

ATTACHMENT D

Fair Employment & Housing Council Employment Regulations Regarding Definitions; Harassment and Discrimination Prevention and Correction; and Training

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 1. General Matters; Article 2. Particular Employment Practices

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Article 1. General Matters

§ 11008. Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(b) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(c) “Employee.” Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) “Employee” does not include an independent contractor as defined in Labor Code section 3353.

(2) “Employee” does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) “Employee” does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(d) “Employer.” Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) “Regularly employing” means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing an average or normal complement of five or more employees on a regular basis each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year regardless of whether the employee’s worksite is located within or outside of California. While employees located outside of California are counted in determining whether employers employ five or more individuals for coverage purposes, the employees located outside of California are not themselves covered by the protections of the Act if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California.

(A) “Regular basis” refers to the nature of a business that is recurring, rather than constant or intermittent. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season “regularly employs” the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) For purposes of “counting,” an employee’s relationship may be established by their presence on the payroll or by other means. Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including CFRA, parenting, and pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code section 12945.2, 12945.6, 12950.1. For purposes of “counting” the (five or more) employees, the individuals employed need not be employees as defined above; nor must any of them be full-time employees. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) “Employer” includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) “Employer” includes any non-profit corporation or non-profit association other than that defined in subsection (5).

(e) “Employer or Other Covered Entity.” Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

(f) “Employment Agency.” Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(g) “Employment Benefit.” Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, “employment benefit” includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or

selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) "Employment benefit" also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) "Provision of a discrimination-free workplace" is a provision of a workplace free of harassment, as defined in section 11019(b).

(h) "Employment Practice." Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual's employment benefits or consideration for an employment benefit.

(i) "Labor Organization." Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

(j) "Person performing services pursuant to a contract." A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) "Unpaid interns and volunteers." For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12925, 12926, 12940, 12941 and 12942, Government Code; Campbell v. Arco Marine, Inc. (1996) 42 Cal.App.4th 1850; Sims v. Worldpac Inc. (N.D. Cal. Feb. 22, 2013) 2013 WL 663277.

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 ~~DFEH-185 brochure on sexual harassment~~, publication on 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.

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

(a) Definitions. For purposes of this section:

(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), for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year.

(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 a supervisor by a trainer, in a setting removed from the 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 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 supervisors must document and demonstrate that each supervisor 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 supervisors 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) 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.

(E) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor's application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors 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 work environment.

(3) "Employee" includes full time, part time, and temporary workers-, interns and 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" 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) for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

(67) "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.

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

(89) "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.

(910) “Trainers” or “Trainers or educators” qualified to provide training under this section are individuals who, through a combination of training and experience have the ability to train supervisors about the following: 1) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) supervisors’ obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 5) how to respond to a harassment complaint; 6) the employer’s obligation to conduct a workplace investigation of a harassment complaint; 7) what constitutes retaliation and how to prevent it; 8) essential components of an anti-harassment policy; and 9) the effect of harassment on harassed employees, co-workers, harassers and employers.

(A) A trainer 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” or “harassment prevention consultants” working as employees or independent contractors with a minimum of two or more years of practical experience in one or more of the following: a) ~~designing or conducting~~ discrimination, retaliation and ~~sexual~~ harassment prevention training; b) ~~responding to sexual~~ harassment complaints or other discrimination complaints; c) ~~conducting investigations of sexual~~ harassment complaints; or d) ~~advising~~ employers or employees regarding discrimination, retaliation and ~~sexual~~ harassment prevention, or

3. “Professors or instructors” in law schools, colleges or universities who have a post-graduate degree or California teaching credential and 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, 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.

(4011) “Training,” as used in this section, is effective interactive training as defined at section 11023(a)(2).

(412) “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.

(b) Training.

(1) Frequency of Training. An employer shall provide two hours of training, in the content specified in section 11023(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.

(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 retrain these supervisors by the end of the next "training year," two years later. Thus, supervisors trained in training year 2005 shall be retrained in 2007. For newly hired or promoted supervisors who receive training within six months of assuming their 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 supervisors beyond the initial two year training year. Thus, with this method, assume that an employer trained all of its supervisors in 2005 and sets 2007 as the next training year. If a new supervisor is trained in 2006 and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in 2007 with the employer's other supervisors.

(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, must provide training to supervisors 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 Supervisors. New supervisors shall be trained within six months of assuming their supervisory position and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(5) Duplicate Training. A 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 new supervisory position or within six months of the employer's eligibility. That supervisor shall

otherwise be put on a two year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.

(6) Duration of Training. The training required by this section 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 a supervisor to pause his or her individual training so long as the actual e-learning program is two hours.

(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 “sexual harassment, harassment based on “sex,” “gender identity,” “gender expression,” and “sexual orientation” as that term those terms are is 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(g)(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 ~~sexual 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) ~~A d~~ Definitions of unlawful sexual 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 ~~a definition of defining sexual harassment covered by this section,~~ an employer may provide a definition of and train about ~~other forms of unlawful harassment on other bases covered by enumerated in~~ the FEHA, as specified at Government Code section 12940(j), and may discuss how harassment of an employee can may cover 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 ~~sexual~~ harassment, discrimination and retaliation in employment.

(C) The types of conduct that constitutes ~~sexual~~ harassment.

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

(E) Strategies to prevent ~~sexual~~ harassment in the workplace.

(F) Supervisors' obligation to report ~~sexual~~ 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 ~~sexual~~ 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 ~~sexual~~ harassment, such as to whom they should report any alleged ~~sexual~~ 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 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 supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor 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(g)(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 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.