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Bullying Be Gone—New California Law Makes Anti-Bullying Training For Employers' Supervisors A Must

By Jennifer Mora and Stephanie Gail Lee

Since 2004, California employers with 50 or more employees have been required to provide their supervisors with sexual harassment training. Effective January 1, 2015, these employers will have an additional responsibility. Governor Jerry Brown signed A.B. 2053 into law on September 9, 2014, mandating that covered employers add anti-bullying training into their current sexual harassment training curriculum.¹ While the new law codifies much of what employers may already be doing, it sets forth specific requirements they must follow starting January 1, 2015.

Current Training Requirements: What, Who, How Much and When

Current California law requires employers with 50 or more employees to provide two hours of sexual harassment training and education to all supervisory employees within the first six months of the employee's assumption of a supervisory role.² Further, covered employers must provide ongoing sexual harassment prevention training every two years.³

Specifically, the training must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition, prevention, correction and remedying of sexual harassment in employment.⁴ It must also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.⁵ Further, it must be presented by trainers or educators with knowledge and expertise in the subject matter.⁶

New Requirements for Training Curriculum

As of January 1, 2015, covered employers will be required to include "prevention of abusive conduct as a component of the [sexual harassment] training and education" The new law defines "abusive conduct" as:⁷

1 New Government Code section 12950.1; text available at <http://leginfo.legislature.ca.gov>.

2 Cal. Gov't Code § 12950.1(a).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 A.B. 2053.

. . . 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. [It] 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, or the gratuitous sabotage or undermining of a person's work performance.

The new law adds that a "single act shall not constitute abusive conduct, unless especially severe or egregious."

The broad language of this new law contains some ambiguity and leaves room for interpretation. For example, it does not specify the content of the training or training materials that must be used, nor does it specify how much time, out of the two hours required for sexual harassment training, must be allocated towards anti-bullying education.

However, employers are not without guidance. The new law does include a list of conduct that may be abusive. Moreover, the legislature's inclusion of the word "malice" in the definition of "abusive conduct" has significance. In the context of punitive damages, "malice" is defined as conduct which is "intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."⁸ Common law definitions of "malice" are aligned.⁹ Accordingly, training should guide supervisors in refraining from acting impulsively in difficult workplace situations, and provide tools for supervisors to dissipate heightened emotions that they may experience. Consideration and examples also should be given in the training regarding co-worker bullying and how that can be handled or prevented.

Furthermore, the phrase "gratuitous sabotage or undermining of a person's work performance" in the definition of "abusive conduct" provides further direction. The legislature seeks to distinguish between bona fide performance critiques and indignant remarks which do not serve the employer's legitimate business interests. Training, therefore, should address and explain the difference between tenacious management and bullying. Consideration also should be given to unusual situations, such as a manager who purposely places lower grades on an evaluation than are justified or intentionally credits someone other than the responsible individual for work that was well performed.

Next Steps and Considerations for Employers and Practitioners

California employers should audit their supervisor training curriculum. Employers may want to consult with counsel in making modifications to ensure that anti-bullying components are included in their next round of trainings and that key terms are defined for training recipients. Multi-state employers may also want to adopt their revised training programs nationwide to ensure consistency throughout their organization. As well, employers and practitioners should consider inserting language into employee handbooks and manuals establishing that it is a violation of company policy to engage in workplace bullying, and confirming that complaints of such will be taken seriously, will be promptly investigated, and offenders will be appropriately disciplined.

While the new enactment does not create a private right of action for an employee against the employer to seek damages for workplace bullying, employers should not take this new training requirement lightly. If an employee is bullied because he or she belongs to a protected class under the California Fair Employment and Housing Act—in other words, for example, because of his or her race, gender, religion, disability, age, etc.—then the employee may have a claim for harassment and discrimination. Undoubtedly, plaintiffs and their attorneys will argue that an employer's failure to adhere to the new training mandates is evidence of an employer's failure to take all reasonable steps to prevent workplace harassment and discrimination.¹⁰

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⁸ Cal. Civ. Code § 3294(c)(1) (emphasis added).

⁹ See e.g. *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944-45 (malice may be established by evidence showing either hatred or ill will, or "a willingness to vex, annoy, or injure") (emphasis added).

¹⁰ *Fair Emp't & Housing v. Lyddan Law Group (Williams)*, No. 10-04-P, FEHC Precedential Decs. 2010; see Cal. Gov't Code § 12940(k).