



Additional Employer Requirements Pursuant to New FEHA Regulations Come Into Effect on April 1, 2016

By: [Louise Truong](#)

Effective April 1, 2016, California employers will have additional obligations pursuant to new regulations under the California Fair Employment and Housing Act (FEHA). Below is a brief synopsis of the new FEHA regulations that we believe are most likely to affect your business.

Covered Employers

FEHA generally applies to employers with at least five employees.¹ With the passing of the new regulations, however, employers are now required to include as "employees" both out-of-state employees and employees on paid or unpaid leave. Therefore, an out-of-state employer with at least one California employee will now have to adhere to FEHA with respect to that one employee if the total number of its employees is at least five. Even though out-of-state employees are counted for the purpose of determining whether an employer is covered under FEHA with respect to its California employees, the out-of-state employees are not themselves protected by the statute.

Anti-Harassment, Discrimination and Retaliation Written Policy Requirements

Starting April 1, 2016, California employers are required to provide their employees with a *written* copy of their harassment, discrimination and retaliation prevention policy. The policy must be translated into every language that is spoken by at least 10 percent of the workforce. The policy must meet all of the following requirements:

- A list of all the protected categories under FEHA, which are: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age for individuals over forty years of age, military and veteran status, and sexual orientation. Employers can no longer rely on a "catch-all" statement that states that the employer will not discriminate based on any category protected by the law;
- A statement indicating that FEHA prohibits not only management from engaging in the prohibited conduct, but co-workers and third parties, such as customers and vendors, as well;
- Instruction to supervisors to report any complaints of misconduct to Human Resources or another designated company representative;
- Provide an option that does not require an employee to complain directly to his or her immediate supervisor, and that allows the employee to complain through an alternative method, such as to a human resources manager, an EEO officer, a complaint hotline,

the Department of Fair Employment and Housing (DFEH) or the Equal Employment Opportunity Commission (EEOC);

- A statement that when the employer receives allegations of misconduct, either orally or in writing, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and that will reach reasonable conclusions based on the evidence collected;
- A statement that if misconduct is found, remedial measures will be taken;
- A statement assuring employees that they will not be exposed to retaliation for making complaints or participating in any workplace investigation; and
- A description of the complaint process for investigating an employee's complaints of discrimination, harassment, and retaliation. The complaint process must detail the following requirements: (1) confidentiality to the extent possible; (2) a timely response; (3) an impartial investigation by a qualified investigator; (4) documentation and tracking; (5) appropriate options for remedial actions and resolutions; and (6) timely closure.

Employers must distribute their updated written policy to employees in one of the following ways:

- Providing a copy to all employees either in hard copy or by email with an acknowledgement form for employees to sign;
- Posting the policy on the employer's intranet site and using a tracking system to ensure that all its employees read and acknowledged receipt of the policy; or
- Distributing the policy upon hire and/or during a new hire orientation.

Sexual Harassment Training/Record-Keeping Requirements

Since 2004, FEHA has required employers with 50 or more employees to provide two hours of sexual harassment training every two years to supervisory employees. The new regulations mandate that such training must now include the following:

- Informing supervisors of their obligation to report to the designated employer representative any sexual harassment, discrimination, and retaliation of which they become aware;
- Appropriate remedial measures to correct harassing behavior, appropriate steps related to investigation, available civil remedies for harassment, and potential exposure against both a company and an individual; and

¹ For purposes of harassment only, an employer is covered under FEHA if it has at least one employee. See California Government Code § 12940(j)(4)(A).

- A meaningful review of “abusive conduct,” which includes an explanation of the negative impact of abusive conduct on the individual and the company as a whole, the elements of abusive conduct, and examples of abusive conduct. The new regulations do not provide a specific amount of time that must be dedicated to the subject of “abusive conduct,” but does state that it must be covered in a “meaningful manner.”

The training must be interactive and include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that the supervisors remain engaged in the training.

Lastly, employers must maintain for two years certain information and all written and recorded materials that comprise the training, including the sign-in sheets, copies of certificates of attendance and completion, the date of training, and the name of the training provider.

Personal Liability for Unlawful Harassment

Under the new regulations, any employee who engages in unlawful harassment of a co-employee is *personally liable* for harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take corrective action.

Pregnancy Rights

The new regulations confirm that an employee is entitled to four months of pregnancy disability leave and continued benefits per *pregnancy* and not per *year*. They further confirm that it is unlawful for an employer to harass an employee because of her pregnancy, perceived pregnancy, childbirth, breastfeeding, or any related medical conditions. Additionally, a transgender employee, who is disabled by pregnancy, is also protected under the statute.

The new regulations also mandate that employers update their policies and post new notices to include the following information:

- Protection from discrimination for harassment because of pregnancy, childbirth and related conditions;
- The employer’s obligation to provide reasonable work accommodation, transfer, and Pregnancy Disability Leave (PDL);
- The employee’s obligation to provide advance notice of the need for reasonable accommodation, transfer or PDL;
- The employer’s requirement, if any, or the employee to provide medical certification to establish the medical advisability for reasonable accommodation, transfer, or PDL; and
- The DFEH contact information

The DFEH has issued a new poster, titled “Your Rights and Obligations as a Pregnant Employee,” which details the foregoing information that employers may use and post at their worksites. Using the DFEH’s poster satisfies an employer’s posting requirements under the new

FEHA regulations. A link to the poster is attached here: [DFEH’s Poster: Rights and Obligations as a Pregnant Employee](#)

Similar to an employer’s harassment policy, PDL policies must also be translated into every language spoken by at least 10 percent of the workforce.

Revised Definitions Relating to Gender Discrimination

The new FEHA regulations provide new definitions for the protected categories of: “Gender Expression,” “Gender Identity,” and “Sex.” In addition, the new regulations provide definitions for the terms: “Transgender” and “Sex Stereotyping.” The definitions are as follows:

- *Gender Expression*: a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth;
- *Gender Identity*: 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 breastfeeding; gender identity; and gender expression;
- *Transgender*: 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;” and
- *Sex Stereotyping*: 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 myth, social expectation, or generalization about the individual’s sex.

National Origin Protection

Last year, FEHA was amended to make it unlawful for an employer to discriminate against an applicant or employee because he or she holds or presents a driver’s license issued under section 12801.9 of the California Vehicle Code—licenses issued to undocumented individuals.

This year, FEHA has been amended to state that employers may require an applicant or employee to hold or present any form of driver’s license as part of employment *only* if:

- Possession of a driver’s license is required by state or federal law; or
- Possession of a driver’s license is uniformly required by the employer and is otherwise permitted by law. If this policy is not uniformly applied or is not justified by legitimate business reasons, however, it may be evidence of a violation of FEHA.

What Employers Should Do

Companies with employees in California are advised to review their anti-discrimination, harassment, and retaliation policies, internal



complaint procedures, sexual harassment training, and pregnancy disability leave policies, make any necessary changes, and promulgate and post the new policies as required, to ensure that they are in compliance with the new FEHA regulations. An employer's failure to comply with the new regulations can be used as evidence against the employer for the failure to take all reasonable steps to prevent harassment, discrimination, and/or retaliation from occurring.



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