

New FEHA Regulations: Understanding California's New Requirements for How Employers Handle Employee Complaints

By Greg Keating, J.D., Partner at Choate, Hall & Stewart

New California regulations require that employers write discrimination, harassment and anti-retaliation policies which include extensive complaint management and investigation procedures.

Snapshot

- » **What has changed?** The new regulations under California's Fair Employment and Housing Act (FEHA), 2 CCR § 11023(b)-(d), add new requirements to companies' procedures for handling internal employee complaints.
- » **Who does it impact?** All employers that conduct business in California and have five or more employees are covered by the new regulations.
- » **What do I need to do?** Employers must now have a written policy covering harassment, discrimination, and retaliation prevention. Amongst other requirements discussed in greater detail below, the policy must specify a complaint management process that ensures anonymous, fair, thorough, and independent investigations.

What You Need To Know

What the New Regulations Require of Your Compliance Procedures

- » The new regulations require that every employer of five or more employees has a written policy against workplace discrimination, harassment, and whistleblower retaliation.
- » The policy must explicitly protect against discrimination or harassment on account of race, religion, 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/veteran status.
- » Covered employers must adopt a complaint management process which as far as possible maintains a complainant's anonymity, ensures a timely response, leads to an impartial investigation by qualified personnel, documents reasonable progress, leads to appropriate punishment for discovered malfeasance, and ends on a timely basis.
- » Employees must have an avenue to share their complaints with someone other than their direct supervisor, such as a complaint hotline or a designated ombudsperson.
- » Supervisors must be instructed to report any complaints to an internal human resources manager, or a similarly empowered person, who must first attempt to resolve the complaint internally.
- » The written policy must be distributed to all employees via email, printed copy, posting on company intranet, or an in-person meeting. Employees must be asked to acknowledge their receipt and understanding of the new policy in some way (like an acknowledgment form).

- » The written policy must also make clear that the company will not retaliate against employees for lodging a complaint or participating in an investigation.
- » If more than 10% of employees speak a language other than English, the policy must be translated into those other languages as well.

What Training Changes Will I Need to Make to Comply with the New Regulations?

To respond effectively to these new regulations, organizations will need to adjust the training they provide to their managers and executives. The new training should:

- » Help managers learn how to protect a complainant's anonymity as far as possible
- » Emphasize the broad range of protected groups, including new categories like gender expression
- » Explain the newly emphasized need for timeliness and thoroughness in complaint investigations
- » Help managers learn how to document reasonable progress of any investigations in a way that will stand up to later scrutiny
- » Teach managers that they must now report any complaints to a dedicated human resources manager, or similarly empowered employee, for a prompt internal review

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ABOUT THE AUTHOR



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Gregory Keating is chair of Choate's Labor Employment & Benefits and Whistleblower Defense Groups. He was nominated to serve as a management representative on the Whistleblower Protection Advisory Committee in 2012 by US Senators Michael Enzi and Johnny Isakson and was later appointed by Hilda Solis, U.S. Secretary of Labor. In 2014, current U.S. Secretary of Labor Thomas Perez re-appointed Mr. Keating to serve another two-year term. In spring 2014, he testified before the U.S. Senate at a hearing on whistleblower protections. Mr. Keating is recognized as a national authority in the area of whistleblowing and retaliation. He litigates and investigates a wide range of whistleblower cases and has extensive experience handling matters arising under the Sarbanes-Oxley Act, the Dodd-Frank Act, the False Claims Act and the Foreign Corrupt Practices Act.

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