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May 2, 2017
For Immediate Release

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DFEH ISSUES WORKPLACE HARASSMENT GUIDE FOR CALIFORNIA EMPLOYERS

Guide provides recommended practices for preventing and addressing workplace harassment

Sacramento – The Department of Fair Employment and Housing (DFEH) announced today the release of a guide for California employers regarding their obligation to take reasonable steps to prevent and correct workplace harassment.

Developed in conjunction with the California Sexual Harassment Task Force, the guide is aimed at helping employers develop an effective anti-harassment program; know what to do and how to investigate reports of harassment; and understand what remedial measures they might pursue. The guide is relevant to addressing all forms of workplace harassment, including harassment based on sex.

In addition, the Department issued a revised brochure detailing California's legal protections against sexual harassment in particular and the steps all California employers must take to prevent and correct harassment.

The brochure (publication DFEH-185) describes the facts about sexual harassment; discusses the types of harassment prohibited by California law; provides examples of behaviors that may constitute sexual harassment; and specifies the procedures and policies California employers must develop and follow to prevent and correct sexual harassment. It also discusses remedies available in sexual harassment cases, including in cases of retaliation for complaining about harassment or rejecting advances.

DFEH has also provided this information in an easy-to-print poster form. Either the poster or the brochure fulfill an employer's responsibility to provide employees an information sheet regarding sexual harassment under Section 12950(b) of the California Government Code.

"Preventing and correcting sexual harassment in the workplace is not only legally required, but it is one of the best ways that an employer can ensure a healthy and productive workplace for all employees," said DFEH Director Kevin Kish. "DFEH is pleased to provide these resources to help employers develop and implement effective polices."

The DFEH is the state agency charged with enforcing California's civil rights laws. The mission of the DFEH is to protect the people of California from unlawful discrimination in employment, housing and public accommodations and from hate violence and human trafficking. For more information, visit the Department's Web site at www.dfeh.ca.gov.

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
WORKPLACE HARASSMENT GUIDE FOR CALIFORNIA EMPLOYERS

California law (called the Fair Employment and Housing Act or FEHA) prohibits discrimination, harassment and retaliation. The law also requires that employers "take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)). The Department of Fair Employment and Housing (DFEH) is the state's enforcement agency related to the obligations under the FEHA.

California's Fair Employment and Housing Council (FEHC) enacted regulations in 2016 to clarify this obligation to prevent and correct wrongful behavior. This document was produced by the DFEH to provide further guidance to California employers.

WHAT DOES AN EFFECTIVE ANTI-HARASSMENT PROGRAM INCLUDE?

- A clear and easy to understand written policy that is distributed to employees and discussed at meetings on a regular basis (for example, every six months). The regulations list the required components of an anti-harassment policy at 2 CCR §11023.

- Buy in from the top. This means that management is a role model of appropriate workplace behavior, understands the policies, walks the walk and talks the talk.

- Training for supervisors and managers (two-hour training is mandated under two laws commonly referred to as AB 1825 and AB 2053, for more information on this see DFEH training FAQs).

- Specialized training for complaint handlers (more information on this below).

- Policies and procedures for responding to and investigating complaints (more information on this below).

- Prompt, thorough and fair investigations of complaints (see below).

- Prompt and fair remedial action (see below).

IF I RECEIVE A REPORT OF HARASSMENT OR OTHER WRONGFUL BEHAVIOR, WHAT SHOULD I DO?

You should give it top priority and determine whether the report involves behavior that is serious enough that you need to conduct a formal investigation. If it is not so serious (for example, an employee's discomfort with an offhand compliment), then you might be able to resolve the issue by counseling the individual. However, if there are allegations of conduct that, if true, would violate your rules or expectations, you will need to investigate the matter to make a factual determination about what happened. Once your investigation is complete, you should act based on your factual findings.

An investigation involves several steps and you need to consider a variety of issues before you begin your work. The following section will address many of those issues.

WHAT ARE THE BASIC STEPS REQUIRED TO CONDUCT A FAIR INVESTIGATION?

A phrase that you might see related to investigations is "due process." Due process is simply a formal way of saying "fairness" – employers should be fair to all parties during an investigation. From a practical perspective, this means:

- Conduct a thorough interview with the complaining party, preferably in person. Whenever possible, the investigation should start with this step.

- Give the accused party a chance to tell his/her side of the story, preferably in person. The accused party is entitled to know the allegations being made against him/her, however it is good investigatory process to reveal the allegations during the interview rather than before the interview takes place. It may not be necessary to disclose the identity of the complaining party in some cases. Due process does not require showing the accused party a written complaint. Rather, it means making the allegations clear and getting a clear response.

- Relevant witnesses should be interviewed and relevant documents should be reviewed. This does not mean an investigator must interview every witness or document suggested by the complainant or accused party. Rather, the investigator should exercise discretion but interview any witness whose information could impact the findings of the investigation and attempt to gather any documents that could reasonably confirm or undermine the allegations or the response to the allegations.

- Do other work that might be necessary for you to get all the facts (perhaps you need to visit the work site, view videotapes, take pictures, etc.).

- You should reach a reasonable and fair conclusion based on the information you collected, reviewed and analyzed during the investigation.

DO I HAVE TO KEEP ALL INFORMATION FROM AN INVESTIGATION CONFIDENTIAL?

You need to look at confidentiality from two sides – the investigator's and the employees'. The first question is how confidential the investigator (internal or external) will keep the information obtained; the second is whether an employer can require that employees keep information confidential.

- **Can the investigator keep the complaint confidential?**

The short answer is no. Employers can only promise *limited* confidentiality – that the information will be limited to those who "need to know." An investigator cannot promise complete confidentiality because it may be necessary to disclose information obtained during the investigation in order to complete the investigation and take appropriate action. It is not possible to promise that a complaint can be kept entirely "confidential" for several reasons:

1. If the complaint is of potential violation of law or policy, the employer will need to investigate, and in the process of investigating it is likely that people will know or assume details about the allegations, including the identity of the person who complained. This is true even when the name of the complainant is kept confidential since allegations are often clear enough for people to figure out who complained about what.
2. The individual receiving the complaint will usually have to consult with someone else at the company about what steps to take and to collect information about whether there have been past complaints involving the same employee, etc. That means the complaint will be discussed with others within the organization.
3. The company may need to take disciplinary action. Again, while the identity of the person who brought the complaint may in some cases be kept confidential, the complaint itself cannot be.

- **Can I tell employees not to talk about the investigation?**

This is a complicated issue. Managers can, and should, be told to keep the investigation confidential. However there have been court rulings that say it is inappropriate for an employer to require that employees keep the information secret, since employees have the right to talk about their work conditions. There are exceptions to this. If you want to require confidentiality, you might want to check with an attorney about when it is appropriate and how to do so.

HOW QUICKLY DO I NEED TO BEGIN AND FINISH MY INVESTIGATION?

The investigation should be started and conducted promptly, as soon as is feasible. Once begun, it should proceed and conclude quickly. However, investigators also must take the time to make sure the investigation is fair to all parties and is thorough. Some companies set up specific timelines for responding to complaints depending on how serious the allegations are (for example, if they involve claims of physical harassment or a threat of violence, act the same day as the complaint is received). If the allegation is not urgent, many companies make it a point to contact the complaining party within a day or two and strive to finish the investigation in a few weeks (although that depends on several factors, including the availability of witnesses).

A prompt investigation assists in stopping harassing behavior, sends a message that the employer takes the complaint seriously, helps ensure the preservation of evidence (including physical evidence such as emails and videos, and witnesses' memories), and allows the employer to fairly address the issues in a manner that will minimize disruption to the workplace and individuals involved.

WHAT ARE SOME RECOMMENDED PRACTICES FOR CONDUCTING WORKPLACE INVESTIGATIONS?

IMPARTIALITY

The investigation should be impartial. Findings should be based on objective weighing of the evidence collected. It is important for the person conducting the investigation to assess whether they have any biases that would interfere with coming to a fair and impartial finding and, if the investigator cannot be neutral, to find someone else to conduct the investigation.

Even if investigators determine they can be neutral and impartial, they must evaluate whether their involvement will create the perception of bias. A perception of bias by the investigator will discourage open dialogue with all involved parties. For example, in a case in which the investigator has a personal friendship with the complainant or accused, either actual or perceived, the investigator may need to recuse him- or herself to avoid the appearance of impropriety. It is generally a bad idea to have someone investigate a situation where either the complainant or accused party has more authority in the organization than the investigator.

INVESTIGATOR QUALIFICATIONS AND TRAINING

Qualifications:

The investigator should be knowledgeable about standard investigatory practices. This includes knowledge of laws and policies relating to harassment, investigative technique relating to questioning witnesses, documenting interviews and analyzing information. He or she should have sufficient communication skills to conduct the interviews and deliver the findings in the written or verbal form. For more complex and serious allegations it is also important for the investigator to have prior experience conducting such investigations.

For workplace investigations, employers may utilize an employee as an investigator or hire an external investigator. In instances of harassment allegations, the employee investigator is often someone from human resources. In California, external investigators (those who are not employed by the employer) must be licensed private investigators or attorneys acting in their capacity as an attorney (See Business and Professions Code Section 7520 et seq.)

Training:

There is no one standard training program for workplace investigators. Internal investigators usually obtain training by professional organizations for HR professionals (such as The Society for Human Resource Management (SHRM), Northern California Human Resource Association (NCHRA), Professionals in Human Resource Association (PIHRA), professional

organizations for workplace investigators (such as the Association of Workplace Investigators - AWI) and enforcement agencies (such as DFEH or EEOC). Many law offices and vendors that provide harassment prevention training also provide training for investigators. At a minimum, training should cover information about the law shaping investigation recommended practices, how to determine scope (what to investigate), effective interviewing of witnesses, weighing credibility, analyzing information and writing a report. An introductory training program typically lasts a full day (some training is longer) and includes skill-building exercises.

TYPE OF QUESTIONING

Investigations should not be interrogations. Neither the complainant nor the accused party should feel they are being cross-examined. Studies have shown that open-ended questions are better at eliciting information while not causing people to feel attacked. Investigators should ask open-ended questions on all areas relevant to the complaint to get complete information from the parties and witnesses.

MAKING CREDIBILITY DETERMINATIONS

Making a determination:

If there is no substantial disagreement about the factual allegations it may not be necessary to make a credibility determination. However, many investigations require a credibility determination, including the classic "he said/she said" situation, and it is up to the investigator to make this determination. An investigator can still reach a reasonable conclusion even if there is no independent witness to an event. In most cases, if the investigator gathers and analyzes all relevant information, it is possible to come to a sensible conclusion.

He said/she said situations:

It is not uncommon for there to be no direct witnesses to harassment. Yet there may be other evidence that would tend to support or detract from the claim. For example, a complainant who complains about harassment may have been seen to be upset shortly after the event, or may have told someone right after the event. This would tend to bolster his or her credibility. On the other hand, it would tend to bolster the accused party's credibility if the investigator learned that the complainant complained many months after sexual joking with a supervisor, was just given a negative performance review, and told a co-worker that he or she could use the joking against the supervisor in the future. In other cases documents such as emails or texts might bolster or reduce a witness's credibility.

Even if there is no evidence other than the complainant's and accused party's respective statements, the investigator should weigh the credibility of those statements and make a finding as to who is more credible. The investigator can utilize the credibility factors stated below.

Credibility factors:

Credibility factors include the following (these are also referred to in statutes and enforcement agency guidance):

1. Inherent plausibility – this refers to whether the facts put forward by the party are reasonable: whether the story holds together. In other words, ask yourself whether it is plausible that events occurred in the manner alleged.
2. Motive to lie (based on the existence of a bias, interest or other motive) – this refers to whether a party has a motive to be untruthful.
3. Corroboration – this refers to whether a direct or indirect witness corroborates some or all of the allegations or response to allegations.
4. Extent a witness was able to perceive, recollect or communicate about the matter – this refers to whether the witness could reasonably perceive the information reported (in terms of where they were, what else was happening, etc.)
5. History of honesty/dishonesty. Although investigations are not meant to make character judgments about the parties (whether they are a "good person"), if an individual is known to have been dishonest, this can weigh against his/her credibility.
6. Habit/consistency – this refers to allegations of a behavior that someone is known to do on a regular basis (such as hugging all female employees in greeting).
7. Inconsistent statements – this refers to one individual giving statements that are inconsistent in a way that is not easily explained.
8. Manner of testimony – such as hesitations of speech and indirect answers (especially when the witness has given direct answers to foundational questions.)
9. Demeanor – experts caution against using demeanor evidence as most people cannot effectively evaluate truthfulness from an individual's demeanor. Demeanor can be used as a credibility factor, but investigators should apply it with caution and understand the pitfalls of relying on demeanor when making a finding. To the extent possible, your conclusions should be based on an analysis of the objective evidence.

BURDEN OF PROOF

Investigators should make findings based on a "preponderance of the evidence" standard. This is the standard that civil courts use in discrimination and harassment cases. This standard is also called "more likely than not" – the investigator is making a finding that it more likely than not that the conduct alleged occurred, or more likely than not that it did not occur. Some workplace investigators make the mistake of applying a higher burden of proof, such as a "clear and convincing" standard or a "beyond a reasonable doubt" standard. Beyond a reasonable doubt is the standard used in criminal law, where a defendant is considered innocent until proven guilty and the consequence of guilt is a loss of freedom. Applying such a standard in a workplace investigation creates an unrealistic expectation about the level of proof needed to make a decision. Even a "clear and convincing" standard is a higher standard than should be expected since it is a higher standard than a civil court would use to determine liability. Some people describe a preponderance of the evidence standard as "fifty percent plus a feather."

DO NOT REACH LEGAL CONCLUSIONS

It is considered a recommended practice for investigators to reach factual conclusions, ***not*** legal conclusions. Sometimes, internal investigators will also reach a conclusion regarding whether behavior did or did not violate a company policy. Note that violating a workplace policy is a different standard than violating the law, which is one reason that investigators should not make legal findings. This means that even if the allegation includes concerns about, for example, unwanted touching, an investigator should only reach findings about the facts and should not reach a conclusion about whether there was unlawful (or lawful) conduct.

Conclusions should state, for example:

> *Mr. Jones says his boss (Mr. Foster) made numerous sexually explicit jokes during meetings, which Mr. Foster denied. Witness interviews confirm Mr. Jones's allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports a conclusion that Mr. Foster did tell sexually explicit jokes at meetings.*

Some investigators (typically internal investigators) are also expected to decide whether a policy was violated. External investigators are usually not asked to make this determination since the employer is often in a better position to interpret its own rules. In the above example, if the investigator were to make a policy violation determination the findings would also include:

> *It is further found that Mr. Foster violated the company's anti-harassment policy which prohibits telling sexually-explicit jokes in the workplace.*

In the event the investigation does not uncover evidence to support the allegations, the conclusion should state that fact, such as:

> *Mr. Jones's allegations against Mr. Foster are not supported by a preponderance of the evidence. This is because no witness recalls hearing the jokes described by Mr. Jones, even though they were present for the meetings in question. These witnesses appeared credible. They provided consistent information and appeared to have no bias for or against either party.*

DOCUMENTATION

Investigators should carefully and objectively document witness interviews, the findings made and the steps taken to investigate the matter. Investigators have different methods of documenting interviews, including taking notes (handwritten or on a computer), drafting statements for witnesses to sign, obtaining witness statements (written by the witness), or audio recording. There are pros and cons to each method and any can be acceptable so long as the information gathered is reliable and thoroughly documented and the documentation is not altered. It is also advisable to be consistent in the way you decide to document your interviews (unless there is a good reason to change your usual practice). It is considered a recommended

practice to retain all documentation. Some investigators type up handwritten notes so they are legible. However, the handwritten notes should also be retained.

SPECIAL ISSUES

What to do if the target of harassment asks the employer not to do anything.

It is rarely appropriate for an employer to fail to take steps to look into a complaint simply because an employee asks the employer to keep the complaint confidential or says that he/she will "solve the problem" with no involvement by the company. Indeed, this is one of the primary reasons why employers should not promise "complete" confidentiality. If the complaint involves relatively minor allegations and the complainant wants to handle the situation him/herself, the complainant can be coached as to how to do so, however the employer should follow up and assure this has occurred and the harassment has stopped. If the allegations are more serious the employer will need to know if they occurred so that appropriate action can be taken. In those cases it is not acceptable to have the complainant handle the matter alone.

Investigating Anonymous Complaints

Anonymous complaints should be investigated in the same manner as those with a complainant who identifies him/herself. The method will depend on the details provided in the anonymous complaint. If the complaint is sufficiently detailed the investigation may be able to proceed in the same manner as any other complaint. If the information is more general, the employer may need to do an environmental assessment* or survey to try to determine where there may be issues. However, the fact that the complaint is anonymous is not a reason to ignore the complaint.

* An environmental assessment is a process of finding out what is taking place in the workplace without focusing on a specific complaint or individual. For example, it might mean interviewing all the employees in a work group about how they interact, if they have experienced or witnessed any behavior that has made them uncomfortable, etc.

Retaliation

Complainants and/or those who cooperate in an investigation must be protected from retaliation. Employers should tell complainants and witnesses that retaliation violates the law and their policies, should counsel all parties and witnesses not to retaliate, and should be alert to signs of retaliation. Retaliation can take many forms. In addition to the obvious, such as terminations or demotions, retaliation could take the form of changes in assignments, failing to communicate, being ostracized or the subject of gossip, etc.

Retaliation can occur at any time, not only right after an incident is reported or an investigation is started. It is good practice to check back with a complainant after an investigation is completed to ensure that the employee is not experiencing retaliation, no matter whether the allegations were determined to be correct.

IMPLEMENTING EFFECTIVE REMEDIAL MEASURES

The FEHC regulations make it clear that an employer must take appropriate remedial steps when there is proof of *misconduct* – the behavior does not need to rise to the level of a policy violation or the law to warrant a remedy. Remember, an employer's legal obligation is to take reasonable steps to **prevent and correct** unlawful behavior. In order to meet this obligation, an employer should:

- Stop behavior before it rises to the level of unlawful conduct, which is why steps should be taken even when the behavior is not yet serious enough to violate the law;
- Impose remedial action commensurate with the level of misconduct and that discourages or eliminates recurrence; and
- Look at what the company has done in the past in similar situations, to avoid claims of unfair (possibly discriminatory) remedial measures.

Remedial measures can include training, verbal counseling, one-on-one counseling/executive training, "last chance" agreements, demotions, salary reductions, rescinding of a bonus, terminations, or anything else that will put a stop to wrongful behavior.