

California Employers, Take Note! New Regulations Mandate Updates to Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Policies by April 1, 2016

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PRACTICES Labor and Employment

California Code of Regulations, title 2, section 11023 became effective April 1, 2016. It has new and specific requirements for employers' anti-harassment, anti-discrimination, and anti-retaliation policies. California employers should revisit their policies to ensure they are in compliance with the new regulations and make sure the policies have been properly distributed to all employees. Additionally, some employers may need to translate the policies for non-English speakers or update their supervisor training programs.

Written Policy Updates

Existing law — California's Fair Employment and Housing Act ("**FEHA**") — requires employers "to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Cal. Gov't Code § 12940(k)), so most employers already have a written anti-harassment, anti-discrimination, and anti-retaliation policy in place. The new regulation, however, sets forth several specific requirements for such policies, including that they:

1. Be in writing;
2. List all current protected categories covered under FEHA;
3. Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers, from engaging in conduct prohibited by FEHA;
4. Create a complaint process that satisfies certain criteria (addressed below);
5. Provide a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, but instead allows for complaints to be made to a designated company representative (e.g., HR or a different supervisor), an employee hotline, an ombudsperson, or the Department of Fair Employment and Housing ("**DFEH**") and the EEOC;
6. Require supervisors to report any complaints to a designated company representative (e.g., HR) so the company can try to resolve the claim internally;
7. Indicate that when the company 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;
8. State that the employer will keep the investigation confidential to the extent possible, but not indicate that the investigation will be completely confidential;
9. Indicate that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken; and
10. Make clear that employees will not be retaliated against for lodging a complaint or participating in any workplace investigation.

The complaint process must ensure that (1) complaints receive an employer's designation of confidentiality to the extent possible, (2) employees receive a timely response, (3) an impartial and timely investigation is performed by qualified personnel, (4) the investigation is documented and tracked for reasonable progress, (5) there are appropriate options for remedial actions and resolutions, and (6) any investigation is timely closed.

Translation Required

Where 10 percent or more of an employer's workforce speaks a language other than English, the employer must translate the policy into every language spoken by at least 10 percent of its workforce.

Policy Distribution

The policy must be distributed to all employees, either by:

1. Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;
2. Emailing it with an acknowledgment return form;
3. Posting it on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policy;
4. Discussing it upon hire or during a new hire orientation session; and/or
5. Any other way that ensures all employees receive and understand the policy.

Supervisor Training Updates

Employers with 50 or more employees must train supervisors to report any complaints of misconduct to a designated company representative as part of their mandated sexual harassment prevention training.

Consequences for Failure to Prevent

The regulation reaffirms existing law that there is no stand-alone, private cause of action under FEHA for failure to prevent discrimination, harassment, or retaliation *unless* the employee also prevails on an underlying claim of discrimination, harassment, or retaliation.

However, the regulation allows the DFEH to independently seek *non-monetary* preventative remedies for failure to prevent, regardless of whether it prevails on an underlying claim of discrimination, harassment, or retaliation. Such remedies could include workplace postings, re-distributing of a compliant harassment policy, and manager training.

Action Items

In response to this regulation, employers should:

1. Ensure their written policies, handbooks, and addenda comport with the regulation's new requirements;

2. Make sure those policies have been distributed to all employees or distribute any updated policies to all employees;
3. If 10 percent or more of an employer's workforce speaks a language other than English as their spoken language, translate the policy into those languages;
4. Consider updating new hire orientation sessions to include coverage of the policy; and
5. Update sexual harassment prevention training if the employer has 50 or more employees.

For more information, please contact: