there other employees available to perform that function, or among whom the job may be distributed? (If the employer has a relatively small number of employees available to perform the work, each employee must perform more than one function; the performance by each employee becomes more critical and the options for reorganizing the work become more limited.)

(5) What is the degree of expertise or skill required? In certain professions and highly skilled positions, the employee is hired for his/her expertise or ability to perform the function; performance of the specialized task is an essential function of the job.

(6) Is the work provided for in a job description, prospectus, or collective bargaining agreement?

(7) What was the work experience of past employees in the job, or of current employees in similar jobs?

(8) How much time is dedicated to performing that function? (If an employee spends the vast majority of the time at a cash register, this becomes evidence that working the cash register is an essential function.)

(9) What are the consequences of failing to perform the job? (Although a firefighter may not regularly carry an unconscious adult out of a burning building, the consequences of failing to require the firefighter to be able to perform this function would be serious.)

NOTE: However, if an employer requires its typists to type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Nor will a hotel who requires its service workers to thoroughly clean 16 rooms per day have to explain why it requires either a thorough cleaning, or 16 rooms. The only requirement imposed upon the employer is that the employer actually impose such a requirement in fact, and not just on paper. An inquiry into essential functions is not intended to second-guess an employer's business judgment concerning production standards, or require employers to lower those standards.

3. Requirement of "Reasonable Accommodation"

An employer is required to provide "reasonable accommodation" to an employee or prospective employee in any of three categories: 1) accommodations required to ensure equal opportunity in the application process; 2) accommodations that enable the disabled employee to perform the essential functions of the job held or desired; and 3) accommodations that enable the employees to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. In addition, an employer cannot prefer or select a qualified individual without a disability over an equally qualified person with a disability because the disabled person will require an accommodation.

"Reasonable accommodation" of a person with a disability may include:

- Making existing facilities used by employees readily accessible and usable, including break rooms, lunch rooms, training rooms, restrooms, etc.;
- Job restructuring, by reallocating or redistributing nonessential, marginal job functions;
- Part-time or modified work schedules:
- Reassignment to a vacant position (available to employees only, not to applicants; reassignment should be considered only when accommodation within the existing position would pose an undue hardship. The reassignment should be to an equivalent position in terms of pay, status, etc., if the individual is qualified and the job is vacant within a reasonable amount of time, determined by the totality of the circumstances.);
- Acquisition or modification of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials or policies;
- Provision of qualified readers or interpreters.

Example:

The claimant is disabled with a back impairment, requiring a special chair. An employer is not required to supply a state-of-the-art mechanical lifting device (the "best" accommodation possible) if it provides the employee with a less expensive or more readily available device that enables the employee to perform the essential functions of the job.

"Reasonable accommodation" may also include allowing the employee access to services even though the employer is not required to supply them. It is a reasonable accommodation for an employer to permit the employee to bring and use a guide dog at work, even though the employer is not required to supply a guide dog for the employee. The employer is only required

to supply job-related accommodation, and not one which helps the person throughout daily activities, off and on the job.

It is the responsibility of the person with a disability to inform the employer that an accommodation is needed; an employer is not required to accommodate disabilities of which he or she has no knowledge. If the need for the accommodation is not obvious, the employer may require the employee to provide documentation of the need for accommodation. The employer may not, however, compel a qualified person with a disability to accept an accommodation.

"Undue Hardship": An employer is expected to make a reasonable accommodation for an employee or potential employee if the person is qualified for the job, but is not expected to undergo undue hardship. "Undue hardship" refers to an accommodation that would require significant difficulty or expense, considering the overall financial resources available, the number of persons employed, and the impact of such accommodation upon the facility's operation. In determining whether the claimant has exercised all reasonable options or alternatives before resorting to a quit, the interviewer will accept the employer's word that he was unable to accommodate the claimant.

Example 1:

The claimant has a disabling visual impairment that makes it extremely difficult to see in dim lighting. He applies for a job as a waiter in a nightclub, and asks that the nightclub be brightly lit as a reasonable accommodation. The nightclub will probably be able to demonstrate that that particular accommodation, although inexpensive, would impose an undue hardship because it would destroy the ambiance of the club or make it more difficult for the customers to see the stage show.

Example 2:

In *Mantolete v. Bolger*, a 1985 Ninth Circuit Court of Appeals decision, Ms. Mantolete was denied employment because she was an epileptic, with what the trial court termed an "elevated risk" of injury. The Ninth Circuit held that an "elevated risk" was not sufficient, and applied the standard of "reasonable probability of substantial harm." They also found that accommodation would have been both simple and inexpensive, consisting of a Plexiglas guard and a $30.00 pair of tongs for clearing paper jams from the equipment; the tongs were already in use at some worksites. (See also, VQ 235)

An employer may require, as a qualification standard (see B.2.e., above) that the employee or potential employee not pose a direct threat to the health or safety of himself or others. Title 29, United States Code, Section 1630.2(r), provides:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical

knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

The standards are to be applied to all applicants and employees, not just to those with disabilities; but if a person poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists, the employer may refuse to hire an applicant or may discharge an employee.

The risk must be a significant risk (a high probability of substantial harm); a slightly increased risk is insufficient. Identification of the risk is made on a case-by-case basis.

- For individuals with mental or emotional disabilities, the employer must identify the specific behavior that poses the direct threat.
- For individuals with physical disabilities, the employer must identify the aspect of the disability that poses the direct threat.
- In both cases, the consideration must rely on objective, factual evidence, and not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes.

Example 1:

The potential employee suffers from narcolepsy, frequently and unexpectedly losing consciousness. The employer is not required to hire the person for a carpentry job requiring the use of power saws and other dangerous equipment.

Example 2:

The potential employee suffers from a stress-related disorder. The employer cannot refuse to hire the potential employee based only on a generalized fear, if there is no factual substantiation of a high probability of substantial harm.

It is the employee's responsibility to advise the employer that reasonable accommodation is needed. The appropriate reasonable accommodation will be mutually determined. The need for accommodation cannot enter into the hiring, discharge, promotion, or similar employment decision, unless the employer can establish that there is no reasonable accommodation that would not impose a hardship.

4. Employment Testing: What Is Required

Employers are required to provide reasonable accommodation if they know, prior to administering the test, that the applicant is disabled and that the disability impairs sensory, manual, or speaking skills.

Title 29, Code of Federal Regulations, Section 1630.11, provides:

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

As accommodation, the employer may:

- Schedule a retest;
- Administer the test in large print or Braille, or via a reader or sign interpreter;
- Evaluate the skill in another manner (through an interview, or through education, license, or work experience requirements);
- Allow additional time to complete the test; or
- Make the test site accessible.

5. Employment Testing: What is Allowed

Note that if the test is administered to test sensory, manual, or speaking skills as part of an essential function of the position, the rule stated above does not apply. In general, the employer is only required to provide reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled. If the applicant or employee, however, does not realize in advance of the test that he or she will need accommodation, the applicant or employee must notify the employer immediately.

6. Association or Relationship With a Person With a Disability

Title 29, Code of Federal Regulations, Section 1630.8, provides:

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

Example:

A qualified applicant without a disability applies for a job, and tells the employer that the spouse has a disability. The employer may not refuse to hire the applicant because the employer believes that the applicant would have to miss work, or leave work early, to care for the spouse.

7 Use of Drugs

a. Current Use of Drugs

A person currently engaging in the illegal use of drugs is not a person with a disability under the Act. "Illegal use of drugs" refers both to contraband drugs and the unlawful use of prescription drugs.

By the phrase "currently engaging," the Act does not require the drugs) to have been taken the day of, or even the week before, the personnel action. By "currently engaging," the Act refers to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.

b Drug Rehabilitation

Persons who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are considered disabled for purposes of the Act.

In *Nisperos v. Buck*, a 1989 District Court case, Mr. Nisperos was an attorney for the Immigration and Naturalization Service in San Francisco. His work did not reveal any drug-related problems, and he received favorable reviews. In August, Mr. Nisperios told his supervisor that he wanted to enter a detoxification program for substance abuse, but he did not enter the program because of planned attendance at training classes. In September, Mr. Nisperos fired a shot at an imaginary intruder and realized that he needed immediate help. He applied to the Veterans' Administration Hospital, but was told there would be a two-week wait for admission. The following day, he was arrested in his home for being under the influence of cocaine and for possession of narcotic paraphernalia. He entered an in-patient rehabilitation program, and the charges against him were dismissed following the completion of the drug diversion program. While in the treatment program, Mr. Nisperos was on leave without pay. Two days after he completed the in-patient treatment program, he was notified he was being terminated for cocaine use and the arrest.

Mr. Nisperos sued for reinstatement under the Rehabilitation Act, which contained terms substantially similar to those of the ADA. The court found that Mr. Nisperos was "regarded as having . . . an impairment" by the INS, and was "rehabilitated or rehabilitating" at the time he was terminated. The court continued:

Defendant's main contention, and the crucial issue before the Court, is that Nisperos' use of illegal drugs and his related arrest alone disqualify him from employment . . . in other words, that freedom from past drug use and related arrest is an essential qualification for the job. . . . The burden is on the defendant to demonstrate that its asserted essential qualification is truly essential and is not merely a "remote concern." (Emphasis in original.)

Defendant contends that an admitted drug user criminally involved with drugs cannot be qualified to be an INS general attorney because a general attorney's duties include representing the INS in deportation proceedings, and some deportation proceedings are based on the alien's

use of illegal drugs. In addition, a general attorney may be called on to render advice and assistance regarding drug laws to INS border patrol agents and other INS personnel . . .

While in the best of all worlds attorneys should not be involved with drugs, defendant must do more than recite broad generalizations to demonstrate that a drug-free history is an "essential" element of a general attorney's job. The INS has made no showing that Nisperos' employment would "pose a danger to Public health or safety or the national security." The link between the former drug use of a rehabilitated addict and the impact of the legal opinions he might render to INS personnel is too tenuous to support the contention that a drug-free history is an essential requirement of Nisperos' position.

Mr. Nisperos was granted summary judgment.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough to be considered a real and ongoing problem. Employers may adopt reasonable policies and procedures, including drug testing, to determine that the employee is no longer using illegal drugs.

8. Employment Applications

Employers are prohibited from asking certain questions on employment applications. Employers may not ask, "Do you have any disabilities? If you do, what are their nature and severity?" and "Do you receive, or have you received, Workers Compensation?"

The employer may ask: "Are you able to perform the functions of this job?"

C. The Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act (FLSA) is a federal act; its counterpart in state law is the (California) Industrial Welfare Commission's Wage Orders. Most California employers are subject to both California and federal law; the following discussion is confined to just the FLSA.

1. Who is Covered?

An employee is protected by the FLSA minimum wage and overtime rules if:

- The employee is engaged in interstate commerce. "Interstate commerce" is defined as any commerce (i.e., commercial transactions) between a state and another state, or a state and any place outside the state, incoming or outgoing. The employee's involvement must be in production, manufacturing, mining, handling, or transportation of goods in interstate commerce, or "any closely related process or occupation directly essential" to the Production.
- The dollar/volume test. If the business is "an enterprise engaged in commerce or the production of goods for commerce" and meets certain dollar and volume tests, all employees of the business will be covered, regardless of their actual duties.

2. Who is Exempt From Coverage?

There are three major categories of exemption: for "executive" employees, for "administrative" employees, and for "professional" employees. The definitions of these terms are detailed and will not be covered here, except to say that there is a "duty" requirement and a "salary" requirement before the exemptions become effective.

Additional, minor categories include outside salespersons and independent contractors.

3. What Are the Benefits Under the FLSA?

In the event that a separation or job refusal occurs out-of-state, interviewers should be generally familiar with the federal requirements. Employees who are covered by the FLSA are protected in the following:

- They must be paid the federal minimum hourly wage (but if the California minimum wage is higher, the California provisions will control for California employees).
- They must be paid premiums for split shifts.
- They must be paid overtime for hours worked in excess of 40 in a workweek (California law is different).

Other states may also have rules similar to California's Industrial Welfare Commission Orders; the affected employer should be able to relate their provisions, which may control the employment situation, either separation or job refusal.

D. The Worker Adjustment and Retraining Notification Act (WARN)

The Worker Adjustment and Retraining Notification Act (WARN) became effective February 4, 1989, to require an employer to give 60 days' notice for an "en masse" layoff or plant closing. It is administered by the Department of Labor.

1. Affected Employers, and Exceptions

WARN applies to employers employing 100 or more employees who work, in aggregate, at least 4,000 hours per week, excluding overtime. The employment may be for profit or nonprofit. There are special rules for seasonal fluctuations, as well as for independent contractors and subsidiaries.

Exceptions to the 60-day notice requirement concern part-time employees, fewer than 50 employees affected, temporary hires, strike or lockout situations, a good-faith belief that notice would hinder corporate refinancing, unforeseen circumstances (such as loss of a contract), and Acts of God (flood, earthquake, drought).

2. Notice Requirement

An affected employer cannot order a plant closing or mass layoff until 60 days after it serves notice to:

- The authorized union representative for the employees affected:
- Each affected employee, if there is no union representative;
- The state dislocated worker unit (EDD); and
- The chief elected official in the area in which the layoff or plant closing will occur.

E. The Federal Unemployment Tax Act (FUTA)

The Federal Unemployment Tax Act, or FUTA, is the federal law that underlies the California Unemployment Insurance Code. There are specific sections of FUTA that specifically affect the payment of benefits:

1. Job Refusals: Strike, Lockout, Other Labor Dispute

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Section 1259, and Provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that:

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike. lockout. or other labor dispute;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(For discussion, please refer to Trade Dispute BDG.)

2. Job Refusals: Prevailing Wage

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Section 1259, and provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that :

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

(For discussion, please refer to Suitable Work BDG.)

3. Lag Period Claims

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Section 1281(a), and provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that:

(B)(7) an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit Year.

(For discussion, please refer to Miscellaneous BDG.)

4. State-Approved Training

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Section 1267, and provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that:

(8) compensation shall not be denied to an individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work).

Unemp. Ins. Code Article 1.5, Retraining Benefits, was to sunset January 1, 1993, but was amended and extended by passage of Senate Bill 2004 to January 1, 1997. (For discussion, please refer to FOM California Training Benefits.)

5. Interstate Claims

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Sections 451 through 454, and provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that:

(9)(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation.

6. Combined Wage Claims

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Sections 455 through 456, and provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that:

(9)(B) the State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for (i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and (ii) avoiding duplicate use of wages and employment by reason of such combining.

7. Cancellation of Wage Credits

26 USC Section 3304(a) is the basis for Unemp. Ins. Code Section 1260.1, and provides:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that:

(10) compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct in connection with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income .

8. Pregnancy

26 USC Section 3304(a)(12) is not specifically addressed by the Unemp. Ins. Code, but is implicit in the requirements of "real, substantial, and compelling" for separations, and "ready, willing, and able" in availability determinations. The federal section Provides:

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy .

9. School Employees and Athletes

26 USC 3304 Sections (a)(6)(A) and (a)(6)(B) apply to school employees, and Section (a)(13) applies to athletes. These sections are incorporated into Unemp. Ins. Code Sections 1253.3 and 1253.4. For school employees, please refer to the School Employee Claims Handbook.

10. Aliens

26 USC Section 3304(a)(14) applies to aliens, and is incorporated into Unemp. Ins. Code Section 1264. Please refer to Miscellaneous BDG, MI 50.

11. Deductible Pensions

26 USC Section 3304(a)(15) refers to periodic pension payments. Please refer to Total and Partial Unemployment BDG.

12. Department of Labor Certification

Each year, on October 31, the Secretary of Labor must certify that the states are complying with federal law. If a state has amended its law so that the above provisions are no longer present, or the state has failed to comply substantially with the provisions even if they are present, the Secretary of Labor must provide notice and a hearing to the Governor before denying the certification. Failure of certification means that there will be no Unemployment Trust Fund moneys forwarded to the state for unemployment insurance purposes.

http://www.edd.ca.gov/UIBDG/Preface_PR_25.htm

California Laws that Prohibit Retaliation and Discrimination

The following is a list of laws enforced by the Labor Commissioner that specifically prohibit discrimination and retaliation against employees and job applicants.

1. **Labor Code section 96(k)**
   Protects an employee from loss of wages as a result of a failure to hire, demotion, suspension, or discharge from employment because the employee engaged in lawful conduct asserting "recognized constitutional rights" occurring during nonworking hours away from the employer's premises.
2. **Labor Code section 98.6**
   Protects an employee filing or threatening to file a claim or complaint with the Labor Commissioner, instituting or causing to be instituted any proceeding relating to rights under the

jurisdiction of the Labor Commissioner, or testifying in any such proceeding, complaining orally or in writing about unpaid wages, or for exercising (on behalf of oneself or other employees) any of the rights provided under the Labor Code or Orders of the Industrial Welfare Commission, including, but not limited to, the right to demand payment of wages due, the right to express opinions about, support or oppose an alternative workweek election, or the exercise of any other right protected by the Labor Code. In addition to other remedies that might be available, a civil penalty of up to $10,000 may be awarded to an employee for each violation of Labor Code section 98.6. Also, protects an employee who is a family member of a person who has or is perceived to have engaged in any protected conduct.

3. **Labor Code section 230(a)**
   Prohibits an employer from discharging or in any manner retaliating against an employee for taking time off to serve on a jury provided the employee gives reasonable notice that he or she is required to serve.
4. **Labor Code section 230(b)**
   Protects an employee who is a victim of a crime, who takes time off to appear in court to comply with a subpoena or other court order as a witness to a judicial proceeding.
5. **Labor Code section 230(c)**
   Prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, and/or stalking for taking time off from work to obtain or attempt to obtain relief to help ensure his or her health, safety, or welfare, or that of his or her child or children. (The complaint must be filed within one year from the date of occurrence of the violation.)
6. **Labor Code section 230(e)**
   An employer shall not discharge or in any manner discriminate or retaliate against an employee because of the employee's status as a victim of domestic violence, sexual assault, and/or stalking, if the victim provides notice to the employer of the status or the employer has actual knowledge of the status. (The complaint must be filed within one year from the date of occurrence of the violation.)
7. **Labor Code section 230(f)**
   An employer of any size shall provide reasonable accommodations for a victim of domestic violence, sexual assault, and/or stalking who requests an accommodation for the safety of the victim while at work. (The complaint must be filed within one year from the date of occurrence of the violation.)
8. **Labor Code section 230.1**
   Protects an employee who is a victim of domestic violence, sexual assault, and/or stalking and works for an employer with 25 or more employees who takes time off to seek medical attention, to obtain services from a domestic violence program or psychological counseling, or to participate in safety planning. (The complaint must be filed within one year from the date of occurrence of the violation.)
9. **Labor Code section 230.2(b)**
   Requires an employer to allow an employee who is a victim of a crime, an immediate family member of a victim, a registered domestic partner of a victim, or the child of a registered domestic partner of a victim to take time off from work to attend judicial proceedings related to that crime. (The complaint must be filed within one year from the date of occurrence of the violation.)
10. **Labor Code section 230.3**
    Protects an employee who takes time off to perform emergency duty as a volunteer firefighter, a reserve peace officer, or an officer, employee, or member of a disaster medical response

entity sponsored or requested by the State. An employee who is a health care provider must notify his or her employer at the time the employee becomes designated as emergency response personnel and when the employee is notified that he or she will be deployed as a member of a disaster medical response team.

11. **Labor Code section 230.4**
    Protects an employee who is a volunteer firefighter, a reserve peace officer, or emergency rescue personnel, and works for an employer employing 50 or more employees, from being discriminated or retaliated against because he or she has taken time off to engage in fire or law enforcement training. The employee is permitted to take up to an aggregate of 14 days per calendar year for such training.
12. **Labor Code section 230.5**
    Protects an employee who is a victim of an offense listed under Labor Code section 230.5 for taking time off from work, to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a postarrest release decision, plea, sentencing, postconviction release decision, or any proceeding in which a right of the victim is at issue. A victim is any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the person's spouse, parent, child, sibling, or guardian. (The complaint must be filed within one year from the date of occurrence of the violation.)
13. **Labor Code section 230.7** and **Education Code section 48900.1**
    Protects an employee who is the parent or guardian of a pupil for taking time off from work to appear in the pupil's school at the request of the pupil's teacher, if the employee, prior to taking the time off, gives reasonable notice to the employer that he or she is requested to appear at the school.
14. **Labor Code section 230.8**
    Protects an employee who is a parent (including stepparent, foster parent, or person who stands in loco parentis to the child), guardian, or grandparent, and who is employed by an employer who employs 25 or more employees, for taking time off from work (up to 40 hours each year, not exceeding eight hours in any calendar month) to participate in activities of the child's school, for school emergencies, or to locate or enroll the child in school or with a child care provider.
15. **Labor Code sections 232(a) and (b)**
    Prohibits an employer from requiring an employee, as a condition of employment, to refrain from disclosing or discussing the amount of his or her wages or requiring an employee to sign a waiver or other document that purports to deny the employee the right to disclose or discuss his or her wages.
16. **Labor Code section 232.5**
    Prohibits an employer from requiring that an employee refrain from disclosing or discussing information about the employer's working conditions, and from requiring an employee to sign a waiver or other document that restricts or denies the employee the right to disclose or discuss information about the employer's working conditions.
17. **Labor Code section 233** and **234**
    Prohibits retaliation for using or attempting to use sick leave that accrued during six months for a reason allowed under section 246.5. Section 234 provides that an employer's "absence control" policies that punish sick leave taken pursuant to section 233 are a violation of section 233.
18. **Labor Code section 244**
    Reporting or threatening to report an employee's, former employee's, or prospective

employee's citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the Labor Code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. Claims of immigration-related retaliation may be processed by the Labor Commissioner under this section, in conjunction with section 98.6, which prohibits retaliation against employees, former employees, and prospective employees for exercising their rights under the Labor Code.

19. **Labor Code sections 245-249**
    Protects an employee who uses accrued paid sick leave, files a complaint with the Labor Commissioner claiming paid sick leave, alleges a violation of paid sick leave rights, cooperates in an investigation or prosecution under this statute, or opposes a policy or practice prohibited by this statute. Employers are prohibited from denying an employee the right to use paid sick leave, or discharging, threatening to discharge, demoting, suspending or in any manner discriminating against an employee who exercises these rights. There is a REBUTTABLE presumption of unlawful retaliation if the employer acts in a manner described above within 30 days of the employee's request for leave or other protected activity. In addition to other remedies that might be available, an administrative penalty of up to $4,000 may be awarded.
20. **Labor Code section 432.7**
    Protects the right of an applicant for employment not to disclose information concerning an arrest or detention that did not result in conviction, or any information regarding referral to, and participation in, any pretrial or posttrial diversion program. Protects the right of an applicant for employment not to disclose information about his or her criminal history that occurred while the applicant was subject to juvenile court law. Prohibits an employer from seeking or using as a factor in an employment decision, any record of an arrest or detention that did not result in a conviction. Provides exceptions for law enforcement employment, health facilities, concessionaires and other specific employment situations.
21. **Labor Code section 432.8**
    Protects the rights of an applicant for employment or employee from disclosing information regarding a conviction related to the possession of marijuana where the conviction is more than two years old.
22. **Labor Code section 432.9**
    A state or local agency shall not ask an applicant for employment to disclose information concerning the conviction history of the applicant until the agency has determined the applicant meets the minimum qualifications for the position as stated in any notice for the position.
23. **Labor Code section 752**
    Ensures that employees in non-unionized smelters or underground mines have a right to a fair and impartial election to establish a workday greater than eight hours. In addition to other remedies that might be available, a civil penalty of up to $200 for each violation for each affected employee may be awarded.
24. **Labor Code section 1019**
    Prohibits certain unfair immigration-related practices in retaliation for engaging in activities protected by the Labor Code and local ordinances. Unfair immigration-related practices include: requesting more or different documents than are required by federal immigration laws; refusing to accept such documents when they reasonably appear on their face to be genuine; using the federal E-Verify system to check the employment authorization of a person at a time or in a manner not required under federal law; filing or threatening to file a false police

report or a false report or complaint with any State or federal agency, including the Federal Immigration and Customs Enforcement Agency ("ICE"); or contacting or threatening to contact immigration authorities. Labor Code section 1019 creates a private right of action in court for victims of unfair immigration-related practices that are retaliatory. The Labor Commissioner will process such complaints under Labor Code section 98.6, which prohibits retaliation for engaging in rights protected under the Labor Code.

25. **Labor Code section 1019.1**
    Makes it an unlawful practice for an employer to request more or different documents than those required by federal immigration law, refuse to honor documents that appear to be genuine, or attempt to reinvestigate or reverify any incumbent employee's authorization to work using an unfair immigration-related practice. In addition to other remedies that might be available, a penalty of up to $10,000 may be awarded for each violation.
26. **Labor Code section 1024.6**
    An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information based on a lawful change of name, social security number, or federal employment authorization document.
27. **Labor Code sections 1025-1028**
    Every private employer regularly employing 25 or more employees shall provide reasonable accommodations for an employee to participate in an alcohol or drug rehabilitation program. If the employee believes that he or she has been denied such reasonable accommodation, he or she may file a retaliation complaint with the Labor Commissioner's office.
28. **Labor Code sections 1030-1033**
    Prohibits retaliation against an employee who requests a lactation accommodation or who attempts to express breast milk. Every employee desiring to express breast milk for the employee's infant child shall be provided a reasonable amount of break time to do so. The break time shall, if possible, run concurrently with any break time already provided to the employee. Break time for an employee that does not run concurrently with the rest time authorized for the employee by the applicable wage order of the Industrial Welfare Commission need not be paid. The employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private. The room or location may include the place where the employee normally works if it otherwise meets the requirements of this section. An employer is not required to provide an employee break time for purposes of lactating if to do so would seriously disrupt the operations of the employer. Retaliation for requesting or using this accommodation is prohibited and will be investigated under Labor Code section 98.6. In addition to other remedies that might be available, a civil penalty of up to $100 for each violation may be awarded.
29. **Labor Code section 1041-1044**
    Every private employer regularly employing 25 or more employees shall reasonably accommodate and assist any employee who reveals a problem of illiteracy and requests the employer's assistance in enrolling in an adult literacy education program. An employee who believes she or he has been denied reasonable accommodation to enroll and participate in an adult literacy education program may file a retaliation complaint with the Labor Commissioner's office.
30. **Labor Code section 1101**
    Protects employees who engage or participate in politics or who become candidates for public

office. An employer may not make, adopt, or enforce any rule, regulation or policy that forbids, controls, directs or tends to direct the political activities or affiliations of employees.

31. **Labor Code sections 1102**
    Prohibits an employer from coercing, influencing or attempting to coerce or influence employees' political action or political activity.
32. **Labor Code section 1102.5**
    Protects against retaliation for disclosing information, or because an employer believes an employee has disclosed information, to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has the authority to investigate, discover, or correct a violation where employee reasonably believes that the information discloses a violation of a state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Protects an employee who refuses to participate in an activity that would result in a violation of a state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Protects an employee who exercised his or her rights under Labor Code section 1102.5 in any former employment. Protects an employee who is a family member of a person who has or is perceived to have engaged in any protected conduct. In addition to other remedies that might be available, a civil penalty of up to $10,000 may be awarded for each violation.
33. **Labor Code section 1171**
    Protects individuals participating in a national service program (e.g., AmeriCorps), for refusing to work overtime for any legitimate reason.
34. **Labor Code section 1197.5**
    Allows an employee who is paid at a wage rate less than the rate paid to an employee of the opposite sex, or another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and which is performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on a bona fide factor other than sex, race, or ethnicity, to file a claim for unequal pay with the Labor Commissioner's office. A civil action to recover wages under section 1197.5(a) may be commenced no later than two years after the cause of action occurs, except that a civil action arising out of a willful violation may be commenced no later than three years after the cause of action occurs. The same filing period will be used for a claim filed with the Labor Commissioner for equal pay as the filing period for a civil action. Also protects an employee who invokes or assists with the enforcement of the equal pay law, discloses his or her own wages, discusses the wages of others, inquires about another employee's wages, or aids or encourages any other employee to exercise his or her rights under this section and is retaliated against. A complaint with the Labor Commissioner alleging retaliation must be filed within six (6) months of the adverse action.
35. **Labor Code section 1198.3**
    Prohibits retaliation against an employee who refuses to work hours in excess of those permitted by the Industrial Welfare Commission (IWC) Orders.
36. **Labor Code section 1311.5**
    Provides for triple damages for individuals who are retaliated against for having filed a claim or civil action alleging a Labor Code violation occurring while the individual was a minor, even if the claim was filed after the individual reached 18. Extends the time limit for claims under the Labor Code, including claims for unpaid wages and retaliation claims, such that the time limit does not begin to run until the individual turns 18.

37. **Labor Code section 1512**
    Prohibits retaliation against an employee who exercises the right to take a paid leave of absence for the purpose of donating his or her organ or bone marrow to another person.
38. **Labor Code section 2814**
    Makes it unlawful to use E-Verify to check the employment authorization status of an existing employee or applicant who has not been offered employment at a time or in a manner not required by federal law, authorized by a federal agency, or as a condition of receiving federal funds. An employer who has offered employment to an applicant can lawfully utilize the federal E-Verify system to check the employment authorization status of a person who has been offered employment. Requires that the employer furnish to the employee any no-match notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee's E-Verify case. In addition to other remedies that might be available, each unlawful use of the E-Verify system carries a civil penalty not to exceed $10,000.
39. **Labor Code section 2929(b) and (c)**
    Prohibits discrimination because the garnishment of an employee's wages has been threatened, or because his or her wages have been subjected to garnishment for the payment of one judgment. The employee shall give notice to his or her employer of his or her intention to make a wage claim within 30 days after being discharged, and file a wage claim with the Labor Commissioner within 60 days after being discharged.
40. **Labor Code section 2930**
    Protects an employee who is disciplined or discharged based on a shopping investigator's report of the employee's conduct, performance, or honesty when the employee was **not** provided with of copy of the report before the discipline or discharge. The shopping investigator must be licensed under the Business and Professions Code for this section to apply.
41. **Labor Code section 6310**
    Protects an employee who: (1) complains about safety or health conditions or practices, (2) institutes or causes to be instituted any proceeding relating to the employee's rights to safe and healthful working conditions, or testifies in any such proceeding, (3) exercises any rights under the California Occupational Safety and Health Act, or (4) participates in an occupational health and safety committee established pursuant to Labor Code section 6401.7. Protects an employee who is a family member of a person who has or is perceived to have engaged in any protected conduct.
42. **Labor Code section 6311**
    Protects an employee who refuses to perform work in the performance of which the Labor Code, any occupational safety or health standard, or any safety order would be violated where the violation would create a real and apparent hazard to the employee or her or his co-workers.
43. **Labor Code section 6399.7**
    Protects an employee who complains or testifies regarding non-compliance with the Hazardous Substances Information and Training Act.
44. **Labor Code section 6403.5**
    Protects an employee who refuses to lift, reposition, or transfer a patient due to the health care worker's concerns about patient or worker safety or because of the lack of trained lift team personnel or equipment.
45. **Health and Safety Code section 1596.881** and **1596.882**
    Protects an employee who: (1) complains about the violation of any licensing or other laws relating to child day care facilities (e.g., staff-child ratios, transportation of children, or child abuse), (2) institutes or cause to be instituted any proceeding against the employer relating to

the violation of any licensing or other laws, (3) appears as a witness or testifies in a proceeding relating to the violation of any licensing or other laws, or (4) refuses to perform work in violation of a licensing or other law or regulation after notifying the employer of the violation. A claim by the employee alleging the violation by the employer of section 1596.881 shall be presented to the employer within 45 days after the action as to which complaint is made, and presented to DLSE not later than 90 days after the action as to which complaint is made.

46. **Unemployment Insurance Code section 1237**
    Protects an employee who seeks information from the Employment Development Department (EDD) concerning rights under the Unemployment Insurance Code or Labor Code, cooperates with any investigation undertaken by EDD, or testifies in any proceeding brought pursuant to the Unemployment Insurance Code or the Labor Code.
47. **IWC Orders 1 through 13, section 3(C)(8); IWC Order 16, section 3(C)(7); and IWC Order 17, section 5 "Election Procedures" (H)**
    Protects an employee who expresses an opinion concerning an alternative workweek election or for opposing or supporting its adoption or repeal.

Please note: Except for the Labor Commissioner's enforcement of the California Equal Pay Act (as noted in #33 above), the Department of Fair Employment and Housing (DFEH) maintains the authority to investigate complaints of discrimination (based on race, religion, sexual orientation, gender, national origin, etc.) in the areas of employment, housing, public accommodations and hate violence. The National Labor Relations Board (NLRB) investigates complaints of unfair labor practices by employers and unions.

http://www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm

California Laws that Prohibit Retaliation and Discrimination

The following is a list of laws enforced by the Labor Commissioner that specifically prohibit discrimination and retaliation against employees and job applicants.

1. **Labor Code section 96(k)**
   Protects an employee from loss of wages as a result of a failure to hire, demotion, suspension, or discharge from employment because the employee engaged in lawful conduct asserting "recognized constitutional rights" occurring during nonworking hours away from the employer's premises.
2. **Labor Code section 98.6**
   Protects an employee filing or threatening to file a claim or complaint with the Labor Commissioner, instituting or causing to be instituted any proceeding relating to rights under the jurisdiction of the Labor Commissioner, or testifying in any such proceeding, complaining orally or in writing about unpaid wages, or for exercising (on behalf of oneself or other employees) any of the rights provided under the Labor Code or Orders of the Industrial Welfare Commission, including, but not limited to, the right to demand payment of wages due, the right to express opinions about, support or oppose an alternative workweek election, or the exercise of any other right protected by the Labor Code. In addition to other remedies that might be available, a civil penalty of up to $10,000 may be awarded to an employee for each violation of Labor Code section 98.6. Also, protects an employee who is a family member of a person who has or is perceived to have engaged in any protected conduct.
3. **Labor Code section 230(a)**
   Prohibits an employer from discharging or in any manner retaliating against an employee for taking time off to serve on a jury provided the employee gives reasonable notice that he or she is required to serve.
4. **Labor Code section 230(b)**
   Protects an employee who is a victim of a crime, who takes time off to appear in court to comply with a subpoena or other court order as a witness to a judicial proceeding.
5. **Labor Code section 230(c)**
   Prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, and/or stalking for taking time off from work to obtain or attempt to obtain relief to help ensure his or her health, safety, or welfare, or that of his or her child or children. (The complaint must be filed within one year from the date of occurrence of the violation.)
6. **Labor Code section 230(e)**
   An employer shall not discharge or in any manner discriminate or retaliate against an employee because of the employee's status as a victim of domestic violence, sexual assault, and/or stalking, if the victim provides notice to the employer of the status or the employer has actual knowledge of the status. (The complaint must be filed within one year from the date of occurrence of the violation.)
7. **Labor Code section 230(f)**
   An employer of any size shall provide reasonable accommodations for a victim of domestic violence, sexual assault, and/or stalking who requests an accommodation for the safety of the victim while at work. (The complaint must be filed within one year from the date of occurrence of the violation.)

8. **Labor Code section 230.1**
   Protects an employee who is a victim of domestic violence, sexual assault, and/or stalking and works for an employer with 25 or more employees who takes time off to seek medical attention, to obtain services from a domestic violence program or psychological counseling, or to participate in safety planning. (The complaint must be filed within one year from the date of occurrence of the violation.)
9. **Labor Code section 230.2(b)**
   Requires an employer to allow an employee who is a victim of a crime, an immediate family member of a victim, a registered domestic partner of a victim, or the child of a registered domestic partner of a victim to take time off from work to attend judicial proceedings related to that crime. (The complaint must be filed within one year from the date of occurrence of the violation.)
10. **Labor Code section 230.3**
    Protects an employee who takes time off to perform emergency duty as a volunteer firefighter, a reserve peace officer, or an officer, employee, or member of a disaster medical response entity sponsored or requested by the State. An employee who is a health care provider must notify his or her employer at the time the employee becomes designated as emergency response personnel and when the employee is notified that he or she will be deployed as a member of a disaster medical response team.
11. **Labor Code section 230.4**
    Protects an employee who is a volunteer firefighter, a reserve peace officer, or emergency rescue personnel, and works for an employer employing 50 or more employees, from being discriminated or retaliated against because he or she has taken time off to engage in fire or law enforcement training. The employee is permitted to take up to an aggregate of 14 days per calendar year for such training.
12. **Labor Code section 230.5**
    Protects an employee who is a victim of an offense listed under Labor Code section 230.5 for taking time off from work, to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a postarrest release decision, plea, sentencing, postconviction release decision, or any proceeding in which a right of the victim is at issue. A victim is any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the person's spouse, parent, child, sibling, or guardian. (The complaint must be filed within one year from the date of occurrence of the violation.)
13. **Labor Code section 230.7** and **Education Code section 48900.1**
    Protects an employee who is the parent or guardian of a pupil for taking time off from work to appear in the pupil's school at the request of the pupil's teacher, if the employee, prior to taking the time off, gives reasonable notice to the employer that he or she is requested to appear at the school.
14. **Labor Code section 230.8**
    Protects an employee who is a parent (including stepparent, foster parent, or person who stands in loco parentis to the child), guardian, or grandparent, and who is employed by an employer who employs 25 or more employees, for taking time off from work (up to 40 hours each year, not exceeding eight hours in any calendar month) to participate in activities of the child's school, for school emergencies, or to locate or enroll the child in school or with a child care provider.
15. **Labor Code sections 232(a) and (b)**
    Prohibits an employer from requiring an employee, as a condition of employment, to refrain

from disclosing or discussing the amount of his or her wages or requiring an employee to sign a waiver or other document that purports to deny the employee the right to disclose or discuss his or her wages.

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    Prohibits an employer from requiring that an employee refrain from disclosing or discussing information about the employer's working conditions, and from requiring an employee to sign a waiver or other document that restricts or denies the employee the right to disclose or discuss information about the employer's working conditions.
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    Prohibits retaliation for using or attempting to use sick leave that accrued during six months for a reason allowed under section 246.5. Section 234 provides that an employer's "absence control" policies that punish sick leave taken pursuant to section 233 are a violation of section 233.
18. **Labor Code section 244**
    Reporting or threatening to report an employee's, former employee's, or prospective employee's citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the Labor Code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. Claims of immigration-related retaliation may be processed by the Labor Commissioner under this section, in conjunction with section 98.6, which prohibits retaliation against employees, former employees, and prospective employees for exercising their rights under the Labor Code.
19. **Labor Code sections 245-249**
    Protects an employee who uses accrued paid sick leave, files a complaint with the Labor Commissioner claiming paid sick leave, alleges a violation of paid sick leave rights, cooperates in an investigation or prosecution under this statute, or opposes a policy or practice prohibited by this statute. Employers are prohibited from denying an employee the right to use paid sick leave, or discharging, threatening to discharge, demoting, suspending or in any manner discriminating against an employee who exercises these rights. There is a REBUTTABLE presumption of unlawful retaliation if the employer acts in a manner described above within 30 days of the employee's request for leave or other protected activity. In addition to other remedies that might be available, an administrative penalty of up to $4,000 may be awarded.
20. **Labor Code section 432.7**
    Protects the right of an applicant for employment not to disclose information concerning an arrest or detention that did not result in conviction, or any information regarding referral to, and participation in, any pretrial or posttrial diversion program. Protects the right of an applicant for employment not to disclose information about his or her criminal history that occurred while the applicant was subject to juvenile court law. Prohibits an employer from seeking or using as a factor in an employment decision, any record of an arrest or detention that did not result in a conviction. Provides exceptions for law enforcement employment, health facilities, concessionaires and other specific employment situations.
21. **Labor Code section 432.8**
    Protects the rights of an applicant for employment or employee from disclosing information regarding a conviction related to the possession of marijuana where the conviction is more than two years old.

22. **Labor Code section 432.9**
    A state or local agency shall not ask an applicant for employment to disclose information concerning the conviction history of the applicant until the agency has determined the applicant meets the minimum qualifications for the position as stated in any notice for the position.
23. **Labor Code section 752**
    Ensures that employees in non-unionized smelters or underground mines have a right to a fair and impartial election to establish a workday greater than eight hours. In addition to other remedies that might be available, a civil penalty of up to $200 for each violation for each affected employee may be awarded.
24. **Labor Code section 1019**
    Prohibits certain unfair immigration-related practices in retaliation for engaging in activities protected by the Labor Code and local ordinances. Unfair immigration-related practices include: requesting more or different documents than are required by federal immigration laws; refusing to accept such documents when they reasonably appear on their face to be genuine; using the federal E-Verify system to check the employment authorization of a person at a time or in a manner not required under federal law; filing or threatening to file a false police report or a false report or complaint with any State or federal agency, including the Federal Immigration and Customs Enforcement Agency ("ICE"); or contacting or threatening to contact immigration authorities. Labor Code section 1019 creates a private right of action in court for victims of unfair immigration-related practices that are retaliatory. The Labor Commissioner will process such complaints under Labor Code section 98.6, which prohibits retaliation for engaging in rights protected under the Labor Code.
25. **Labor Code section 1019.1**
    Makes it an unlawful practice for an employer to request more or different documents than those required by federal immigration law, refuse to honor documents that appear to be genuine, or attempt to reinvestigate or reverify any incumbent employee's authorization to work using an unfair immigration-related practice. In addition to other remedies that might be available, a penalty of up to $10,000 may be awarded for each violation.
26. **Labor Code section 1024.6**
    An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information based on a lawful change of name, social security number, or federal employment authorization document.
27. **Labor Code sections 1025-1028**
    Every private employer regularly employing 25 or more employees shall provide reasonable accommodations for an employee to participate in an alcohol or drug rehabilitation program. If the employee believes that he or she has been denied such reasonable accommodation, he or she may file a retaliation complaint with the Labor Commissioner's office.
28. **Labor Code sections 1030-1033**
    Prohibits retaliation against an employee who requests a lactation accommodation or who attempts to express breast milk. Every employee desiring to express breast milk for the employee's infant child shall be provided a reasonable amount of break time to do so. The break time shall, if possible, run concurrently with any break time already provided to the employee. Break time for an employee that does not run concurrently with the rest time authorized for the employee by the applicable wage order of the Industrial Welfare Commission need not be paid. The employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private. The room or location may include the place where the

employee normally works if it otherwise meets the requirements of this section. An employer is not required to provide an employee break time for purposes of lactating if to do so would seriously disrupt the operations of the employer. Retaliation for requesting or using this accommodation is prohibited and will be investigated under Labor Code section 98.6. In addition to other remedies that might be available, a civil penalty of up to $100 for each violation may be awarded.

29. **Labor Code section 1041-1044**
    Every private employer regularly employing 25 or more employees shall reasonably accommodate and assist any employee who reveals a problem of illiteracy and requests the employer's assistance in enrolling in an adult literacy education program. An employee who believes she or he has been denied reasonable accommodation to enroll and participate in an adult literacy education program may file a retaliation complaint with the Labor Commissioner's office.
30. **Labor Code section 1101**
    Protects employees who engage or participate in politics or who become candidates for public office. An employer may not make, adopt, or enforce any rule, regulation or policy that forbids, controls, directs or tends to direct the political activities or affiliations of employees.
31. **Labor Code sections 1102**
    Prohibits an employer from coercing, influencing or attempting to coerce or influence employees' political action or political activity.
32. **Labor Code section 1102.5**
    Protects against retaliation for disclosing information, or because an employer believes an employee has disclosed information, to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has the authority to investigate, discover, or correct a violation where employee reasonably believes that the information discloses a violation of a state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Protects an employee who refuses to participate in an activity that would result in a violation of a state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Protects an employee who exercised his or her rights under Labor Code section 1102.5 in any former employment. Protects an employee who is a family member of a person who has or is perceived to have engaged in any protected conduct. In addition to other remedies that might be available, a civil penalty of up to $10,000 may be awarded for each violation.
33. **Labor Code section 1171**
    Protects individuals participating in a national service program (e.g., AmeriCorps), for refusing to work overtime for any legitimate reason.
34. **Labor Code section 1197.5**
    Allows an employee who is paid at a wage rate less than the rate paid to an employee of the opposite sex, or another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and which is performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on a bona fide factor other than sex, race, or ethnicity, to file a claim for unequal pay with the Labor Commissioner's office. A civil action to recover wages under section 1197.5(a) may be commenced no later than two years after the cause of action occurs, except that a civil action arising out of a willful violation may be commenced no later than three years after the cause of action occurs. The same filing period will be used for a claim filed with the Labor Commissioner for equal pay as the filing period for a civil action. Also protects an employee who invokes or

assists with the enforcement of the equal pay law, discloses his or her own wages, discusses the wages of others, inquires about another employee's wages, or aids or encourages any other employee to exercise his or her rights under this section and is retaliated against. A complaint with the Labor Commissioner alleging retaliation must be filed within six (6) months of the adverse action.

35. **Labor Code section 1198.3**
    Prohibits retaliation against an employee who refuses to work hours in excess of those permitted by the Industrial Welfare Commission (IWC) Orders.
36. **Labor Code section 1311.5**
    Provides for triple damages for individuals who are retaliated against for having filed a claim or civil action alleging a Labor Code violation occurring while the individual was a minor, even if the claim was filed after the individual reached 18. Extends the time limit for claims under the Labor Code, including claims for unpaid wages and retaliation claims, such that the time limit does not begin to run until the individual turns 18.
37. **Labor Code section 1512**
    Prohibits retaliation against an employee who exercises the right to take a paid leave of absence for the purpose of donating his or her organ or bone marrow to another person.
38. **Labor Code section 2814**
    Makes it unlawful to use E-Verify to check the employment authorization status of an existing employee or applicant who has not been offered employment at a time or in a manner not required by federal law, authorized by a federal agency, or as a condition of receiving federal funds. An employer who has offered employment to an applicant can lawfully utilize the federal E-Verify system to check the employment authorization status of a person who has been offered employment. Requires that the employer furnish to the employee any no-match notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee's E-Verify case. In addition to other remedies that might be available, each unlawful use of the E-Verify system carries a civil penalty not to exceed $10,000.
39. **Labor Code section 2929(b) and (c)**
    Prohibits discrimination because the garnishment of an employee's wages has been threatened, or because his or her wages have been subjected to garnishment for the payment of one judgment. The employee shall give notice to his or her employer of his or her intention to make a wage claim within 30 days after being discharged, and file a wage claim with the Labor Commissioner within 60 days after being discharged.
40. **Labor Code section 2930**
    Protects an employee who is disciplined or discharged based on a shopping investigator's report of the employee's conduct, performance, or honesty when the employee was **not** provided with of copy of the report before the discipline or discharge. The shopping investigator must be licensed under the Business and Professions Code for this section to apply.
41. **Labor Code section 6310**
    Protects an employee who: (1) complains about safety or health conditions or practices, (2) institutes or causes to be instituted any proceeding relating to the employee's rights to safe and healthful working conditions, or testifies in any such proceeding, (3) exercises any rights under the California Occupational Safety and Health Act, or (4) participates in an occupational health and safety committee established pursuant to Labor Code section 6401.7. Protects an employee who is a family member of a person who has or is perceived to have engaged in any protected conduct.

42. **Labor Code section 6311**
    Protects an employee who refuses to perform work in the performance of which the Labor Code, any occupational safety or health standard, or any safety order would be violated where the violation would create a real and apparent hazard to the employee or her or his co-workers.
43. **Labor Code section 6399.7**
    Protects an employee who complains or testifies regarding non-compliance with the Hazardous Substances Information and Training Act.
44. **Labor Code section 6403.5**
    Protects an employee who refuses to lift, reposition, or transfer a patient due to the health care worker's concerns about patient or worker safety or because of the lack of trained lift team personnel or equipment.
45. **Health and Safety Code section 1596.881** and **1596.882**
    Protects an employee who: (1) complains about the violation of any licensing or other laws relating to child day care facilities (e.g., staff-child ratios, transportation of children, or child abuse), (2) institutes or cause to be instituted any proceeding against the employer relating to the violation of any licensing or other laws, (3) appears as a witness or testifies in a proceeding relating to the violation of any licensing or other laws, or (4) refuses to perform work in violation of a licensing or other law or regulation after notifying the employer of the violation. A claim by the employee alleging the violation by the employer of section 1596.881 shall be presented to the employer within 45 days after the action as to which complaint is made, and presented to DLSE not later than 90 days after the action as to which complaint is made.
46. **Unemployment Insurance Code section 1237**
    Protects an employee who seeks information from the Employment Development Department (EDD) concerning rights under the Unemployment Insurance Code or Labor Code, cooperates with any investigation undertaken by EDD, or testifies in any proceeding brought pursuant to the Unemployment Insurance Code or the Labor Code.
47. **IWC Orders 1 through 13, section 3(C)(8); IWC Order 16, section 3(C)(7); and IWC Order 17, section 5 "Election Procedures" (H)**
    Protects an employee who expresses an opinion concerning an alternative workweek election or for opposing or supporting its adoption or repeal.

Please note: Except for the Labor Commissioner's enforcement of the California Equal Pay Act (as noted in #33 above), the Department of Fair Employment and Housing (DFEH) maintains the authority to investigate complaints of discrimination (based on race, religion, sexual orientation, gender, national origin, etc.) in the areas of employment, housing, public accommodations and hate violence. The National Labor Relations Board (NLRB) investigates complaints of unfair labor practices by employers and unions.

http://www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm

10 Common Types of Bias that Lead to Bad Trading Decisions

July 29, 2015

Decisions, decisions...Buy or sell? Take a profit or let it ride? Whether we like it or not, making good, well informed decisions is an essential part of successfully trading and surviving the stock markets.

Maybe you are stuck trying to decide what type of trading software you need, confused over where that trend line should be placed or agonizing over what charting software indicators to use.

Whatever the case may be, good informed decision making is important. It's not enough to rely on just luck or guesswork. This disguises poor decisions, reinforces your trading biases, and ultimately costs you dearly.

What you have to understand is that our actions and opinions, from all the decisions we make, are shaped by reason, emotions, memories and different types of bias. Some of which are made unconsciously, while others play on our minds, in a kind of mental tug of war.

Anyone who has experienced wrestling with the emotions of fear and greed when trading, will understand this emotional battle.

Of course, it would be great for us as traders, to be able to totally detach ourselves emotionally. Everything would be so much easier. So its hardly surprising then that the best traders are those that come close to achieving this state of mind.

But...we also have to realize we are human beings not emotionless machines. So no matter what, emotions and cognitive bias will always play a part in the decision making process.

In this article I take a look at what I consider to be 10 of the most common types of bias that in my experience have the greatest negative impact on most peoples trading.

I am going to show you the characteristics of each, their effects on your trading and provide some solutions that I hope will help you more effectively deal with them.

The 10 Most Common Types of Bias.

1. Optimism bias

In common terms this is called "wishful thinking" where the probability of a good outcome is overestimated above that of a bad one.

Over-optimism is commonly seen in the form of large price moves and over reactions in the market. These are fueled by feelings of uncontrolled optimism that become contagious amongst traders.

It is not uncommon to see these reactions right at the top of a stock or market run and they are usually accompanied by plenty of good news..

Effect:

1. Lead you to take a larger trading position than you should
2. Buy in an area of high risk
3. Delay cutting your losses

Solution:

The first step to coming to terms with any types of bias is to be aware of them and accept that they are real.

In the case of optimism bias because there is a tendency to be overly keen and jump into trades without much thought, it is essential that a trading plan be formulated. It's really important that you provide a framework for yourself to keep your over-enthusiasm in check.

Keeping a trading journal is also a great idea, so you can review your actions and see where you have gone wrong. A big problem with having an optimism bias is the tendency to not want to face up to losing situations and their causes.

Unfortunately these tend to be ignored and put out of our mind in order to protect our self belief. This in turn compounds the optimism bias.

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2. Overconfidence bias

At first glance this would appear to be similar to over optimism, but there are some big differences. The main one being that it is entirely possible to be an over-confident pessimist.

This is more common among traders who consider themselves experts. Novices tend to harbor a general lack of confidence until they get a few good trades under their belts. They do have to be careful though that as their confidence increases that they don't wipe out their trading account.

This is a pretty common occurrence once traders start to believe that they are invincible.

The truly ironic thing about this particular bias, is that we need a degree of confidence to trade well, but too much of it and our account suffers.

Interestingly female traders do much better than male traders because of their tendency to have lower confidence levels. This makes them more cautious, they don't get caught up in the trap of over trading and because of this they generate much better returns.

Effect:

1. May make you overestimate price targets & profits

2. Believe you are better than everyone else
3. Take on too many trading positions
4. Take positions that are too large

Solution:

Try and focus on what you could be doing better, not on how good you think you are. Remember overconfident traders don't last long. You may be lucky and do well for a while but ultimately your overconfidence will affect your judgement and hurt your account.

3. Confirmation bias

This is the desire to find or search out information that agrees with your own views and can be a critical element in poorly interpreting your view of a stock chart.

A perfect example of this might be the trader who believes the market may drop because he watches the news and has an overall negative view. He will then focus only on the stocks that support this view. In the meantime, as is the way of the markets, they move up to new highs and he/she misses it.

Effect:

1. The tendency to place a lot more importance on information that confirms your position
2. Leads to self deception

Solution:

Open you eyes to the bigger picture and search out as many possible alternative scenarios to your situation as you can. Try and take the alternative view and prove yourself wrong.

Embrace any shocks or suprises, don't gloss over or bury them just because they don't agree with your view

Find a mentor or communicate with others involved in trading - seek out alternate views

4. Illusion of Control

This is the belief that somehow you can influence the outcome of events that you really have no control over. This is seen a lot among traders who actually believe that they can influence the outcome of a trade.

The reality is you are always at the mercy of the market and random events.

A classic everyday example of this is peoples belief that because they chose the numbers on their lottery ticket, it'll give them more of a chance of winning than one randomly generated by a lottery ticket dispenser. This is the illusion of control.

Effect:

1. Leads you to overestimate your own ability.
2. Become too overoptimistic faced with a risky trade because you believe that you can control the outcome.
3. Leads to overconfidence, over trading, taking too large a position, etc.

Solution:

Guard against overconfidence. Don't think that just because you have accumulated a lot of information in regards to your trade that it will somehow affect the outcome of it.

Keep a trading journal and write down the decisions you make, why you made them and their outcomes and then review them from time to time.

5. Illusion of knowledge

The greatest enemy of knowledge is not ignorance, it's the illusion of knowledge

Steven Hawking
Theoretical Physicist

This is one of those types of bias that along with the illusion of control leads directly to over-confidence.

Traders and investors alike often fall into the trap of thinking that the more information they can gather, the more control over their trading or investment outcomes they will have.

The problem is that this is a complete illusion.

This bias can be clearly seen by looking at just how many people lose money in the stock markets. They certainly don't go into the markets with this intention. In fact they are banking on the opposite and yet the majority still do.

Why? Well the fault is usually due to the illusion of knowledge. People tend to glean a little knowledge about the markets or maybe a particular stock or trading technique. They then apply that knowledge in a manner where they believe they know more that they actually do.

I know from my own experience that my worst trades have been the ones where I have researched and found out as much about the company I have bought into as possible.

Armed with this illusion of knowledge I then found it incredibly difficult to exit the stock when things started to go wrong. I believed I knew more than I actually did and of course told myself the chart action must be wrong.

Unfortunately the chart never lies and it cost me dearly in a couple of instances.

Effect:

1. Leads to the illusion of control
2. May prevent you from acting on stops
3. Can act to delay profit taking and stay in the trade too long
4. Question the validity of your chart.

Solution:

Seek out alternate views from other traders or a mentor, avoid the over confidence trap, be aware of your trading biases and the fact that a lot of knowledge doesn't mean you'll make a good decision.

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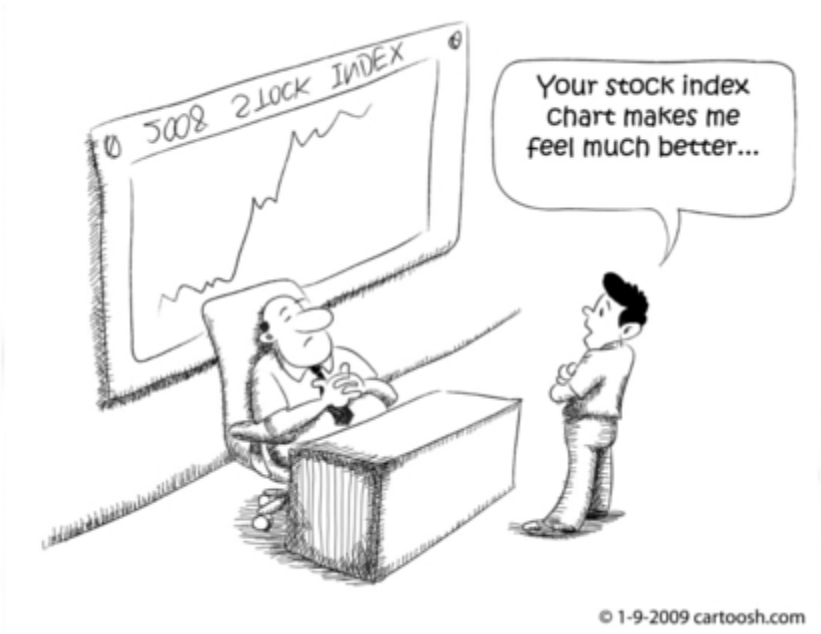
6. Representativeness



Faced with uncertain situations, representativeness bias causes people to look for familiar patterns and then assume that future patterns will continue in the same manner.

For example it doesn't mean that just because a chart looks bullish it'll continue higher.

This can be a big trap among traders trying to use chart patterns to determine future chart action. Often they blindly accept that a certain type of pattern will repeat, without looking into the reasons why the original pattern even occurred in the first place.

They may also fall prey to this bias by being attracted to buying stocks that have recently increased in price. This is what makes pump and dumps (where a stock is rapidly marked up to suck in investors and traders at higher prices) particularly dangerous for your trading account.

This is also commonly seen among fund managers who look at the returns from a given period of time and then expect them to continue at that same rate into the future. The true reality is that they have no real way of knowing if it will occur.

Effect:

1. A belief that events in the past will repeat again in the future. For traders this means believing a run will continue in a certain direction because it has in the past. Whereas the truth is it can change anytime.

Solution:

A good knowledge and understanding of market structure. Look to larger time frames. Learn to see the big picture, accept that nothing is certain and have a plan to deal with that uncertainty.

7. Anchoring and Adjustment bias

Anchoring is focusing on one main piece of information when making a decision.

Many traders and investors will fixate on specific stock prices especially at levels where they have purchased stock previously or at what they deem to be the true value of the stock. This can lead them to think that the stock is undervalued, yet there may have been a change in the underlying fundamentals which they haven't seen.

The big trap with anchoring is that it prevents you from selling when you should and you will hang onto a losing trade because you are anchored to your original buy price.

This greatly increases your risk. Instead of acting on your stop loss and realizing a small loss. Now you are at risk of further falls in price as you wait for the stock to return to your original buy in price.

This is how traders and investors end up riding stocks all the way to the bottom and suffering massive losses.

Effect:

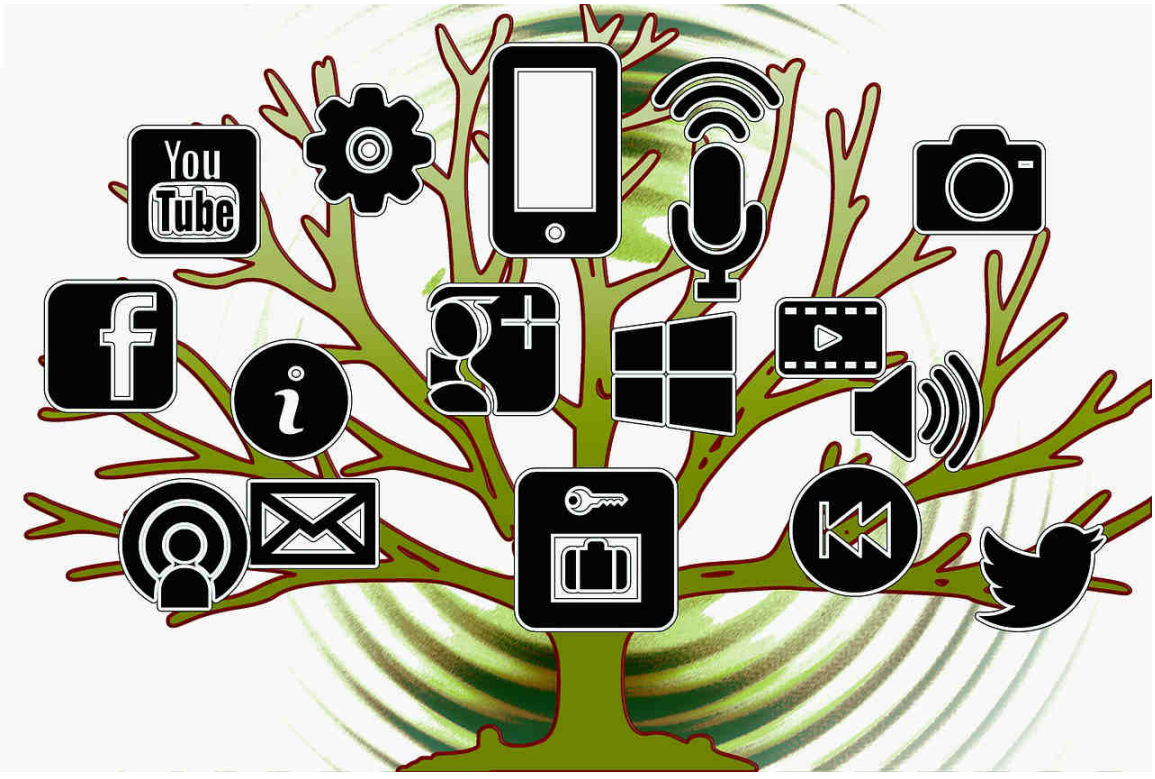
1. Hang onto losing trades
2. Trade against the direction of the market
3. Miss opportunities to get in a trade because of a pre-concieved notion of price.

Solution:

Make sure you evaluate the data and determine if you are making an emotional decision or a data driven decision. Don't focus on only one piece of data, cross reference and get other peoples opinions.

8. Availability bias

This is a particularly interesting bias and explains a lot when it comes to people buying at market tops or into stocks at exactly the wrong time. This occurs because people tend to make decisions based on information they see most frequently.



This information of course may not necessarily be the most accurate, but it may be readily available. Hence the name.

An example of this and how it works is seen when stocks are rallying and hitting all time highs. A rational trader would see that things are becoming overbought and sit and wait for the inevitable correction.

Novice traders and investors bombarded with what they see on the news, hear on the radio or read on the internet develop a fear of missing out and may come to the conclusion that it is the time to buy.

They may do ok for a while, but as price invariable reverses and drops, they are usually still listening to the information in the media. This may be still telling people to buy and of course positions that should have been exited, are hung onto.

This is the kind of thing that occurs in every market downturn, people fail to see what is really happening. Of course by the time they do its usually too late, losses compound and psychologically it becomes impossible to exit and losses pile up.

Listening to and making trading decisions from information on blog posts, in forums, or from the media is inherently risky and feeds a lot of availability bias among traders. No wonder we see so many losing money.

Effect:

1. Failure to see what is really happening in the market
2. Tendency to follow the herd
3. Failure to see a turn coming or act on stops
4. Develop a reliance on media or crowd driven information

Solution:

Don't believe information gleaned from broker reports, the news, forums, tips from friends etc. Always do your own research and look at what the chart is telling you. It never lies!

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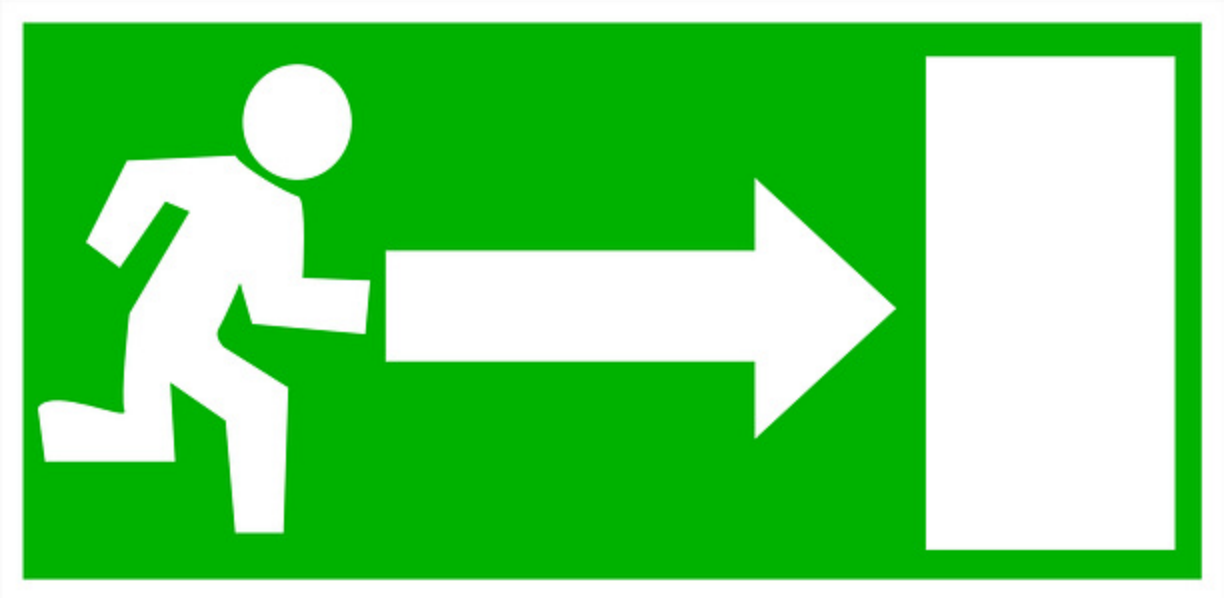
9. Loss aversion bias



Loss aversion bias refers to the tendency for people to dislike losing a lot more than they enjoy winning. It is seen when losses loom larger than gains of identical magnitude and people focus more on the potential loss.

This sounds pretty obvious but can have massive effects on your trading. Its a major reason why traders exit trades too early and don't manage to maximise their gains in winning trades.

In 1979 Kahneman & Tversky looked at many different types of bias and formulated what is known as the prospect theory. They found that losses are felt between two and two and a half times stronger than gains.

This then leads a lot of traders towards inaction rather than action, and they miss a lot of opportunities.

Effect:

1. Deviation from your trading plan
2. Exit trades too early
3. Keep stops too tight and get whipsawed
4. Leads to the fear of taking a trade

Solution:

Develop a sound trading plan before you take the trade and prepare to give your stock room to move. This means not setting stops too tight. Nothing ever goes up or down in a straight line in the markets.

Accept that you will only ever win at best 50% of the time and that losses are an inevitable part of the "cost of doing business". Don't hesitate to act once a buy signal occurs or a stop is broken, stick to your plan!

10. The Bandwagon or Herding bias

This I would have to say is one of the most important types of bias to be aware of. It is the belief that the general opinion is right. This leads to herd behavior in the markets.

Driven in part by the availability bias it is a MAJOR contributor to people losing a lot of money in the stock markets. In fact it is exploited by the smart money in a lot of cases to place the unwary into a position where they are either sold to or bought from.

As an example you may hear news in the media regarding a forthcoming market downturn but your chart isn't showing any signs of it.

You might then hop onto a stock market forum or maybe talk to fellow traders who confirm the bearish media view, so you decide to sell all your positions just to be safe.

The market of course then reverses, continues upward and leaves you behind.

Congratulations! You have just experienced a few different types of bias. The bandwagon bias fueled by an availability bias and you have now become one of the herd.

Effect:

1. Causes you to ignore your analysis
2. Exit or buy at the wrong time.
3. Encourages you to follow the crowd.

Solution:

Learn not to follow the crowd, make you own decisions based on what you believe about your own analysis. Don't listen to and believe everything you see or hear on the news. If you have a mentor or forum group of like minded individuals get varying points of view.

Remember when the crowd is all moving in the same direction it means a change in direction is just around the corner.

Conclusion

As you have probably discovered by now, there are a lot of different types of bias and this is only a list of the 10 main ones, there are many more. We all suffer from bias in some form or another but being aware of their impact is the first step to controlling their effect.

In a lot of cases its probably not a great idea to try and rid yourself of your bias completely and frankly I'm not sure that's even possible. Trading without any confidence for example would be a very unprofitable outcome. You'd probably never take a trade again!

So there has to be a balance. In a lot of cases just being aware of all of these types of bias will help you. Keep a trading journal and make notes of your frame of mind when taking a trade or how you felt when you exited.

Review these notes from time to time and as you become more experienced, hone your trading system to accommodate and allow for these different types of bias.

Trade!...after all, nothing really teaches you more than being in the market!

Hopefully you have enjoyed this article. If you did and think it may be helpful to others then please share it. I'd also love to hear your views on this subject so leave me a comment below and let me know about what types of bias you think affect your trading and how you deal with them.

http://www.mindfulsharetrader.com/types-of-bias/

Why Marijuana Bans Are Racist


Flickr/Office of Public Affairs

While people tend to think of marijuana legalization as a drug law issue, there's a serious racial component of the movement to consider. Black people have been disproportionately affected by the war on drugs, and because the majority of drug arrests in the U.S. are marijuana-related, pot prohibition is increasingly seen as a racial injustice.

RELATED: The Real Reason Why Marijuana Is Illegal in the U.S.

From the inception of the drug war, minorities have faced more frequent and serious sentencing for marijuana offenses.

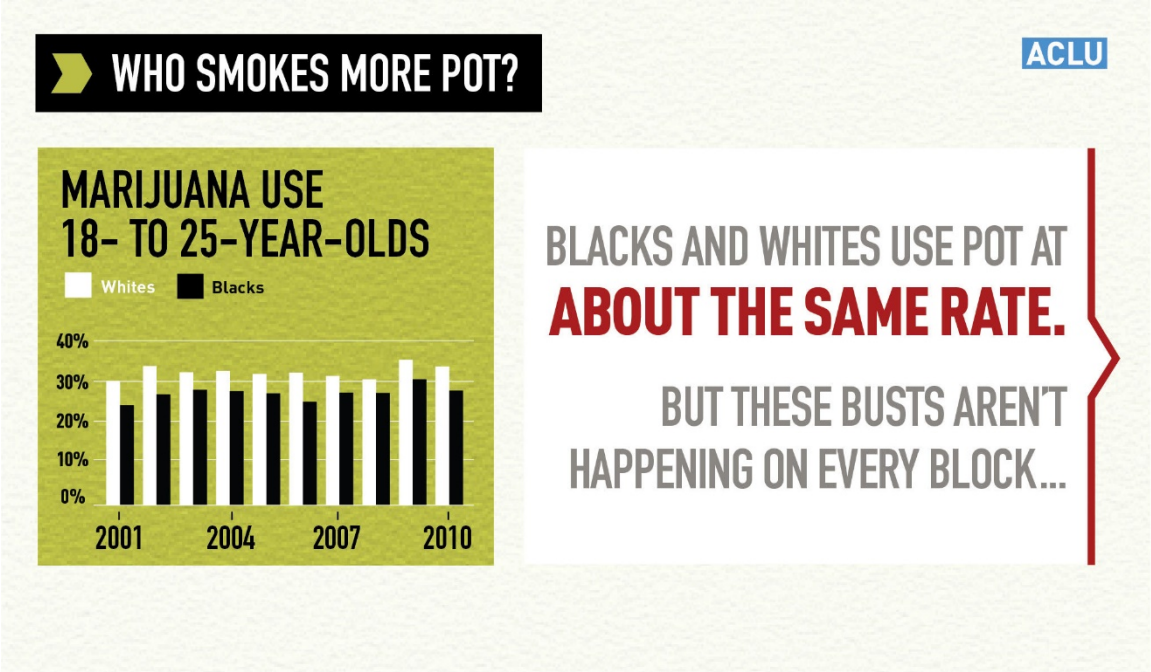

Wollertz - bigstockphoto.com

Harry Anslinger, the face of the war on weed, regularly made racist claims in the 1930s in an effort to stoke fears about cannabis, arguing that "reefer makes darkies think they're as good as white men," for example. And though the rhetoric has changed, the effect has not: there is a racial disparity when it comes to pot.

RELATED: Many Eyes Are Focusing on Ohio's Marijuana Vote

Here are four statistics that prove that marijuana prohibition is racist.

1. Rates of cannabis use are about equal between races, but Black people are more frequently arrested for marijuana possession.



ACLU - aclu.org

According to the ACLU's 2013 report—"The War on Marijuana in Black and White"—a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person. The ACLU wrote:

"Despite the fact that marijuana is used at comparable rates by whites and blacks, state and local governments have aggressively enforced marijuana laws selectively against Black people and communities. In 2010, the Black arrest rate for marijuana possession was 716 per 100,000, while the white arrest rate was 192 per 100,000. Stated another way, a Black person was 3.73 times more likely to be arrested for marijuana possession than a white person—a disparity that increased 32.7 percent between 2001 and 2010."

2. In states where the racial disparity is greatest, Black people are on average more than six times as likely to be arrested for marijuana possession.

While there is not one exclusive region in the U.S. where Black communities face increased possession arrests, there are some observable trends, with states such as Illinois and New York carrying out racially disproportionate arrests at higher levels.

"In the worst offending counties across the country, Blacks were over 10, 15, even 30 times more likely to be arrested than white residents in the same county," the ACLU reported. "These glaring racial disparities in marijuana arrests are not a northern or southern phenomenon, nor a rural or urban phenomenon, but rather a national one."

3. The increase in marijuana-related arrests seems to correlate with racially biased policing tactics.

Between 1995 and 2010, marijuana arrests went up by approximately 52 percent. Civil rights organizations argue that the shift toward "broken windows" policing has contributed to that rise—and that Black communities have been unfairly targeted as a result. Even the creator of the controversial policing tactic, George Kelling, worried that it could lead to racial problems, he said in an interview with PRI.

"Minority communities have a history of two problems with the police, and one is police brutality—that is a serious problem that has to be dealt with. But the second is under-policing. My fear is that because of the questions that are being raised now about the overuse of authority, we're going to under-police minority communities again. And that comes at a great, great cost."

4. The incarceration rate for minorities does not match with rates of drug use.

As of 2005, Black people represented about 12 percent of the country's total drug using population—yet they represented about 34 percent of the total number of drug-related arrests and 45 percent of those in state prisons for drug offenses, according to the Sentencing Project.

Attitudes toward marijuana are changing.

In a recent call to recognized the challenges presented in criminalizing marijuana offenders, Democratic presidential candidate Bernie Sanders recently discussed the racial unfairness of pot prohibition, calling for marijuana to be federally legalized.

"Let us be clear, as is the case in many other areas, that there is a racial component to this situation," Sanders said at a campaign event held at George Mason University. "Although about the same proportion of blacks and whites use marijuana, a black person is almost four times more likely to be arrested for marijuana possession than a white person."

"Too many Americans have seen their lives destroyed because they have criminal records because of marijuana use. That is wrong. That has got to change…A criminal record could include not only time in jail, but a criminal record makes it harder for a person to get a job, harder for a person to get public benefits, harder for a person to even get housing. A criminal record stays with a person for his or her entire life."

https://www.attn.com/stories/3956/how-marijuana-prohibition-is-racist

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2014 SHOW AGENDA SEE PAGES 3-5

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Insights for America's cannabusiness entrepreneurs & investors

VOL 1 • ISSUE 5 • FALL 2014

Battling Cannabusiness Sexism

page 18

Also in This Issue:

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Unspoken

Gender bias flows through cannabis industry, & women are speaking out

by John Schroyer

"Weed wenches."

That was the nickname an older male employee came up with for female budtenders at a Denver-area cannabis business where Deb Hall used to work.

"I don't think he meant anything mean-spirited by it, but it was still like, um, okay," Hall said recently at a Denver networking event sponsored by Women Grow, which aims to connect women in the cannabis industry.

Undercurrent

Hall's experience offers a peek at the undercurrent of gender bias that runs beneath the surface of the cannabis industry. In some cases it's subtle, such as an offhand remark or a comment made in jest. In other instances it's much more overt, such as when a marijuana company asks female job applicants to submit headshots along with their resumes, as though they were applying for a modeling job.

Either way, it's something women in the business encounter more frequently than their peers in many other industries – yet it's not discussed openly very often.

Fortunately, this is changing as the industry grows and matures.

More women than ever are involved in cannabis businesses, both as general employees and as executives and owners. The industry is much more welcoming than it used to be, while sexism isn't nearly as big of an obstacle as it was just a year or two ago. And women are increasingly speaking out, finding ways to counter gender bias and seeking to reshape the cannabis climate.

"That's exactly what we're seeing right now… is women standing up, and that's making a great, wonderful impact on the industry," said Heather Manus, the medical director of the MMJ dispensary Sacred Garden in Santa Fe, New Mexico.

Egregious ads, events

When Manus got into the industry in 2009, it was like jumping into a cold shower.

"I recognized it immediately. It was like, oh, man, every one of these growers I talk to hits on me. Every one of these dispensary owners, they've got this sexual undertone," Manus said. "For me, it was just like, okay, this is just one of those things I'm going to have to deal with."

As Manus and other women have discovered, it can run much deeper than flirtatious comments.

One of the biggest sore spots for many female cannabis professionals is the abundance of marijuana ads featuring scantily clad women in provocative

Heather Manus


Christie Lunsford

positions. That overtly sexual approach - which is common throughout the industry - trivializes both women and the medicinal benefits of marijuana.

"The advertising messaging you're seeing a lot of times is the stereotypical naked woman with a bong between her legs; that's what we have to overcome as female business people," said Christie Lunsford, a Denver-based cannabis entrepreneur and freelance business consultant who has worked in the industry since 2009. "It's really damaging messaging. Advil and Viagra don't use half-naked women. They could class it up."

Dr. Lakisha Jenkins, who holds a Ph.D in naturopathy and owns Kiona's Farm'acy in California, was incensed for the same reason after she attended the Medical Cannabis Cup in Los Angeles sponsored by High Times magazine. One of the events at the cup was a wet T-shirt contest, which obviously has nothing to do with medicine.

"(Medicine) should be the theme. There should never be wet T-shirt contests and women in bikinis representing the cannabis industry," Jenkins said. "I talked to cancer survivors that came to the event, and that was their feedback: 'I came here thinking that this was my solution, and now I'm just going to go home and die, because I'm no better educated and I'm completely turned off by what I've seen here.'"

Many female cannabis professional say this needs to change quickly.

But it can be difficult to convince dispensaries and other cannabis advertisers to move in a different direction. The reason: sex sells.

"The stats are that men purchase cannabis more than women. So that's why they market it that way," Manus said.

Yet cannabis businesses that go this route fail to see the big picture. They have much to gain by catering to women – or at the very least not offending them.

"They're missing out on the fact that women make 80% of the health care choices for their families, and they're missing out on a huge sector of people who are interested in their product, because they're turned off by these stereotypical images," Lunsford argued.

This precise problem was one of the reasons that Diane Fornbacher founded Ladybud Magazine, an online publication that caters to women cannabis consumers. Fornbacher is a former editor of SKUNK Magazine, previously worked for High Times magazine and is on the national board of directors for NORML.

"I started Ladybud because there was no magazine tailored specifically to our demographic," Fornbacher said. "We don't accept ads with women who are showing a lot of flesh. It's just not part of my palate or my brand's identity."

> "Medicine should be the theme. There should never be wet T-shirt contests and women in bikinis representing the cannabis industry."
>
> *-Lakisha Jenkins*


Lakisha Jenkins

Mad (Wo)Men

Working in the cannabis industry as a woman can sometimes resemble a scene from the hit TV show "Mad Men," which is set in a 1960s corporate advertising agency rife with sexism.

That's how Gina Berman and Lilach Power – who operate two

...continued on page22

Banding Together

Jane West started the Denver-based networking group Women Grow in part to provide a forum for women to build camaraderie in such a heavily male-dominated industry and occasionally talk about the challenges they face.

West, who founded Edible Events Co., has been in the industry for less than a year, but she wants to foster the wealth of knowledge, creativity and skill that women can bring to all areas of the cannabis business.

"The main goal is to connect women nationwide who are interested in playing a role in the new cannabis industry," West said. "For each individual dispensary or business, there are one or two women working there, and because they're in their individual silos, they don't realize how many other women are in the industry."

Other networking groups for women interested in the marijuana business have sprouted up in recent times as well, such as the Women's Cannabusiness Network and Women of Weed in Washington State.

These groups are growing in popularity as more women enter the cannabis industry.

At the first Women Grow meeting in Denver on Aug. 14, roughly 60 women — who were either already established in the cannabis industry or are looking to get in — showed up to rub elbows.

"One owned a construction company, one just moved here a week ago, and another had been in the industry for five years," West said.

Since there are so many opportunities for women of all stripes in the infant cannabis industry, women are only going to continue to flock to it and look for openings, West said.

Women Grow will be an ongoing resource for women in cannabis as well. West plans to hold a meeting the first Thursday of every month in cities across the country. In Denver she is working out a deal for space where she can start an incubator for cannabis entrepreneurs, complete with work spaces and a communal area for educational session. And, of course, more networking. Eventually, she says, she wants it to expand and include men as well.

"I'm hoping that by the end of 2015, Women Grow will just be Grow," West said. "It's just notable that it was founded by and with the idea of supporting women in the industry."

...continued from page20

dispensaries in Arizona – feel sometimes. Women professionals were subject to sexism at every turn several decades ago and didn't even realize it, Berman said.

"And I think we're kind of in a similar situation where a lot of times we just don't even realize that, hey, wait a minute, maybe this isn't the way it should be," she said.

In early 2013, for instance, Berman was asked to join the Arizona Dispensaries Association's board of directors - simply because she's female.

"The president called me and said, 'We don't have a woman on the board. Would you like to be on the board?' And of course I did want to be on the board, but I was like, 'Oh, so the fact that I'm a physician and the owner of two dispensaries, that's not the reason you want me on the board?'" Berman said. "It was insulting. Not only did he ask me on the phone, but he introduced me to the rest of the organization as, 'This is our female member.' He was completely oblivious."

Berman stressed that since then, she's felt included and

Gina Berman

Lilach Power

valued as a board member by the men she works with. But that memory still rankles.

Power added with a laugh that at one board meeting she attended, a man in the room referred to her as "the hot one."

"He was actually an attorney for one of the other dispensary owners," Power said.

Power and Berman have this advice for other women: Don't let these types of setbacks slow you down.

"In this industry, because it's so new, it's fair game for anyone. It's all about how much you're willing to work and how you run your business," Power said.

Serious Business

Another challenge women face - particularly when they first start out in the marijuana industry - is being taken seriously by men.

Jenkins, who runs Kiona's Farm'acy, is a longtime board member of the California Cannabis Industry Association and has been president of the CCIA since January 2013. She said that even though her male counterparts respect her and listen to her opinions on issues, she does think women in general have to fight for that respect much more than men do.

While women have to be resilient in order to succeed in just about any business endeavor, that's particularly true in the cannabis industry.

"It's probably not as important for the men on a board of directors to have to prove themselves as much on why they think a particular way, or why they want to operate this way, or why they voted this way, as it is for women," Jenkins said. "I do get challenged on a regular basis."

The solution, she said, is education combined with backbone.

"You have to be pretty assertive and pretty sure of yourself and knowledgeable in whatever piece of the industry you choose to participate in, just to have a stake," Jenkins said. "Educate yourself. You may be limited on how far you can go in the industry unless there's something that sets you apart."

Manus, of Sacred Garden in Santa Fe, echoed that sentiment. Once she started

...continued on page25

A recent Women Grow meeting

...continued from page20

establishing limits for men she worked with, that set the tone for her professional environment.

"You have to have a thick skin. You can't be sweet and kind all the time. You have to have your boundaries. So I definitely learned to do that right off the bat," Manus said. "Don't call me 'baby.' Don't call me 'honey.' Don't call me 'sugar.' My name is this, and that's what you need to call me."

That kind of confidence and no-nonsense attitude has served many women well in the cannabis industry, Manus said. She just hopes it spreads, and continues.

Cannabis entrepreneur Lunsford found that being consistent and professional "every single day" is critical.

"I made inroads with that kind of behavior," Lunsford said. "We (women) have made great strides. When I walk into a meeting and sit down at the head of a board table, the men I'm working with have enough respect for me that none of them even bat an eye."

Jane West

Tangible progress

Many female cannabis professionals say they've seen a lot of progress in recent years when it comes to how women are viewed in the marijuana industry.

"I've seen a proliferation of a lot of businesses. Toni Fox, for example (owner of the Denver recreational marijuana retailer 3D Cannabis Center). She's a great leader in this movement," Fornbacher said.

When Fornbacher began as a cannabis activist years ago and started working with NORML, the entire board of directors were all middle-aged white men, she said. Now there are several women on the board — and they're women of color.

"That's really important," stressed Fornbacher. She also helped found the NORML Women's Alliance in 2010, partly to help improve the business climate for women in the cannabis industry, as well as in the larger political cannabis movement.

Jenkins said women are slowly but surely emerging as leaders in the industry in their own right, with their own innovations and business models.

"I'm meeting more and more women as I travel the country, and there are some really dynamic women in this industry who have some really great ideas," Jenkins said.

Jane West, who runs an edibles events company in Colorado and recently started the networking group Women Grow, said fostering connections among women in the industry will be important as time goes on. She predicted

Diane Fornbacher

that as the cannabis industry expands and becomes more mainstream, larger corporations will begin to take hold of the industry, and the influence of corporate America will present even more obstacles for women.

But West isn't interested in complaining about sexism — or other difficulties — she's had to overcome. She's more focused on what lies ahead of her. And given her success and motivation, perhaps that's the best advice she has to offer other would-be entrepreneurs.

"I don't want to focus on that (sexism). I want to focus on what's next. I want to focus on the future," she said. "We want women to picture themselves as successful leaders in this industry."

And by all accounts they are doing just that.

"I think that as more women come into the industry, we won't have that sexism part as much. And really, I don't think we'll see the glass ceiling for women in this industry," Manus said. "Really when you boil it down, it's a compassionate industry, and sometimes women are better at that than men. So I think we'll shine."