

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
FAIR EMPLOYMENT AND)	
HOUSING COMMISSION)	(Gov. Code, sec. 11349.3)
)	
REGULATORY ACTION:)	
Title 2,)	
California Code of Regulations)	OAL File No. 06-1214-01 S
)	
ADOPT: 7288.0)	
AMEND: 7288.0, 7288.1, 7288.2)	
_____)	

DECISION SUMMARY

This action adopts the Fair Employment and Housing Commission’s regulations implementing sexual harassment training for supervisory employees located in California as mandated by AB 1825 (Stats. 2004, Chap. 933).

On January 30, 2007, the Office of Administrative Law (“OAL”) notified the Fair Employment and Housing Commission (“FEHC”) of the disapproval of the above-referenced regulatory action. OAL disapproved the regulations for the following reasons: (1) failure to comply with the “Clarity” standard of Government Code section 11349.1 and (2) failure to comply with APA procedural requirements.

DISCUSSION

Regulations adopted by FEHC must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (the “APA;” Gov. Code, secs. 11340 through 11361). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the act from compliance with the APA. (See Gov. Code, sec. 11346.) No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and the rulemaking record must be reviewed by OAL for compliance with the procedural requirements and the substantive standards of the APA, in accordance with Government Code section 11349.1.

CLARITY

OAL must review regulations for compliance with the substantive standards of the APA, including the “Clarity” standard, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “Clarity” as meaning “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “Clarity” standard is further defined in section 16 of Title 1 of the California Code of Regulations (“CCR”), OAL’s regulation on “Clarity,” which provides the following:

“In examining a regulation for compliance with the ‘clarity’ requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons ‘directly affected;’ or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

- (b) Persons shall be presumed to be ‘directly affected’ if they:
 - (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.”

Several provisions of FEHC’s proposed section 7288.0 fail to meet the “Clarity” standard.

1. Proposed section 7288.0 (c) provides the following:

“(c) ‘Trainers or educators’ under this section shall be ‘Subject Matter Experts’ who have **legal education coupled with practical experience, or substantial practical experience** in training in harassment, discrimination and retaliation prevention.” [Emphasis added in bold].

The two emphasized phrases set up alternative methods or requirements for qualifying as a “Subject Matter Expert” which is a prerequisite for functioning as a “trainer or educator” under this section. Neither emphasized phrase is defined in this regulation or relevant statutes. Clear definitions for both phrases are essential in determining who qualifies as a “trainer or educator” under this section. The lack of clear definitions makes the phrases vague leaving many questions unanswered as to their meaning and application to potential “Subject Matter Experts”. How much and what type of “legal education” is required in order to meet part of the first alternative qualification requirement? What type and how much “practical experience” are required for the second part of this first alternative qualification requirement. The second alternative qualification requirement, “substantial practical experience”, is similarly vague. Obviously, the use of the disjunctive “or” between the alternative qualification requirements shows that the FEHC intends some distinction between the “practical experience” necessary for the first qualification requirement and the “substantial practical experience” for the second. What type and how much “practical experience” rises to the level of “substantial” so that persons directly affected may qualify under the second requirement without the additional “legal education” of the first requirement? For each alternative qualification requirement, what entity or process determines whether either alternative requirement has been met so that a candidate qualifies as a “Subject Matter Expert” pursuant to this section? The failure to adequately define these key phrases makes this provision a presumed clarity violation under Title 1 California Code of Regulations section 16(a)(3).

2. Proposed section 7288.0(a)(6) defines “qualified trainer” as:

“(6) A ‘qualified trainer’ refers to an individual who either through formal education and training or substantial experience can effectively lead in-person or webinars. If the qualified trainer is also a Subject Matter Expert as referenced and defined at 7288.0, subdivisions (a)(7) and (c), then the qualified trainer may answer questions and provide immediate feedback to training participants. If the qualified trainer is not a Subject Matter Expert, then a Subject Matter Expert shall be available to answer questions and provide feedback either during the training session or within two business days.”

As defined in subsection (a)(6), some “qualified trainers” are not “Subject Matter Experts”. All “qualified trainers”, however, are permitted to conduct any of the three methods of harassment training permitted by proposed subsection (a)(11) – “Classroom” training, “E-learning”, and “Webinar”. Not having to qualify as “Subject Matter Experts” means that some portion of “qualified trainers” are not expressly required to be “qualified to train about” the eight areas of “harassment, discrimination, and retaliation prevention” listed in the subsection (c)(1) definition of “Subject Matter Experts”:

“(1) The trainer or educator shall be qualified to train about the following:

- A. what are unlawful harassment, discrimination and retaliation under both California and federal law.;
- B. what steps to take when harassing behavior occurs in the workplace;
- C. how to report harassment complaints;

- D. how to respond to a harassment complaint
- E. the employer's obligation to conduct a workplace investigation of a harassment complaint;
- F. what constitutes retaliation and how to prevent it;
- G. essential components of an anti-harassment policy; and
- H. the effect of harassment on harassed employees, co-workers, harassers and employers."

Reading both subsections together raises a "Clarity" issue regarding what a "qualified trainer" not a "Subject Matter Expert" must be qualified to train about that is different than that mandated for a "Subject Matter Expert" in (c)(1) because the definition of "qualified trainer" contains no similar listing of areas a "qualified trainer" not a "Subject Matter Expert" must be "qualified to train about". This ambiguity is a presumed clarity violation under Title 1 California Code of Regulations section 16(a)(3).

3. FEHC's definitions for proposed section 7288.0 are listed in subsection (a). The definitions in subsection (a) are in alphabetical order. However, the defined terms "New" supervisory employees in (a)(9) and "Effective, interactive training" in (a)(11) (which should also be shown in quotes) are not in alphabetical order. Failure to follow FEHC's chosen alphabetical order format is a presumed "clarity of display" violation under Title 1 California Code of Regulations section 16(a)(5).

In addition to the three "Clarity" issues discussed above, other minor punctuation or formatting corrections are needed prior to resubmittal. OAL will work with FEHC on these additional corrections after FEHC's receipt of this decision.

INCORRECT APA PROCEDURES

1. Government Code section 11347.3(b)(2) requires every rulemaking file to contain an updated informative digest. The updated informative digest in this file is inaccurate because it is partially incomplete. The updated informative digest included in Volume I, Tab N states:

"UPDATED INFORMATIVE DIGEST

On September 29, 2006, Governor Arnold Schwarzenegger signed AB 2095 (Ch. 737, Niello). AB 2095 amended Government Code section 12950.1, subdivision (a), to specify that only California supervisors need to be trained by employers with two hours of mandatory sexual harassment training. AB 2095 will go into effect January 1, 2007.

Prior to the Governor signing AB 2095, on August 29, 2006, the Commission had revised its proposed regulations at California Code of Regulations, title 2, section 7288.0, subdivision (a)(8), consistent with AB 2095. The August 29, 2006, version of the Commission's regulations interpreted Government Code section 12950.1, subdivision (a), to specify that California employers are required to provide two hours of mandatory sexual harassment training only to California

supervisors. That interpretation remained also in the final November 14, 2006, version of its harassment training regulations.

There have been no other changes in the laws related to the proposed action or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.” [Emphasis added in bold.]

The bolded sentence is inaccurate because FEHC made numerous substantive changes to the regulation text through three 15-day notices. The updated informative digest should be updated to briefly discuss the substantive changes made by those notices to the effect of the proposed regulations.

2. Proposed section 7288.0 incorrectly includes individual “Authority” and “Reference” citations after each regulation subsection. This violates Title 1 California Code of Regulations section 14(d) which requires, in pertinent part:

“(d) Citations. Citations of ‘authority’ and ‘reference’ **for each regulatory section** which has been adopted or amended and submitted to OAL for filing with the Secretary of State **shall appear at the end of each section . . .**” [Emphasis added in bold.]

FEHC should consolidate all authority and reference citations into one Note appearing at the end of proposed section 7288.0.

ADDITIONAL CORRECTIONS

While not reasons for disapproval, FEHC should correct the following items prior to resubmittal:

1. Correct all third level hierarchy references in the regulation text from, for example, “A.” to “(A)”.
2. Delete the 45-day notice period dates from block B.4. of the OAL Form 400. Block B.4. lists only the 15-day notice dates.
3. In addition to labeling the text in Volume I, Tab E as the regulation text adopted by the FEHC on September 13, 2005, also identify and label it as the “originally proposed” regulation text as required by Government Code section 11347.3(b)(10).

CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. If you have any questions, please contact me at (916) 323-8916.

Date: February 6, 2007

Gordon R. Young
Senior Staff Counsel

For:

WILLIAM L. GAUSEWITZ
Director

Original: Ann Noel, Executive and Legal Affairs Secretary