

EFFECTIVE APRIL 1, 2016: NEW EMPLOYMENT DISCRIMINATION REGULATIONS – TIME TO REVIEW YOUR POLICIES

On April 1, 2016, new employment discrimination regulations will go into effect in California. Promulgated by the Department of Fair Employment and Housing (DFEH), Fair Employment & Housing Council (FEHC), these new regulations have been updated to include recent case law and statutory changes. The regulations also make changes to the requirements for sexual harassment training and education, which are detailed in a separate *Briefing*.

This *Briefing* summarizes the changes in the regulations regarding an employer's duties including the contents of a written harassment and discrimination policy; the definition of "employee"; and the scope of sex discrimination, among other changes.

EMPLOYER'S DUTIES

The regulations reiterate an employer's affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. In addition to distributing the DFEH-185 brochure on sexual harassment (or alternative writing that complies with Gov. Code 12950), the regulations state that an employer must develop a written harassment, discrimination and retaliation prevention policy that:

- Lists all protected categories of employees.
- Indicates that the law prohibits harassing and discriminatory conduct from coworkers and third parties, as well as supervisors and managers.
- Creates a complaint process to ensure complaints receive confidential treatment, to the extent possible; timely response; impartial and timely investigation; documentation and tracking; appropriate options for remedial action and resolution; and timely closures.
- Provides a complaint mechanism that does not require an employee to report to an immediate supervisor.
- Instructs supervisors to report any complaints of misconduct to a designated company or agency representative.
- Indicates that when an employer receives allegations of misconduct, it will conduct a fair, thorough and timely investigation affording due process to all parties and reaching reasonable conclusions based on the evidence collected.
- States that confidentiality will be kept by the employer to the extent possible.

- Indicates that appropriate remedial action will be taken if misconduct is found.
- Makes it clear that retaliation is prohibited.

This policy must be distributed to all employees in a way that ensures that all employees receive and understand the policies. The regulations state that sending the policy via e-mail, posting it on a company or agency intranet or printing and providing a copy to all employees are all adequate means of distribution, provided that there is an acknowledgement form provided requiring each employee to state that they have read and understand the policy.

DEFINITION OF “EMPLOYEE”

The new regulations clarify that California’s anti-discrimination and harassment laws apply to unpaid interns and volunteers as well as paid employees. Moreover, the regulations define an employment benefit to include the selection or training of any person for, or freedom from termination from, an unpaid internship or other limited duration program to provide unpaid work experience for that person.

DRIVER’S LICENSES

The new regulations limit the circumstances under which an employer can require an applicant to hold or present a driver’s license, in furtherance of AB 1660 (Chapter 452, Statutes of 2014.) Under the law, it is unlawful for an employer to discriminate against an applicant or employee because he or she holds a driver’s license that indicates the person is an undocumented immigrant. The regulations state that an employer can require a driver’s license under only two circumstances: (1) possession of a driver’s license for the position is required by state or federal law; or (2) it is both otherwise permitted by law and necessary for performing an essential function of the job and is required by the employer pursuant to a uniformly applied employer policy.

SEX DISCRIMINATION AND HARASSMENT

In accordance with California statutes, discrimination against a person because of their sex includes discrimination because of their gender identity or gender expression. “Gender expression” is defined in the regulations as person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth. “Gender identity” is defined as a person’s identification as male or female and a gender different from the person’s sex at birth, or transgender. The regulations also prohibit harassment based on those categories.

The regulations incorporate within sex discrimination, treatment based on an employee’s pregnancy, childbirth, medical conditions related to pregnancy or childbirth or breastfeeding. Furthermore, they offer explicit protection for transgender individuals disabled by pregnancy.

With regard to sexual harassment, the regulations clarify that an employer may be liable for sexual harassment even if the harassing conduct was not motivated by sexual desire. An employer may also be liable even though the harassing conduct was not directed at the person alleging sexual harassment and regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.

CLARIFICATIONS ON PREGNANCY DISABILITY LEAVE

The regulations clarify that pregnancy disability leave need not be taken in one continuous period of time. They also specify that employees are eligible for up to four months of disability leave per pregnancy, not per year.

The regulations also consolidate the two employer notices to employees of rights with regard to pregnancy leave into one notice - "Your Rights and Obligations as a Pregnant Employee." The consolidated notice is set forth at 2 CCR 11051, a copy of which is attached to this *Briefing*.

RELIGIOUS CREED DISCRIMINATION

The new regulations state, in accordance with Government Code section 12926, that "religious creed" includes all aspects of religious belief, observance, and practice, including religious dress and grooming practices. They clarify that state law prohibitions against religious discrimination and the 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. Unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public. The regulations also make it clear that it is unlawful to retaliate against a person for requesting a reasonable accommodation because of religion.

DISABILITY DISCRIMINATION

The regulations provide that the interactive process required to accommodate an employee with a disability 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. Reasonable accommodation can include a "support animal," which is defined as 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."

SUMMARY

While most of these changes have already been in place through case law or statutory changes, employers are still advised to review their policies, procedures and forms to ensure that they comply with the new regulations.

For more information regarding the new forms, please contact your Claims Analyst or Christine Gerbasi at cgerbasi@keenan.com.

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Your Rights and Obligations as a Pregnant Employee

If you are pregnant, have a related medical condition, or are recovering from childbirth, PLEASE READ THIS NOTICE.

- California law protects employees against discrimination or harassment because of an employee's pregnancy, childbirth or any related medical condition (referred to below as "because of pregnancy"). California law also prohibits employers from denying or interfering with an employee's pregnancy-related employment rights.
- Your employer has an obligation to:
 - reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);
 - transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and
 - provide you with pregnancy disability leave (PDL) of up to four months (the working days you normally would work in one-third of a year or 17 1/3 weeks) and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.
 - provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code.
- For pregnancy disability leave:
 - PDL is not for an automatic period of time, but for the period of time that you are disabled by pregnancy. Your health care provider determines how much time you will need.
 - Once your employer has been informed that you need to take PDL, your employer must guarantee in writing that you can return to work in your same position if you request a written guarantee. Your employer may require you to submit written medical certification from your health care provider substantiating the need for your leave.
 - PDL may include, but is not limited to, additional or more frequent breaks, time for prenatal or postnatal medical appointments, doctor-ordered bed rest, severe morning sickness, gestational diabetes, pregnancy-induced hypertension, preeclampsia, recovery from childbirth or loss or end of pregnancy, and/or post-partum depression.

- PDL does not need to be taken all at once but can be taken on an as-needed basis as required by your health care provider, including intermittent leave or a reduced work schedule, all of which counts against your four month entitlement to leave.
- Your leave will be paid or unpaid depending on your employer's policy for other medical leaves. You may also be eligible for state disability insurance or Paid Family Leave (PFL), administered by the California Employment Development Department.
- At your discretion, you can use any vacation or other paid time off during your PDL.
- Your employer may require or you may choose to use any available sick leave during your PDL.
- Your employer is required to continue your group health coverage during your PDL at the same level and under the same conditions that coverage would have been provided if you had continued in employment continuously for the duration of your leave.
- Taking PDL may impact certain of your benefits and your seniority date; please contact your employer for details.
- If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

Notice Obligations as an Employee

- Give your employer reasonable notice: To receive reasonable accommodation, obtain a transfer, or take PDL, you must give your employer sufficient notice for your employer to make appropriate plans. Sufficient notice means 30 days advance notice if the need for the reasonable accommodation, transfer, or PDL is foreseeable, otherwise as soon as practicable if the need is an emergency or unforeseeable.
- Provide a Written Medical Certification from Your Health Care Provider. Except in a medical emergency where there is no time to obtain it, your employer may require you to supply a written medical certification from your health care provider of the medical need for your reasonable accommodation, transfer or PDL. If the need is an emergency or unforeseeable, you must provide this certification within the time frame your employer requests, unless it is not practicable for you to do so under the circumstances despite your diligent, good faith efforts. Your employer must provide at least 15 calendar days for you to submit the certification. See your employer for a copy of a medical certification form to give to your health care provider to complete.

- PLEASE NOTE that if you fail to give your employer reasonable advance notice or, if your employer requires it, written medical certification of your medical need, your employer may be justified in delaying your reasonable accommodation, transfer, or PDL.

Additional Rights under California Family Rights Act (CFRA) Leave

- You also may be entitled to additional rights under the California Family Rights Act of 1993 (CFRA) if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave. This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition (not related to pregnancy) or that of your child, parent or spouse. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances. For further information on the availability CFRA leave, please review your employer's Notice regarding the availability of CFRA leave.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). For more information about your rights and obligations as a pregnant employee, contact your employer, visit the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov.