

California Amends FEHA Regulations: New Discrimination, Harassment Policy Requirements

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The California Department of Fair Employment and Housing (DFEH) recently revised the Fair Employment and Housing Act (FEHA) regulations, which forbid discrimination and harassment in the workplace based on race and gender, among other protected categories. The new regulations go into effect on April 1, 2016, and include the following important new provisions:

- A requirement that businesses with five or more employees have a policy to combat discrimination, harassment, and retaliation, and that employers disseminate the policy to their entire workforce;
- Definitions of the following terms: gender expression, gender identity, sex stereotype, and transgender; and
- Extension of national-origin protections to undocumented immigrants who hold special “AB 60” driver’s licenses.

DISCRIMINATION, HARASSMENT & RETALIATION POLICY REQUIREMENTS

Among the most significant of the changes is the requirement that employers adopt detailed policies for reporting harassment and discrimination. Under the new regulations, California employers must now:

- Have a thorough complaint process that allows for employees to report to someone other than a direct supervisor;
- Maintain confidentiality throughout the complaint investigation to the extent possible;
- Specify that supervisors, co-workers, and third parties are prohibited from engaging in unlawful behavior under the FEHA;
- List all protected groups under the FEHA, including gender identity and expression;
- Tell supervisors to report all complaints to a company representative;
- State that all complaints will be followed by a fair, complete, and timely investigation;
- Tell employees it will take remedial measures if any wrongdoing is detected; and
- Not retaliate against an employee for making a complaint or participating in an investigation.

Under the new regulations, employers must provide the policy to employees, both current and future, and retain records that the policy was distributed, such as by having employees sign an acknowledgment of receipt, sending an email with a read receipt, posting on a company intranet with some way of tracking employee receipt, including in new hire orientation, or any other method that ensures the policy has been received and understood.

Additionally, if more than 10 percent of the workers in a given location speak a language other than English, employers must translate the policy into those alternate languages.

NEW DEFINITIONS

Under the new Regulations, the following definitions have been updated with respect to FEHA:

- “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 California 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.
- “Sex Stereotype” means 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 a myth, social expectation, or generalization about the individual’s sex.
- “Transgender” is 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.”

NATIONAL-ORIGIN PROTECTIONS

The Regulations also state that it is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver’s license issued under section 19 12801.9 of the California Vehicle Code, which issues licenses to non-citizens.

The Regulations further state that an employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

- Possession of a driver’s license is required by state or federal law; or
- Possession of a driver’s license is required by the employer or other covered entity and is otherwise permitted by law.

Further, under the new changes to the Regulations, an employer’s or other covered entity’s policy requiring applicants or employees to present or hold a driver’s license may be evidence of a violation of FEHA if the policy is not uniformly applied, or is inconsistent with legitimate business reasons (i.e., possessing a driver’s license is not needed in order to perform an essential function of the job).

Employers should review the new regulations carefully and consult with counsel to ensure their policies and practices are in compliance with the regulations prior to their effective date on April 1, 2016.

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