



California Amends FEHA Employment Regulations

New regulations regarding the Fair Employment and Housing Act (FEHA) go into effect on April 1, 2016. Some important additions include the following:

Written Policy Requirements

California employers with five or more employees have an affirmative duty to take “reasonable” steps to prevent and correct discrimination and harassment. Under the new regulations, employers must create detailed written policies for preventing harassment, discrimination, and retaliation. The policies must:

- List all protected groups under the FEHA;
- Allow employees to report to someone other than a direct supervisor;
- Instruct supervisors to report all complaints;
- State that all complaints will be followed by a fair, complete and timely investigation;
- State that the employer will maintain confidentiality to the extent possible;
- State that remedial action will be taken if any misconduct is found;
- State that employees will not be retaliated against for complaining or participating in an investigation; and
- State that supervisors, co-workers, and third-parties are prohibited from engaging in unlawful behavior under the FEHA.

Under the new regulations, an employer must distribute its prevention policies to all current and future employees. If 10 percent or more of the workers in a given location speak a language other than English, an employer must also translate its policies into those alternative languages. (§ 11023.)

The new regulations also clarify that:

- the DFEH may independently seek preventative remedies for violations of Government Code section 112940(k); and
- a determination of compliance with Government Code section 12940(k) requires an individualized assessment, considering factors such as workforce size, budget, nature of business, and individual facts of the case.

Definitions Regarding Sex and Gender

- “Gender expression” means a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth. (§ 11030(a).)
- “Gender identity” means a person’s identification as male, female, a gender different from the person’s sex at birth, or transgender. (*Id.* at (b).)
- “Sex” includes, but is not limited to, pregnancy, childbirth, breastfeeding, and any related medical conditions, and gender identity and expression. (*Id.* at (c).)
- “Sex Stereotype” means an assumption about a person’s appearance or behavior, or about an individual’s ability or inability to perform certain kinds of work based on a myth,

social expectation, or generalization about the individual’s sex. (*Id.* at (d).)

- “Transgender” 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.” (*Id.* at (e).)

Sex Discrimination

- Discrimination on the basis of sex protects all individuals from sex discrimination—not just females. (§ 11029.)
- Gender identity, gender expression, and transgender status are expressly protected. (*Id.*; § 11035.)

Reasonable Accommodations

- The interactive process requires an individualized assessment of (1) the job requirements and (2) the specific limitations of the individual that are directly related to the need for accommodation (§ 11064(b).)
- It is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on mental or physical disability. (§ 11068(k).)

Human Trafficking

An applicant or employee who is a victim of human trafficking may have a separate cause of action under FEHA if he or she alleges discrimination on a protected ground. (§ 11009(d).)

Unpaid Interns and Volunteers

It is an unlawful employment practice for an employer or covered entity to:

- Discriminate against a person serving in an unpaid internship or other program providing unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any protected basis (§ 11009)(e).; or
- Subject unpaid interns and volunteers to unlawful harassment. (§ 11019(b).)

The new regulations also define key terms with respect to interns and volunteers:

- “Unpaid interns and volunteers” include any individual that works without pay for an employer or covered entity in an internship or other program providing unpaid work experience, or as a volunteer. (§ 11008(k).)
- Unpaid interns and volunteers may or may not be “employees.” For harassment claims, interns and volunteers are considered “employees.” (§ 11019(b).)
- An “employment benefit” now includes the selection, training, or freedom from termination from an unpaid internship or other programs providing unpaid work experience (§ 11008(g).)

Pregnancy

- It is an unlawful employment practice to harass an employee or applicant because of pregnancy or perceived pregnancy, childbirth, breastfeeding, or any related medical condition (§ 11036.)
- An employee is eligible for up to four months of leave *per pregnancy*. That leave need not be taken in one continuous period. (§ 11042.)
- An employer must provide advance notice of employee rights and obligations regarding pregnancy, childbirth, and related medical conditions. The notice must be in easily readable text and posted in a conspicuous place where employees are employed. A new notice is posted on DFEH website [here](#). The notice must “explain” the FEHA’s provisions and provide the contact information for filing a complaint with the DFEH or learning more about employee rights and obligations. (§ 11049(d).)
- An employer notice should state that employees are required to give advance notice of the need for leave whenever possible, and notify employees of potential entitlement to CFRA leave. (§11051.)

Religious Discrimination

Under the new regulations, unpaid interns and volunteers are protected from religious discrimination:

- The prohibition on religious discrimination and the duty to provide reasonable accommodations for an individual’s religion 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, as well as to employees, applicants and other covered individuals. (§ 11059(d).)

The new regulations also clarify the duty to accommodate an individual’s religion:

- It is unlawful discrimination to fail to hire or terminate an employee in order to avoid accommodating a religion. (§ 11062.)
- It is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on religion. (§ 11062(d).)
- An accommodation is not reasonable if it requires segregation of an employee from customers or the public, unless expressly requested by the employee. (§ 11062(a).)

Support Animals

- An “assistive animal” means an animal that is necessary as a reasonable accommodation. Training to provide assistance for a person’s disability is not required. (§ 11065(a).)
- Assistive animals include “support dogs” and “support animals” that provide 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. (§ 11065(a).)

- A request for an assistive animal as a reasonable accommodation requires an individualized analysis reached through the interactive process. (§ 11065(a).)

National-Origin Discrimination

The regulations prohibit discrimination against an applicant or employee because he or she holds or provides a driver’s license issued under section 12801.9 of the California Vehicle Code, which issues licenses to non-citizens.

An employer or covered entity may require that an applicant or employee 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 covered entity and it is otherwise permitted by law.

An employer or covered entity policy that requires employees or applicants to hold or present a driver’s license may be evidence of unlawful discrimination if that policy is (a) not uniformly applied, or (b) inconsistent with a legitimate business reason (i.e., possessing a driver’s license is not required to perform an essential function of the job).

However, the regulations do not alter an employer or covered entity’s rights or obligations under federal immigration law. (§ 11028)(e).)

Anti-Bullying Training

The new regulations also add training requirements for California employers with fifty or more employees. Training must discuss:

- The steps necessary to remedy harassing behavior, including investigation of complaints;
- Supervisors’ obligation to report harassment, discrimination and retaliation of which they become aware;
- Negative effects of “abusive conduct” on victim and employer by reducing productivity and morale;
- Elements of “abusive conduct.” (§ 11024.)

The regulations also include new documentation and record-keeping requirements, including maintaining sign-in sheets, certificates of attendance or completion, and a copy of training materials. (§ 11024.)

To read the regulations with tracked changes, click [here](#).