

ATTACHMENT C

FAIR EMPLOYMENT AND HOUSING COUNCIL Employment Regulations Regarding Harassment Prevention Training

INITIAL STATEMENT OF REASONS

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

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and/or veteran status of any person.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed, substantive regulation or amendment and the reason it is necessary are described below. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subdivision, as applicable, when the proposed change goes beyond mere clarification.

§ 11023, Harassment and Discrimination Prevention and Correction

The purpose of this section is to detail employers' duty to prevent and correct harassment and discrimination, the required contents of harassment and discrimination policies, and the dissemination and translation of such policies. The Council proposes (1) to clarify that all employers with at least 5 employees, not just those with at least 50 employees, are required to address during harassment prevention training that the employer's supervisors must report claims of misconduct and (2) to add that an employer's policies must include "a link to, or the Department's website address for, the sexual harassment online training courses created by the Department." These changes are necessary to conform the regulations with SB 1343 (Stats. 2018, ch. 956), specifically Government Code sections 12950(b)(8) and 12950.1(a), and are mostly declarative of existing law. With respect to adding a link or address to the Department's website for the online harassment prevention training, the regulations promote the educational intent of the new law and are consistent with the existing regulations that require various forms of information regarding the Department in the employers' policies. The addition will have minimal impact for employers, who have to update their policies to comply with the new law in any event, and will promote the awareness of employees and employers to the availability of free educational materials covering the topic that are made available by the Department as required

by the statute.

§ 11024, Sexual Harassment Training and Education

The purpose of this section is to address the more nuanced rules regarding harassment prevention training and education that is mandated by Government Code section 12950.1, specifically by clarifying statutory requirements and making the regulations consistent with existing law. Covered topics are definitions, training requirements, training objectives and content, remedies for failure to comply with training requirements, and compliance guidance.

SB 1343 amended the Fair Employment and Housing Act to require that all employers of 5 or more employees provide one hour of sexual harassment, harassment based on gender and abusive conduct prevention training to non-managerial employees and two hours of sexual harassment, harassment based on gender and abusive conduct prevention training to managerial employees once every two years. Previously, only supervisors at employers with 50 or more employees needed to be trained. SB 1343 also required the Department to produce and post a two-hour sexual harassment prevention online training course for supervisors and a one-hour course for non-supervisory employees to its website. Relatedly, SB 778 (Stats. 2019, ch. 215) clarified and extended the deadline for when employees need to be trained. Accordingly, throughout the regulation, the Council proposes to change “50” to “5,” “supervisor” to “employee,” (in applicable instances), reference the Department’s online training course, differentiate between one and two hour trainings, update when the training must be completed, and make clarifying technical changes. This is necessary to implement the aforementioned legislation and is declarative of the law.

§ 11024, subd. (a)(2)(D) “Effective Interactive Training” Includes DFEH’s Online Training

The Council proposes to include the “Department’s online training courses on the prevention of sexual harassment in the workplace” as part of the definition of “effective interactive training.” This is a change without regulatory effect necessary to reiterate Government Code section 12950.1(j)’s requirement that the “department shall develop or obtain two online training courses on the prevention of sexual harassment in the workplace in accordance with the provisions of this section” in order to accommodate the influx of Californians required to receive harassment prevention training. Government Code section 12950.1(l) makes clear that the Department’s training will be interactive in nature, thus meeting the definition of “effective interactive training.”

§ 11024, subd. (a)(3) “Employee” Coverage Threshold

The Council proposes to add that “for purposes of determining whether employers meet the coverage threshold of employing five or more individuals” before the pre-existing “the term ‘employee’ includes unpaid interns, unpaid volunteers, and persons providing services pursuant to a contract.” This is a change without regulatory effect necessary to accurately reflect Government Code section 12950.1(a) and (h), which limit the harassment prevention training requirements to employers of five or more employees and is consistent with the fact that unpaid interns, unpaid volunteers, and persons providing services pursuant to a contract are covered by the harassment protections of the statute.

§ 11024, subd. (a)(13) “One Hour”

The Council proposes to add the meaning of “one hour.” Other than changing “two” to “one,” the definition mirrors the definition of two hours. This is a change without regulatory effect necessary to accurately reflect the first sentence of Government Code section 12950.1(a), which contains a new requirement prescribing “at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California” and to provide a similar level of clarity as is provided for the two hour requirement for supervisors.

§ 11024, subd. (b)(4) Training for New Employees

The Council proposes to add that “[n]ew 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.” This is a change without regulatory effect necessary to accurately reflect Government Code section 12950.1(a), which prescribes when new employees must be trained. The Council addressed tracking methods, discussed in subdivision (b)(1), to remind readers of their applicability to new employees.

§ 11024, subd. (b)(~~6~~)(7) Duration of Training

The Council proposes to add that required training “may be completed in segments, so long as the combined segments meet or exceed the applicable hourly requirement” (one hour for nonsupervisory employees and two hours for supervisors). This is a change without regulatory effect necessary to accurately reflect Government Code section 12950.1(a)’s wording; the pre-existing text that was stricken conveyed the same thing with different phrasing.

§ 11024, subd. (b)(8) Training of Employees That Are Minors

The Council proposes to outline rules for the harassment prevention training of minors. This is necessary to clarify how Government Code section 12950.1’s broad mandate regarding “employees” applies to the training of minors on sensitive topics such as sexual harassment, gender harassment and abusive conduct. While the legislature did not address this in SB 1343, it recently addressed this issue in very similar circumstances through Labor Code section 1700.52’s treatment of training minors in the entertainment industry. The proposed regulations incorporate this legislative directive into the FEHA requirements on the same topic and have the added benefit of maintaining consistency between California employment laws. Otherwise, if “employee” is left unmodified as it relates to minors, the result would be nonsensical and unwieldy; for example, toddlers working in film would have to receive harassment prevention training. There is no indication that the legislature intended to mandate that toddlers be exposed to harassment or abusive conduct topics and doing so would not serve any conceivable legitimate purpose. The Council also incorporated the requirement that new employees be provided training within six months of hire from the third sentence of Government Code section 12950.1. In this context, rather than being hired, the minor would attain the minimum age to be trained. This addition is necessary to address the situation in which a minor is not a “new” hire but is newly eligible for training.

§ 11024, subd. (b)(9) Training of Seasonal or Temporary Employees

The Council proposes to outline rules for the harassment prevention training of seasonal or temporary employees. This is necessary to implement Government Code section 12950.1(h)(1).

The Council also proposes to clarify the mechanics of tracking compliance with and deadlines for the training of seasonal or temporary employees that are hired by employers through union hiring halls and may work for numerous employers during the training period. This is necessary to address an employment context not explicitly addressed or contemplated in the statute. The proposed regulations clarify that an employer may contract with a union hiring hall to administer the trainings and maintain records of compliance, since the union hiring hall may be best positioned to track the trainings and deadlines for re-training across the many employers hiring the employee through the hiring hall. However, the employer is ultimately responsible for any deficiencies in compliance since SB 1343 and Government Code 12950.1 places the training requirement on the employer. A hiring hall would need to provide both its and the worksite's policy because each entity might have different policies and during the course of joint employment, the employee could report to both entities.

§ 11024, subd. (b)(10) Training of Migrant and Seasonal Agricultural Workers

The Council proposes to address rules for the harassment prevention training of migrant and seasonal agricultural workers. This is necessary to implement Government Code section 12950.1(g). Because the legislature explicitly pegged the training of these workers to Labor Code section 1684(a)(8), the Council did not have discretion to devise a separate training standard and instead added this subdivision, which is declaratory of existing law.

§ 11024, subd. (b)(11) Training of Workers Subject to a Multiemployer Collective Bargaining Agreement in the Construction Industry

The Council proposes to address rules for the harassment prevention training of workers subject to a multiemployer collective bargaining agreement in the construction industry. This is necessary to implement SB 530 (Stats. 2019, ch. 722). Because the legislature prescribed the rules in Government Code section 12950.1(l), the Council referenced that section rather than construct new rules. This subdivision is declaratory of existing law and is necessary to include for a comprehensive rendering of the Fair Employment and Housing Act's requirements.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments describe and clarify the Fair Employment and Housing Act without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs within the state, the creation of new businesses or the elimination of existing businesses within the state, or the expansion of businesses currently doing business within the state because they implement existing law and do not create new requirements. To the contrary, adoption of the proposed amendments is anticipated to benefit the health and welfare of California residents and businesses and improve worker safety by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations, and reducing litigation costs for businesses. These regulations would not affect the environment.