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California's Fair Employment and Housing Commission signs off on its sexual harassment training regulations.

California Edition

A Littler Mendelson California-specific Newsletter

At Long Last - Done!: The FEHC Releases Final Regulations on A.B. 1825 Compliance

By Christopher E. Cobey, David N. Goldman and Tara G. Bedeau

At its November 14, 2006 meeting, the California Fair Employment and Housing Commission concluded an almost year-long process by approving the agency's final regulations on California's law mandating training of larger employers' supervisors on sexual harassment (A.B. 1825; Cal. Leg. 2003-2004, now codified as Government Code §12950.1.) The good news for employers who followed the regulatory process is that final regulations are identical to the draft regulations issued on October 2, 2006.

The FEHC will now send the final regulations to the Office of Administrative Law ("OAL"). The OAL vets the FEHC's work to ensure that the Commission drafted regulations that bear a logical relationship to the statute and that the Commission appropriately considered public comments. The OAL has 30 days to complete this evaluation. Considering that the Commission went through four drafts and four intensive public comment periods, the OAL is unlikely to find problems with the regulations, and will likely send them to the Secretary of State's office to be promulgated. The regulations will become effective 30 days after being filed with the Secretary of State.

When Will the Regulations Become Effective, and When Will Affected California Employers Be Required to Comply With Them?

The Commission's Executive and Legal Affairs Secretary has stated that she expects the regulations to be effective in February 2007, depending on the OAL review time and whether it requests some final tweaks and changes to the regulations.

The final version of these regulations provides the most comprehensive guidance on complying with the law, just as most covered employers are preparing for the legally mandated re-training of all supervisory employees in 2007. This ASAP reviews the key provisions of the regulations. A more comprehensive review of A.B. 1825, the regulations, and best practices can be found in "Mandatory Training For Employers In California – A Littler Mendelson White Paper on A.B. 1825," which will be published and available at the Compliance Tools page of Littler's website.

Who Must Comply With A.B. 1825?

A.B. 1825 applies only to employers with 50 or more employees or contractors. This seemingly simple language leads to several important questions, which the regulations answer. Employees include full time, part time, and temporary workers. As defined by the criteria specified in California Government Code section 12940(j)(5), contractors are those providing work under a contract for each working day in twenty consecutive weeks in the current calendar year or preceding calendar year.

The regulations also contain an important clarification applicable to employers with seasonal workers, as the size of the workforce changes throughout the year for such employers. An "employer" is deemed to have 50 or more employees if the entity employs or engages "fifty or more employees or contractors for each working day in any twenty consecutive weeks in the current calendar year or preceding calendar year."

Even employers with less than 50 employees in California may be covered by A.B. 1825.

The regulations define "employer" as "any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly." As the regulations state: "There is no requirement that the 50 employees or contractors work at the same location or all reside in California."

Who Must Be Trained?

A.B. 1825 does not contain a definition of the statute's term "supervisory employee." The Fair Employment Housing Act (FEHA) definition of "supervisor" is adopted by the draft regulations.

Under the FEHA, a supervisor is any individual having the authority:

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

Cal. Gov. Code §12926(r).

The regulations clarify only supervisors located in California must receive the required training. Some previous draft regulations required any supervisor who "directly supervised" an employee in California to be trained – even if the supervisor was not based in California. The change to restrict the regulations to those supervisors in California only was most likely made to conform the regulations to the language of current A.B. 2095, which will become effective on January 1, 2007.

Who Can Conduct the Training?

A.B. 1825 mandates trainers "must have knowledge and expertise in the prevention of harassment, discrimination, and retaliation." The definition of these requirements significantly changed during the regulation drafting process.

The final regulations now state that live training sessions must be lead by a "qualified trainer" ("QT"). A QT satisfies the requirements if, as an individual, she or he has demonstrated two qualities:

1. Through formal education and training or substantial experience, the QT can effectively lead in-person or webinar trainings; and
2. The QT is a qualified subject matter expert ("SME"). A SME is an individual who must have "legal education coupled with practical experience, or substantial practical experience in training in harassment, discrimination and retaliation prevention."

If the trainer meets the first requirement, but is not a SME, then a SME must be available to answer questions and provide feedback either during the training session, or within two business days (presumably, within two business days after the question is asked).

All trainers, even those who are not SMEs, must also be qualified to train about the following subjects:

- What are unlawful harassment, discrimination and retaliation under both California and federal law.
- What steps to take when harassing behavior occurs in the workplace.
- How to report harassment complaints.
- How to respond to a harassment complaint.
- The employer's obligation to conduct a workplace investigation of a harassment complaint.
- What constitutes retaliation and how to prevent it.
- Essential components of an anti-harassment policy.
- The effect of harassment on harassed employees, coworkers, harassers and employers.

Who May Design E-Learning Training Programs?

These knowledge and expertise standards also apply to those responsible for writing, reviewing or approving self-study e-learning harassment training. Such training must be developed and approved by instructional designers, QTs, or SMEs. Instructional designers (that is, individuals with expertise in current instructional best practices), cannot develop a program on their own. Instead, they must develop the training content based upon material provided by a SME.

What Subjects Must Be Included?

The regulations contain a preamble to the list of mandatory subjects to ensure that training programs promote the underlying purpose of A.B. 1825, as opposed to merely providing a defense against litigation. The learning objectives of the training and education are to: (1) assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment," as that term is defined in California and federal law; and (2) develop, foster and encourage a set of values in supervisory employees who complete mandated training and education that will assist them in preventing and effectively responding to incidents of sexual harassment.

- The following subjects represent a minimum curriculum that applies to all training programs, regardless of the training format, that are needed to meet these goals.
- A definition of unlawful sexual harassment under the FEHA and Title VII of the Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, and discuss how harassment of an employee can cover more than one protected category.
- FEHA and Title VII statutory provisions concerning the prohibition against and the prevention of unlawful sexual harassment.
- The types of conduct that constitute harassment.
- Remedies available for harassment.
- Strategies to prevent harassment in the workplace.
- Practical examples of workplace harassment, including but not limited to role plays, case studies, group discussions, and examples that the employees will be able to identify with and apply in their employment setting.
- The limited confidentiality of the complaint process.
- Resources for victims of unlawful harassment, such as to whom they should report any alleged harassment.

- The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- What to do if the supervisor is personally accused of harassment.
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy should be provided to supervisors. Regardless of whether the employer's policy is used as part of the training, the employer must give each supervisor a copy of its anti-harassment policy and require that each supervisor read and acknowledge receipt of the policy.
- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. (This requirement is not mentioned in the regulations but is required by the express language of A.B 1825. Training programs should certainly include such examples.)

What Subjects May Be Included?

The plain language of A.B. 1825 requires employers to provide "two hours of sexual harassment" training. The term "sexual harassment," is used 15 times in the statute, which leads to the following question: "May I conduct a two hour program and discuss harassment on legally protected categories other than sex?"

The regulations explicitly allow programs to explain "a definition of other forms of harassment covered by the FEHA and [to] discuss how harassment of an employee can cover more than one basis."

What Training Formats May Be Used?

Requirements For All Programs

One requirement is common to all three methodologies – interactivity. All training programs must be interactive and "shall" (not "may") include the following: 1) questions that assess learning, 2) skill-building activities that assess the supervisor's understanding and application of content learned, and 3) numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain measurably engaged in the training.

Requirements Particular to Classroom Training

The Commission's confidence in the methodology of classroom training is reflected in the regulations because there is only one requirement specific to this method – that it be conducted in a setting removed from the supervisor's daily duties.

Self-Study E-Learning

There are two important restrictions in the use of self-study e-learning. The first restriction is that learners must have the opportunity to ask questions of a qualified person *while taking* the program. Thus, the program must provide a link or directions on how to contact directly qualified trainers or educators. These trainers or educators must be available to answer questions and to provide guidance and assistance on harassment training issues within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked. Remember that the questions and answers will likely be discoverable in subsequent litigation.

The second major restriction is that employers must also ensure that students spend at least two hours taking the course. Although book marking functions are allowed, an e-learning program must contain some way to ensure that each learner spends the requisite amount of time actually taking the program.

Live Webinars or Webcasts

Live webinars, in theory, combine the advantages of classroom training (an instructor who can pose and answer questions in real time) without learners having to leave their offices. The key is to ensure that learners actually took the entire program, as opposed to answering their e-mails while the course played in the background. Therefore, those using webinars must document that each supervisor attended the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities.

How Can I Track the "Every Two Year" Re-Training Requirements?

The final regulations confirm the availability of the training year tracking ("TYT") method. Training year tracking may be used as an alternative to the "individual" training tracking (ITT) method. TYT allows an employer to designate a training year in which it trains some or all of its supervisors, and requires supervisors so trained to be retrained by the end of the next training year, two years later. The training year need not coincide with a calendar year – it may be any period of twelve consecutive months.

The final regulations clarify that, if an employer elects to use the TYT method:

> "[f]or newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions and that training falls in a different training year, the employer may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new supervisors beyond the initial two year training year."

Thus, an employer may shorten, but may not lengthen, the two-year retraining requirement for newly trained supervisors.

Most employers will use the TYT method exclusively because it is easier to administer in the long term, and the "every year training" for new supervisors would only occur after the first year of hire or promotion. Then the employee would cycle into the alternate-year TYT method. Here are some examples assuming the employer elects to use the TYT method:

- Assume that 2005 was the employer's designated training year. Rosa received training on January 15, 2005. Rosa must be retrained no later than December 31, 2007.
- Assume that 2007 will be the employer's designated training year. Stephan was hired as a supervisor on April 1, 2006, and completed his required harassment training on June 1, 2006 (4 months before the deadline!). Stephan must be trained during the 2007 re-training year.
- Company X designates 2005, 2007, 2009, etc. as training years. Stephan is a new hire on June 1, 2006. Stephan must complete his initial training no later than December 1, 2006 – six months from his date of hire). Stephan must be retrained no later than December 31, 2007.

Duplicate training

The final regulations specify when a new supervisor may be able to count prior training received within six months of becoming a new supervisor

to satisfy the new supervisor training requirements for her or his current employer:

> A supervisor who has received anti-harassment training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's new supervisory position or within six months of the employer's eligibility. That supervisor will otherwise be put on a two year tracking schedule based on the supervisor's last harassment training.

Remember that the burden of establishing that the prior training was legally compliant with this section will be on the current employer.

How Do I Verify that the Training Occurred?

Employers must now track compliance by keeping records of its harassment training. The records must include:

- The name of the supervisor trained
- The training date
- The type of training
- The name of the trainer, educator or instructional designer

The records reflecting this information must be maintained for a minimum of two years.

What Should I Do to Prepare for the 2007 Training or Re-Training Year?

During 2007, most employers will need to re-train all of their California-based supervisory employees. Littler's employer surveys show that it takes most organizations four to seven months to implement a training program. Thus, taking action as soon as possible is warranted. When finalizing your training programs, consider these items, in addition to those mentioned throughout this ASAP.

- Employers should continue to carefully audit which non-California supervisors "directly" supervise California employees – including those supervisors who do not reside in California. Although the regulations no longer require such training, it is highly advisable to train non-resident supervisors of California employees.
- Use the checklist of training topics to audit the content of the training program, and keep auditing the training content even after the program is purchased or finalized. Make sure the coverage of required topics can be easily spotted in a quick review by regulators. If the required topics are buried in a mass of information, covered only in a brief bullet point attached to another topic, or only viewable in a click-on link, regulators could miss their inclusion in the program.
    - Remember, the regulations call for covering both California and federal law. In 2005, the California Supreme Court and the U.S. Court of Appeals for the Ninth Circuit (which includes California) issued three landmark decisions regarding harassment and retaliation. This year, the California Supreme Court issued its ruling on the "Friends" sexual harassment case, and the U.S. Supreme Court expanded the scope of retaliation claims. Because the law changes, programs that were sufficiently compliant one month may not be the next.

Simply put, the regulations now require a variety of interactive exercises. Static training programs or ones with just one type of interactive (e.g., multiple choice only) will likely not meet regulatory standards.

- Ask yourself whether you would be comfortable with your trainer or vendor being cross-examined at a trial or in an administrative proceeding on his or her credentials.
- For classroom training, few employers will want to have two trainers at every session or available for post-class questions. Therefore, most employers will likely have one SME conduct live training sessions.
- If you are using e-learning, whether self-study or webinars, ensure that the programs meet the extra requirements of those training methods. Factor in the time and expense of implementing such a process before deciding on a delivery method.
- Consider conducting training programs longer in duration than the two-hour minimum. Even a 2.5 hour program provides employers significant extra protection. Employers can say that they conducted more than the minimum training required by law and regulations, and the extra time provides an additional cushion against claims that the training was less than two hours.
- Consider providing similar training to all supervisory employees nationwide. Doing so avoids inconsistency in training, and will help buttress the organization's defense to litigation against claims of inadequate or inconsistent training.
- Provide training beyond sexual harassment. At a minimum, programs should cover other forms of workplace harassment and include examples not only of sexual harassment, but of other types of prohibited conduct. The regulations allow such additional topics to be covered. Doing so will provide additional protection from damages in litigation. Remember that training on subjects such as discrimination, ADA, FMLA, and ethics can provide significant protection against civil and criminal damages. Covering these subjects would certainly require training longer than two hours. However, the additional time will be a small investment when compared to the amount of liability protection the training provides.

Christopher E. Cobey is a senior counsel in Littler Mendelson's San Jose office. David N. Goldman is Managing Attorney for Littler's Legal Learning Group. Tara G. Bedeau, a former associate of the San Francisco Office, is currently an attorney for the Legal Learning Group. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Cobey at ccobey@littler.com, Mr. Goldman at dgoldman@littler.com or Ms. Bedeau at tbedeau@littler.com.