December 2014

SIGNIFICANT CHANGES TO THE FEHA: ARE YOU PREPARED FOR 2015?

Governor Brown signed two pieces of legislation in 2014 that amend the FEHA and will have significant impacts on employers in 2015. The first, AB 2053, requires that employers include a discussion of "abusive conduct" during mandatory harassment prevention training with employees. The second, AB 1443, expanded the applicability of the FEHA by including unpaid interns and volunteers in the scope of protection against harassment and certain forms of discrimination. We discuss each in turn.

AB 2053 – ABUSIVE CONDUCT TRAINING

AB 2053 amends the FEHA training requirements to include "prevention of abusive conduct" as a component of the mandatory sexual harassment prevention training that must be provided to supervisory employees every two years (and within six months of initial appointment to a supervisory position). Abusive conduct is defined as:

> *Conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include:*
>
> - *Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets;*
> - *Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating;*
> - *The gratuitous sabotage or undermining of a person's work performance.*
>
> *A single act shall not constitute abusive conduct, unless especially severe and egregious.*

While employers are obligated to include information about preventing abusive conduct in the mandatory training, the bill did not extend the other protections of the FEHA to abusive conduct, and did not create a private right of action for abusive conduct.[1] This is the Legislature's first attempt at addressing the growing problem of bullying in the workplace. While this legislation has not made abusive conduct unlawful under the FEHA, employers would be wise to take action to avoid other potential liability, such as a workers' compensation stress-related claim or intentional or negligent infliction of emotional distress.

Kelly A. Trainer, a partner in Burke's Orange County office, represents and advises employers on matters involving numerous federal and state law claims, including discrimination, harassment, retaliation, wrongful termination, disability, labor negotiations, wage and hour, freedom of speech and association, and privacy. Ms. Trainer is also an experienced workplace investigator and trainer, who conducts numerous seminars and employee trainings on employment matters.
email: ktrainer@bwslaw.com
direct: 949.265.3416

Katy A. Suttorp, , a Senior Associate in Burke's Orange County office, counsels employers on a wide range of personnel matters under state and federal law, including interactive process/reasonable accommodation issues, medical leaves, employee discipline and performance, handbook and policy preparation and revision, wage and hour practices, workplace investigations, and labor issues. Ms. Suttorp also conducts customized trainings on topics of interest for clients in the area of employment law.
email: ksuttorp@bwslaw.com
direct: 949.265.3403

[1] Naturally, an employee may be able to recover damages under other legal theories based on "abusive conduct" in the workplace, such as a workers' compensation stress-related claim or intentional or negligent infliction of emotional distress.

December 2014

Training Obligations

The bill contains no details about what needs to be included in the mandatory training about abusive conduct beyond providing the above general definition and requiring some kind of discussion about preventing such conduct. To ensure adequate training is provided, employers should speak with the individual providing harassment prevention training to discuss how such information will be presented. The trainer needs to be made aware of any existing employer policies or procedures related to abusive conduct, which may include policies on workplace violence prevention, policies prohibiting bullying or hazing, or policies that prohibit discourteous treatment of others. The employer should also be sure that the trainer is discussing the limitations of the abusive conduct bill and that it is not given the same legal treatment as harassment. Finally, given that employees are likely to have significant questions about abusive conduct, it would be wise to select a trainer who is experienced not only with workplace harassment, but also with bullying, hazing, and workplace violence prevention.

Preventative Measures and Responding to Complaints

While it is not expressly contemplated in the text of AB 2053, most employers are anticipating an increase in complaints of bullying or abusive conduct as a result of this bill. Indeed, some organizations and individuals are already misrepresenting the scope of AB 2053, and advising employees that bullying is against the law. However, the Legislature has expressly stated that there is no legal cause of action for bullying under the FEHA.

That being said, there are many reasons that employers would be wise to consider how to best address these issues and to get out in front of them, rather than responding to issues as they arise. Abusive conduct can be a form of harassment if based on a protected characteristic. Abusive conduct, if left unaddressed, will often turn into actual violence in the workplace, on the part of the abuser or abused employee, or both. At minimum, abusive conduct impairs employee morale and decreases productivity. Overall, abusive conduct is very disruptive and detrimental to a workplace. Accordingly, we recommend that employers explore the following questions in preparation for January 1, 2015, when AB 2053 takes effect.

Should We Adopt a Policy? First, ask yourself if abusive conduct is already addressed in a workplace policy. Some potential policies would include:

- Policy prohibiting bullying and hazing
- Policy prohibiting workplace violence
- Statement of compliance with the OSHA/CalOSHA obligation to provide a safe workplace
- Policy prohibiting discourteous treatment of others
- Policy prohibiting conduct unbecoming an employee

If you do not feel that your workplace policies adequately address the issue of abusive conduct, then employers should evaluate whether or not to address these issues in policy, and if so, the most effective approach for doing so. Employers with labor unions will need to comply with applicable obligations to negotiate these policies with labor unions before implementation.

Should We Conduct Comprehensive Training? It may be advisable to provide a training that is more comprehensive than what is required by AB 2053. Such training should focus on the more general subject of dangerous workplace conduct, and include issues such as discourteous

treatment, bullying, hazing, and workplace violence. Training employees, both general and supervisory, can have significant benefits for a workplace. A well-structured and in-depth training can appropriately educate employees on the expected standards of conduct and dissuade employees from behaving inappropriately, as well as resolve possible conflicts and educate victims on the available complaint procedures.

Should We Investigate Complaints of Abusive Conduct? More often than not, there will be good reason for an employer to investigate claims of abusive conduct despite the fact that the FEHA investigation obligation may not expressly apply to all potential complaints. Abusive conduct might be the subject of a grievance or the basis for performance concerns in an evaluation that warrant further inquiry. Conducting a workplace investigation may also provide your agency with the just cause needed in disciplinary proceedings. In general, an investigation in response to claims of abusive conduct will assist your agency in determining whether there are any practices that are not conducive to a productive workplace that should be addressed.

In sum, AB 2053 on its face does not really require that much – just a discussion of a new, related topic within harassment prevention training. However, the bigger picture of AB 2053 reflects recognition by California lawmakers that bullying and hazing in the workplace is a problem and needs to be addressed. Accordingly, it is quite likely that additional legislation on this topic will be coming in the future. For now, AB 2053 is going to be a new source for discussion of the issue of bullying and hazing in the workplace, and employers would be wise to be prepared for it.

AB 1443 – UNPAID INTERNS AND VOLUNTEERS

The second amendment to the FEHA extends its protections to unpaid interns and volunteers. Two published court of appeal decisions had previously addressed the questions of whether the FEHA applied to volunteers. In the most recent of the two decisions, *Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, the court ruled that despite receiving coverage under the City's workers' compensation policy, a volunteer police reserve officer was not protected by the FEHA and as a result, could not state a FEHA disability discrimination claim .[2]

AB 1443 invalidates both prior decisions and expressly includes volunteers and unpaid interns in the coverage of the FEHA. Specifically, AB 1443 adds the following language to Section 12940 of the Government Code:

- *It is an unlawful employment practice…[c][f]or any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment,* ***an unpaid internship****, or* ***another limited duration program to provide unpaid work experience*** *for that person because of [that person's legally protected characteristic]…*

- *It is an unlawful employment practice…[j] [f]or any employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of [that person's legally protected characteristic], to harass an employee, an applicant,* ***an unpaid intern or volunteer****, or a person providing services pursuant to a contract. Harassment of an employee, an applicant,* ***an unpaid intern or volunteer****, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the*

[2] *See also Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625 [unpaid volunteer community service officer could not sue for disability discrimination under the FEHA].

entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, ***unpaid interns or volunteers****, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.*

- *It is an unlawful employment practice…(l)(1) [f]or an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program,* ***an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry****.*

The Fair Employment and Housing Council has also announced proposed amendments to the FEHA Regulations.[3] The proposed amendments include the following definition of "unpaid interns and volunteers":

> *"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. However, when used in these regulations, the term "employee" shall include any individual who is an unpaid intern or volunteer.*

Employers should consider any necessary changes that may result from these new provisions , which will likely include some or all of the following:

[3] The full text of the proposed amendments is available here: http://www.dfeh.ca.gov/res/docs/Council/10%2024%202014/Text%20of%20Proposed%20Amendments%20to%20Fair%20Employment%20and%20Housing%20Act%20Regulations.pdf. Public comment on the proposed amendments closed on December 8, 2014.

- Employers will need to consider whether their existing harassment policy requires updating to comply with the requirements of AB 1443. At a minimum, employers should distribute the harassment policy to all volunteers and unpaid interns and receive their signed acknowledgement of receipt of the policy. Any change to the policy should clearly articulate that the inclusion of volunteers and unpaid interns in the definition of employee does not change the employment status of the volunteer or unpaid intern.

- Employers who offer harassment prevention training to all employees, rather than just to supervisors, should also begin including volunteers and unpaid interns in that training (or perhaps offer a separate training for them).

- Employees who supervise volunteers and interns should be made aware of this change in the law. Employers should request that the individual performing harassment prevention training alert supervisors to this issue.

- Employers should evaluate whether there is a volunteer who supervises other volunteers. Recall that the definition of "supervisor" under the FEHA is quite broad:

  "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routing or clerical nature, but requires the use of independent judgment."

It is quite possible that a volunteer performs one or more of these functions. The FEHA is silent about the possibility of a volunteer meeting the definition of a supervisor. However, it is logical to read the amendment as requiring training of that volunteer supervisor, as well as any employee who may newly be considered a "supervisor" due to authority over volunteers or unpaid interns.

HOW CAN BURKE HELP?

Burke has a number of seasoned employment attorneys who have conducted hundreds of workplace seminars including AB1825-compliant sexual harassment prevention training, and the prevention of bullying, hazing, and workplace violence in the workplace. Burke's attorneys are also experienced in the drafting and negotiating of employment policies on these issues. Contact us for further information and to help to make sure that your organization is fully compliant with your legal obligations.

Law Offices Throughout California
burke
BURKE, WILLIAMS & SORENSEN, LLP

444 South Flower Street | Suite 2400 | Los Angeles | CA | 90071
800.333.4297 | www.bwslaw.com