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## Employment

# Employers Must Ensure Harassment-Prevention Training Complies With Law

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California's Harassment Training and Education law requires most employers to provide sexual harassment prevention training to all supervisory employees once every two years. On June 20, the California Fair Employment and Housing Commission, the agency charged with enforcement of the harassment training law, adopted important modifications to proposed regulations it had previously issued to interpret the training law. While not yet final, the proposed modifications highlight the commission's expansive interpretation of the training law's reach and clarify key aspects of the required training. Given the timing and impact of the proposed regulations, employers should review their training programs now to ensure that future training will comply with California law.

The commission adopted the June 20 modifications in response to public comment received about the original proposed regulations, and the new modifications are subject to further, if somewhat limited, public comment. The commission accepted written comments about the modified regulations through last Saturday, and will decide whether to adopt or make further changes to the modified regulations at the commission's next meeting on Aug. 29. The commission's discussion and consideration of its proposed regulations at the meeting will be open to the public, but no public testimony will be taken. Employers wishing to submit comments on the proposed

regulations may obtain further information from the commission's Web site, [www.fehe.ca.gov](http://www.fehe.ca.gov).

California Government Code Section 12950.1 mandates that employers with 50 or more employees or "contractors" provide at least two hours of classroom or other effective interactive training and education regarding the prevention of sexual harassment to supervisory employees. The training must be repeated every two years, and newly hired supervisors must be trained within six months of their assumption of a supervisory position.

The required two hours of harassment training is intended to establish a minimum threshold; employers are encouraged to provide longer, more frequent or more elaborate training and education if necessary to meet their obligations to take "all reasonable steps" to prevent and correct unlawful harassment and discrimination.

The required training must include information and practical guidance about: 1) federal and state law concerning prohibited sexual harassment, its prevention and correction; 2) the remedies available to employees who are victims of sexual harassment; and 3) practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation. The training must be presented by trainers or educators with relevant knowledge and expertise in the prevention of harassment, discrimination and retaliation.

The training also must be "interactive," giving participants the opportunity to ask questions, get answers and otherwise participate in the training session.

On Dec. 16, the commission adopted proposed regulations interpreting Government Code Section 12950.1. Perhaps most important, the initial proposed regulations clarified that an employer is subject to the requirements of Section 12950.1 if it has 50 or more employees or contractors, regardless of whether they work or live in California.

The initial proposed regulations also acknowledged that computer or Internet-based training, such as "e-learning" or "webinar" sessions, may be sufficiently interactive if designed appropriately.

However, the initial proposed regulations left open some important questions, such as whether employers were required to train all supervisors or just those who supervise California-based employees.

The June 20 proposed modifications clarify both Section 12950.1 and the commission's initial proposed regulations. First, supervisors located outside of California need not be trained unless they "directly" supervise California employees. This point wasn't clear under the first set of proposed regulations, which simply stated that employees who supervise California employees need not be physically present in California themselves in order to be subject to the training requirement. Through the insertion of the word "directly," the proposed regulations now suggest that upper-management personnel who oversee California operations, but who do not directly supervise California employees, are not subject to the training mandate.

Second, all covered supervisors must receive the requisite training every two years. While the initial proposed

regulations allowed employers to designate a training year for tracking purposes that effectively expanded the training window for some supervisors beyond two years, the commission now intends to measure each supervisor's training deadline individually, based on the date that the supervisor was last trained. This proposed change significantly increases the administrative burden on employers by forcing them to separately track training deadlines for each covered employee.

There also are new rules for "newly hired supervisors." If a new supervisor received compliant training from a previous employer within two years of his or her hire date, the supervisor need only be retrained two years from the date of his or her last training session, as long as the new employer gives the supervisor a copy of its anti-harassment policy and requires the supervisor to read, and acknowledge receipt of, the policy in the first six months of employment. This new rule notwithstanding, employers may choose to simply retrain newly hired supervisors because of the inherent difficulty of confirming that prior training by third party employers satisfied the requirements of the training statute.

To ensure that supervisors understand the training course content, the proposed regulations also specify that trainers should: 1) involve the audience in the discussion through questions, problem solving and quizzes; 2) address hypothetical situations based on workplace situations or factual scenarios taken from case law, news media accounts or other sources; and 3) use training modalities such as role play, case studies and group discussions. The commission's

specification of these training methods demonstrates its commitment to make the training interactive and practical.

The modified proposed regulations include other important changes, such as required distribution and tracking of anti-harassment policies, interactivity and timing requirements for "e-learning" and "webinar" training, record keeping and documentation requirements, and a revised definition of "contractors."

While the modified regulations clarify some hotly debated aspects of the California mandatory training law, they also highlight new obligations that employers will have to meet in conducting future training. Given the prevalence and ramifications of sexual harassment claims, employers should consider taking the following steps to not only help ensure that future training complies with the statute but also to better prevent and defend against claims of harassment and discrimination.

Assume your company is subject to the training statute if you have 50 or more full-time, part-time, or temporary employees or contractors, and if any one of them lives or works in California. Do not assume you are exempt just because you do not have at least 50 employees or contractors in California.

**T**rain all supervisors — regardless of their location — who directly supervise California employees. If it is unclear whether particular supervisors directly supervise California workers, assume they do and train them.

Create and enforce a fixed training schedule. To avoid having to track countless individual training deadlines, assign employees to manageable groups that

complete the training together. For example, break up the two-year training period into four six-month periods and assign one-fourth of your work force to each period by hire date, alphabetically by last name or by some other method. Leave enough time between deadlines to audit and follow up on employees who slip through the cracks by scheduling training on intervals of less than two years (e.g., retrain everyone every 18 months).

Regularly evaluate your training programs, especially for changes in applicable law. Harassment and discrimination law is constantly evolving, and Section 12950.1 mandates that trainers address current California and federal law. Use recent court decisions to update training programs.

Go beyond the minimum training required. Consider: 1) training supervisors even if your company isn't subject to Section 12950.1; 2) training all supervisory employees without regard to whether they directly supervise California employees; 3) providing more than two hours of training every two years; or 4) addressing topics not required by law, such as other forms of harassment, medical and family leave laws, etc. By training broadly, your company not only will lower the number of employment claims filed by employees, but also will strengthen its defenses against such claims in litigation.

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