

# Insight

## IN-DEPTH DISCUSSION

MARCH 4, 2016

### **Don't be Fooled: Significant New Anti-Discrimination and Harassment Policy Requirements Start April 1 for California Employers**

BY DENISE VISCONTI, SHANNON GOING, AND MARISSA DRAGOO

On April 1, 2016, new California regulations take effect requiring employers to develop written anti-discrimination and harassment policies that meet numerous new and detailed requirements.<sup>1</sup> These regulations require employers to develop and distribute anti-discrimination and harassment policies to employees in English as well as in any additional languages that are spoken by at least 10% of the workforce. The regulations also impose requirements for conducting discrimination and harassment investigations.

#### **Backdrop to the New Regulations**

The new regulations aim to clarify employers' already-existing obligation under Government Code section 12940(k) of the Fair Employment and Housing Act ("FEHA")<sup>2</sup> to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct in the workplace.<sup>3</sup> According to the Fair Employment and Housing Council ("FEHC"), the new regulations are intended to create concise, "user-friendly" regulations that encompass best practices and eliminate ambiguity regarding whether employers' anti-discrimination and harassment policies meet FEHA's requirements.<sup>4</sup>

---

1 See Cal. Code Regs., tit. 2, § 11023 (as amended). The Amended Regulations are available at: [https://govt.westlaw.com/calregs/Document/IAE3578DFDCF341E681DEBDF753A5BA45?viewType=FullText&originatorContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/IAE3578DFDCF341E681DEBDF753A5BA45?viewType=FullText&originatorContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

2 Cal. Gov. Code §§ 12900, et seq.

3 FEHC, Initial Statement of Reasons (2014) Addition of Cal. Code Regs., tit. 2, § 1123, p. 3, available at <http://www.dfeh.ca.gov/res/docs/Council/10%2024%202014/Initial%20Statement%20of%20Reasons%20for%20Proposed%20Amendments%20to%20Fair%20Employment%20and%20Housing%20Act%20Regulations.pdf> ("Initial Statement of Reasons"); Cal. Reg. Notice Register 2014, No. 43-Z, p. 1767-69, available at <http://www.oal.ca.gov/res/docs/pdf/notice/43z-2014.pdf>.

4 FEHC, Initial Statement of Reasons (2014) Addition of Cal. Code Regs., tit. 2, § 1123, p. 3, available at <http://www.dfeh.ca.gov/res/docs/Council/10%2024%202014/Initial%20Statement%20of%20Reasons%20for%20Propose>

The FEHC adopted the regulations over objections received during the public comment period. Many argued the requirements were “particularly onerous for employers” and employers would be forced to incur costs to implement the new requirements.<sup>5</sup> In response, the FEHC reiterated its position that the new regulations were easy to comply with and not particularly burdensome to employers.<sup>6</sup>

## Requirements Imposed on Employers Under the New Regulations

The regulations set forth that, in addition to the already-existing requirement for employers to distribute the Department of Fair Employment and Housing (DFEH)-185 brochure on sexual harassment, they must now also have anti-discrimination and harassment policies that:

- Are in writing.
- List the categories of individuals protected by FEHA.
- Make clear that FEHA prohibits coworkers, third parties, supervisors and managers from engaging in discriminatory, harassing, or retaliatory conduct.
- Provide a complaint process to ensure complaints are: kept confidential (to the extent possible); responded to timely; investigated by qualified personnel in a timely and impartial manner; and documented and tracked. The complaint process also must provide for appropriate remedial actions, resolution of complaints, and timely closure of investigations.
- Establish a complaint mechanism, such as a complaint hotline or access to an ombudsperson, that does not require an employee to complain directly to an immediate supervisor.
- Instruct supervisors to report any complaints of misconduct to a designated company representative so the company can try to resolve the claim internally.<sup>7</sup>
- Clarify that allegations of misconduct will be addressed through a fair, timely, and thorough investigation.
- State that confidentiality will be kept by the employer to the extent possible.
- Indicate that if misconduct is found during the investigation, appropriate remedial measures shall be taken.
- Make clear that the company will not retaliate against employees for lodging a complaint or participating in an investigation.<sup>8</sup>

In addition to the foregoing substantive policy provisions, the regulations require employers to disseminate the anti-discrimination and harassment policies. To this end, employers can do one of the following:

- Provide a copy of the policies to all employees either in hard copy or by email with an acknowledgment form for employees to sign.

---

5 FEHC, Final Statement of Reasons for Proposed Amendments to FEHA Regulations (2015) Cal. Code Regs., tit. 2, § 1123, p. 10, available at <http://www.dfeh.ca.gov/res/docs/FEHC/FinalStatementofReasons.pdf>.

6 *Id.*

7 Additionally, employers with 50 or more employees are required to include the reporting of complaints as a topic in California's mandated sexual harassment prevention training. See Cal. Code Regs., tit. 2, § 11024.

8 Cal. Code Regs., tit. 2, § 1123(b).

- Post the policies on a company intranet site and use a tracking system to ensure all employees read and acknowledge receipt of the policies.
- Discuss the policies upon hire or during new-hire orientation sessions.<sup>9</sup>

Finally, the regulations require employers whose workforce includes 10% or more non-native English-speaking employees to issue the anti-discrimination and harassment policies in each such language.<sup>10</sup>

### What Do These New Regulations Mean For Employers?

California employers must ensure they have written policies that comply with the new regulations.

In particular, employers should:

- Review and update their anti-discrimination and harassment policies prior to April 1, 2016.
- Distribute their anti-discrimination and harassment policies via one or more of the approved methods (in addition to Form DFEH-185).
- Ensure proper complaint and investigation procedures are in place.
- Train human resources personnel on how to address all inquiries and potential complaints related to implementation of these new policies and procedures.

It is important to note that the new regulations do not alter existing law, which provides there is no standalone, private cause of action under Government Code section 12940(k) for failure to prevent harassment and discrimination *unless* a private claimant is able to prove discrimination, harassment, or retaliation.<sup>11</sup> Nevertheless, the DFEH may elect to pursue non-monetary preventative remedies for violations of these regulations regardless of whether the Department prevails on an underlying claim of discrimination, harassment, or retaliation.<sup>12</sup> Failure to comply with these regulations may also become a contested issue in discrimination or harassment litigation with individual employees.

### Tools to Assist with Compliance

On March 25, 2016, Littler will conduct a complimentary webinar to discuss these new regulations and how they will affect California employers. During this online session, Littler's subject-matter specialists will explain the new regulations and answer your questions in real time. Contact your Littler attorney for more information, or check Littler's [events calendar](#) for updates.<sup>13</sup>

---

<sup>9</sup> Cal. Code Regs., tit. 2, § 1123(c). Alternatively, employers can use any other method that ensures employees receive and understand the policies.

<sup>10</sup> Cal. Code Regs., tit. 2, § 1123(d).

<sup>11</sup> Cal. Code Regs., tit. 2, § 1123(a)(2); *Dickson v. Burke Williams, Inc.*, 234 Cal. App. 4th 1307 (Cal. Ct. App. 2015).

<sup>12</sup> Cal. Code Regs., tit. 2, § 1123 (a)(3).

<sup>13</sup> Additionally, Littler offers innovative solutions for California employers, including [HR PolicySmart](#) software to assist with creating and maintain current and comprehensive policies, as well as a full curriculum of compliance, ethics, and leadership [training](#) for every level of your organization.