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LABOR & EMPLOYMENT

ALERT

MARCH 2015

SIGNIFICANT CHANGES TO EMPLOYER OBLIGATIONS IN CALIFORNIA EFFECTIVE APRIL 1ST

By Scott J. Wenner

The Fair Employment and Housing Act (the "Act") is the California's omnibus law prohibiting discrimination in employment and housing. The Department of Fair Employment and Housing's ("DFEH") Fair Employment and Housing Council ("FEHC") promulgates regulations that implement the Act. Late last year, after a lengthy notice and comment period, the FEHC filed sweeping amendments to the Act's existing regulations with California's Secretary of State to take effect April 1, 2016. (The amended regulations can be found here.) According to the FEHC, the purpose of these amendments is to update the existing regulations to conform to recent legislation, and to recent judicial and administrative decisions. The amended regulations add materially to the obligations of California employers to publish policies and procedures addressing unlawful harassment and discrimination, and to train supervisors. They also purport to expand the Act's coverage to entities previously too small to be covered.

Coverage

The Act applies to employers that regularly employ five or more persons. While previously unclear whether the five employees had to be based in California for the employer to be covered by the Act, the amended regulations specifically declare that employees both within and outside California are counted when determining coverage. Thus, so long as an employer has a single employee in California, the FEHC's position is that it is subject to the Act if it regularly employs at least five persons, including those on leave, anywhere.

New Requirements for Discrimination and Harassment Policies and Procedures

Employers already must provide employees with written information about sexual harassment by distributing either DFEH-185, a brochure prepared by the DFEH, or by providing an equivalent document. Under the new regulations, far more information about unlawful harassment and discrimination must be given to employees

Beginning April 1, as part of the general obligation of employers under the Act to prevent unlawful harassment and/or discrimination, all covered employers will be required to publish a company policy that forbids unlawful discrimination and harassment. That policy must be in writing, and its contents must meet the following specific minimum requirements:

1. The policy must specifically refer to all characteristics that are protected by the Act.

2. The policy must state that the Act prohibits unlawful discrimination and harassment by anyone with whom an employee has contact during the workday, including managers, supervisors, coworkers and third parties (such as vendors and independent contractors).

3. The policy must include a process by which employees can effectively complain about unlawful discrimination and/or harassment, and that process must assure employees that complaints will

a. Be processed promptly;

b. Be handled confidentially (to the extent possible consistent with the duty to investigate;

c. Be investigated impartially and promptly by a person qualified to investigate;

d. Be subject to tracking and documentation requirements for all investigative activity to ensure appropriate progress and a timely closure; and

e. Adequate remedial options available as necessary for final resolution.

4. The policy must allow employees to complain to someone other than a direct supervisor by designating other company representatives to receive complaints (e.g., an EEO officer, human resources manager or ombudsperson); by creating a company hotline; and/or by identifying the DFEH or the Equal Employment Opportunity Commission as resources to receive complaints;

5. The policy must direct supervisors to report complaints of misconduct in violation of the policy against unlawful discrimination and harassment to a designated company representative so that the Company can address and possibly resolve the complaint internally.

6. The policy must explain the investigatory process and commit to conducting a fair, timely, and thorough investigation that provides those involved with appropriate due process, and also reaches reasonable conclusions based on the evidence collected. In addition, although redundant of assurances required elsewhere,

a. The policy must state that the employer will keep the investigation confidential to the extent possible, without promising complete confidentiality;

b. The policy also must represent that the employer will take appropriate remedial measures if misconduct is found; and

c. The policy must provide a clear assurance that employees will not be exposed to retaliation for lodging a complaint of discrimination and/or harassment or for participating in any workplace investigation.

7. The policy must be disseminated in one or more of the following forms:

a. Distribution of printed copies with an acknowledgment to sign and return;

b. Distribution by email with an acknowledgment return form;

c. Posting on the company intranet with a tracking capability to ensure all employees have read the policy and acknowledged receipt;

d. Discussion of the policy upon hire and/or during orientation or training; and/or

e. Another method, so long as it ensures that employees receive and understand the policy.

8. Where a language other than English is primarily spoken by ten percent (10%) or more of an employer's workforce, the employer must translate the policy into each such language and distribute that version of the policy to the 10% of its employees who speak each of those languages.

New Training Requirements

At present, California employers with 50 or more employees must provide semi-annual training to supervisors on preventing unlawful harassment. The amended regulations add the following substance to this supervisor training requirement:

1. Training must include instruction on obligation to report potential unlawful harassment, discrimination and/or retaliation about which they become aware;

2. It must review the remedies potentially available to unlawful harassment victims in a civil

action, as well as possible exposure to the employer and employee;

3. It must address "abusive conduct" in a "meaningful manner." This requirement is in response to recent legislation imposing an anti-bullying training requirement on covered employers, which is codified at California Government Code §12950.1. This recent provision defines *abusive conduct* as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." To satisfy this new requirement the training must:

a. Define abusive conduct;

b. Explain the adverse impact of abusive conduct on the victim and others;

c. Discuss the elements of abusive conduct;

d. Provide examples of abusive conduct; and

e. Explain that a single act does not amount to abusive conduct unless it is especially severe or egregious.

New Training Recordkeeping Requirements

Training records must be maintained for at least two years and must include

1. Names of training participants;
2. Dates of training;
3. Sign-in sheets;
4. Copies of certificates of attendance or completion (if any);
5. Description of type of training;
6. Copy of all written or recorded materials used; and
7. Name of trainer.

Liability for Failure to Prevent Unlawful Harassment or Discrimination Clarified

The Act imposes a duty on all employers to "take all reasonable steps to prevent discrimination and harassment from occurring." The courts have permitted plaintiffs to bring a claim against their employer for failing to satisfy this duty. However, in commonsense fashion, recent decisions have refused to permit a claim for failure to prevent discrimination to go forward where the plaintiff failed to establish a claim of unlawful discrimination and/or harassment against him or her. The amended regulations adopt the reasoning of those decisions, and add further guidance with which to assess such claims:

1. In determining whether the employer failed to take all reasonable steps to prevent unlawful discrimination or harassment, the fact finder should consider more than simply whether the employee proved that he/she was treated unlawfully, and also should weigh:

a. The size of the employer's workforce;

b. The size of the employer's budget;

c. The nature of the employer's business; and

d. The facts and circumstances of the case before it.

2. While agreeing that an employee whose claim of discrimination or harassment fails cannot bring a claim that the employer failed to take all reasonable steps to prevent discrimination or harassment, the amended regulations permit the DFEH to bring such a claim against an employer even if it cannot prove liability to any employee if it seeks only preventative remedies and no monetary relief.

Religious Accommodation

The amended regulations address the duty of California employers to reasonably accommodate the religious creed of applicants and employees. The regulations now provide explicitly that 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.

Conclusion

It is important that employers covered by the Act promptly review their policies and procedures on unlawful discrimination and harassment to ensure that they are compliant with the detailed new requirements of the amended regulations, and that those employers with 50 or more employees confirm that their supervisor training covers all of the issues required by the amended regulations.

Despite the detailed requirements imposed by the amended regulations, most prudent employers should not have to make significant changes to their policies and procedures – that is, prudent employers already have included in their existing policies and procedures on discrimination and harassment much of what the FEHC now will require. Indeed, under the laws of most states – although not in California – employers that publish and adhere to the kind of process now required by the amended regulations have an affirmative defense in many instances to claims of unlawful harassment, and also can use such evidence effectively to defend against punitive damages even in California. Thus, forward-looking employers already have policies that contain much of what the amended regulations require.

There is a potential trap in the regulations for the unwary. There is a risk in California that a failure to follow a published policy will lead to a breach of contract claim. It is easy to imagine an employee who claims to have been harassed or discriminated against unlawfully also disagreeing that she received the "due process" promised in the policy, and/or claiming that the person who investigated her internal complaint was qualified to conduct the investigation as promised. Thus, it is important that the policies and procedures required by the amended regulation be carefully written to avoid to the extent possible exposure to contract-based claims by employees and former employees unhappy with the outcome of an internal complaint. ◆

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