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New FEHA Regulations Coming April 1; Update EEO and Anti-Harassment Policies Now

On April 1, 2016, revised California Fair Employment Housing Act (FEHA) regulations will take effect, with new anti-discrimination and anti-harassment obligations for California employers. Here's an overview of the key provisions.

Harassment, Discrimination, and Retaliation Policy Requirements

The new regulations emphasize an employer's affirmative duty to take steps to create a workplace that is free from discrimination, harassment and retaliation. To that end, the regulations make it mandatory for employers to have a *written* anti-discrimination, harassment and retaliation policy that covers specific information and sets up a complaint and investigation process. The written policy must:

- List all protected categories covered under the FEHA;
- Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;
- Create a comprehensive complaint process to ensure that complaints receive:
 - An employer's designation of confidentiality, to the extent possible;
 - A timely response;
 - Impartial and timely investigations by qualified personnel;
 - Documentation and tracking for reasonable progress;
 - Appropriate options for remedial actions and resolution; and
 - Timely closures;
- Provide a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor. Complaint options include:
 - Direct communication, either orally or in writing, with a designated company representative, such as an HR manager, EEO officer, or other supervisor;

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

12121 WILSHIRE BLVD.
SUITE 1375
LOS ANGELES
CA 90025
310 943 8500 T
310 943 8501 F

- A complaint hotline;
- Access to an ombudsperson; and/or
- Identification of the California Department of Fair Employment and Housing (DFEH) and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints;
- Instruct supervisors to report all complaints of misconduct to a designated company representative, such as an HR manager, so the company can try to resolve the claim internally;
- Indicate that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected;
- Specify that confidentiality will be maintained to the extent possible, although the policy should not indicate that the investigation will be completely confidential;
- State that if misconduct is found, appropriate remedial measures will be taken; and
- Make clear that employees will not be retaliated against for lodging a complaint or participating in any workplace investigation.

The new regulations direct employers to distribute the policy through one or more of these methods: 1) providing a printed copy to all employees with an acknowledgement form for the employee to sign and return; 2) emailing the policy to employees, along with an acknowledgement return form; 3) posting the policy on the company intranet, along with a tracking system that ensures all employees have read the policy and acknowledged receipt; 4) discussing the policy with new hires or during orientation sessions; and/or 5) any other distribution method that ensures employees receive and understand the policy.

An employer whose workforce at any facility or establishment contains 10 percent or more employees who speak a language other than English as their spoken language must translate the policy into each such language.

A.B. 1825 Training Updates

The new regulations also update training and recordkeeping requirements under California's existing A.B. 1825 supervisor harassment training provision, which applies to employers in California with 50 or more employees anywhere. Key changes include:

- The training must instruct supervisors about their obligation to report complaints of discrimination, harassment or retaliation to a designated company representative (such as an HR manager), and must review with supervisors the steps necessary to take appropriate remedial measures to correct harassing behavior.
- The training must cover “abusive conduct,” including the definition of abusive conduct, the negative impact of abusive conduct, the elements of and examples of abusive conduct, and the fact that a single act will not constitute abusive conduct unless it is sufficiently severe and egregious. The regulations state that there is not a specific amount of time that must be spent on abusive conduct in the training but it should be covered in a meaningful manner.
- Employers must maintain training documentation for a minimum of two years. Documentation must include names of the supervisors trained, training date, sign-in sheet, certificates of attendance or completion, type of training, copies of written or recorded training materials, and the name of the training provider. For webinar training, employers must also retain a copy of the webinar, written materials used by the trainer, written questions submitted during the program, and written responses or guidance that the trainer provided during the webinar. For e-learning training, employers must retain written questions received and written responses or guidance provided.

Other Provisions

Other updates to the FEHA regulations include:

- New definitions of gender expression, gender identity, sex stereotype, and transgender;
- A statement that a woman/female disabled by pregnancy includes a transgender employee who is disabled by pregnancy;
- Clarification of what constitutes actionable harassment and the basis for co-worker liability;
- A new rule permitting the DFEH to recover “non-monetary preventative remedies” against an employer, regardless of whether the agency prevails on an underlying claim for discrimination, harassment or retaliation; and

- Provisions implementing A.B. 60, which bars discrimination against applicants and employees on the basis that they hold a special driver's license that can be issued to undocumented individuals.

Getting Ready

With the new FEHA regulations taking effect on April 1, 2016, employers should promptly review their employee handbooks, EEO and anti-harassment policies, and anti-harassment training to ensure compliance with the updated rules. [Click here](#) to download a copy of the new regulations.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, wage and hour class actions, trials, appeals, compliance advice and counseling. If you have questions about these developments or other workplace obligations, please contact us at (415) 464-4300.

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