

Mandatory Sexual Harassment Training: **AB 1825 Compliance**

As many of you know, on September 29, 2004, Assembly Bill 1825 (AB 1825) was signed into law. Modeled after a Connecticut statute, AB 1825 amended the Fair Employment and Housing Act (FEHA) by requiring many California employers to provide on-the-job, sexual harassment training for their supervisors. One of the factors that led to the passing of the bill was the fact that sexual harassment was the number one complaint filed with the Department of Fair Employment and Housing (DFEH). During the 2002-03 fiscal year alone, 4,321 sexual harassment cases were filed with the DFEH, comprising 22% of all cases filed. After the passage of AB 1825, California's sexual harassment training requirements are among the nation's most stringent.

While AB 1825 mandates that employers provide their employees with sexual harassment training, it had become a good idea to provide such training prior to the passage of the statute. In 1985, the California Legislature made it a violation of FEHA if "an employer . . . fail[ed] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." In 2003, the California Supreme Court ruled that an employer is *strictly liable* for all acts of sexual harassment by its supervisors. With developments such as these, it comes as no surprise that many employers began providing sexual harassment training before the passage of AB 1825, in order to help prevent the occurrence of sexual harassment committed by supervisors; and, if a sexual harassment claim made it to trial, to show a finder-of-fact that "all reasonable steps necessary to prevent discrimination and harassment" had been taken.

Although the plain language of AB 1825 is relatively clear, there have been a number of grey areas with regard to the statute's breadth and consequences. Primarily, these ambiguities concern: (a) which employers are impacted by the law; (b) which employees must receive the training; (c) what forms of training are acceptable; (d) what must be taught; (e) who can provide the training; and (f) what are the consequences for businesses that have not complied with the law by the deadline. Many employers have been put in the uncomfortable position of needing to comply with the law before the deadline (discussed below), without knowing what exactly the law requires.

Recently, The California Fair Employment and Housing Commission (Commission) has released a *draft of proposed* regulations, in order to provide guidance regarding AB 1825. This article will provide an overview of AB 1825, identify the ambiguities in the law, and clarify those grey areas based on the Commission's proposed regulations. Additionally, this article will analyze the effects of the law and suggest methods of compliance.

Overview of AB 1825

AB 1825 mandates that, by January 1, 2006, employers with fifty or more employees shall provide at least two hours of interactive training and education with respect to sexual harassment identification, prevention, and correction to all supervisory employees who are employed as of July 1, 2005. All supervisory employees hired after July 1, 2005, must receive such training within six months of when they were hired. After January 1, 2006, employers that are covered under the statute

are required to provide sexual harassment training to all supervisory employees at least once every two years. Employers that already provided training to supervisory employees after January 1, 2003, are exempt from the January 1, 2006 deadline.

Clarification of Grey Areas

Which Employers Must Comply?

As mentioned above, AB 1825 applies to employers doing business in California having fifty or more employees. Under the statute, employees can be full-time, part-time, or *contract workers*. A business will be deemed to have fifty or more employees if the business employs fifty or more employees for each working day in any twenty consecutive weeks in the current calendar year or preceding calendar year. *There is no requirement that the fifth employees work at the same location or all reside in California.*

There are a few significant points to note with regard to this part of the statute. First, in calculating if a business has fifty or more employees, because the term “employee” under the statute includes contract workers, an employer cannot avoid being covered under the law by contending that a significant number of its workers are independent contractors.

Second, even businesses that employ seasonal workers, where the size of the workforce changes throughout the year, should note that they will be deemed “employers” under the statute if they employ fifty or more employees for each working day in any twenty consecutive weeks in the current calendar year or preceding calendar year.

Finally, it is important to recognize that the statute applies to *all* employers (doing business in California) with fifty or more employees, *even if the entity and most of its employees are located out of state*. For example, what if a business entity, based in Nevada, has fifty employees, and only one of those fifty works in California? Under the proposed regulations proffered by the Commission, the entity would still be covered by AB 1825, with the rationale being that the single California employee nonetheless be subjected to harassment, thus his or her employer’s supervisors can be found liable under FEHA.

It should be noted that AB 1825 also applies to the state of California, counties, and cities, *regardless of the number of employees.*

Which Employees Must Be Trained?

As mentioned above, the sexual harassment training mandated by AB 1825 need only be provided to supervisory employees. According to the proposed regulations, a “supervisor” is:

. . . 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 recommend that action, if . . . the exercise is not of a merely routine or clerical nature, but requires the use of independent judgment.

Due to the fact that AB 1825 was created to protect California employees from sexual harassment, the Commission's proposed regulations state that AB 1825 covers supervisors that are *located in other states* if they supervise employees that are in California. According to the Commission, there are roughly 1,174,914 persons who fall into the category of "supervisor" as defined by the statute.

As stated in the draft of proposed regulations, employees in a non-supervisory role who are given sexual harassment training will *not* be considered supervisors merely because they received such training. The rationale behind this provision is that if receiving AB 1825 training were to create a presumption that the trainee is a supervisor, then employers would be reluctant to provide such training to employees who do not fall under the definition of "supervisor," so as to limit the number of employees whose actions they would be strictly liable for. However, because the Commission does not want to discourage employers from providing *any* employee sexual harassment training, there is no such presumption.

What Method of Training Must Be Used?

Although AB 1825 explicitly states that employers must provide "classroom" training, the statute also expressly allows "other effective interactive training" as an alternative to classroom training. This alternative form of training includes "non-classroom instruction using audio, video, or computer technology. . ." This means that webinars (seminars that are accessible over the internet) and e-learning (individualized, computer-based training) are acceptable methods of training. However, webinars must be taught by a qualified trainer (discussed below), while any e-learning software must be designed by a qualified "instructional designer."

In addition, any webinar or e-learning software must provide employees with an opportunity for feedback: employees should be able to ask questions, and to receive answers. Also, the alternative training methods should feature testing that measures the progress of the trainees. To ensure that employees are actively taking part in the training, any e-learning software or webinar should have a participation component *at least once every 15 minutes*. In other words, the alternative training methods described should be interactive, with feedback of some sort (such as answers to questions posed by the webinar instructor or the e-learning course) from the employee once every 15 minutes.

Who is Qualified to Train?

AB 1825 requires that the training be conducted by someone with "knowledge and expertise" in preventing harassment and discrimination. Classroom trainers, web trainers, and "instructional designers" of e-learning tools may include ". . . California licensed attorneys, human resource professionals, psychologists or others, provided the instructors have legal education or practical experience in harassment training and knowledge of California laws prohibiting unlawful harassment."

Trainers, educators or developers must be qualified to train on the following topics:

- (a) what is unlawful harassment;
- (b) how to intervene when harassing behavior occurs in the workplace;
- (c) how to report harassment complaints;

- (d) how to respond to harassment complaints;
- (e) how to investigate harassment complaints and the employer's obligation to do so;
- (f) the illegality of retaliation for filing a harassment complaint and how to prevent retaliation from occurring when an employee has filed a harassment complaint; and
- (g) the employers' anti-harassment policy.

The Commission also gives guidance on what qualities are desirable with regard to trainers. Desirable qualities for an effective trainer or educator include a person who: "can use various training methodologies; can facilitate small and large group discussions; is an effective listener; has a credible, positive professional reputation, and continues to learn about gender and cultural issues and concerns."

According to the Commission, undesirable qualities for an effective trainer or educator include "a person who is or has a reputation of being in the workplace or the instructional environment: a 'hugger,' sexual, flirtatious, aggressive, arrogant, abusive, and demeaning to women or men, telling offensive jokes or using sexual, racial, religious, sexual orientation or other protected bases stereotypes or derogatory language."

What Content Should be Contained in the Training Sessions?

Whether taught in a classroom, via webinar, or by e-learning, all training mandated by AB 1825 should include, *but is not limited to*, the following:

1. A definition of unlawful harassment under the Fair Employment and Housing Act and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of other forms of harassment covered by the FEHA. . . and discuss how harassment of an employee can cover more than one basis.
2. FEHA and Title VII statutory provisions and case law concerning the prohibition against, and the prevention of, unlawful harassment in employment.
3. The types of conduct that constitute harassment.
4. Remedies available for harassment.
5. Strategies to prevent harassment in the workplace.
6. "Practical examples," including, but not limited to, role plays, case studies, group discussions, and examples with which the employees will be able to identify and apply in their employment setting.
7. The confidentiality of the complaint process.
8. Resources for victims of unlawful harassment, such as to whom they should report any alleged harassment.
9. Training on how to conduct an effective investigation of a harassment complaint.
10. Training on what to do if the supervisor is personally accused of harassment.
11. Training on the contents of the employer's anti-harassment policy and how to utilize it if a harassment complaint is filed.

There are a few issues that should be noted in this area. First, other forms of illegal harassment,

besides that which is based on sex, may be discussed in AB 1825 training. According to Sarah Reyes, the author of AB 1825, “AB 1825 does not say that it has to be solely, only, two hours or sexual harassment training . . . you can add additional training in there as well.”

Also, the Commission has stated that employers that have made “substantial, good-faith efforts” to comply with AB 1825 by completing supervisor training by the January 1st deadline “shall be deemed to be in compliance” with the statute, *even if the content or method of the training does not squarely meet the Commission’s current regulations*. The purpose of this provision is to make sure that entities that tried to comply with AB 1825 before the deadline are not penalized unfairly, because they did not have the benefit of the guidance provided by Commission’s regulations.

What is the Minimum Allowable Duration of Each Training Session?

As mentioned above, covered employees must receive “two hours” of training. The “two hours” can either be an actual two hours of traditional classroom or webinar training, or “the amount of time that the same content may be covered in an e-learning program for an average learner.” Thus, at least with an e-learning program, *the training does not necessarily have to take two hours to complete*.

However, according to Sarah Reyes, with regard to e-learning, it must be designed so that “. . .the person who is taking the e-training cannot skip . . . or jump to the end.”

Further, the Commission has made it explicitly clear that AB 1825 training does not have to be completed in two consecutive hours, or even in one day. With regard to classroom and webinar training, training segments can be as short as thirty minutes. With regard to training via e-learning, the segments can be as short as fifteen minutes. Therefore, as an example, an employer could spread the training over the course of a month, but providing one training segment per week, for thirty minutes at a time. With this provision, the Commission clearly wanted to provide flexibility for employers, but be sure that training sessions are long enough to be practical.

What Happens if an Employer Has Not Complied by the Deadline?

If a sexual harassment complaint is filed against an employer covered by AB 1825, DFEH personnel will verify if that employer has complied with the mandatory supervisor training requirement. If the DFEH finds that an employer has violated any of the statute’s requirements, the DFEH must issue an order requiring compliance. AB 1825 does not provide a penalty for non-compliance. However, even though employers will not incur fines or other penalties for failing to provide the required training, a violation of the statute is likely to have a major, negative impact for a defendant if a sexual harassment claim makes it to trial.

AB 1825 provides that a claim that training failed to reach a particular individual does not automatically result in liability of the employer for sexual harassment. However, the statute also provides that an employer’s compliance with the statute does not automatically protect it from liability for sexual harassment. Ultimately, while failure to comply with AB 1825 will not create automatic liability in a sexual harassment suit, plaintiff’s attorneys will certainly use the fact that an employer failed to follow the statute as evidence that the employer has not taken preventative efforts

seriously: an employer cannot seriously contend that it took “all reasonable steps necessary to prevent discrimination and harassment from occurring,” if it did not provide sexual harassment training to its employees. As stated by Sarah Reyes, “AB 1825 intentionally does not have a penalty because in the case it is violated, there will be an attorney out there who will do a class action suit who will get more compensatory damages than the state could ever provide.”

Conclusion

While it has always been a good idea for employers to provide their employees, particularly supervisors, with sexual harassment training, after the passage of AB 1825 such training is now mandatory in many circumstances. Although the language of AB 1825 is straightforward, many employers who sought to comply with the statute before January 1, 2006, had questions regarding its scope and effect. Until recently, there has been little guidance for these employers; however, with promulgation of the Commission’s draft of proposed regulations, most of these questions have been answered. It must be noted that while the Commission’s proposed regulations offer clarity and guidance, *they have not yet been codified* (some form of the regulations will be codified by the third quarter of 2006).

While it is still too early to gauge the effectiveness of AB 1825, there is evidence from other states that have enacted similar laws that suggests that employers may ultimately save money, due to lowered litigation costs, by complying with the statute. Indeed, the evidence suggests that the value of the training, with regard to prevention of litigation, may surpass the costs of the training itself.

For example, the State of Washington implemented a training program for its state supervisors which included harassment training, and realized a substantial decrease in employment-related claims. Before implementing the training, from 1995 to 1998, State of Washington employees filed 110 new employment-related claims. In February 1998, Washington State implemented its training program. From 1999 to 2001 (after the training was provided), the number of claims dropped to sixty-four, a decline of 42%.

The DFEH reports 3,571 sexual harassment complaints were filed in California during 2003-04. If harassment training in California is as effective in reducing employment claims as it was in Washington, California could expect a reduction of sexual harassment claims of 1,500 per year. When one considers the cost of litigating a claim (attorney’s fees, investigator’s fees, court costs, employee time, morale, productivity, insurance costs, and adverse publicity), it becomes clear that, in the long-run, the value of providing training outweighs the cost of such training.

Employers who have not done so already should still comply with AB 1825. *There is no penalty for late compliance*, as there is no statutory penalty for non-compliance. Although employers face strict liability in the event that a supervisor sexually harasses an employee, the amount of damages, if any, can be decreased by a showing that the employer took measures to prevent the occurrence of such harassment (this is especially true with respect to punitive damages). This is truly an example of “better late than never.”