

EFFECTIVE APRIL 1ST, SMALL EMPLOYERS WITH 5 OR MORE EMPLOYEES ARE BURDENED WITH A VARIETY OF NEW LAWS UNDER THE FAIR EMPLOYMENT AND HOUSING ACT

Mr. Richard Fader of Ft. Lee, New Jersey asks: “Is it true that effective April 1st new employment laws will become effective and require me, as a small business owner, to change the way I conduct my business internally?”

Well Mr. Fader, this is no April Fool’s joke. As most California employers know, the complex snare of laws that control employment in the state is broad and constantly expanding. Under the Fair Employment and Housing Act (“**FEHA**”) it has become even more complicated.

Employers with 5 or more employees are subject to the new FEHA regulations. Mr. Fader, these new regulations now apply if you collectively have 5 or more employees located anywhere in the United States, one of which is located in California. This means that if you have 1 employee here in California and 4 or more employees somewhere outside of California, the new FEHA regulations discussed below apply to you and you can be sued for failure to comply. Moreover, if you have any employees who are out on leave (such as medical leave), they also count toward the 5-employee requirement as well.

The new FEHA regulations now impose the following obligations upon affected small employers:

- Acceptance of Drivers’ Licenses Issued to Undocumented Persons. FEHA was amended last year to make it unlawful for an employer to discriminate against an applicant or employee because they hold a driver’s license issued under California law to undocumented individuals. These new regulations state that employers may require an applicant or employee to hold or present any form of driver’s license only if possession of a driver’s license is required by state or federal law for the position in question or possession of a driver’s license is uniformly required by the employer and is otherwise permitted by law such as completing an I-9 form, although such a policy may be evidence of a violation of the FEHA if the policy is not uniformly applied or is not justified by legitimate business reasons.
- Require employers to now develop, implement and communicate new anti-discrimination and harassment policies that meet numerous new and detailed requirements. While California employers have always been required to distribute the Department of Fair Employment and Housing (“**DFEH**”) brochure on sexual harassment (Form DFEH-185) to employees, effective April 1st you are now required to do a lot more. Under these new regulations, employers must have in place written anti-discrimination and anti-harassment policies that undertake each of the following:

- Identify each of the following categories of individuals who are protected by FEHA: age (40 and over), ancestry, color, religious creed (including religious dress and grooming practices), denial of Family and Medical Care Leave, disability (including mental and physical, HIV and AIDS), marital status, medical condition (including cancer and genetic characteristics), genetic information, military and veteran status, national origin (including language use restrictions), race, gender (including pregnancy, childbirth, breastfeeding and medical conditions related to pregnancy, gender identity, gender expression and sexual orientation).
 - State that the FEHA prohibits co-workers, third parties, supervisors and managers from engaging in discriminatory, harassing or retaliatory conduct.
 - Create a complaint reporting mechanism that allows an aggrieved employee to communicate their complaint that employee's direct manager, supervisor, another company representative, a confidential hotline, and/or the California Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission.
 - Instruct managers and supervisors to promptly report any complaints of misconduct to a designated company representative so your business can try to resolve the claim internally.
 - Create a complaint procedure process that ensures that complaints are kept confidential (to the extent possible), respond in a timely manner, investigate by "qualified personnel" in a timely and impartial manner, and document and track the complaint and investigation. The complaint procedure process must also provide for appropriate remedial action and resolution and timely closure of investigations.
 - State that allegations of misconduct will be addressed through a fair, timely, and thorough investigation.
 - State that confidentiality will be maintained to the extent possible.
 - State that if misconduct is found during the investigation, appropriate remedial measures will be taken.
 - Make clear that your business will not retaliate against employees for making a complaint or participating in an investigation.
- Update the definitions of "gender identity," "gender expression" and transgender. These new regulations provide new definitions for "gender expression," "gender identity" and "transgender" - "gender expression" means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's gender at birth; "gender identity" means a person's identification as male, female, a gender different from the person's gender at birth, or transgender; and "transgender" is a general term that refers to a person whose gender identity differs from the person's gender at birth. A

transgender person may or may not have a gender expression that is different from the social expectations of the gender assigned at birth. A transgender person may or may not identify as “transsexual.”

- Require employers to distribute those policies to employees in English as well as in any additional languages that are spoken by at least 10% of the workforce. These new regulations require you, as the employer, to disseminate the anti-discrimination and anti-harassment policies to all of your employees. To comply with this regulation, you may do any one of the following:
 - Provide a copy of the policies to all employees either in hard copy or by email with an acknowledgment form for all your employees to sign and return to you.
 - Post the policies on a company intranet site and use a tracking system to ensure all of your employees read and acknowledge receipt of the policies.
 - Discuss the policies upon hire or during new-hire orientation sessions.

These regulations also require employers whose workforce includes 10% or more non-native English-speaking employees to issue the anti-discrimination and harassment policies in each such language.

- Create new requirements for conducting discrimination and harassment training. Anti-discrimination and anti-harassment training must now cover “abusive conduct,” which is defined in California Government Code section 12950.1(g)(2) – “abusive conduct” means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and 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. A single act shall not constitute abusive conduct, unless especially severe and egregious.” The training must cover the negative effects of “abusive conduct,” including reduction in productivity and morale, and discuss the elements of “abusive conduct” quoted above.

Mr. Fader, as a California employer you should undertake, at a minimum, the following steps to ensure compliance with the new FEHA regulations:

- ❖ Confirm that your business has the written policies that comply with the new regulations and that such policies are disseminated in one or more of the approved methods (in addition to Form DFEH-185).
- ❖ Confirm that your business has the proper complaint, investigation and resolution procedures in place.

- ❖ Confirm that your managers, supervisors and human resources personnel receive proper training on these new regulations so that all inquiries and potential complaints can be addressed in a timely and compliant manner.

Failure to fully and completely comply with the new FEHA regulations creates an otherwise avoidable liability exposure. For example, an aggrieved employee may file suit claiming discrimination or harassment. Moreover, the new regulations provide that the DFEH may elect to pursue “non-monetary preventative remedies” for failure to prevent discrimination or harassment ***regardless of whether the DFEH prevails on an underlying claim of discrimination or harassment***. While it is currently unclear what “non-monetary preventative remedies” means, history tells us that it will likely be interpreted in the broadest manner possible.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of California law. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are in compliance with the applicable California law. Please feel free to reach out to the author with any questions or comments.