

# What California Employers Need to Know About April 1, 2016

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**DFEH AMENDMENTS AND REGULATIONS**

# Welcome

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Business & People Strategy Consulting Group

Free Webinar Series

Labor, Employment & HR Laws and Practices

Website: [www.bpscllc.com](http://www.bpscllc.com)

# Today's Presenter

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- Doctorates in Jurisprudence (JD) and Psychology (PsyD)
- Certified Interrogator
- Author of "Dirty Little Secrets: Declassifying the Employment Game"

# Today's Agenda

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## **Review the DFEH new regulations and laws affecting CA employers**

- Protections for Unpaid Interns and Volunteers
- Legal Standard to Establish Unlawful Discrimination
- Personal Liability for Unlawful Harassment
- Employer's Duty to Prevent and Correct Discriminatory and Harassing Conduct
- Compliance with AB 1825 Supervisor Sexual Harassment Training Requirements
- Unlawful Discrimination Based on an Undocumented Person's Driver's License
- Sex Discrimination and Harassment
- Pregnancy, Religious and Disability Discrimination

# Covered Employees

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Employers with fewer than five employees are generally not covered under the FEHA or the new corresponding FEHC regulations.

The new FEHC regulations now make clear that out-of-state employees count toward the five employee requirement.

This would mean that under the new regulations, a Florida-based company with a small office of three employees in California would be covered if it were to have two or more employees in Florida or elsewhere.

Additionally, employees who are out on leave (e.g., medical leave) now count toward the five employee requirement.

# Protections for Unpaid Interns and Volunteers

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There are 3 regulations now incorporated in the FEHA protections against discrimination and harassment provided to unpaid interns and volunteers under AB 1443, that went into effect previously on January 1, 2015.

# Protections for Unpaid Interns and Volunteers

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Defined unpaid interns and volunteers as “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.

# Protections for Unpaid Interns and Volunteers

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Makes it unlawful for an employer to **discriminate against unpaid interns** in the selection, termination, training, or other terms or treatment of those individuals on any basis protected by FEHA.

Makes it unlawful for **unpaid interns, volunteers, and persons** providing services pursuant to a contract to be subjected to **unlawful harassment** in the workplaces on any basis protected by FEHA.



# Legal Standard to Establish Unlawful Discrimination

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The amended regulations update the legal standard to establish unlawful discrimination to conform with the California Supreme Court's decision in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, which interpreted that standard under FEHA as follows:

- To support a claim for unlawful discrimination or retaliation under FEHA, an **employee must prove** by a preponderance of the evidence that a protected category was a **substantial motivating factor** in the **denial of an employment benefit**.

# Legal Standard to Establish Unlawful Discrimination

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However the regulations clarify that this legal standard for employment discrimination **does not necessarily apply to other unlawful practices under FEHA**, including harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide certain leaves of absence.

# Personal Liability for Unlawful Harassment

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The regulations now incorporate a long-standing provision of FEHA dating back to 2001, which provided that **any employee who engages in unlawful harassment of a co-employee is personally liable for harassment**, regardless of whether the employer knew or should have known of the conduct and/or failed to take corrective action.

# Employer's Duty to Prevent and Correct

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The amendments to the regulations also clarify an employer's affirmative duty to take reasonable steps to prevent and correct discriminatory and harassing conduct in the workplace and the penalties for failing to do so as follows:

- The amendments clarify that there is **no stand-alone, private cause of action** against an employer for failing to prevent harassment or discriminatory conduct.

# Employer's Duty to Prevent and Correct

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- A private claimant must also **plead and prevail on an underlying claim** of discrimination, harassment, or retaliation in order to successfully bring a claim against an employer for **failing to take reasonable steps to prevent and correct** discrimination or harassment.
- However, the DFEH **may seek non-monetary preventive remedies** against an employer for failing to prevent harassment or discriminatory conduct **even if it does not prevail on the underlying claim** of unlawful harassment, discrimination, or retaliation under FEHA.

# Employer's Duty to Prevent and Correct

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- In order to maintain workplaces free of harassment, discrimination, and retaliation, employers are **required to develop** harassment, discrimination, and retaliation **prevention policies that must contain specific information** on what conduct is prohibited and provide a proper complaint procedure.
- In addition, employers are also **obligated to show that they have properly provided such policies to employees and confirm receipt of the policy.**

# Employer's Duty to Prevent and Correct

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- If **10% or more of the workforce** at any employer facility speak a language **other than English as their spoken language**, employers must **translate the prevention policies** into each relevant language.

# Undocumented Individual Driver's Licenses

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The regulations were also updated to comply with AB 1660 (effective January 1, 2015), which made it unlawful for an employer to **discriminate against an applicant or employee who has a driver's license that can be issued to undocumented persons.**



# Sex Discrimination and Harassment

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The regulations were amended to incorporate legislative changes and case law interpretations regarding sex discrimination and harassment as follows:

- Provide definitions for “**gender identity,**” “**gender expression,**” and “**transgender**” persons in conformance with AB 887.
- Pursuant to AB 292 (2013), clarify that it is **not a defense** to a complaint of harassment based on sex that the alleged harassing conduct was **not motivated by sexual desire.**

# Sex Discrimination and Harassment

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- Incorporate existing FEHA statutory law that an individual alleging sexual harassment is **not required to sustain a loss of tangible job benefits** in order to establish harassment.
- The regulations have also been updated to include explanations of “**quid pro quo**” and “**hostile work environment**” sexual harassment.

# AB 1825 Compliance

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The regulations now provide further details regarding the **proper training methods and recordkeeping of required supervisor sexual harassment trainings**.

The required training went into effect back in 2005 and generally requires two hours of supervisor harassment training every two years (commonly referred to as “**AB 1825 supervisor harassment training**”).

The regulations now provide the following:

# AB 1825 Compliance

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Employers must maintain the following information related to the supervisor harassment trainings for a minimum of two years:

- Names of the supervisory employees trained,
- Date of training,
- Sign in sheet,
- Copy of all certificates of attendance or completion issued,
- Type of training,
- Copy of all written or recorded materials that comprise the training, and
- Name of the training provider.

# AB 1825 Compliance

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- For any interactive electronic trainings (g., e-learning or webinar training), the trainer must also maintain copies of all materials, employee questions, and written responses to employee questions for two years after the training.
- Outlines examples of interactive measures that can be used in the training to satisfy the requirements to assess a supervisor's understanding of content and to ensure that the supervisor remains engaged in the training.

# AB 1825 Compliance

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Requires that the supervisor harassment training also cover:

- Potential exposure and liability for employers and individuals,
- Supervisors' obligation to report sexual harassment, discrimination, and retaliation when they become aware,
- Steps necessary to take appropriate remedial measures to correct harassing behavior; and
- Review “abusive conduct” (in compliance with AB 2053 requirements that went into effect on January 1, 2015).

# Pregnancy Discrimination

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The regulations on pregnancy discrimination were amended as follows:

- Expanded the definition of “eligible female employee” to **include a transgender employee who is disabled by pregnancy.**
- Clarify that unlawful harassment because of pregnancy also includes harassing an **employee or applicant because of childbirth, breastfeeding, or any related medical conditions.**

# Pregnancy Disability Leave (PDL)

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The PDL regulations were significantly amended back in December 2012, with a number of new provisions.

The amended regulations further clarify an employer's PDL obligations as follows:



# Pregnancy Disability Leave (PDL)

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Simplify the requirement to provide and post a PDL notice into one unified notice that combines the relevant information, including the following:

- The notice must now include information about the Act's provisions and contain information about **how to contact DFEH to file a complaint.**
- The poster containing the PDL notice must be **large enough to be easily read.**
- The poster can **still be posted electronically**, so long as it is put in a place or places **where employees would tend to view it in the workplace.**

# Pregnancy Disability Leave (PDL)

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- The notice must be **translated into every language spoken** by at least **10 percent of the workforce**.
- Clarify that PDL **need not to be taken in one continuous period of time**.
- Clarify that eligible employees are permitted to take **four months of PDL per pregnancy, not per year**.

# Religious Discrimination

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The amended regulations expand the definition of religious discrimination based on statutory changes and case law interpretations as follows:

- The definition of “religious creed” was revised to encompass **all aspects of religious belief, observance, and practice, including religious dress and grooming** to bring it in accordance with AB 1964 (effective January 1, 2013).
- Refusing to hire an applicant or terminating an employee **to avoid the need to accommodate a religious practice constitutes religious creed discrimination**, as held by the United States Supreme Court in EEOC v. Abercrombie & Fitch Stores, Inc. (2015) 135 S.Ct. 2028.

# Religious Discrimination

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- An employer **cannot require segregation of an employee from customers or the general public in order to accommodate an employee's religious practice unless expressly requested by an employee.**
- Clarify that it is unlawful for an employer to discriminate or retaliate against a person **who requests a reasonable accommodation based on religion, regardless of whether the employer grants the request.**
- Provide **covered apprentices and unpaid interns protections** from unlawful discrimination based on religion and religious accommodations in accordance with AB 1443 (effective January 1, 2015).

# Disability Discrimination

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The amended regulations also clarified an employer's obligations regarding disability accommodations as follows:

- Makes it unlawful for an employer to **retaliate or discriminate** against a person for **requesting an accommodation for his or her disability**, regardless of whether the accommodation was granted.

# Disability Discrimination

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- Clarifies that a “**support animal**” **may constitute a reasonable accommodation** in certain circumstances.
- A “support animal” 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.”
- However, the regulation points out that whether a support animal “constitutes a reasonable accommodation **requires an individualized analysis reached through the interactive process.**”
- In other words, an employee’s requested accommodation to bring a support animal to work **does not always have to be granted** and will depend on the outcome of the disability interactive process to determine if that is a reasonable accommodation.

## Summing it all up...

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Beyond the obvious reasons...CA employers should pay close attention to the specific laws that have been rolled out in the past few years...specifically related to harassment, discrimination, abusive conduct, and disabilities.

Plaintiff attorneys know that the stage is being set for them to strike hard...knowing that many employers will simply be unaware of these laws.

## Summing it all up...

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- Employers need to ensure that they have new policies in place that are compliant with the DFEH requirements for harassment, discrimination, retaliation and abusive conduct prevention.
- Employers with 50+ employees must ensure they are compliant with AB 1825/2053 training requirements for supervisors.
- Employers need to ensure they are engaging the interactive process, properly addressing reasonable accommodations, and not engaging discriminatory actions against employees with disabling conditions.



## Summing it all up...

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- Employers need to review their policies and practices to ensure they (and their managers) don't engage discriminatory actions based upon religion, pregnancy, gender, and undocumented employee DLs.
- Employers need to ensure that their anti-discrimination policies extend to interns and volunteers.
- Have policies translated when 10% of the population speaks a language other than English.

## A few extra tips...

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- Don't ask questions designed to detect a person's sexual orientation or gender identity.
- Be sure your dress code isn't discriminatory.
- Allow employees to use restrooms that correspond with their gender identities.
- Ensure employees have the ability to directly communicate with internal and/or external representatives, hotline, etc. for complaints.
- Make it mandatory for supervisors to report complaints to a designated rep, hotline, etc.
- Only allow qualified, trained individuals conduct investigations.
- Be sure you are providing DFEH 185 to all new hires.

## How we can help...

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- Our online training for supervisors/managers to satisfy compliance with AB 1825/2053.
- Draft policies to satisfy compliance with the April 1 DFEH requirements.
- Provide guidance related to managing workplace disabilities.
- Review company practices and policies from pre to post employment for compliance...specifically related to potential litigation areas.
- Investigation services for harassment, discrimination, retaliation, and abusive conduct complaints.
- Our HR 911 phone line providing unlimited access to our team for questions related to HR, compliance, and labor/employment laws.

## Thanks for Attending Today's Webinar

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