

ATTACHMENT E

Fair Employment & Housing Council Modifications to Employment Regulations Regarding Harassment Prevention Training (Intended to take effect January 1, 2021)

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 2. Particular Employment Practices

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Article 2. Particular Employment Practices

§ 11023. Harassment and Discrimination Prevention and Correction.

(a) Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. (Gov. Code, § 12940(k).)

(1) A determination as to whether an employer has complied with Government Code section 12940(k) includes an individualized assessment, depending upon numerous factors sometimes unique to the particular employer including, but not limited to, its workforce size, budget, and nature of its business, as well as upon the facts of a particular case.

(2) There is no stand-alone, private cause of action under Government Code section 12940(k). In order for a private claimant to establish an actionable claim under Government Code section 12940(k), the private claimant must also plead and prevail on the underlying claim of discrimination, harassment, or retaliation.

(3) However, in an exercise of its police powers, the Department may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation.

(b) Employers have an affirmative duty to create a workplace environment that is free from employment practices prohibited by the Act. In addition to distributing the Department's

publication on sexual harassment or an alternative writing that complies with Government Code section 12950, an employer shall develop and distribute to its employees a harassment, discrimination, and retaliation prevention policy that:

- (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.

(11) Includes a link to, or the Department's website address for, the sexual harassment online training courses created by the Department.

(c) Dissemination of the policy shall include one or more of the following methods:

(1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;

(2) Sending the policy via e-mail with an acknowledgment return form;

(3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;

(4) Discussing policies upon hire and/or during a new hire orientation session; and/or

(5) Any other way that ensures employees receive and understand the policies.

(d) In addition to the actions described above, every employer shall post a poster developed by the Department regarding transgender rights in a prominent and accessible location in the workplace.

(e) Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the policy into every language that is spoken by at least 10 percent of the workforce.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940 and 12950, Government Code; *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986; *Trujillo v. No. County Transit Dist.* (1998) 63 Cal.App.4th 280, 289; *Dept. Fair Empl. & Hous. v. Lyddan Law Group, LLP.* (October 19, 2010) No. 10-04-P [2010 WL 4901732, at *16 (Cal.F.E.H.C)].

§ 11024. Required Training and Education Regarding Harassment Based on Sex, Gender Identity, Gender Expression, and Sexual Orientation.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) “Contractor” is a person performing services pursuant to a contract with an employer, meeting the criteria specified by Government Code section 12940(j)(5), under the means described in section 11008(d).

(2) “Effective interactive training” includes any of the following:

(A) “Classroom” training is in-person, trainer-instruction, whose content is created by a trainer and provided to ~~an employee~~~~supervisor~~ by a trainer, in a setting removed from the ~~employee’s~~~~supervisor’s~~ daily duties.

(B) “E-learning” training is individualized, interactive, computer-based training created by a trainer and an instructional designer. An e-learning training shall provide a link or directions on how to contact a trainer who shall be available to answer questions and to provide guidance and assistance about the training within a reasonable period of time after the ~~employee~~~~supervisor~~ asks the question, but no more than two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.

(C) “Webinar” training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its ~~supervisor~~~~employees~~ must document and demonstrate that each ~~supervisor~~~~employee~~ who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training’s interactive content, discussion questions, hypothetical scenarios, polls, quizzes or tests, and activities. The webinar must provide the ~~supervisor~~~~employees~~ an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance. For a period of two years after the date of the webinar, the employer shall 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.

(D) The Department’s online training courses on the prevention of sexual harassment in the workplace.

~~(DE)~~ Other “effective interactive training” and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training. These, however, are supplemental tools that cannot, by themselves, fulfill the requirements of this subdivision.

~~(EF)~~ For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the ~~supervisor’s~~~~employee’s~~ application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that ~~supervisor~~~~employees~~ remain engaged in the training. Examples include pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios,

use of brief scenarios discussed in small groups or by the entire group, or any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the ~~supervisor's~~employee's work environment.

(3) “Employee” includes full time, part time, and temporary workers. ~~For purposes of~~In this section only, for purposes of determining whether employers meet the coverage threshold of employing five or more individuals, the term “employee” includes unpaid interns, unpaid volunteers, and persons providing services pursuant to a contract.

(4) “Employer” means any of the following:

(A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly.

(B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section, governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered “political subdivisions of the state.”

(5) “Harassment” under this section refers to harassment on the bases of sex, gender identity, gender expression, and sexual orientation.

(6) “Having 50 or more employees” means employing or engaging 50 or more employees or contractors under the means described in section 11008(d). There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

(7) “Instructional Designer” under this section is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.

(8) “New” supervisory employees are employees promoted or hired to a supervisory position after the date the employer last provided sexual harassment prevention training.

(9) “Supervisory employees” or “supervisors” under this section are supervisors located in California, defined under Government Code section 12926. Attending training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.

(10) “Trainers” or “Trainers or educators” qualified to provide training under this section are individuals who, through a combination of training, experience, knowledge, and expertise, have the ability to provide training about the following: 1) the definitions of abusive conduct, sexual harassment as specified in Government Code section 12940(j), gender identity, gender expression, sexual orientation, and the definitions of the other bases enumerated in the FEHA as specified in Government Code section 12940(a); 2) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation

under both California and federal law; 3) what steps to take when harassing behavior occurs in the workplace; 4) how to report harassment complaints; 5) supervisors' obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 6) how to respond to a harassment complaint; 7) the employer's obligation to conduct a workplace investigation of a harassment complaint; 8) what constitutes retaliation and how to prevent it; 9) essential components of an anti-harassment policy; 10) the effect of harassment on harassed employees, co-workers, harassers and employers; and 11) practical examples in the prevention of harassment, discrimination, and retaliation based on sex, gender identity, gender expression, sexual orientation, and the prevention of abusive conduct. Nothing in this section shall preclude an employer from utilizing multiple trainers who, in combination, meet all of the qualifications required by this subsection.

(A) A trainer also shall be one or more of the following:

1. "Attorneys" admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or
2. "Human resource professionals," "harassment prevention consultants," or peer-to-peer trainers with a minimum of two years of practical experience in one or more of the following: a) designing or conducting discrimination, retaliation and harassment prevention training; b) responding to harassment complaints or other discrimination complaints; c) conducting investigations of harassment complaints; or d) advising employers or employees regarding discrimination, retaliation and harassment prevention, or
3. "Professors or instructors" in law schools, colleges or universities who have either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

(B) Individuals who do not meet the qualifications of a trainer as an attorney, human resource professional, harassment prevention consultant, peer-to-peer trainer, professor or instructor because they lack the requisite years of experience may team teach with a trainer, in accordance with subsections (A)1. through (A)3., immediately above, in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

(11) "Training," as used in this section, is effective interactive training as defined at section 11024(a)(2).

(12) "Two hours" of training is two hours of classroom training or two hours of webinar training or, in the case of an e-learning training, a program that takes the supervisor no less than two hours to complete.

(13) "One hour" of training is one hour of classroom training or one hour of webinar training

or, in the case of an e-learning training, a program that takes the employee no less than one hour to complete.

(b) Training.

(1) Frequency of Training. An employer shall provide one hour of training to non-supervisory employees and two hours of training to supervisory employees, in the content specified in section 11024(c), once every two years, and may use either of the following methods or a combination of the two methods to track compliance.

(A) “Individual” Tracking. An employer may track its training requirement for each ~~supervisory~~-employee, measured two years from the date of completion of the last training of the individual ~~supervisor~~employee.

(B) “Training year” tracking. An employer may designate a “training year” in which it trains some or all of its ~~supervisory~~-employees and thereafter must again complete a retraining of these supervisors-employees by the end of the next “training year,” two years later. For example, ~~supervisors-employees~~ trained in training year ~~2005-2020~~ shall be retrained in ~~2007-2022~~. For newly hired employees or employees promoted to supervisory positions who receive training within six months of their hiring or their assuming their of a supervisory positions and that training falls in a different training year, the employer may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new employees and/or new supervisors beyond the initial two year training year. Thus, with this method, assume that an employer trained all of its supervisors in ~~2005-2020~~ and sets ~~2007-2022~~ as the next training year. If a new employee and/or new supervisor is trained in ~~2006-2021~~ and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in ~~2007-2022~~ with the employer’s other ~~supervisor~~employees.

(2) Documentation of Training. To track compliance, an employer shall keep documentation of the training it has provided its employees under this section for a minimum of two years, including but not limited to the names of the ~~supervisory~~-employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider.

(3) Training at New Businesses. Businesses created after January 1, ~~2006~~2021, must provide training to ~~supervisors-employees~~ within six months of their establishment and thereafter biennially. ~~Businesses that expand to 50 employees and/or contractors, and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.~~

(4) Training for New Employees. New employees shall be trained within six months of their hire date and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(54) Training for New Supervisors. New supervisors shall be trained within six months of assuming their supervisory position (either as a new hire or as a promoted employee) and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(65) Duplicate Training. ~~An employee supervisor who has received training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's employee's new supervisory position or within six months of the employer's eligibility. That supervisor employee shall otherwise be put on a two year tracking schedule based on the supervisor's employee's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.~~ An employee who has received training in compliance with this section within the prior two years either from a current, a prior, or an alternate or a joint employer, or who received a valid work permit from the Labor Commissioner that required the employee to receive training in compliance with this section within the prior two years, shall be given, and required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the employee's new position. That employee shall then be put on a two year tracking schedule based on the employee's last training. The current employer shall have the burden of establishing that the prior training was legally compliant with this section.

(76) Duration of Training. The training required by this section may be completed in segments, so long as the combined segments meet or exceed the applicable hourly requirement~~does not need to be completed in two consecutive hours~~. For classroom training or webinars, the minimum duration of a training segment shall be no less than half an hour. E-learning courses may include bookmarking features, which allow ~~an employee supervisor~~ to pause ~~his or her~~ the individual training so long as the actual e-learning program is ~~two one~~ hour for nonsupervisory employees and two hours for supervisors.

(8) Training of Employees ~~Who That~~ Are Minors. ~~Minors who that~~ are between fourteen and seventeen years of age shall be trained. Employers may elect to train minors in the same manner as other employees and provide them with~~receive~~ the same training materials provided to other employees. Alternatively, employers may elect to train minors in a manner they deem is better tailored for minors, and provide similarly tailored training materials, so long as the training and materials comply with the subject matter content and format requirements set forth in Government Code Section 12950.1 and these regulations. The minor may ~~shall~~ be accompanied by a parent or legal guardian for the training. Employers are not required to provide the training mandated by Government Code section 12950.1 to minors younger than fourteen. If, during the course of the minor's employment, the minor attains the age of fourteen, the employer is then required to provide the training to the minor and the minor's parent or legal guardian within six months of the minor employee's fourteenth birthday and every two years thereafter, measured either from the individual or training year tracking method.

(9) Training of Seasonal or Temporary Employees. For seasonal, ~~or~~ temporary, or other

employees, or any employee that who are hired to work for less than six months, an employer shall provide the training within 30 calendar days after the hire date or within one hundred hours worked, whichever comes first. In those instances where a seasonal, temporary, or other employee is hired to work for less than six months, but has not worked in the 30 calendar days after being hired, then the “hire date” shall mean the first day of work for purposes of identifying the required date of compliance with this provision. Seasonal, temporary or other employees who are hired to work both for less than 30 calendar days and for less than one hundred hours of work are not required to be trained. In the case of a temporary employee employed by a temporary services employer, as defined in Section 201.3 of the Labor Code, to perform services for clients, the training shall be provided by the temporary services employer, not the client. ~~In such instances, the~~ temporary services employer shall also provide both their own anti-harassment policy and the anti-harassment policy of any client employer at whose worksite the employee is working ~~at the time the training is provided.~~ The temporary services employer may coordinate with the client employer to instead have the client employer provide its own anti-harassment policy, but remains responsible for any failure by the client employer to provide the policy. Employers ~~that~~ who hire seasonal or temporary employees through union hiring halls may contract with the union to have the union administer the trainings and maintain records of compliance with the training deadlines required by Government Code section 12950.1, but remain responsible as the employer for any deficiencies in compliance.

(10) Training of Migrant and Seasonal Agricultural Workers. Migrant and seasonal agricultural workers, as defined in the federal Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. section 1802), shall be trained in a manner consistent with California Labor Code section 1684(a)(8).

(11) Training of Workers Subject to a Multiemployer Collective Bargaining Agreement in the Construction Industry. An employer that employs workers pursuant to a multiemployer collective bargaining agreement in the construction industry may meet the training requirements by demonstrating that an employee has been trained within the past two years under any of the circumstances permitted by and outlined in Government Code section 12950.1(l).

(c) Objectives and Content.

(1) The learning objectives of the training mandated by Government Code section 12950.1 shall be: 1) to assist California employers in changing or modifying workplace behaviors that create or contribute to harassment based on “sex,” “gender identity,” “gender expression,” and “sexual orientation” as those terms are defined in California and federal law, where applicable; 2) to provide trainees with information related to the negative effects of abusive conduct (as defined in Government Code section 12950.1(i)(2)) in the workplace; and 3) to develop, foster, and encourage a set of values in ~~supervisory~~ employees who complete mandated training that will assist them in preventing, effectively responding to incidents of harassment, and implementing mechanisms to promptly address and correct wrongful behavior.

(2) Towards that end, the training mandated by Government Code section 12950.1 shall include, but is not limited to:

(A) Definitions of unlawful harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the federal Civil Rights Act of 1964, where applicable. In addition to defining harassment covered by this section, an employer may provide a definition of and train about unlawful harassment on other bases enumerated in the FEHA, as specified at Government Code section 12940(j), and may discuss how harassment of an employee may encompass more than one basis.

(B) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful harassment, discrimination and retaliation in employment.

(C) The types of conduct that constitute harassment.

(D) Remedies available for harassment victims in civil actions; potential employer/individual exposure/liability.

(E) Strategies to prevent harassment in the workplace.

(F) Supervisors' obligation to report harassment, discrimination, and retaliation of which they become aware.

(G) Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.

(H) The limited confidentiality of the complaint process.

(I) Resources for victims of unlawful harassment, such as to whom they should report any alleged harassment.

(J) In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an employer's obligation to conduct an effective workplace investigation of a harassment complaint.

(K) Training on what to do if ~~the~~ a supervisor is personally accused of harassment.

(L) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the ~~supervisor~~employees. Regardless of whether the employer's policy is used as part of the training, the employer shall give each ~~supervisor~~employee a copy of its anti-harassment policy and require each ~~supervisor~~employee to read and to acknowledge receipt of that

policy.

(M) A review of the definition of “abusive conduct” as used in this context (and as defined by Government Code section 12950.1(i)(2)). The training should explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace. The discussion should also include information about the detrimental consequences of this conduct on employers - including a reduction in 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). Examples of abusive conduct 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. Finally, the training should emphasize that a single act shall not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.

(d) Remedies. A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance.

(e) Compliance with section 12950.1 prior to effective date of Council regulations. An employer who has made a substantial, good faith effort to comply with section 12950.1 by completing training of its ~~supervisors~~employees prior to the effective date of these regulations shall be deemed to be in compliance with section 12950.1 regarding training as though it had been done under these regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12950 and 12950.1, Government Code.