

California Requires Mandatory Sexual Harassment Training

California has often led the charge when it comes to passing laws that address the responsibilities which employers have to their workers. That trend continues with the enactment on September 29, 2004 of Assembly Bill 1825 (“AB 1825”), which mandates new sexual harassment training requirements for California businesses with at least 50 workers.

Beginning on January 1, 2005, all California employers with 50 or more employees or contractors will be required to provide at least 2 hours of sexual harassment training to all supervisory employees who have not received such training in 2003 or 2004. All newly hired supervisors (including persons newly promoted to supervisor) will also be required to undergo 2 hours of sexual harassment training within 6 months of their hiring or promotion. In addition, beginning on January 1, 2006, employers will need to provide on-going training for all supervisors, consisting of at least 2 hours of harassment training every two years.

While employers have voluntarily trained their employees for years on harassment issues, the new law sets forth specific guidelines for such training. These guidelines require all covered employers to audit any existing training programs and implement changes in areas where their current training methods do not meet minimum standards. Regular record-keeping and audit procedures will need to be put in place to ensure continuing compliance. In addition, the new training guidelines may become the standard of care against which all harassment training programs will be measured, even if those programs are being

used for non-supervisory employees or employers with fewer than 50 workers.

Background On AB 1825

AB 1825 was drafted to bolster California’s Fair Employment and Housing Act (“FEHA,” codified at Government Code §12926 *et seq.*), which prohibits sexual harassment and discrimination in the workplace. Prior to AB 1825, FEHA required that employers take “all reasonable steps” to prevent harassment from occurring. Many employers and courts interpreted “reasonable steps” to include some form of harassment training, but it was not mandated and the scope of the specific training to be done was left to employer discretion. In addition, the only state-mandated activities included: displaying a state-authored poster on sexual harassment, distributing an information sheet to all employees about sexual harassment, setting up an internal complaint procedure for receiving complaints of sexual harassment, and providing employees with contact information for the Department of Fair Employment and Housing. (Government Code §§ 12940(j) and (k), 12950). According to the legislative history of AB 1825, its author, Assemblywoman Sarah Reyes, believed that AB 1825 was necessary because sexual harassment cases still comprise 22 percent of all cases filed with the Department of Fair Employment and Housing, with 4,231 sexual harassment cases filed during the 2002-2003 time period.

To Whom Does AB 1825 Apply?

AB 1825 applies to all entities that regularly have 50 or more workers, whether they work as employees or independent contractors.

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Similarly, it applies to persons acting as an agent of such entities. (It also applies to any political or civil subdivision of the state and its cities.) The legislative history of AB 1825 suggests that the “regularly employing 50 or more” requirement will be interpreted such that an employer with at least 50 workers (including part-time workers) regularly working in California during twenty consecutive weeks of the current or the preceding calendar year will meet the threshold. If this interpretation is applied, employers that fall below the threshold will still be expected to conduct training, as long as they met the standard in the previous year.

AB 1825 does not require that all employees be trained. Instead, it only applies to the training of “supervisors.” The new legislation does not define the term “supervisor,” although it is defined elsewhere in FEHA as any person “having the authority, on behalf 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 to effectively recommend that action, if...the exercise of that authority is not merely routine or clerical...but requires the use of independent judgment.” (Government Code § 12926(r).)

What Type of Training is Required?

Employers will be required to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment, discrimination and retaliation. The training must be given by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation. Thus, the credentials of the trainer will be scrutinized and some low-level or inexperienced managers, and even some Human Resources personnel may not qualify as “trainers.” In addition, the training must include information and practical guidance regarding federal and state laws concerning sexual harassment, including what type of conduct is prohibited, how to prevent and correct sexual harassment if it occurs and what remedies are available to victims of

sexual harassment. The training must also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

The content of the training sessions is therefore an important component of whether the training complies with the statute. It will no longer be sufficient to simply define sexual harassment and the types of behavior which may fall within the scope of harassment. Training should be expanded to include working examples that will assist supervisors in identifying prohibited behavior, the necessary steps to take to prevent harassment from occurring, and the tools that teach them how to respond to complaints should they occur.

Employers who currently provide sexual harassment training should evaluate whether their training meets this criteria. Some training methods currently in use may no longer be sufficient. One area where many training programs may fail to meet the new standards is in the “interactive” component. While this term has not been specifically defined by AB 1825, it is safe to assume that the training should have a question and answer component, wherein hypotheticals or other examples are used. Employers who currently use video-based or computer-based training programs will need to supplement such training as necessary to include an opportunity for supervisors to ask questions of a knowledgeable instructor.

When Must the Training Be Completed?

The new requirements go into effect on January 1, 2005, and require employers to train all current supervisory employees by January 1, 2006. The only supervisors exempt from this initial training are those supervisors who have already received equivalent training from the employer between January 1, 2003 and January 1, 2005. Employers wishing to take advantage of this exemption should make sure they are able to demonstrate that their prior training sessions meet the minimum requirements of AB 1825 and that they have sufficient records showing the attendees at such sessions.

In addition to training current supervisory employees, **any supervisory employees hired or promoted after January 1, 2005 must be trained within six months of their hire or promotion date.** Finally, after January 1, 2006, any employer covered by AB 1825 must provide **an additional two hours of sexual harassment training to its supervisors once every two years.**

Practical Considerations for Employers

The new statutory training requirements will require employers to audit their current training programs for compliance with the statute. Record keeping methods will also need to be evaluated to determine whether covered employers are able to demonstrate that they have complied with the statute. Thus, employers should determine whether their current training methods have:

- ▶ Qualified trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation;
- ▶ At least two hours of classroom or other effective interactive training;
- ▶ Information and practical guidance about what constitutes sexual harassment, how to prevent and correct sexual harassment, and what remedies are available to victims of harassment;
- ▶ Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination or retaliation;
- ▶ An opportunity for supervisors to ask questions of a knowledgeable instructor about sexual harassment;
- ▶ Sufficient methods to identify persons who are “supervisors” subject to the training requirements; and
- ▶ Sufficient record-keeping methods to identify when supervisors have been trained, and to remind employers when the supervisors are due to be re-trained.

Importantly, the statute only addresses *minimum* training guidelines. AB 1825 expressly states that it sets “a minimum threshold and should not discourage or

relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.” Therefore, prudent employers would be wise to expand their training programs to not only meet these minimum guidelines, but also to include non-supervisory employees and training on laws covering other types of discrimination, such as age, race, gender, national origin, sexual orientation, religion and disability.

What Happens if A Supervisor is Not Trained?

Under AB 1825, there is no automatic liability should a particular individual or group of individuals somehow fail to receive the sexual harassment training contemplated by the statute. However, failure to train a particular individual who is later accused of sexual harassment—or who fails to properly

respond to a sexual harassment issue—further exposes employers to potential liability and may lead to heightened scrutiny of an employer’s overall training methods and record-keeping requirements. In addition, employers who fail to comply with AB 1825’s training requirements will be subject to an order issued by the Fair Employment & Housing Commission requiring compliance.

Does Compliance with AB 1825 Protect Us From Liability for Sexual Harassment?

There is no safe harbor for employers who implement a training program in compliance with AB 1825. Rather, AB 1825 expressly states that an employer’s compliance with its training requirements does not insulate it from civil liability for sexual harassment.

Do Employers With Fewer Than 50 Employees or Contractors Need to Worry About AB 1825?

Yes. Even though employers with fewer than 50 employees or contractors are not required

to comply with AB 1825, it will still affect these employers when they are faced with a claim of sexual harassment by an applicant or employee. Irrespective of AB 1825, all employers must take “all reasonable steps” necessary to prevent and redress sexual harassment in the workplace. One such “reasonable step” is an effective program to train and educate employees about sexual harassment. AB 1825 has now set a statutory standard for such a training program in terms of the content of the course, the knowledge and experience of the instructors, and time requirements and methods for instructing employees on sexual harassment. It is therefore prudent for all employers to expect that AB 1825 has set the floor, not the ceiling, for their future sexual harassment training.

Please contact members of Cooley’s Employment Group with any questions you may have regarding the issues discussed in this Alert. ■

New Sexual Harassment Training Requirements At A Glance

What employers are covered by the statute?	Employers with 50 or more employees and/or independent contractors, agents of such employers, and state and local government entities.
Who must be trained?	Supervisors, defined as individuals with the authority to hire, fire, or discipline employees, or to direct employees or adjust their grievances, or to effectively recommend such action
When must the training take place?	Beginning January 1, 2005, all current supervisors must be trained within one year unless they have undergone comparable training between January 1, 2003 and January 1, 2005. Beginning January 1, 2005, within 6 months of newly hiring or promoting someone to supervisor. Beginning January 1, 2006, all supervisors must be re-trained once every two years.
What type of training is required?	2 hours of classroom or other effective interactive training regarding sexual harassment by a person with expertise and knowledge in this area. The training must include practical guidance and examples regarding state and federal laws, including identifying, preventing and correcting sexual harassment, discrimination and retaliation and the remedies available to victims of such behavior.
If my company has less than 50 workers, do I need to follow the statute?	Practically speaking, the statute is likely to become the criteria against which all training programs will be measured. Thus, while employers with less than 50 employees need not comply with the statute, they would be wise to voluntarily adopt the guidelines for their own training programs as it may become a measurement of whether the employer has taken “all reasonable steps” to prevent sexual harassment from occurring.