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**NEW FEHA REGULATIONS TOOK EFFECT APRIL 1, 2016,
ADDING WRITTEN POLICY AND TRAINING REQUIREMENTS**

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As of April 1, 2016, California employers must comply with new regulations under the Fair Employment and Housing Act (FEHA). While many employers already have equal employment opportunity policies in place, these should be reviewed in light of the new regulations, which set forth specific requirements for anti-harassment policies, processes, and training, among other additions and modifications.

Required Anti-Harassment Policy

Under the new regulations, California employers must develop a harassment, discrimination, and retaliation prevention policy that:

- Is in writing;
- Lists all FEHA protected categories — *i.e.*, race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status;
- Indicates that the FEHA prohibits coworkers and third parties – not just supervisors and managers – from engaging in discriminatory, harassing, or retaliatory conduct;
- Creates a confidential complaint process to ensure a timely response, impartial investigation by qualified personnel, documentation and tracking, appropriate remedial action, and timely closures;
- Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor (for example, by setting up a complaint hotline or designating a company representative to receive complaints);
- Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager;
- Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely investigation;
- States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential;

- Indicates that appropriate remedial measures will be taken if misconduct is found at the end of the investigation; and
- Makes clear that employees will not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

Employers should disseminate the policy in a way that ensures employees receive and understand the policy. This can include methods such as:

- Providing a hard copy to employees with an acknowledgment form for employees to sign and return;
- E-mailing the policy with an acknowledgment return form;
- Electronically posting the policy with a tracking system to ensure all employees have read and acknowledged receipt of the policies; or
- Discussing the policy upon hire and/or during a new hire orientation session.

If 10% or more of an employer's workforce at a given location speak a language other than English, the employer must translate the policy into every language that is spoken by at least 10% of the workforce.

Sexual Harassment Training and Education

The FEHA has for over a decade required employers with 50 or more employees to provide sexual harassment training to supervisors. Under the new regulations, the training must also cover:

- Supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware;
- The steps necessary to take appropriate remedial measures to correct harassment behavior; and
- A review of "abusive conduct" – meaning malicious conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests – including its negative effects on its victims, its detrimental consequences on employers, its elements, and the fact that a single act does not constitute abusive conduct unless it is especially severe or egregious.

Employers were previously required to keep for two years documentation of the training they provided to employees, including the names of the employees trained, training dates, type of training, and name of the training provider. The new regulations expand the materials employers must maintain to include the sign-in sheet, a copy of all certificates of attendance or completion issued, and a copy of all written or recorded materials that comprise the training. Employers using a webinar also should keep a copy of the webinar, all written materials used, all written questions submitted, and all written responses or guidance the trainer provided for two years.

Added Definitions

The FEHA covers the following protected categories: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status.

The new regulations add definitions of gender constructs.

- “Gender expression” is defined as a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth.
- “Gender identity” means a person’s identification as male, female, a gender different from the person’s sex at birth, or transgender.
- “Transgender” refers to a person whose gender identity differs from the person’s sex at birth.

Remedies

Consistent with existing law, the new regulations make clear that there is no independent private cause of action for failure to prevent discrimination or harassment under California Government Code section 12940(k). In order to have a claim, a private litigant must succeed on the underlying claim of discrimination, harassment, or retaliation. However, the Department of Fair Employment and Housing can seek non-monetary preventative remedies for failure to prevent discrimination or harassment, irrespective of whether it prevails on the underlying claim.

Employers should review their policies, procedures, and training to ensure compliance with the new FEHA regulations. Please contact us if you have any questions about the new FEHA regulations.

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