



California Employers Are Required To Provide Mandatory Sexual Harassment Training, Commencing In 2005

Employment and Labor Practice Team

December 9, 2004

The California Legislature has mandated that all California employers with 50 or more employees provide at least two hours of training on the subject of sexual harassment to all supervisory employees, within one year of January 1, 2005. Employers who have provided equivalent training to supervisors between January 1, 2003 and the present, and who can prove they did so, are exempt from the requirement that the training be made during the year 2005.

This statute, Assembly Bill 1825, will become part of the California Fair Employment and Housing Act ("FEHA"), which is California's version of Title VII of the Civil Rights Act of 1964. California's FEHA, unlike Title VII, imposes specific obligations on employers to take all reasonable steps to prevent sexual or other unlawful forms of harassment. Assembly Bill 1825 expands those obligations even further.

Failure to provide the required training does not create per se liability in subsequent sexual harassment litigation (and compliance does not insulate the employer from liability). However, evidence concerning compliance or non-compliance with the new training requirements can be offered in subsequent litigation. Failure to provide the required training will increase the risk of liability.

Employers Covered.

The statute applies to employers with 50 or more employees, and for purposes of the statute an independent contractor or agent of the employer counts as an "employee." Though not expressly stated, the 50 employee test is likely based on total US employment, not just California employees.

While the statute applies only to employers with 50 or more employees (including independent contractors), smaller employers may also wish to provide sexual harassment training. Doing so, regardless of the employer's size, may prevent future harassment claims.

Training Requirements.

Covered employers must provide at least two hours of "classroom or other effective interactive training and education" to all "supervisory employees" who are employed as of July 1, 2005. The same training must be provided to all new supervisory employees within six months of their assuming a supervisory position. The initial training must occur prior to January 1, 2006.

After January 1, 2006, each covered employer must provide sexual harassment training to each supervisory employee every two years. The content of the training required by the statute is somewhat vague. The statutory language states that the training must "include information and

practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment.” Further, the mandatory training must also “include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation.”

The statute does not specify particular credentials that should be held by trainers. We recommend that the trainers be either licensed and experienced labor/employment attorneys or experienced human resource professionals holding an SPHR or PHR credential or the equivalent.

Because of the requirement that all new supervisory employees be trained within six months of assuming a supervisory position, a conservative approach would be to provide this training every six months. All supervisors must subsequently be trained at least once every two years.

Training Materials and Records.

We recommend that detailed records be kept of the training, including sign-in sheets indicating which persons attended, the date the training occurred and the location the training occurred. Additionally, written course materials should be distributed and copies retained by the employer. The statute suggests that on-line training (“effective interactive training”) is acceptable but no further specifics are provided. It is doubtful it will be sufficient to simply show supervisors a videotape on the subject of harassment. Watching a videotape is probably not “effective interactive training.”

Who Is a Supervisor?

The statute does not define the term “supervisory employee.” However, a separate provision of FEHA defines “supervisor” as “any individual having the authority, and the interest of the employer, to hire, transfer, suspend, layoff, 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 merely of a routine or clerical nature, but requires the use of independent judgment.”

It is not clear whether the requirement applies to supervisors located outside of California. We recommend that the training be provided to anyone with supervisory authority over employees in California, regardless of the supervisor’s principal place of employment.

Training for Non-Supervisors.

Nothing in the new statute precludes an employer from training non-supervisory employees on the topic of harassment. However, we recommend that the content of the training for supervisory employees be more detailed than training that might be provided to non-supervisors. Specifically, supervisors must be trained in methods to recognize potential discrimination or harassment, to report suspected or apparent harassment to human resource personnel, and to avoid retaliation, among other topics.

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Other California Requirements to Prevent Harassment.

In addition to the new mandatory training, California law already obligates employers to “take all reasonable steps to prevent harassment from occurring.” California law requires all employers to post a poster describing protections against sexual and other unlawful harassment. It also requires that each employer distribute an information sheet on unlawful harassment (the California Department of Fair Employment and Housing publishes an acceptable information sheet). Additionally, individual employees who commit unlawful harassment may be personally liable for damages. In California, the employer may even be responsible for unlawful harassment committed by non-employees, or by persons providing services under a contract in the workplace, if the employer or its supervisors knew or should have known of the harassing conduct and fails to take immediate and appropriate corrective action.

Many providers will be offering harassment training designed to comply with the new statute. Pillsbury Winthrop’s labor and employment group can provide this training at a reasonable price.

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