

Public Entity Labor and Employment

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AALRR Alert



California Implements New Anti-Harassment, Anti-Discrimination Policy Regulations Effective April 1

Nate J. Kowalski
Cerritos
562.653.3200
nkowalski@aalrr.com

Irma Rodriguez Moisa
Cerritos
562.653.3200
imoisa@aalrr.com

Jay G. Trinnaman
Cerritos
562.653.3200
jtrinnaman@aalrr.com

Effective April 1, 2016, new regulations under the Fair Employment and Housing Act (“FEHA”) will require employers to develop or modify written anti-harassment and discrimination policies.

Employer Policies to Prevent Harassment, Discrimination, or Retaliation

The new regulations require employers to develop and distribute a written harassment, discrimination and retaliation prevention policy. (2 Cal. Code Regs. §11023.) Employers are already required to distribute either the DFEH-185 Brochure or a policy in compliance with Government Code section 12950.

The purpose of adding these new requirements is to elaborate on an employer’s obligation under Government Code section 12940(k) to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. The California Fair Employment and Housing Council (“FEHC”) claims the new regulation combines case law and “best practices” to create “a concise, user-friendly regulation

that would eliminate ambiguity and the need to research a vast amount of fragmented information on one’s own.” (FEHC Proposed Amendments to the Fair Employment and Housing Act Regulations, Initial Statement of Reasons (2014), p. 3.)

The regulation provides numerous detailed requirements for the written prevention policy, including the following:

- List all protected categories;
- Explain the law prohibits harassment and discrimination by supervisors, managers, coworkers, and third parties;
- Establish a complaint procedure;
- Indicate all complaints will be fairly, timely, and thoroughly investigated; all parties are accorded appropriate due process; and conclusions are based on the evidence collected;
- State the employer will keep complaints and investigations confidential to the extent possible but do not indicate investigations

will be completely confidential;

- Provide appropriate remedial measures and resolutions will be taken if misconduct is found; and
- Ensure the employer will not retaliate against an employee for filing a complaint or participating in an investigation.

Within the policy, the complaint procedure must specify the following:

- Investigations will be conducted in a timely manner by an impartial qualified person;
- Appropriate options for remedial actions and resolutions;
- There will be a timely response and resolution to the investigation;

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- The employer will document and track the complaint's progress; and
- An employee may file a complaint with someone other than his or her direct supervisor (e.g. Human Resources Manager, ombudsperson, or agency hotline);

Additionally, supervisors must report any complaints to a designated agency representative. Employers with 50 or more employees must include this requirement in mandated sexual harassment prevention training. (2 Cal. Code Regs. §11023(b)(6).)

Employers are required to distribute the policy to employees in a manner ensuring employees receive and understand the policy. (2 Cal. Code Regs. §11023(c).) The regulation suggests using one or more of the following methods: printed copy; emailed policy; posting on Agency intranet; discussing policy upon hire; and/or other ways ensuring employees receive and understand the policy.

If 10 percent or more of an employer's workforce speaks a language other than English, then the policy must be translated into such language. (2 Cal. Code Regs. §11023(d).)

To bring a cause of action for failing to prevent and promptly correct discriminatory and harassing conduct, a claimant must plead and prevail on an underlying claim for discrimination, harassment, or retaliation. (2 Cal. Code Regs. §11023(a).) However, even if there is no claim of harassment,

discrimination, or retaliation, the Department of Fair Employment and Housing ("DFEH") may seek non-monetary preventative remedies for failing to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct (i.e. preparing a compliant policy). (Id.)

To meet the April 1, 2016 deadline, employers who do not already have an anti-harassment and discrimination policy need to develop one including a complaint procedure to comply with these new regulations. Employers with an existing anti-harassment and discrimination policy will need to review their policy to ensure it contains all the information required by the new regulations. Employers should distribute the new and/or revised policy to all employees and have all employees acknowledge receipt.

New Definitions

The amended regulations also define several terms for sex and gender, including "gender expression," "gender identity," and most notably "transgender." (2 Cal. Code Regs. §11030.) The FEHC determined it was necessary to define these terms in order to "implement, interpret, and make specific," the additions of "gender identity" and "gender expression" as protected categories under the FEHA. The new definitions include:

- "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" has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender identity; and gender expression.

- "Transgender" is a general term referring 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 different from social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."

The new definitions, along with the DFEH's recently issued guidance on transgender issues in the workplace, provide much needed guidance on what protections are expected for gender identity and gender expression.

For more information concerning the new regulations, please contact one of the authors or attorneys in the Private Public Entity Labor and Employment Group or visit our website at www.aalrr.com.