

California DFEH Releases Workplace Harassment Guidance for California Employers

MAY 30, 2017

In March 2016, California's Fair Employment and Housing Council (FEHC) enacted changes to California Fair Employment and Housing Act (FEHA) regulations concerning discrimination, harassment, and retaliation in the workplace in order to—among other things—clarify California employers' obligation to prevent and correct wrongful behavior. See our client briefing, [California Amends FEHA Regulations: New Discrimination, Harassment Policy Requirements](#). In May 2017, California's Department of Fair Employment and Housing (DFEH) published a "Workplace Harassment Guide for California Employers" (Guide), to provide further guidance to employers. The Guide outlines the structure of an effective anti-harassment program and addresses the questions employers are most likely to ask when formulating and enforcing harassment policies.

The Guide first sets forth the elements of a compliant and effective anti-harassment program, including:

- A clear and easy to understand written policy that is distributed to employees and regularly discussed at meetings (e.g., every six months);
- Buy-in from management, as a role model of appropriate workplace behavior;
- Training for supervisors and managers (legally required two-hour training on anti-harassment and prevention of abusive conduct);
- Specialized training for complaint handlers;
- Policies and procedures for responding to, and investigating complaints;
- Prompt, thorough, and fair investigations of complaint; and
- Prompt and fair remedial action.

Second, the Guide reviews the steps—reporting, investigating, and implementing remedial measures—for an effective and fully compliant harassment program.

Reporting

Employers should make any reports a “top priority” and determine if the report involves behavior serious enough to warrant a formal investigation. If there are allegations of conduct that violate the company’s rules or expectations, then the company will need to investigate to make a factual determination about what happened.

Investigating

The bulk of the Guide addresses how to best conduct a prompt and thorough investigation, from the initial interview with the complaining party to the conclusion. To conduct an investigation that is “fair to all parties,” the Guide provides advice on, among other topics:

- The basic steps required to conduct a fair investigation, including who to interview, gathering of all facts, and reaching a reasonable and fair conclusion;
- Limitations on confidentiality;
- Timing;
- Impartiality;
- Investigator qualifications and training;
- Type of questioning;
- Credibility determinations, and handling “he said/she said” situations;
- Burden of proof;
- Making factual conclusions instead of legal conclusions;
- Documenting evidence;
- Handling special issues such as anonymous complaints and what to do if the target of harassment asks the employer not to do anything; and
- Preventing and addressing retaliation.

Implementing Remedial Measures

The Guide clarifies that the FEHC regulations require an employer to take appropriate remedial steps when there is proof of misconduct, regardless of whether the behavior is a violation of any particular policy or law. The Guide lays out actions to take in order to meet the legal obligation to “prevent and correct” unlawful behavior, and sets forth several possible remedial measures (including training, verbal counseling, “last chance” agreements, demotions, salary reductions, or other monetary consequences, and terminations).

DFEH’s issuance of the Guide provides a resource for employers, as well as a reminder to: update anti-harassment policies and procedures, conduct appropriate training, and make sure that complaints of harassment are immediately addressed when they arise.

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