



**FREEMAN FREEMAN &
SMILEY, LLP**

**EMPLOYMENT LAW
BULLETIN**

March 14, 2016

Bradley D. Ross

*specializing in Employment
Law and Business Litigation*
310.255.6180
bradley.ross@ffslaw.com

Teresa R. Tracy

*specializing in Employment
Law and Business Litigation*
310.255.6176
teresa.tracy@ffslaw.com

NEW REQUIREMENTS FOR CALIFORNIA HARASSMENT AND DISCRIMINATION PREVENTION AND CORRECTION

Effective April 1, 2016, new California regulations become effective that require employers to augment their policies and procedures for preventing and correcting harassment and discrimination. Employers need to review their policies and procedures to ensure that they are in compliance with the details of the new requirements. While there is no stand-alone, private cause of action for a failure to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, it can be a viable cause of action if the claimant pleads and wins on the underlying claim of discrimination, harassment, or retaliation. Furthermore, the Department of Fair Employment and Housing (DFEH) has taken the position that it will independently seek non-monetary preventive remedies for such a failure, whether or not it prevails on an underlying claim.

The California Fair Employment and Housing Act (FEHA) has long required employers, as an affirmative duty, to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. The regulations make it clear that a determination of whether an employer has done so includes an individualized assessment, depending upon numerous factors that may be unique to the employer, such as number of employees, budget, nature of its business, and the facts of a particular case.

The new regulations make it clear that covered employers must:

1. Distribute the DFEH brochure on sexual harassment or an alternative writing that complies with Government Code § 12950;
2. Develop a harassment, discrimination, and retaliation prevention policy that:
 - a. Is in writing;
 - b. Lists all current protected categories under FEHA;
 - c. Indicates that the law prohibits co-workers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in unlawful harassment, discrimination, or retaliation;
 - d. Includes a complaint process to ensure that complaints receive:
 1. An employer's designation of confidentiality, to the extent possible;
 2. A timely response;
 3. Impartial and timely investigations by qualified personnel;



**FREEMAN FREEMAN &
SMILEY, LLP**

**EMPLOYMENT LAW
BULLETIN**

March 14, 2016

Bradley D. Ross

*specializing in Employment
Law and Business Litigation*
310.255.6180
bradley.ross@ffslaw.com

Teresa R. Tracy

*specializing in Employment
Law and Business Litigation*
310.255.6176
teresa.tracy@ffslaw.com

4. Documentation and tracking for reasonable progress;
 5. Appropriate options for remedial actions and resolutions; and
 6. Timely closures.
- e. Provides a complaint mechanism that does not require an employee to complain directly to the employee's immediate supervisor, including, but not limited to, the following:
1. 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
 2. A complaint hotline; and/or
 3. Access to an ombudsperson; and/or
 4. Identification of the DFEH and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.
- f. 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.
- g. 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.
- h. States that confidentiality will be kept by the employer to the extent possible, but does not indicate that the investigation will be completely confidential.
- i. Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures will be taken.
- j. Makes it clear that employees will not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.
3. Disseminate the policy by one or more of the following methods:
- a. Printing and providing a copy to all employees with an acknowledgement form for the employee to sign and return; and/or
 - b. Sending the policy by email with an acknowledgement return form; and/or



**FREEMAN FREEMAN &
SMILEY, LLP**

**EMPLOYMENT LAW
BULLETIN**

March 14, 2016

Bradley D. Ross

*specializing in Employment
Law and Business Litigation*
310.255.6180
bradley.ross@ffslaw.com

Teresa R. Tracy

*specializing in Employment
Law and Business Litigation*
310.255.6176
teresa.tracy@ffslaw.com

- c. Posting current versions of the policy on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policy; and/or
- d. Discussing policies upon hire and/or during a new hire orientation session; and/or
- e. Any other way that ensures employees receive and understand the policies.

Furthermore, any employer whose workforce at any facility or establishment contains 10% 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% of the workforce.

While in the past, the new details might have been treated as “best practices,” they are now required.

What Employers Need to Do Now:

1. Review and update policies to comply with the new regulations;
2. Distribute the updated policies using one or more of the identified methods (in addition to distributing DFEH Form 185 if the employer has not already done so);
3. Ensure that proper complaint and investigation procedures exist and are being followed;
4. Train the appropriate company personnel how to address all questions, concerns and complaints related to the new policies or alleged harassment, discrimination, and retaliation; and
5. Implement the required tracking system.

Written by **Teresa R. Tracy**

* * *

This Bulletin is made available for educational purposes and to provide general information on current legal topics, not to provide specific legal advice. The publication of this Bulletin does not create any attorney client relationship, and this Bulletin should not be used as a substitute for competent legal advice from a licensed professional attorney.