

California Code of Civil Regulations

§ 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, or an alternative writing that complies with Government Code section 12950, an employer shall develop 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) 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)].