NO JOKE—APRIL 1, 2016 CHANGES TO FEHA CREATE MORE LIABILITIES FOR EMPLOYERS

Starting on April 1, 2016, employers will face more stringent responsibilities in the workplace, as new regulations will go into effect that reflect changes and interpretations of courts regarding the Fair Employment & Housing Act ("FEHA"). These changes will likely increase liability on the part of employers and make it imperative for employers to seek legal assistance in preparing them for the years ahead. Below is a summary of those changes.

Previously, FEHA applied to employers that "regularly employed" five or more employees. However, the definition of regularly employing those employees expanded to include those individuals regardless of whether the employee's worksite is located within or outside of California and also includes those employees who are on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other types of leave. (2 California *Code of Regulations* ("C.C.R.") § 11008[d][1 & 2]).

Further, while employees located outside of California are counted in determining whether employers employ five or more individuals for coverage purposes, the employees located outside of California are not themselves covered by the protections of the Act if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California. (2 C.C.R. § 11008[d][1]).

Principles of Employment Discrimination

The legal standard to establish causes of action for discrimination and retaliation was codified to reflect the California Supreme Court's ruling in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, which states "Discrimination can now be established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense." (2 C.C.R. §11009[c]).

The code further explains this standard does not apply to other FEHA causes of action, such as harassment, denial of reasonable accommodation, failure to engage in the interactive process and failure to provides leaves under Government Code §§ 12945 and 12945.2. (*Id*).

Harassment and Discrimination Prevention and Correction

FEHA now states there is now no stand alone, private cause of action under California *Government Code* §12940(k) for an employer's failure to prevent (discrimination, harassment or retaliation) and per the new regulation, the claimant must also plead and prevail on the underlying claim of discrimination, harassment or retaliation. (2 C.C.R. §11023[a][2]).

The amendments also increase the responsibility of an employer significantly in requiring it to develop its own harassment, discrimination and retaliation prevention policy that is not only in writing, but has to extensively comply with a plethora of rules included below.

(1) Is in writing;
(2) Lists all current protected categories covered under the Act;
(3) Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;
(4) Creates a complaint process to ensure that complaints receive:
    (A) An employer's designation of confidentiality, to the extent possible;
    (B) A timely response;
    (C) Impartial and timely investigations by qualified personnel;
    (D) Documentation and tracking for reasonable progress;
    (E) Appropriate options for remedial actions and resolutions; and
    (F) Timely closures.
(5) Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, the following:
    (A) Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or
    (B) A complaint hotline; and/or
    (C) Access to an ombudsperson; and/or
    (D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.
(6) 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, pursuant to section 11024 of these regulations.
(7) 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.
(8) States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.
(9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.
(10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation. (2 C.C.R. §11023[b]).

These employer written policies must also be translated into any language that is spoken by at least 10 percent of the workforce. (2 C.C.R. §11023[d]).

Sexual Harassment Training and Education

Several changes to the FEHA include requiring employers who provide sexual harassment training and education to retain documents and materials for an extended period of time.

For example, if the training is provided via e-learning, the trainer is now required to 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 C.C.R. §11024[a][2][B]).

For webinar training, the employer must 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 for two years after the date of the webinar. (2 C.C.R. §11024[a][2][C]).

In addition to the requirements that trainers were already required to have the ability to train supervisors about, the code adds how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law and a supervisor's obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware. (2 C.C.R. §11024[a][9]).

The regulations focus on training employees specifically about "abusive conduct", which needs to be covered in a "meaningful manner". This training should explain the negative effects that abusive conduct has on the victim as well as others in the workplace, the detrimental consequences it could have on employers, including a reduction of productivity and morale. The training should 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). (2 C.C.R. §11024[c][2][M]).

It lists specific examples of abusive conduct, which may include repeated infliction of verbal abuse, such as 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. (*Id*).

National Origin and Ancestry Discrimination

It is now unlawful to discriminate against an applicant or employee because he or she presents a driver's license issued under § 12801.9 of the California *Vehicle Code*, which is a license issued when a person is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law. (2 C.C.R. §11028[e]).

Sex Discrimination

The Statement of Purpose for FEHA'S section on sex discrimination was revised to state:

"The purpose of the laws against discrimination and harassment in employment because of sex is to eliminate the means by which individuals, by virtue of their sex, gender identity, or gender expression, 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 individual’s sex." (2 C.C.R. §11029[b]).

The code now includes definitions for gender expression, gender identity, and transgender, expanded the definition of sex to include pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breastfeeding; gender identity; and gender expression and also edited the definition of sex stereotype to include assumptions about a person's appearance or behavior, social expectations or sex. (2 C.C.R. §11030[a-e]). FEHA also states 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[d]).

One of the most important amendments in the code is related to sexual harassment and the liability of an employer (or individual harasser) depending on the parties involved, as now an employer or a covered entity may be liable for sexual harassment committed by a supervisor, coworker or even a third party. (2 C.C.R. § 11034[f][2][C]).

It first distinguishes the difference between quid pro quo sexual harassment and hostile work environment sexual harassment, as quid pro quo is the 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 and hostile work environment. (2 C.C.R. §11034[f][1-2]).

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. (2 C.C.R. §11034[f][2]).

The code then narrows down the liability depending on the situation:

Harassing conduct by its agents or supervisors- employer strictly liable regardless of whether the employer or other covered entity knows or should have known of the harassment.

Harassing conduct by an employee other than its agents or supervisors- employer liable if the entity or its agents or supervisors knows or should have known on the conduct

Harassing conduct by nonemployees to its employees- employer liable if the entity or its agents or supervisors knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

Harassing conduct by an employee to a co-employee- employee personally liable regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate action. (§ 11034[f][2][C][1-4]).

These changes unequivocally set out who is liable for harassment depending on the parties involved, but the changes also broaden the liability of employers, likely to result in an increase of harassment claims.

Pregnancy, Childbirth or Related Medical Conditions

Previously known as Sex Discrimination, FEHA effectively renamed Article 6 to Pregnancy, Childbirth or Related Medical Conditions, which addresses issues related to transgender individuals who are disabled by pregnancy. Some of these include, "Nothing is this Article shall exclude a transgender individual who is disabled by pregnancy" (2 C.C.R. §11035[f]) and "Eligible female employee includes a transgender employee who is disabled by pregnancy" (2 C.C.R. § 11035[f]).

This Article also makes clear that pregnancy disability leave does not need to be taken in one continuous period of time, and employees are eligible for up to four months of leave per pregnancy, not per year." (2 C.C.R. § 11042[a]&[a][1]).

Moreover, notices regarding pregnancy leave must now be in a conspicuous place where employees are employed and the notice shall explain FEHA's provisions and provide information about how to contact the Department of Fair Employment and Housing to file a complaint and learn more about rights and obligations under FEHA. The poster must be large enough to be easily read, contain fully legible text and be translated in every language that is spoken by at least 10 percent of the workforce. (2 C.C.R. § 11049[d]).

Religious Creed Discrimination

FEHA's prohibition against religious discrimination and duty to provide reasonable accommodations for religious observances and dress and grooming practices now applies to individuals serving in apprenticeship programs, unpaid internships, and any other program to provide unpaid experience. (2 C.C.R. 11059[d]).

The definition of religious creed was expanded to encompass all aspects of religious belief, observance, and practice, including religious dress and grooming practices. (2 C.C.R. § 11060).

Furthermore, refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination and unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public. (2 C.C.R. § 11062[a]).

Disability Discrimination

The FEHA was updated to include the interactive process requiring an individualized assessment of both the job at issue and the specific physical or mental limitations that are directly related to the need for reasonable accommodations. (2 C.C.R. § 11064[b]).

Additionally, support animals now include animals that provide cognitive, or other similar support, as well as the previous emotional support to a person with a disability, including but not limited to traumatic brain injuries or mental disabilities, such as major depression. (2 C.C.R. §11065[a]).

It is also 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[k]).

Age Discrimination

Lastly, age-based stereotype is a new definition which refers to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over forty. (2 C.C.R. § 11075[a]).

These important changes, such as the new liabilities in harassment and requirements for employers to provide written policies on harassment should never be attempted without proper legal advice. Thus, it is more important than ever for employers to seek attorney advice in preparing them for the upcoming changes in the FEHA so they can be well-equipped to protect their businesses. The full text of the new FEHA changes can be accessed via the following link: http://www.dfeh.ca.gov/res/docs/FEHC/FinalText.pdf

Authors: Shannon Jenkins, Robin Sagstetter