

New California Fair Employment Regulations: It's Time for California Employers to Update Their Policies

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By Jennifer L. Nutter, Amy B. Messigian, Nancy L. Gunzenhauser, and Alexandra Bruno Carlo

On April 1, 2016, California's amended Fair Employment and Housing Act Regulations ("[Amended Regulations](#)"), which interpret substantive rights under the Fair Employment and Housing Act ("FEHA"), will take effect. The Amended Regulations do the following: (1) require employers to establish a written discrimination, harassment, and retaliation prevention policy; (2) define key terms related to gender; (3) update the poster notifying pregnant employees of their rights; (4) explicitly cover discrimination against interns and volunteers; (5) impose a two-year record-keeping requirement for sexual harassment prevention training; and (6) expand possible reasonable accommodations to include "support animals."

The Amended Regulations cover all employers that regularly employ five or more individuals, regardless of whether an employee's worksite is located within California. Thus, California employers with five or more employees as well as out-of-state employers with at least one California employee¹ and five or more total employees should make note of the following regulatory changes.

Harassment, Discrimination, and Retaliation Prevention Policy

The Amended Regulations require covered employers to establish and maintain a written harassment, discrimination, and retaliation prevention policy. This policy must contain:

- a list of all protected categories covered under the Act;²

¹ While all California employees are covered by the protections of the FEHA (so long as the employer meets the minimum employee threshold), the Amended Regulations make clear that out-of-state employees are only covered if the wrongful conduct occurred in California or was ratified by decision makers or participants located in California.

² The current protected categories under the FEHA are as follows: race, religious creed (including religious dress and grooming practices), color, national origin (including language use and possession of a driver's license issued to persons unable to prove their right to be present in the United States under federal law), ancestry, physical disability, mental disability, medical condition (including cancer and genetic characteristics), genetic information, sex (including pregnancy, childbirth, breastfeeding, or a

- a statement indicating that the law prohibits harassment, discrimination, or retaliation by coworkers and third parties, as well as supervisors and managers;
- a description of the complaint process (see below for details about the requirements of the complaint process);
- the identity of someone to whom a complaint may be directed outside of the employee's direct supervisor, such as a human resources manager, a complaint hotline, or the EEOC/Department of Fair Employment and Housing ("DFEH");
- an instruction to supervisors to report any complaints of misconduct to a designated representative;
- a statement that the employer will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected when the employer receives an allegation of misconduct;
- a statement that remedial measures will be taken if misconduct is found; and
- a statement prohibiting retaliation for reporting complaints or participating in an investigation.

The Amended Regulations require the complaint process established by employers have the following elements:

- Complaints must be kept confidential (to the extent possible).³
- Employers must respond to complaints in a timely manner.
- Complaints must be investigated by impartial qualified personnel.
- Complaints should be documented and tracked for reasonable progress.
- The complaint process should include appropriate options for remedial actions and resolutions.
- The complaint process should also ensure timely closure of investigations.

Employers may distribute the policy to employees in a variety of ways, including by providing a copy to all employees with an acknowledgment form for the employee to sign and return, sending the policy via e-mail with an acknowledgment return form, or discussing policies upon hire and/or during a new hire orientation session. The policy

related medical condition), gender (including gender identity and gender expression), age (40 and over), military and veteran status, and sexual orientation. Cal. Gov't Code §§ 12940, *et seq.*

³ The Amended Regulations make clear that complete confidentiality should not be promised.

must be translated into every language that is spoken by at least 10 percent of the workforce.

Key Terms Related to Gender Discrimination Defined

FEHA prohibits employers in California from discriminating against job applicants and employees on the basis of gender, gender identity, or gender expression. The Amended Regulations define key terms related to these types of discrimination:

- “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” is a general term that refers to a person whose gender identity differs from the person’s sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as “transsexual.”
- “Sex Stereotype” is 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.

Pregnancy Rights Poster Updated

The DFEH has issued [a new poster](#) informing pregnant employees of their rights. This replaces the former “Notice A” and must be posted by April 1, 2016. The most notable change is that the poster now informs employees that they may be entitled to up to 12 weeks of baby bonding time under the California Family Rights Act (“CFRA”) following their leave under the pregnancy disability leave (“PDL”) law.

Interns and Volunteers Protected in the Same Manner as Employees

The Amended Regulations mirror the recent FEHA amendments extending protection to unpaid interns and volunteers with respect to employment discrimination and unlawful harassment, and require employers to provide unpaid interns and volunteers with reasonable accommodations for religious observances. Given this clarification, written harassment, discrimination, and retaliation prevention policies should expressly include unpaid interns and volunteers.

Sexual Harassment Prevention Training—Records and Abusive Conduct

Current law requires employers with 50 or more employees to provide two hours of sexual harassment training every two years to supervisory employees. The Amended Regulations provide that each employer must document the training that it has provided its employees and retain those records for at least two years. Documentation can include the sign-in sheet from the training and copies of certificates of attendance

issued by the employer. In addition, employers must retain copies of all written training materials and written questions and answers exchanged with the trainer.

The Amended Regulations also track the new FEHA requirement that training should include information related to the negative effects of abusive conduct in the workplace, including, but not limited to, the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace, the elements of “abusive conduct,” and clarification that a single act does not constitute abusive conduct, unless the act is especially severe or egregious.⁴

Support Animal as a Reasonable Accommodation

The Amended Regulations specify that the use of a “support animal” may constitute a reasonable accommodation in certain circumstances. A “support animal” is one who provides emotional, cognitive, or other similar support to a person with a disability. Also, a prior requirement that “assistive animals” be trained to provide assistance for an employee with a disability has been eliminated.

What California Employers Should Do Now

- Post the new [PDL poster](#) in place of the former “Notice A” by April 1, 2016.
- Ensure that your harassment, discrimination, or retaliation policy complies with the specific requirements provided for in the Amended Regulations and update your policy, as necessary, before April 1, 2016.
- Distribute, in one of the specified manners, copies of the written policy and retain confirmation of receipt.
- Train supervisors on how to respond to complaints in light of any changes to the written policy.
- Reevaluate the company’s response to any reasonable accommodation requests by current employees for the presence of support animals in the workplace.

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For more information about this Advisory, please contact:

Jennifer L. Nutter
Los Angeles
310-557-9518
jnutter@ebglaw.com

Amy B. Messigian
Los Angeles
310-557-9540
amessigian@ebglaw.com

⁴ “Abusive conduct” is defined as conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. Cal. Gov’t Code § 12950.1(g)(2).

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Alexandra Bruno Carlo
New York
212-351-3702
acarlo@ebglaw.com

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