
Amended California FEHA Regulations Take Effect on April 1 and Impose New Requirements on Employers

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On April 1, 2016, amendments to California's Fair Employment and Housing Act (FEHA) regulations, dealing with the prevention of discrimination, harassment and retaliation, go into effect. The amendments place an affirmative duty on covered employers to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct in the workplace and, most notably, include changes to covered employers' policy and training requirements.

New Discrimination, Harassment and Retaliation Prevention Policy Requirements

In addition to distributing the California Department of Fair Employment and Housing (DFEH) brochure regarding sexual harassment or an equivalent policy, the amended regulations mandate that covered employers (California employers regularly employing five or more individuals) adopt a written harassment, discrimination and retaliation prevention policy that:

- lists all current protected classes covered under FEHA;
- indicates that managers, supervisors, co-workers and third parties with whom employees come into contact are prohibited from engaging in conduct prohibited by FEHA;
- creates a complaint process to ensure that complaints receive an employer's designation of confidentiality, to the extent possible; timely responses; impartial and timely investigations by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures;
- provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor and instead allows an employee to complain to a designated company representative, a complaint hotline, an ombudsperson, or the DFEH and/or Equal Employment Opportunity Commission;
- instructs supervisors to report any complaints of misconduct to a designated company representative;
- provides that complaints will be addressed through a fair, timely and thorough investigation;
- notes that the company will take appropriate remedial measures if the investigation reveals that misconduct occurred; and

- makes clear that employees will not be exposed to retaliation for raising a complaint or participating in a workplace investigation.

In order to ensure that employees are aware of their employer's harassment, discrimination and retaliation prevention policy, the amended regulations require that an employer disseminate the policy by specified means, such as printing and providing a copy to all employees with an acknowledgement form for signature or emailing the policy to employees with an acknowledgement form to be returned. Further, an employer must translate its policy and distribute it in any additional languages that are spoken by at least 10 percent of its workforce.

New Training and Document Retention Requirements

Although the requirement that California employers with 50 or more employees must provide regular sexual harassment training to supervisors is not new, the amended regulations now require that such training include additional elements, including:

- instruction for supervisors on how to identify behavior that may constitute unlawful harassment, discrimination and/or retaliation under both California and federal law and about a supervisor's obligation to report harassing, discriminatory or retaliatory behavior of which he or she becomes aware;
- information about the remedies available for harassment, including potential employer/individual exposure and liability; and
- information regarding the negative effects of abusive conduct in the workplace, including a discussion about the elements of abusive conduct and the effects that abusive conduct has on the victim of the conduct, others in the workplace and the employer.

In addition to these new elements that an employer must include in training, the amended regulations require that an employer keep training records for a minimum of two years, including the names of the employees trained, the date of training, the sign-in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, a copy of all written questions received during or after a webinar or e-learning training and all written responses or guidance provided, and the name of the training provider.

Clarification of Definitions Related to Sex Discrimination

The amended regulations clarify that FEHA's general prohibition against discrimination on the basis of sex includes a prohibition of discrimination or harassment based on gender identity or gender expression and that gender discrimination includes sex stereotyping. The new regulations define "gender expression" as a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth and "gender identity" as a person's identification as male, female, a gender different from the person's sex at birth, or transgender, which is further defined as a person whose gender identity differs from the person's sex at birth. The amended regulations also clarify that "sex stereotype" means an assumption about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation or generalization about the person's sex.

New Non-Monetary Preventative Remedies

The amended regulations now allow the DFEH to independently seek non-monetary preventative remedies against an employer for failure to prevent and correct discriminatory, harassing and retaliatory conduct, regardless of whether the DFEH prevails on an underlying claim of discrimination, harassment or retaliation. This means that the DFEH can pursue action against an employer for not having a compliant policy or not providing appropriate training, even if there is no successful claim against the employer for discrimination, harassment or retaliation.

What Employers Should Do

As April 1 approaches, California employers should review their policies and training programs to ensure compliance with the amended regulations. Any new or updated policies should be distributed as soon as possible. Training should be performed at the earliest opportunity as well. Employers should not hesitate to contact employment counsel for assistance in ensuring compliance with the amended regulations.

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