

Summary of New California FEHA Regulations

California employers, take note: Recent [amendments](#) to California's Fair Employment and Housing Act (FEHA) regulations go into effect on April 1, 2016. The amendments are largely intended to bring the regulations into compliance with recent statutory changes and case law. The following is an overview of the most significant changes.

Protections for Unpaid Interns and Volunteers

The amended regulations incorporate the FEHA protections against discrimination and harassment provided to unpaid interns and volunteers that went into effect on January 1, 2015. The regulations (2 C.C.R. 1108) define **unpaid interns and volunteers** as individuals (often students or trainees) who work without pay for an employer or other covered entity, in any unpaid internship or another limited duration program, to provide unpaid work experience or as a volunteer. Unpaid interns and volunteers may or may not be employees.

Personal Liability for Harassment

The amended regulations (2 C.C.R. 11019) clarify that an employee who engages in unlawful harassment of a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

Required Employer Policies

The amended regulations (2 C.C.R. 11023) clarify that employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. As part of this duty, covered employers **must** develop a harassment, discrimination, and retaliation prevention policy that meets all of the following criteria:

1. Is in writing.
2. Lists all current protected categories covered under the FEHA.
3. Indicates that the FEHA prohibits co-workers and third parties, as well as supervisors and managers with whom the employee comes into contact, from engaging in conduct prohibited by the FEHA.
4. Creates a complaint process to ensure that complaints receive:
 - An employer's designation of confidentiality, to the extent possible.
 - A timely response.
 - Impartial and timely investigations by qualified personnel.
 - Documentation and tracking for reasonable progress.
 - Appropriate options for remedial actions and resolutions.
 - Timely closures.
1. Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, **any or all of** the following:
 - Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor.
 - A complaint hotline.
 - Access to an ombudsperson.
 - Identification of the department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.

1. Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training.
2. Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
3. States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.
4. Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures will be taken.
5. Makes clear that employees will not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

Employers must disseminate their policies by one or more of the following methods:

- Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return.
- Sending the policy via email with an acknowledgment return form.
- Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies.
- Discussing policies upon hire and/or during a new hire orientation session.
- Any other way that ensures employees receive and understand the policies.

Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language must translate the policy into every language that is spoken by at least 10 percent of the workforce.

Sexual Harassment Training and Education

The amended regulations (2 C.C.R. 11024) make many changes with regards to sexual harassment training:

1. The definition of “e-learning” training has been revised to provide that e-learning trainers must maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.
2. The definition of “webinar” has been revised to provide that, if an employer uses a webinar for training, the employer must, for a period of two years after the date of the webinar, maintain a copy of the webinar, all written materials used by the trainer and all written questions submitted during the webinar, and document all written responses or guidance the trainer provided during the webinar.
3. Clarification of other “effective interactive training” as supplemental tools, examples of how to assess learning within the training method, and new requirements for trainer qualifications.
4. The records needed to document training has been expanded to include the sign in sheet, a copy of all certificates of attendance or completion issued, and a copy of all written or recorded materials that comprise the training.
5. The objectives of training have been expanded to include providing trainees with information related to the negative effects of abusive conduct in the workplace, and implementing mechanisms to promptly address and correct wrongful behavior.
6. Mandated training under FEHA has been expanded to include:
 - Remedies available for sexual harassment victims in civil actions; potential employer/individual

exposure/liability.

- Supervisor's obligation to report sexual harassment, discrimination, and retaliation of which they are aware.
- In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- A review of the definition of "abusive conduct."

The regulations provide that the training regarding abusive conduct should:

- Explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace.
- Include information about the detrimental consequences of this conduct on employers — including a reduction in productivity and morale.
- Specifically discuss the elements of abusive conduct, including conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests (including performance standards).
- Include examples of abusive conduct, such as included repeated infliction of verbal abuse, the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance.
- Emphasize that a single act will not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.

National Origin Discrimination

The revised regulations (2 C.C.R. 11028) provide that it is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver's license issued under Cal. Veh. Code § 12801.9, which issues licenses to noncitizens.

The revised regulations further state that an employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

- Possession of a driver's license is required by state or federal law; or
- Possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law.

Under the revised regulations, an employer's or other covered entity's policy requiring applicants or employees to present or hold a driver's license may be evidence of a violation of FEHA if the policy is not uniformly applied, or is inconsistent with legitimate business reasons (i.e., possessing a driver's license is not needed in order to perform an essential function of the job).

However, the law does not limit or expand an employer's authority to require an applicant or employee to possess a driver's license, nor does it alter an employer's or other covered entity's rights or obligations under federal immigration law.

Sex Discrimination

The amended regulations (2 C.C.R. 11029) clarify that the purposes of the laws against discrimination

and harassment in employment because of sex are to eliminate discrimination and harassment based on sex, gender identity, or gender expression for those who are treated differently, paid less, treated adversely based on stereotyping, subjected to conduct of a sexual nature, subjected to hostile work environments, or made to suffer other forms of adverse action, and to guarantee that in the future equal employment benefits will be afforded regardless of the individuals' sex. The revised regulations also provide amended definitions of the following terms:

- **Sex** has the same definition as provided in Cal. Govt. Code § 12926, which includes, but is not limited to, pregnancy; childbirth; medical condition related to pregnancy, childbirth, or breast feeding; gender identity; and gender expression (2 C.C.R. 11030).
- **Sex stereotype** means an assumption about a person's appearance or behavior, or about an individual's ability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex (2 C.C.R. 11030).

The amended regulations also provide the following new definitions:

- **Gender expression** means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth (2 C.C.R. 11030).
- **Gender identity** means a person's identification as male, female, a gender different from the person's sex at birth, or transgender (2 C.C.R. 11030).
- **Transgender** is a general term that refers to a person whose gender identity differs from the person's sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual" (2 C.C.R. 11030).

Additionally, the revisions clarify that it is no defense to a complaint of harassment based on sex that the alleged harassing conduct was not motivated by sexual desire (2 C.C.R. 11031).

Sexual Harassment

The amended regulations (2 C.C.R. 11034) clarify that an employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment.

In addition, the regulations provide that sexually harassing conduct may be either "quid pro quo" or "hostile work environment" and defines the terms as follows:

- **Quid pro quo** (Latin for "this for that") sexual harassment is characterized by explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.
- **Hostile work environment** sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee's work performance or create an intimidating, hostile, or offensive work environment. In regards to hostile work environment sexual harassment:
 - The harassment must be severe or pervasive such that it alters the conditions of the victim's employment and creates an abusive working environment. A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. To be unlawful, the harassment must be both subjectively and objectively offensive.
 - An employer or other covered entity may be liable for sexual harassment even though the offensive conduct has not been directed at the person alleging sexual harassment, regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.

- An employer or other covered entity may be liable for sexual harassment committed by a supervisor, co-worker, or third party. Accordingly:
 - An employer or other covered entity is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or other covered entity knew or should have known of the harassment.
 - An employer or other covered entity is liable for harassment of an employee, applicant, or independent contractor, perpetrated by an employee other than an agent or supervisor, if the entity or its agents or supervisors knows or should have known of the harassment and fails to take immediate and appropriate corrective action.
 - An employer or other covered entity is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.
 - An employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

Additionally, the revised regulations clarify that an employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

Pregnancy, Childbirth, or Related Medical Conditions Definitions

Under the amended regulations (2 C.C.R. 11035), the definitions for pregnancy, childbirth, or related medical conditions clarifies that a transgender individual who is disabled by pregnancy may not be excluded from the pregnancy disability protections and specifically includes a transgender employee who is disabled by pregnancy within the definition of an eligible female employee who qualifies for coverage under her employer's group health plan.

The regulations further clarify that it is an unlawful employment practice for any employer with one or more employees (or other covered entities) to harass an employee or applicant because of pregnancy or perceived pregnancy, childbirth, breastfeeding, or any related medical conditions (2 C.C.R. 11036).

Pregnancy Disability Leave

The amended regulations (2 C.C.R. 11042) clarify that the leave entitlement for pregnancy disability leave is four months (which does not need to be taken in one continuous period of time) and that employees are eligible for up to four months of leave and continued benefits per pregnancy, not per year.

The regulations also change the language in the California Pregnancy Disability Leave notice that employers are required to post. Under the amended regulations, the notice must explain the FEHA provisions that relate to pregnancy disability leave and include information about all of the following:

- An employee's right to request reasonable accommodation, transfer, or pregnancy disability leave.
- An employee's obligations to provide adequate advance notice to the employer of the need for reasonable accommodation, transfer, or pregnancy disability leave.
- The employer's requirement, if any, that the employee provide medical certification to establish the medical advisability for pregnancy disability leave, reasonable accommodation, or transfer.

- How to contact the Department of Fair Employment and Housing (DFEH) to file a complaint and learn more about rights and obligations under the FEHA.

The DFEH has issued a new poster, [Your Rights and Obligations as a Pregnant Employee](#), which details the information that employers may use and post at their worksites. Using the DFEH's poster satisfies an employer's posting requirements under the amended regulations.

Religious Discrimination

With regards to religious discrimination, the amended regulations (2 C.C.R. 11059 and 11060):

- Clarify that the FEHA's prohibition against religious discrimination and duty to provide reasonable accommodations for religious observances and dress and grooming practices applies to individuals serving in apprenticeship programs, unpaid internships, and any other program to provide unpaid experience for a person in the workplace or industry, in addition to employees, applicants, and others covered by the act.
- Revise the definition of "religious creed" to encompass all aspects of religious belief, observance, and practice, including religious dress and grooming practices. Dress and grooming standards or requirements for personal appearance must take into account religious dress and grooming practices when making a reasonable accommodation to an employment policy or practice.
- Provide that refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination. Additionally, a reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement. Unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public.
- Provide that it is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on religion, regardless of whether the employer granted the request.

Disability Discrimination

With regards to providing reasonable accommodations to individuals with a disability, the amended regulations:

- Clarify that the interactive process requires an individualized assessment of both the job at issue and the specific physical or mental limitations of the individual that are directly related to the need for reasonable accommodation (2 C.C.R. 11064).
- Clarify that a "support animal" may constitute a reasonable accommodation in certain circumstances. A **support animal** is one that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. As in other contexts, what constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process (2 C.C.R. 11065).
- Provide that it is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on mental or physical disability, regardless of whether the employer granted the request (2 C.C.R. 11068).

Conclusion

This material provides only a brief overview of some of the major changes contained in the more than 90 pages of amended regulations. These regulations are applicable to most California employers, who are highly encouraged to read through the regulations in their entirety.