

# Management Alert



## No Joke: Amendments To FEHA Discrimination Regulations Effective April 1!

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On April 1, 2016, California's amended anti-discrimination regulations will go into effect. The [amendments](#), propounded by the California Fair Employment & Housing Council, conform to existing law that protects employees from workplace harassment, discrimination, and retaliation. These amended regulations have been in the works since 2014, and now, finally, have been adopted after several lengthy periods of public comment. While the substantive law concerning these topics has not changed, the amendments contain several new and detailed requirements for employer policies, processes, and education, as well as new definitions of several terms, including gender identity, gender expression, and transgender.

We mention some highlights.

### Mandatory anti-harassment policy

The vast majority of California employers already maintain written policies that prohibit workplace harassment. The amended FEHA regulations now make such a policy mandatory and specify a few conditions.

As of April 1, every California employer must have a harassment, discrimination, and retaliation prevention policy that (a) is in writing, (b) lists all current protected categories under the Fair Employment & Housing Act, (c) specifies that employees are protected from illegal conduct from any workplace source, including third parties who are in the workplace, (d) creates a confidential complaint process that ensures a timely response, impartial investigation by qualified personnel, documentation and tracking, appropriate remedial actions and resolutions, and timely closure, (e) informs employees about several avenues of complaint other than to a direct supervisor, (f) requires supervisors to report any complaints of misconduct to a designated company representative, and (g) makes clear that employees will not be exposed to retaliation as a result of making a complaint or participating in any workplace investigation.

To ensure that employees know about the policy and mandated procedures, employers may publicize the policy through various means, including providing a copy of the policy upon hire, posting it in the workplace, and obtaining a written acknowledgment from each employee who receives the policy. Further, if the workforce contains persons whose spoken language is a language other than English, then the employer must translate the policy into every language that is spoken by at least 10 percent of the workforce.

## New definitions

The amended regulations define several terms regarding gender discrimination, such as *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), and *transgender* (a general term for a person whose gender identity differs from the person's sex at birth). The regulations also remind us that gender discrimination includes *sex stereotyping* (relying on assumptions about a person's appearance or behavior, or making assumptions 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 gender).

## Recordkeeping

The amendments also include a two-year record retention requirement for all sexual harassment training materials. Among these materials would be sign-in sheets and course materials, including questions and written answers exchanged in connection with training done by webinar. Training must include information regarding potential employer and individual liability in civil actions and highlight a supervisor's obligations to report sexual harassment, discrimination, and retaliation.

## Important Takeaways

The new amendments to the FEHA regulations do not alter substantive law against workplace discrimination and harassment. For example, they do not create a private right of action under California Government Code section 12940(k) (for failure to prevent harassment or discrimination) unless the complainant is able to prove discrimination, harassment, or retaliation. It remains the case, however, that the DFEH may seek injunctive relief, and any failure to comply with the regulations could undermine a defense to a claim of harassment, discrimination, or retaliation.

Therefore, these amendments should prompt California employers to re-examine policies and procedures to ensure compliance. Employers should review and revise policies, prepare to distribute any amended policies, and perform any needed training.

Attorneys in Seyfarth's California Workplace Counseling Solutions group are available to assist and to respond to any questions you may have. In addition, we will also be announcing soon a program on the topic *California-Peculiar Policies: What Every California Employee Handbook Should Contain*, which will discuss the requirements of these new amendments.

If you would like further information, please contact your Seyfarth attorney, [Colleen M. Regan](mailto:CRegan@seyfarth.com) at [cregan@seyfarth.com](mailto:CRegan@seyfarth.com), or [David D. Kadue](mailto:DKadue@seyfarth.com) at [dkadue@seyfarth.com](mailto:dkadue@seyfarth.com).

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