Time to Update Your Anti-Harassment Policy: California’s New FEHA Regulations

By Maria Audero, Felicia Davis & Ryan Derry

Introduction

On April 1, 2016, California employers will be subject to new anti-discrimination and anti-harassment regulations, as amended by the California Fair Employment and Housing Council ("FEHC"). Although the amendments are intended to conform the existing regulations to recent court decisions, the most notable addition is the requirement that covered California employers develop and distribute anti-harassment and discrimination policies with certain required elements and create formal internal complaint processes to address employee concerns. Employers should promptly review their anti-harassment, discrimination, and retaliation policies for compliance with these new regulations.

New Harassment, Discrimination, and Retaliation Policy Requirements

Covered California employers have had an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. But, employers generally had discretion in deciding how to do so. No longer. Starting April 1, 2016, a covered California employer must have a harassment, discrimination, and retaliation policy that:

- Is in writing;
- Lists all current protected categories covered under the FEHA;
- Indicates that managers, supervisors, coworkers and third parties with whom employees come into contact are prohibited from engaging in unlawful conduct under the FEHA;
- Creates a complaint process to ensure that complaints receive: (a) a designation of confidentiality, to the extent possible; (b) timely responses; (c) impartial and timely investigations by qualified personnel; (d) documentation and tracking for reasonable progress; (e) appropriate options for remedial actions and resolutions; and (f) timely closure;
- Provides a complaint mechanism that permits employees to complain to someone other than his or her immediate supervisor, such as a designated company representative (including a human resources manager, EEO officer, or other supervisor), a complaint hotline, an ombudsperson, or identification of the California Department of Fair Employment and Housing ("DFEH") and the U.S. Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints;
• Assures employees that if the employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation in a manner that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected;

• States that confidentiality will be kept by the employer to the extent possible, but not that an investigation will be completely confidential;

• Instructs supervisors to report complaints of misconduct to a designated company representative, such as a human resources manager;

• Indicates that if misconduct is found after investigation, appropriate remedial measures shall be taken; and

• Confirms that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

Employers must disseminate this written policy to employees by one or more of the following methods: (1) providing a printed copy to all employees with an acknowledgement form for the employee to sign and return; (2) sending the policy via email to all employees with an acknowledgement return form; (3) posting the current versions of the policies on a company intranet with a tracking system to ensure that all employees have read and acknowledged receipt of the policies; (4) discussing the policy upon hire and/or during a new hire orientation session; and/or (5) any other way that ensures employees receive and understand the policy.5 Employers must translate the written policy into every language that is used as the “spoken language” by at least 10 percent of the workforce at any facility or establishment.6

These dissemination requirements are in addition to employers’ continuing obligation to distribute to employees the DFEH’s brochure on sexual harassment (DFEH-185), or an alternative writing compliant with the FEHA.7

Training Requirements

Since 2004, California has required that employers with 50 or more employees provide biennial and continual sexual harassment prevention training.8 The regulations impose new training and record-keeping requirements for those employers.

Such training must now also:

• Instruct supervisors of their obligation to report sexual harassment, discrimination, and retaliation of which they become aware;9

• Cover appropriate remedial measures to correct harassing behavior;10 and

• Review the definition of “abusive conduct,” explain the negative impact of abusive conduct, specifically discuss the elements of abusive conduct, provide examples of abusive conduct, and emphasize that, unless the act is especially severe or egregious, a single act shall not constitute abusive conduct. Although the new regulations still do not identify the amount of time that must be dedicated specifically to the subject of “abusive conduct,” they make clear that the subject should be covered “in a meaningful manner.”11
Employers must maintain for two years all written or recorded materials that comprise the training, including copies of all webinars, all written questions and responses from webinars and e-learning, all sign-in sheets, and all certificates of attendance or completion issued, in addition to the already-required names of supervisory employees trained, the date of the training, the type of training and the name of the training provider.\textsuperscript{12}

**Enforcement**

The regulations track existing case law and confirm that there is no stand-alone private cause of action for failure to prevent harassment or discrimination under the FEHA. A private claimant must also plead and prevail on an underlying claim of discrimination, harassment, or retaliation.\textsuperscript{13}

The DFEH, however, may independently seek non-monetary preventative remedies for a violation—regardless of whether the DFEH prevails on an underlying claim for discrimination, harassment, or retaliation.\textsuperscript{14}

---

*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

**Los Angeles**

Maria A. Audero  
1.213.683.6307  
mariaaudero@paulhastings.com

Felicia A. Davis  
1.213.683.6120  
feliciadavis@paulhastings.com

Ryan D. Derry  
1.213.683.6292  
ryanderry@paulhastings.com

**Orange County**

Stephen L. Berry  
1.714.668.6246  
stephenberry@paulhastings.com

**San Diego**

Mary C. Dollarhide  
1.858.458.3019  
marydollarhide@paulhastings.com

**San Francisco**

Paul W. Cane Jr.  
1.415.856.7014  
paulcane@paulhastings.com

Jeffrey D. Wohl  
1.415.856.7255  
jeffwohl@paulhastings.com
1 FEHA generally covers California employers regularly employing five or more individuals (including individuals employed outside of California and employees who may then be on paid or unpaid leave). See Cal. Gov’t Code § 12926(d); Cal. Code Regs. tit. 2 § 11008(d)(1) (2016).

2 Cal. Gov’t Code § 12940(k).


4 The current list of protected categories under FEHA includes 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, or military and veteran status. See Cal. Gov’t Code § 12940(a). The new regulations also now provide the following definitions: “gender expression” means 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; “sex” includes pregnancy, childbirth, medical conditions related to pregnancy, childbirth, or breast feeding, gender identity, and gender expression; “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 individual’s sex; and “transgender” means a person whose gender identity differs from the person’s sex at birth. Cal. Code Regs. tit. 2 § 11023(c) (2016).


6 Cal. Code Regs. tit. 2 § 11023(b) (2016).

7 Covered employers must provide sexual harassment training to all supervisory employees in California once every two years, and within six months of being hired or promoted into a supervisory position. Cal. Gov’t Code § 12950.1(a). The new regulations retain the same language in determining whether an employer has 50 or more employees: “Having 50 or more employees” means employing or engaging 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.” Cal. Code Regs. tit. 2 § 11024(a)(5) (2016).


