Preventing Sexual Harassment

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In the wake of a new California law, it's time to review your training efforts

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The typical sexual harassment lawsuit will cost an employer an average of $450,000 in defense costs and $350,000 in compensatory damages if liability is found. An employer found to have exercised reckless disregard for the law may also be liable for punitive damages which can far exceed the amount awarded for compensatory damages. For example, a Santa Clara County, Cal. jury recently awarded $328,000 in compensatory damages and $2 million in punitive damages to two women who claimed they were sexually harassed while working at a FedEx sorting facility. The jury agreed that the women had been sexually harassed, and sent the company a $2 million message that it had failed to prevent and correct the behavior at issue.

Even where claims of sexual harassment do not end in litigation, employers pay significant amounts to employees who prevail in claims filed with the Equal Employment Opportunity Commission (EEOC) and related state agencies. In 2004, according to the EEOC, employers paid approximately $37.1 million to individuals who prevailed in their claims of sexual harassment. This figure does not include any additional monies paid by employers found liable as a result.

Workplace harassment costs the average *Fortune* 500 company approximately $6.7 million per year in indirect costs. The Institute for Conflict Management estimates that 400 hours of employee productivity is lost in the average sexual harassment case, and this is just the tip of the iceberg. Although prevention and training are the accepted methods of reducing this workplace hazard and the extraordinary costs associated with it, the Society for Human Resource Management estimated that, while 97 percent of companies had written harassment prevention policies, only 62 percent of these companies conducted sexual harassment prevention training.

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Sexual harassment prevention training programs not only help to prevent sexual harassment from occurring, they also protect employers from liability for sexual harassment under federal law. Since many state anti-harassment laws contain provisions encouraging or requiring employers to take reasonable steps to prevent or correct sexual harassment, training programs may actually reduce the long-term costs of compliance.

Although many states now require sexual harassment prevention training, it is still unclear to many employers what type of training is sufficient to limit or avoid liability under state and federal law. California's recently enacted sexual harassment prevention training law, California Government Code Section 12950.1, provides concrete guidelines for all employers seeking to better understand their duties under the law. It also provides a baseline for measuring training effectiveness in California, and may be helpful in assessing training effectiveness elsewhere in the nation.

What Is Required by California's Sexual Harassment Prevention Training Law?

Section 12950.1 requires employers with 50 or more employees, regardless of location, to provide a minimum of two hours of interactive sexual harassment prevention training to supervisory employees.

Only those employers with 50 or more employees or independent contractors, regardless of location (covered employers), are required to provide sexual harassment prevention training. Although unclear, the plain language of the statute indicates that even those employers with only a few workers in California are subject to this law, as long as the employer's workforce totals 50 or more employees. Moreover, because the statute does not distinguish between part- and full-time workers, employers should include both in their calculation.

Training of Supervisors

Covered employers are only required to provide sexual harassment prevention training to supervisory employees. In California, a "supervisor" is statutorily defined as one who has the:

- responsibility to direct other employees or adjust their grievances;
- authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees; or
- authority to recommend to the employer that any of the foregoing actions be taken.

Supervisory authority must be exercised using independent judgment and cannot be of a routine or clerical nature.

Employers in California should provide the required training to all employees who meet California's definition of a "supervisor."

Format and Content of Required Training

The training required by Section 12950.1 must be classroom or other interactive training presented by persons with knowledge and expertise in the prevention of harassment, discrimination and retaliation. The California Department of Fair Employment and Housing (DFEH) is responsible for enforcing Section 12950.1, but it has not yet issued regulations explaining these requirements. However, a similar statute in Connecticut has been interpreted as permitting web-based training as long as trainees can submit questions and receive answers. Thus, it appears that interactivity is key. While merely showing a video presentation is probably insufficient to satisfy California law, the provision of materials in various formats (video, Internet or printed material) combined with the opportunity to ask questions of, and receive answers from, a qualified individual would likely suffice. Presentations involving role play are also effective methods of satisfying the requirements of Section 12950.1.

Substantively, California law dictates that the required training must include information and practical guidance regarding:

- federal and state statutory provisions addressing the prohibition against, and prevention and correction of, sexual harassment;
- the remedies available to victims of sexual harassment in employment; and
- practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

All three topics must be covered in order to satisfy the requirements of California law.

Other Actions To Consider

In addition to addressing the required topics, it is also good practice to inform supervisors that they personally may be held liable under California law for sexual harassment. Notice of this potential liability may provide a supervisor who is tempted to engage in offensive conduct with the necessary incentive to exercise restraint.

Additionally, in order to encourage truthful reporting, employers should also consider informing their employees that, while the reporting of untruthful information may open them up to liability for defamation, they cannot be held personally liable for providing accurate information about sexual harassment to their employers.

Timing and Frequency of Required Training

Section 12950.1 requires both immediate and continuous sexual harassment prevention training. At the outset, all supervisory employees of a covered employer who were hired or promoted before Jan. 1, 2005 must be afforded a minimum of two hours of sexual harassment prevention training by no later than Jan. 1, 2006, unless training that conforms to the new requirements has already been provided since Jan. 1, 2003. Moreover, any supervisory employee who is hired or promoted after Jan. 1, 2005 must be provided the minimum amount of sexual harassment prevention training within six months of his or her assumption of duties. After Jan. 1, 2006, covered employers must supply the minimum amount of training to supervisory employees once every two years.

The California legislature expressly states that the amount of training required by statute (two hours every two years) is merely a minimum threshold, and employers may be obligated to provide additional training in order to prevent and correct sexual harassment and discrimination. Neither the courts nor the DFEH is likely to accept the statutory minimum amount of training as sufficient to prevent or correct sexual harassment from an employer or supervisor that has recently been found liable for, or made aware of a problem regarding, sexual harassment. Moreover, supervisors who have been accused of harassment or inappropriate conduct should be given additional training in order to correct any offensive behavior and prevent similar conduct from occurring in the future.

Consequences of Violating California's Sexual Harassment Prevention Training Law

A covered employer's failure to provide Section 12950.1 training does not necessarily imply that the employer will be found liable for sexual harassment. However, failure to provide training required by Section 12950.1 may result in a DFEH compliance order. Once such an order is issued, the DFEH is permitted scrutiny of all the employer's practices, thereby opening the door to a much broader range of inquiry into employment law violations. Non-compliance may also provide a basis for employer liability for failure to take all reasonable steps to prevent harassment and, moreover, lay the foundation for the imposition of punitive damages if the employer is held liable for sexual harassment.

Why Should Employers With Fewer Than 50 Workers Care About Sexual Harassment Prevention Training?

In California, an employer that regularly employs five or more individuals is legally accountable if it fails to take reasonable steps to prevent or correct unlawful harassment from occurring. In order to determine what constitutes "reasonable steps to prevent sexual harassment" under California's Fair Employment and Housing Act (FEHA), courts are likely to look to the minimum acceptable standards for sexual harassment prevention training established by Section 12950.1. Thus, employers with five or more employees will probably be expected to provide Section 12950.1 training, despite the fact that they are not expressly subject to Section 12950.1's mandate.

Why Should Employers Consider Expanding Sexual Harassment Prevention Training Beyond the Law's Requirements?

Providing Training to All Employees, Not Just Supervisors, Enhances Compliance

Section 12950.1 only requires employers to provide supervisory employees with sexual harassment prevention training. However, the California Supreme Court has held that providing sexual harassment prevention training to both supervisors and employees may reduce an employer's liability for hostile environment sexual harassment claims. Thus, even where sexual harassment prevention training does not prevent sexually harassing conduct from occurring in the workplace, the provision of such training to both supervisors and employees can help to reduce an employer's liability for such conduct in the event of a lawsuit.

Expanded Training Demonstrates Broad-based Legal Compliance

Employers in California and other states are required to take reasonable steps to prevent harassment related to any protected characteristic. In these jurisdictions, employers that provide only sexual harassment prevention training may still be liable for failing to take steps to prevent harassment on the basis of any other protected characteristic.

The most commonly protected characteristics are race, national origin, religion, age and disability. However, California state law also includes sexual orientation, physical or mental disability, medical condition, marital status and immigration status as protected characteristics. Whether a particular characteristic is protected depends on the applicable law.

Addressing Sexual Harassment by Customers or Third Parties

Employers may be held liable for sexual harassment committed by third parties, such as clients, customers and independent contractors, pursuant to federal and state law. As a result, employers who are required to take reasonable steps to prevent harassment in the workplace should be sure to address harassment by third parties during their sexual harassment prevention training sessions. Such training will raise awareness about this related problem and not only encourage supervisors to remedy such harassment when it occurs, but also focus supervisors on the need to prevent the occurrence of such harassment in the future.

Recommendations to Employers Regarding Compliance With the Sexual Harassment Prevention Training Law

Implement a Training Program Now

Covered employers must complete the training required by Section 12950.1 every two years. The first deadline is Jan. 1, 2006. Employers are strongly cautioned to avoid last-minute attempts to comply.

Employers, particularly those with many supervisory employees, will likely need substantial lead time to identify those who must receive training, and then provide the requisite amount of training to those individuals. An employer with a history of problems with sexual harassment will also need substantial lead time to comply because an additional amount of training is required in order to correct the problem and prevent future harassment from occurring.

Determine Exactly Who Qualifies as a Supervisory Employee Under California Law

Covered employers are required to provide Section 12950.1 training to all "supervisors." Failure to provide training to all required employees may preclude an employer from being able to submit evidence of its compliance with statutory mandates. This could open the door to an award of damages, including punitive damages, for sexual harassment.

In light of the above, covered employers should not rely merely on job titles but, instead, review the responsibilities of each employee with authority over another in order to determine whether such individual qualifies as a "supervisor" under California law.

Ensure That the Training Program Is Adequate Under the Law

In order to ensure full compliance with Section 12950.1, employers should verify that:

- their trainers are sufficiently qualified as experts in sexual harassment;
- the program addresses the subjects expressly required by statute; and
- the methods used to effect training are interactive and, at a minimum, allow the participants to ask questions and obtain answers.

Employers should also diligently anticipate additional considerations implicated by the requirements of Section 12950.1, including the possibility that some employees will require bilingual training in order to understand and be able to interact with the trainer.

Establish a Written Policy of Sexual Harassment Prevention

In addition to maintaining a policy against unlawful harassment, employers should also establish written policies regarding sexual harassment prevention training so that all supervisory employees are aware of their obligation to participate.

Employers should also establish written policies requiring supervisory employees to report inappropriate conduct which may be construed as sexual harassment to an individual who will ensure that additional training is provided where necessary.

Centralize Oversight of Training Compliance

Depending on the size of its workforce, a particular person (or group) should "own" the responsibility for overseeing the company's compliance with Section 12950.1 in order to ensure that the required training is completed by the deadline, and in accordance with the law. Such individual should be responsible for:

- maintaining a master calendar of training and updating the calendar to account for any newly hired or promoted supervisors;
- keeping track of all employees who require additional training due to recent complaints of sexual harassment and ensuring that additional training is, in fact, provided;
- reviewing the training program on a regular basis to ensure that it complies with the requirements of the law; and
- recommending training program changes or updates where necessary.

Keep Accurate Records of Training

In the event that an employer is audited by the DFEH, it will be required to provide documentation establishing that it has provided adequate sexual harassment prevention training to all supervisory employees. Moreover, if an employer is sued for sexual harassment, it is in the employer's interest to have detailed documentation evidencing the provision of the sexual harassment prevention training required by Section 12950.1 in order to support its defense. As a result,

employers can only benefit from the maintenance of detailed records regarding such training.

Employers should maintain an acknowledgment signed by the employee that he or she has completed the training which includes the dates and times of training sessions. However, it is also important to maintain copies of the training materials in order to establish that all required subjects were addressed during the presentation. If training materials are updated, records of the changes and dates of changes are also necessary in order to be able to establish accurately what was presented on a particular date.

If an employer utilizes outside professionals in order to provide the required sexual harassment prevention training, it should also maintain updated contact information for such individuals. This is particularly important in the event that an employer needs additional evidence of training or to establish the qualifications of its trainers.

Be Sure Training Provided Since Jan. 1, 2003 Was in Compliance

A covered employer that has provided Section 12950.1 training since Jan. 1, 2003 is excused from providing such training again until after Jan. 1, 2006. Employers that believe they fall into this exception should be careful to ensure that the training which was already provided complies with the requirements of the new California law. Because the law is specific as to minimum time requirements, the subjects to be addressed, and manner of training (i.e., interactive), it is possible, if not likely, that an employer may be required to provide additional training in order to fulfill the law's mandate.

Proactive employers that have already provided sexual harassment prevention training since Jan. 1, 2003 must also be sure that they have maintained adequate records of such training in order to establish when the training was conducted and that the program provided complies with the dictates of Section 12950.1. An employer that cannot prove that sexual harassment prevention training was provided is subject to the same provisions as an employer that has not performed the training at all.

Conclusion

Sexual harassment is a problem for both employers and employees. Inappropriate workplace conduct lowers employee productivity and increases the costs of business for employers. Educating employees about the problem of sexual harassment, and providing training to supervisory employees on how to respond to employee complaints of harassment, help the workplace remain free from the consequences of unlawful behavior.

California is not alone in its effort to formalize sexual harassment prevention in the workplace. While California ranks among the leaders in anti-harassment legislation, there are a number of states in the nation that require some level of sexual harassment prevention training from employers within their jurisdictions. Furthermore, even where states do not mandate sexual harassment prevention training per se, many of them require that employers take reasonable efforts to

prevent harassment and recommend that such prevention be accomplished through sexual harassment prevention training. Employers should expect more states to recognize training as a proven method of effectively correcting and preventing inappropriate or offensive workplace conduct. California's Section 12950.1 provides useful guidelines for employers across the nation that wish to prevent harassment from occurring and, moreover, limit or avoid liability for sexual harassment when it does occur.

Resources

For educators, a detailed discussion of sexual harassment issues may be found in the *Educator's Guide to Controlling Sexual Harassment*, published by Thompson Publishing Group. Go to www.thompson.com.

Excerpted from Human Resources 2006: Answers to Your Top 25 Questions, *available from Thompson Publishing Group. For more information or to order this 250-page book, call 800-677-3789 or go to http://www.thompson.com and click on "Employment Law."*