

Education Law

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AALRR Alert



Newly Amended FEHA Regulations Require Prompt Review of Employment Policies

Sharon J. Ormond

Cerritos

562.653.3200

sormond@aalrr.com

Cathie L. Fields

Irvine

949.453.4260

cfields@aalrr.com

Michelle A. Landenberger

Irvine

949-453-4260

mlandenberger@aalrr.com

Amendments to the Fair Employment and Housing Act's ("FEHA") anti-discrimination and anti-harassment regulations take effect on April 1, 2016. While the amendments conform the regulations to existing law and recent court decisions, they impose several new requirements on employers. All public educational agencies should promptly review their local policies and administrative regulations/procedures to ensure compliance with the amended regulations.

Harassment and Discrimination Prevention and Correction

The amended regulations require that in addition to distributing the Department of Fair Employment and Housing's DFEH-185 brochure on sexual harassment, employers must develop a written harassment, discrimination, and retaliation prevention policy that:

- **Lists all current protected categories.** In a random review of school and community college districts' board policies, we noticed that some policies fail to include *all* of the protected categories enumerated in

Government Code section 12940(a) (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). Agencies should review their nondiscrimination and anti-harassment policies to ensure that *all* protected categories are listed.

- **Indicates that the law prohibits coworkers, third parties, supervisors and managers from engaging in prohibited conduct.** Most of the policies we reviewed did not specifically mention coworkers and third parties. Local policies and administrative regulations/procedures should be reviewed and revised if necessary to include such a statement.
- **Creates a complaint process to ensure complaints receive designation of confidentiality (to the extent possible), timely**

response, impartial and timely investigations by qualified personnel, documentation and tracking, appropriate options for remedial actions and resolutions, and timely closures.

Educational agencies should already have an established procedure for addressing employee complaints. However, agencies should verify their procedures contain these elements. A prudent practice is to review all discrimination complaint procedures at regular intervals.

- **Provides a complaint mechanism that does not require the employee to complain directly to his or her immediate supervisor, but provides alternatives such as**

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a designated representative, hotline, or ombudsperson, or identifies the DFEH and the U.S. Equal Employment Opportunity Commission as additional complaint avenues.

Most policies state employees can complain directly to the Coordinator for Nondiscrimination in Employment or a similar designated official. Any policy that *suggests* a lock-step process by which employees are required to first report complaints to their supervisors should be amended to make clear the other available complaint avenues.

- **Requires supervisors to report any complaints of misconduct to a designated representative to try to resolve the complaint internally.** Most but not all policies we reviewed contained a statement to this effect. Educational agencies should review and revise their policies or administrative regulation/procedure, as needed, to comply with this requirement.
- **Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides due process and reaches reasonable conclusions based on the evidence.** This language is likely contained in the regulation/procedure detailing the complaint process but should be added if necessary.

- **States the employer will maintain confidentiality to the extent possible, but will not guarantee the investigation will be completely confidential.** Inclusion of this statement in the policy or regulation/procedure should be verified.

- **Indicates the employer will take appropriate remedial measures if, at the end of the investigation, misconduct is found.** If this or a similar statement is not in the procedure, it must be added.

- **Makes clear that employees will not be exposed to retaliation for lodging a complaint or participating in a workplace investigation.** While all policies we randomly reviewed contained a prohibition of retaliation, it is imperative that educational agencies review their policies to ensure this prohibition is expressly stated.

The amended FEHA regulations also require employers *to distribute* the policy by one or more of the following methods:

- Via email or provision of a hard copy to all employees *with an acknowledgment form that the employee must sign and return.*
- Posting on the employer's intranet *with a tracking system* to ensure all employees have read

and acknowledged receipt of the policies.

- Discussing policies upon hire or during new-hire orientation sessions.

Additionally, where 10 percent or more of the workforce speaks a language other than English, the employer must translate the policy into every language that is spoken by at least 10 percent of the workforce. We encourage educational agencies to ensure regular distribution to all employees of information regarding harassment, discrimination, and retaliation prevention policies. Annual notices avoid employee claims about lack of knowledge of the policies and complaint procedures, and provide evidence of employers' affirmative efforts to prevent harassment, discrimination, and retaliation in the workplace.

If we can be of assistance in reviewing and updating policies and procedures to conform with the new FEHA regulations, please contact your local AALRR office.