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Who Are My Employees?

Paul Bressan and Ruth L. Seroussi

The legal landscape for employers is changing. Led by the National Labor Relations Board (the "NLRB"), there is a growing trend to hold employers accountable, not only for their own employees, but also for the employees of their contractors, franchisees, and others with whom they do business. This increased accountability results from the expanding definition of "joint employer."

Browning-Ferris

On August 27, 2015, the NLRB issued its decision in *Browning-Ferris Indus. of California, et al. v. Sanitary Truck Drivers*, 362 NLRB No. 186. In Browning-Ferris, the NLRB held that it was no longer necessary to exercise direct, immediate control over workers to be deemed a joint employer. Rather, the NLRB found it sufficient for a finding of joint employer status if an employer exercises "indirect control" over working conditions or if it has "reserved authority" to do so. The NLRB therefore concluded that Browning-Ferris Industries of California Inc. ("BFI") was a joint employer of workers provided by a staffing agency at a BFI recycling plant. This in turn resulted in a requirement that BFI participate with the staffing agency in negotiations with the Teamsters union (which won the union election conducted among the staffing agency's employees) for a collective bargaining agreement covering the wages, hours and terms and conditions of those employees. By means of BFI's "technical refusal to bargain" with the Teamsters union, the case is now pending before the U.S. Court of Appeals for the D.C. Circuit, which will consider the NLRB's underlying joint employer decision. The Court of Appeals is not expected to issue a decision until late this year or in 2017. In the meantime, the NLRB's ruling is significant. The decision potentially subjects employers to collective bargaining obligations for employees provided to them by staffing agencies and to liability for labor violations committed by their labor contractors if a joint employer relationship is found.

Franchises and Contractors

Even though the *Browning-Ferris* ruling involved a contractual relationship between a staffing agency and an employer and not a franchisor-franchisee relationship, there are many parallels between franchisor-franchisee relationships and contractor-subcontractor relationships. In fact, the NLRB has filed complaints against McDonalds USA, LLC, with respect to employees of certain of its franchisees, contending that McDonalds should be held to be a joint employer of these employees. It is likely that the NLRB will apply the broader standard articulated in *Browning-Ferris* when it ultimately rules on the McDonalds cases.

Miller & Anderson, Inc.

For over a decade, the NLRB has held that, where there is a joint employer relationship, both employers must consent for the employees to be part of a multi-employer bargaining unit. In a pending case against Miller and Anderson, Inc., the NLRB may change this rule. The NLRB has accepted briefs on the issue of whether an appropriate employee unit for collective bargaining should include both the employees of the staffing agency and the employees of the contracting company, without the consent of both entities. If the NLRB determines that it should, this would extend the holding of *Browning-Ferris* by potentially requiring the contracting company to bargain with a successful union, not only with respect to the employees of the staffing company, but also with respect to a bargaining unit consisting of employees of both entities. Presuming the NLRB decides Miller and Anderson this way, as is expected, then if joint employment status is indeed easier to establish following *Browning-Ferris*, more employers may be compelled to bargain with unions in a multi-employer unit comprised of regular employees and temporary employees.

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California Labor Code Section 2810.3

California has gone even further in expanding the scope of liability for employers who contract with temporary staffing agencies. On September 28, 2014, Governor Brown signed California's AB1897 into law, adding section 2810.3 of the California Labor Code. Each affected California employer now "shares" civil responsibility and liability with its "labor contractors" (defined as an individual or entity that "supplies a client employer with workers to perform labor within the client employer's usual course of business") regarding the "payment of wages" and "any failure to secure valid workers compensation coverage" with respect to temporary workers assigned to the employer. These obligations remain regardless of the affected employer's participation in or control of the payment of wages to these contracted employees by its labor contractor, or any knowledge of the labor contractor's failure to provide workers' compensation coverage for these employees. In effect, if Labor Code section 2810.3 is applicable, the using company becomes a "joint employer" of these employees for the stated civil liability, without any proof of joint employer status under any standard.

Some Steps Employers and Franchisors Can Take to Reduce the Risk of Liability

In the face of this expanded joint employer liability, employers and franchisors should consider the feasibility of reducing their control over the employees of their contractors and franchisees, by taking steps such as the following:

- Reviewing and revising contracts to establish the requisite separation between the two entities;
- Reviewing and revising contracts to provide for indemnification in the event of a finding of joint employment and resultant liability, in accordance with applicable law;
- Limiting direction to product and brand quality protection to ensure "a standardized product and customer experience;"
- Steering clear of codetermining matters governing the wages, hours and essential terms and conditions of employment for the employees of contractors and franchisees;
- Avoiding the exercise of direct or indirect control over wages, hours or working conditions;
- Staying away from providing directives to the contractor's and franchisee's employees concerning day to day operations;
- Relinquishing any "reservation of authority" or right to exercise direct or indirect control over wages, hours or working conditions; and
- Eschewing any mandatory requirement that contractors or franchisees strictly follow your rules on employment practices or policies.

Although these suggestions will not insulate affected California employers from potential civil liability under Labor Code Section 2810.3, they may help employers reduce their overall exposure and a finding of joint employer status in other circumstances.

Conclusion

It remains to be seen how far the NLRB will go in this joint employer arena, and whether pending legislation to combat the NLRB will be successful in any respect. It also remains uncertain whether and to what extent this NLRB expansion will find its way into standards by the Department of Labor, the Equal Employment Opportunity Commission and other federal agencies. Nevertheless, prudent employers should hope for the best, but prepare for the worst.

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Like It or Love It: How Not to Get Pinned (Legally) When Using Social Media to Promote Your Brand

Philip Nulud

Twitter®, Instagram®, Facebook®, Pinterest® and other social media websites and apps are great ways to interact with friends, family and potential customers. They are great avenues for advertising and promotion of one's business and brand. A brand owner can share their latest offerings, get people excited about new products, develop brand awareness, etc.—the possibilities are endless.

However, in using social media to promote one's business, there are a number of pitfalls that one must avoid. Using social media in relation to a business is not the same as using it for personal, non-commercial use. While it may seem like everything online is fair game, it is not. Just because something is found online does not mean that it is ok to use. Trouble can and does arise rather quickly…

There are three primary legal considerations when using social media and they fall within the realm of intellectual property—copyrights, right of publicity and trademarks. Often times, it is difficult to distinguish whether you are using someone else's intellectual property—one must be cautious not to do so when posting on social media. The issues with using someone else's copyright, likeness and trademark in social media to promote one's business is that one is profiting off of someone else's property that does not belong to them and that can and does create a significant amount of conflict. Profiting from another's property is what separates the use of social media in business from just personal use.

Copyrights protect works of authorship that are original and fixed in a tangible form or medium. This includes photographs, pictures, drawings, designs, songs, poems and other works. Many times, brand owners see pictures of celebrities out in public wearing their clothes on various blogs and websites. Although this can be extremely exciting for the brand owner, it is unwise to share these photos on social media without clearing it first.

Often times, those pictures found online are copyrighted. The photographers obtain copyright registrations for those photos and retain attorneys to protect their intellectual property. Attorneys have been known to use reverse image search software to find where those photos were posted online. If the photos appear on

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a business's social media account, they will often times send a cease and desist letter and request compensation of $7,000–$14,000. If you refuse to submit to their demands you will most likely be threatened with a lawsuit against you, or worse, they will just go ahead and file a lawsuit against you. Sadly, while it does seem disingenuous, many times they have a colorable case since their client has a copyright registration and their client's photo was used without authorization for commercial purposes.

How does one avoid these situations? Determine where the photo came from. Get a license for the photo. Look to see if the photo is in the public domain. Do not just repost the photo. This happens not only with celebrity photos, but also with photos that appear to be stock photos online. Unless there is a license that comes with a photo, you should not use what you find online. Feel free to post all the photos you take, but be cautious when it comes to posting photos from unknown sources.

In addition to a potential copyright claim over the use of a celebrity's photo, there could be a right of publicity claim. Right of publicity is the right to use one's name, likeness or identity for a commercial purpose. It applies when someone uses a celebrity's name, likeness or voice and can range anywhere from a picture or silhouette to a well-known quote. Thus, if you post a picture of a celebrity wearing your goods, a quote from them or anther item that would refer to them, it may create a false and misleading impression that they are endorsing your product. A famous person does not need to be alive for a claim to be made, their estate can still make the claim for them. The laws vary from state to state and the applicable law is determined by where the celebrity resides or died. In general, you should not use the image, name, likeness or even quotes from a celebrity to promote your products as it may cause a false impression that they have an affiliation with your company. If you would like to do that, contact them, speak with their agent and try to obtain a license or endorsement.

The last social media concern is trademarks. Trademarks protect brands and their identity. Trademarks can be a simple word, slogan, logo, design or even sound. Trademarks are used as source identifiers to help consumers identify where a particular product originates from.

Ideally, one does not wish to cause any confusion with another brand owner. Thus, in using social media, be aware of the potential trademarks of others. Do not use anyone's brand name.[1] There may be a funny slogan or brand name that you want to make a play on, but if there is a possibility consumers will immediately think of the other brand owner and be confused, then do not do it. It could cause the other brand owner to bring forth trademark infringement claims. It does not take much for someone to send a cease and desist letter.

In sum, while social media is a great marketing tool, exercise caution when using it. One must look to where they are obtaining their posts, pictures and inspiration from and one must review whether their post would cause any confusion with or false association with another. If there are any questions or potential confusion in one's commercial use of social media, then it is best simply not to do it, but if you must, consult with an experienced attorney.

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1. The only exception in using someone's trademark is in comparing your product to another's. It's part of the trademark doctrine of "fair use". One can use a competitor's trademark (but only as much as necessary to accurately identify the product) to compare their product with another's product.

Preparing for 2016: The Fair Pay Act

Paul Bressan and Audrey Olson

Employers should take note of a particular change to California's legal landscape: the Fair Pay Act ("FPA"). On October 6, 2015, Governor Jerry Brown signed Senate Bill No. 358 (the FPA) into law. The Act takes effect on January 1, 2016, applies to all employers regardless of size, and amends California's Equal Pay Act (Labor Code section 1197.5) in a number of significant ways:

The New "Substantially Similar" Standard

The most notable change that the FPA brings is the replacement of the current "equal work" standard with the new "substantially similar" standard. Prior to the FPA, section 1197.5 prohibited an employer from paying an employee of one sex less than an employee of the opposite sex for equal work on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions. This "equal work" standard was relatively unclear, as the Department of Labor Standards Enforcement ("DLSE") has never issued any regulations explaining what qualifies as "equal work." Additionally, only a handful of cases have interpreted section 1197.5, and those cases have consistently looked to the federal Equal Pay Act (29 U.S.C. § 206(d)), which also prohibits paying opposite sex employees differently for equal work, for guidance.

However, rather than clarifying section 1197.5, the California legislature enacted the FPA, which moved the statute further away from what little interpretive guidance existed in the first place. Under the FPA, section 1197.5 now prohibits employers from paying an employee of one sex less than an employee of the opposite sex for "substantially similar work when viewed as a composite of skill, effort, and responsibility under similar working conditions." Whereas courts have at least been able to look to the federal Equal Pay Act for assistance in interpreting section 1197.5 due to the similarity of the language, courts and employers are now left on their own to guess as to what constitutes "substantially similar work when viewed as a composite of skill, effort, and responsibility."

This vague standard opens up a number of questions and makes it difficult to be certain how to pay employees in various scenarios. For example, it is unclear whether jobs are only substantially

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similar when they require the same degree of skill, effort, and responsibility, or whether jobs with varying degrees of skill, effort, and responsibility may be considered substantially similar so long as the net job requirements meet some sort of threshold. These are questions that only the courts can answer. Until they do, two things are clear: (1) the FPA makes it more difficult for employers to establish fair and legally compliant pay policies and (2) the FPA increases the ability of employees to contest their wages through litigation.

Deletion of the "Same Establishment" Requirement

Prior to the FPA, employers were only prohibited from paying opposite sex employees who did equal work at the same establishment differently. The FPA, however, has deleted the "same establishment" requirement and now prohibits wage differentials for opposite sex employees doing substantially similar work in any of the employer's establishments. Thus, beginning on January 1, 2016, employees may challenge wage gaps that exist between substantially similar jobs at any of an employer's locations. For example, a woman who works at a facility in Oakland, California may now compare her pay to that of a man who works in the same position at a facility a mile away in Berkeley. Employers who run multiple work sites should take note of this change and make sure to review and compare the pay practices at all company locations.

Good News: Exceptions

Fortunately, the FPA did not amend away an employer's affirmative defenses and ability to protect itself. Section 1197.5 still authorizes employers to pay employees of the opposite sex who do substantially similar work differently where the employer is able to demonstrate that the wage differential is based entirely upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or upon a bona fide factor other than sex, such as education, training, or experience. However, the FPA specifically emphasizes that such a bona fide factor (1) may not be based on or derived from a sex-based differential in compensation; (2) must be job related with respect to the position in question; and (3) must be consistent with a "business necessity." Once again, the FPA fails to give employers clear guidance by vaguely defining "business necessity" as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Note also that this defense will not apply if the employee is able to show that "an alternative business practice exists that would serve the same business purpose without producing the wage differential."

Retaliation Provision

The FPA also adds a retaliation provision, prohibiting employers from discharging, discriminating, or retaliating against any employee for bringing or assisting with a claim under section 1197.5. Further, while employers are not required to disclose the wages of one employee to another employee, they may not prohibit employees from disclosing their own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under section 1197.5.

Three-Year Record Keeping Requirement

Prior to the FPA, employers were required to keep records of the wages and wage rates, job classifications, and other terms and conditions of employment of persons employed for a period of two years. Under the FPA, employers are now required to keep these records for three years.

The Takeaway

In sum, the Fair Pay Act has amended California's Equal Pay Act into a far more subjective and employee-friendly standard, thereby encouraging litigation. Employers in violation of the Act may be subject to administrative or civil actions brought by the DLSE, or civil actions by aggrieved employees to recover back pay, liquidated damages, interest, and costs of suit. Fortunately, there are steps that employers can take now to minimize their risk of liability. We highly recommend that employers take the following steps now to prepare for the Fair Pay Act's amendments in 2016:

- Make sure that job descriptions contain details that reflect legitimate reasons for any pay differentials
- Review pay policies and practices across all locations to determine whether any wage differentials exist among "substantially similar" jobs
- If wage differentials exist among substantially similar jobs, make sure you have a justification to support the differential that (1) is not based on sex or any other protected category, (2) relates to the job at issue, (3) and serves a substantial business purpose
- Ensure that there is no prohibition against the discussion of wages in company documents (e.g., Employee Handbooks), and that these documents contain appropriate anti-retaliation provisions
- Review and update training of any individuals who make compensation decisions and remind them of the appropriate job-related factors on which pay may be based
- Update record retention policies from two to three years

The FPA has complexities and ambiguities that warrant careful consideration. Accordingly, employers should conduct an analysis of their workforce wages in advance of the New Year (preferably with the assistance of an attorney to maintain the attorney-client privilege) to determine whether they are vulnerable to potential challenges under the FPA.

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Litigation Gone Sour: A Failed Landlord Lawsuit

Manuel Fishman

A recent published article on a failed landlord lawsuit serves as a good teaching point for real estate executives and lawyers. The bottom line is that a real estate executive that seeks "outcome-driven" legal advice proceeds at his or her peril, and lawyers should tell a client when his or her strategy is not well thought through.

As reported, Equinox, an upscale fitness club chain, had been operating in a mixed-use building in Lower Manhattan for close to 15 years. A new developer purchased the building in which Equinox operated in late 2014. In January 2016, the new owner served Equinox with a notice of default under the lease asserting various non-monetary defaults relating to excessive noise and vibration, demanding the defaults be cured by mid-February 2016 and electing to terminate the lease.

What did Equinox do in response? Within two weeks it filed a lawsuit against the new owner seeking a stay of any default periods under the lease, an injunction against the owner in enforcing the lease provisions in question, a hearing to obtain a court ruling that Equinox was not in default under the lease and a demand for $8 million in damages from the owner.

What went wrong here? Most experienced real estate professionals can read between the lines and see that a speculative developer purchased a New York mixed-use building and determined the rents being generated from the Equinox space, approximately 27,000 square feet, were under market, and with two five-year options to extend still in the lease at fixed increments, the tenant could tie up the space for a long time for a use the developer thought was incompatible with the higher rents it wanted to achieve at the property. Seeking legal advice (or even worse, trying to get outcome-driven advice), the real estate executive got the advice he or she wanted to hear: Find some defaults in the lease and pressure the tenant to move.

It was a bad business strategy compounded by getting the wrong legal advice. Even assuming the legal advice disclosed the risks of declaring a default under the lease for non-monetary conditions that had arguably existed for several years prior to the fitness club's operations, this was clearly a business strategy driven by an attempt to spin facts into an unreachable outcome, and the result was a pushback by a well-financed tenant, resulting in a greater downside to the owner than the perceived benefits of the business strategy.

Sometimes lawyers need to tell clients when their strategy is not achievable. While there are always lawyers that will say "yes" to a business strategy (protecting themselves with the proper disclosures of the risk), in my view having the relationship with legal counsel that you trust is worth much more than the blowback and expense you'll most likely get by following outcome-driven legal advice (and the bad press that has clearly been focused on both the real estate developer and the lawyer who provided the ill-fated advice). As to this case, Equinox will likely get a pretty improvement allowance to drop its lawsuit and preserve its leasehold in the building, further complicating the ROI to the new ownership.

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

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

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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
- 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

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- 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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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).

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