



## New Fair Employment and Housing Act Regulations Expand Obligations of California Employers

MSK Client Alert by [Brett Thomas](#)

On April 1, 2016, California employers subject to the Fair Employment and Housing Act (“FEHA”) will be required to comply with a plethora of amendments to the FEHA that were recently adopted by the California Fair Employment and Housing Council (“FEHC”). Many of the amendments are targeted at increasing employers’ responsibilities with respect to preventing unlawful harassment, discrimination and retaliation from occurring. Several other amendments make the regulations consistent with recent statutory changes and case law, such as outlining the burden of proof in FEHA discrimination and retaliation cases, clarifying that sexual harassment does not need to be motivated by sexual desire, and prohibiting harassment of independent contractors, unpaid interns and volunteers. While we will not summarize all of the changes in this Alert, the more significant amendments are discussed below. The full text of the regulations may be found [here](#).

**Scope of FEHA:** FEHA’s prohibition against discrimination applies to any employer “regularly employing” five or more individuals. The amended regulations clarify that an employer must count individuals working outside of California, as well as employees on paid or unpaid leave, to determine if it meets the five-person threshold. However, employees located outside of California cannot assert claims under FEHA if the wrongful conduct at issue occurred outside of California and was not ratified by decision makers or participants located in California.

**Employers Required to Adopt Harassment/Discrimination/Retaliation Prevention Policy:** FEHA imposes an affirmative duty on the part of employers to “take all reasonable steps to prevent discrimination and harassment from occurring.” To effectuate that duty, the amended FEHA regulations expressly require employers to develop a written harassment, discrimination and retaliation prevention policy. The policy must include the following key elements:

1. **Explain Prohibited Conduct:** The policy must list all of the current protected categories under FEHA (*i.e.*, race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status). The policy also must explain that FEHA prohibits unlawful conduct not only by supervisors and managers, but also by coworkers and third parties.
2. **Create a Complaint Process:** The policy must set forth the process by which an individual may make a complaint to the employer of unlawful discrimination or harassment. The complaint process cannot require an employee to complain to his or her immediate supervisor, but instead must identify at least one of the following avenues for an employee to assert a complaint: (a) a designated company representative (such as a human resources manager, EEO officer or other supervisor); (b) a complaint hotline; (c) an ombudsman; and/or (d) the California Department of Fair Employment and Housing (“DFEH”) or the Equal Employment Opportunity Commission.

The policy must create a complaint process where: the employer will provide a timely response to the complaint; an impartial and timely investigation will be conducted of the complaint by qualified personnel; the investigation will be documented and tracked to ensure that it progresses reasonably; the investigation will have a timely closure; and there are appropriate options for remedial actions and resolutions. The employer is required to designate the complaint as confidential, to the extent possible.



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Finally, the policy must instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the employer can try to resolve the complaint internally.

3. **Explain the Investigatory Process:** The harassment, discrimination and retaliation prevention policy must notify individuals that when the company receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties with appropriate due process and reaches reasonable conclusions based on the evidence collected. The policy must state that the employer will keep the investigation confidential to the extent possible, but not promise complete confidentiality, and further state that the employer shall take appropriate remedial measures if misconduct is found. Finally, the policy must clearly provide that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.
4. **Dissemination of the Policy:** The amended FEHA regulations specify various methods for an employer to distribute its harassment, discrimination and retaliation prevention policy, such as via email with an acknowledgment return form, by posting on the employer's intranet (if there is a tracking system to ensure that employees have read and acknowledged the policy) or "any other way that ensures employees receive and understand the policies." The policy must be translated to another language if ten percent (10%) or more of the workforce at any facility speaks that language.

In addition to implementing a new harassment, discrimination and retaliation prevention policy, employers are still required to distribute to new employees the FEHA's pamphlet entitled, "Sexual Harassment: The Facts About Sexual Harassment," or an alternative writing setting forth the same basic information.

**New Requirements for Harassment Prevention Training:** For more than ten years, California employers who regularly employ fifty or more persons have been required to provide harassment prevention training to supervisors every two years. The amended FEHA regulations impose additional requirements regarding the content of, and recordkeeping requirements pertaining to, the training.

The amended FEHA regulations reflect recent changes to FEHA that require training to address the negative effects of "abusive conduct." The amended regulations provide more specifics as to what the trainer must discuss regarding abusive conduct and clarify that no specific amount of time must be dedicated to addressing abusive conduct, as long as the topic is covered "in a meaningful manner." In addition, the trainer must instruct supervisors on the following new topics: how to identify unlawful harassment, discrimination and retaliation; their obligation to report harassing, discriminatory or retaliatory behavior of which they become aware; remedies available for sexual harassment claims brought in court, including potential employer and individual exposure; strategies to prevent harassment; and the steps necessary to take remedial action to correct harassing behavior (including conducting an effective investigation).

The employer and the trainer are required to retain specific records of the training for at least two years. In addition to the records an employer previously was required to keep, employers now must keep a copy of the training sign-in sheet, all certification of attendance or completion issued, and the written or recorded materials of the training. In addition, if the employer provides training via webinar, it must keep a copy of the webinar, all written materials used by the trainer, all written questions submitted during the webinar, and all written responses or guidance the trainer provided during the webinar.

**The DFEH May Obtain Relief If Employer Fails To Prevent Discrimination/Harassment/Retaliation:** As mentioned above, FEHA creates an affirmative duty on the part of employers to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. The amended FEHA regulations





codify previous California court decisions finding that in order for a private litigant to prevail on a claim of failure to prevent harassment, discrimination and/or retaliation, the plaintiff must prevail on the underlying claim of discrimination, harassment and/or retaliation. However, the amended regulations create a carve out that allows the Department of Fair Employment and Housing to obtain non-monetary preventative remedies against an employer who fails to prevent such conduct, even if the underlying claims fail.

**New Definitions for Expanded Categories of Gender Discrimination:** FEHA was amended in 2012 to prohibit discrimination based on gender expression or gender identity. While gender expression previously was defined in FEHA, gender identity is now defined in the amended FEHA regulations as “a person’s identification as male, female, a gender different from the person’s sex at birth, or transgender.” The amended FEHA regulations also include a definition for “transgender,” and revise the definition of “sex” (which includes reference to breast feeding) and “sex stereotype.”

**New Posting Requirement Re Pregnancy-Related Accommodations and Disability Leaves:** The DFEH has created a new notice entitled “Your Rights and Obligations As A Pregnant Employee” that all employers subject to FEHA are required to display. The notice advises employees of their rights and responsibilities regarding pregnancy, childbirth or related medical conditions. The new notice replaces the two prior notices created by the DFEH, one of which applied to employers with more than fifty employees (who are required to comply with family and medical leave laws) and one for employers with less than fifty employees. The notice must be translated to another language if ten percent (10%) of the workforce at any facility speak that language as their spoken language.

The amended FEHA regulations also clarify that an employee is entitled to up to four months of pregnancy-related disability leave per pregnancy, not per year, and that transgender individuals who are disabled by pregnancy are protected under the law.

**Religious Accommodations:** The amended FEHA regulations clarify an employer’s obligation to reasonably accommodate an applicant or employee’s religious creed. An accommodation is not reasonable if it requires segregation of the employee from customers or the general public, unless the employee specifically requests such an accommodation. In addition, an employer’s dress and grooming policies must take into account religious dress and grooming practices.

**Elimination of Affirmative Action for State Contractors:** The amended FEHA regulations eliminate provisions that previously authorized state contractors to have affirmative action programs. According to the FEHC, the deletion was necessary to comply with Proposition 209 that was passed in 1996 and added a provision to the California Constitution banning California from engaging in affirmative action. However, the amended FEHA regulations do not prohibit hiring or employment practices that are necessary for an employer to be eligible for federal programs, if the ineligibility would result in the loss of federal funds for California.

### **Ask MSK**

*Do employers need to revise any employment policies or practices in order to comply with the amended FEHA regulations?*

Yes. If an employer has not adopted a written policy prohibiting discrimination, harassment and retaliation, it should do so by April 1, 2016. An employer with an existing policy is advised to review its content to ensure that it contains all of the specific information required by the amended regulations. In addition, if an employer has fifty or more employees, it should verify that the harassment prevention training that it provides to its employees covers all of the required topics set forth in the amended FEHA regulations, whether the employer provides the training itself or hires an outside party. Such employers also must comply with the new recordkeeping requirements pertaining to the training.





*What other steps should employers take to comply with the amended FEHA regulations?*

An employer must display a new notice entitled “Your Rights and Obligations As A Pregnant Employee” no later than April 1, 2016.

Employers should also comply with the obligation to reasonably accommodate the religious beliefs of applicants and employees. A reasonable accommodation is one that eliminates any conflict between an individual’s religious practice and the job requirements. Reasonable accommodation not only includes allowing employees time off from work to observe religious holidays, but it also requires altering employer policies that do not accommodate an employee’s religious dress or grooming unless it creates an undue hardship. An employer should not segregate an applicant or employee based on his or her religious dress or grooming (unless the segregation is requested by the individual).



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