

## BETTER LATE THAN NEVER: NEW SEXUAL HARASSMENT TRAINING REGULATIONS ADOPTED

By Zeenat Basrai and Suzanne Steinke

*New regulations articulate and clarify requirements for mandatory sexual harassment awareness training of supervisors.*

The California Fair Employment and Housing Commission recently approved final regulations offering long-awaited guidance to employers on their obligations under AB 1825, which amended the Fair Employment and Housing Act ("FEHA") in 2004 to require sexual harassment awareness training for most California supervisors. These new regulations, which became effective August 17, 2007, clarify which "employers" and "employees" are covered by AB 1825; identify format, content, and record-keeping requirements for the training; and set forth the necessary qualifications of trainers.

### Covered "Employers"

The regulations include a very broad definition of "employer." Any person engaged in any business or enterprise in California who employs 50 or more *employees, contractors, or persons acting as its agents* for each working day in any 20 consecutive weeks in the current or preceding calendar year must comply with FEHA's sexual harassment training requirements. To determine whether this "50 or more" threshold is met, employers need to tally *all* full-time, part-time, and temporary workers, contractors, and agents, whether they work at the same or different locations and whether they work within *or outside* California. California governmental entities, regardless of the number of employees, also are included in the definition of covered "employers."

### Who Must Be Trained

While the scope of covered employers is broad, *only supervisors located in California* must be trained. Under the FEHA, a "supervisor" is defined as someone who has the "the authority, in the interest 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 effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Generally, employers should err on the side of training all persons who would likely meet this definition, as the new regulations specify that participation in the training does not, by itself, create any inference that a participant is a supervisor or that a contractor is an employee or a supervisor.

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**Q:** MUST TRAINING COVER FORMS OF HARASSMENT OTHER THAN SEXUAL HARASSMENT?

**A:** NO, BUT EMPLOYERS ARE STRONGLY ENCOURAGED TO DO SO IN ORDER TO HELP AVOID CLAIMS THAT THE EMPLOYER FAILED TO TAKE ALL REASONABLE STEPS NECESSARY TO PREVENT DISCRIMINATION AND HARASSMENT FROM OCCURRING.

**Q:** HOW DOES AN EMPLOYER ENSURE IT IS PROVIDING "EFFECTIVE INTERACTIVE TRAINING?"

**A:** FOLLOW THE CONTENT REQUIREMENTS SET OUT IN THE REGULATIONS AND INCLUDE MULTIPLE, TRULY "INTERACTIVE" TRAINING ELEMENTS, INCLUDING SKILL-BUILDING ACTIVITIES THAT ASSESS THE SUPERVISOR'S APPLICATION AND UNDERSTANDING OF THE TRAINING CONTENT AND HYPOTHETICALS WITH DISCUSSION QUESTIONS AND "PRACTICAL EXAMPLES," SUCH AS FACTUAL SCENARIOS TAKEN FROM CASE LAW, THE MEDIA AND/OR THE WORKPLACE.

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## Frequency of Training and Tracking Compliance

Covered employers must train their supervisors every two years. Compliance may be tracked on an “individual” basis, measuring two years from the last training date of an individual supervisor, or by designating a “training year” in which the employer trains some or all supervisors and thereafter retrain these supervisors by the end of the next “training year” two years later. A combination of tracking methods also may be used. To properly track compliance, employers must retain documentation of the training for a minimum of two years and shall include the names of those trained, dates of training, type of training used, and name of training provider. Because evidence of training may be particularly valuable in defending claims, employers should consider maintaining these records for longer than the required minimum.

New supervisors must receive their first training within six months of hire or promotion into a supervisory position. However, if a new

## Sexual Harassment Prevention Training

In order to assist our clients and friends in complying with the training requirements of California law, MS&K is pleased to offer sexual harassment prevention training for supervisors

**When:** Tuesday, December 4, 2007

Registration 8:30 – 9:00 am, Program 9:00 – 11:00 am

**Where:** MS&K, 11377 W. Olympic Boulevard, Los Angeles, CA 90064

**Cost:** \$50 per attendee

**RSVP:** Mary Marshall, [mqm@msk.com](mailto:mqm@msk.com) or 310-914-7981 by November 27

supervisor has received training in compliance with the regulatory requirements from a current, prior, alternate, or joint employer within the prior two years, the employer may comply with this initial training requirement simply by giving the new supervisor the employer’s anti-harassment policy and requiring her or him to read and acknowledge receipt of it within six months of assuming the supervisory role. However, if challenged, the current employer has the burden of proving that the former training complied with the regulations.

## Qualified Trainers

The regulations make clear that training must be conducted by a qualified “trainer,” defined as (1) an attorney admitted to practice in any state for two or more years and whose practice includes employment law under the FEHA or Title VII; (2) a human resource professional or consultant with a minimum of two or more years of practical experience either

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designing or conducting discrimination, retaliation, and sexual harassment prevention training, *or* investigating and responding to sexual harassment or other discrimination complaints, *or* advising employers on discrimination, harassment, and retaliation prevention; or (3) a law school, university, or college professor or instructor who has a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience teaching about employment law under the FEHA and/or Title VII. Persons who do not meet the foregoing requirements may conduct training if a qualified trainer is also present throughout the training to answer questions.

### Approved Training Methods

AB 1825 mandated that employers provide “classroom or other effective interactive training and education regarding sexual harassment.” The new regulations explain that this training may be offered in a live classroom setting or through a “webinar” or “e-learning” method, so long as the training is given by a qualified trainer and is interactive. That is, whatever the type of training used, instruction must include: (1) questions that assess learning; (2) skill-building activities that assess the supervisor’s application and understanding of content learned; and (3) numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training. Other “effective interactive training” includes the use of audio, video, and/or computer technology in conjunction with classroom, webinar, and/or e-learning training.

A “webinar” is an internet-based seminar whose content is created and taught by a qualified trainer and transmitted over the internet or intranet in real time. Employers using webinars must document and demonstrate that each supervisor not physically present in the same room as the trainer attended the entire training and actively participated with the interactive content. Webinars must afford supervisors an opportunity to ask questions, to have them answered, and otherwise to seek guidance and assistance.

“E-learning” training is individualized, interactive, computer-based training created by an instructional designer with expertise in current instructional best practices, based on materials provided by a qualified trainer. E-learning training must provide a link or directions on how to contact a qualified trainer available to answer questions and provide guidance and assistance about the training no more than two business days after the question is asked.

All training, regardless of method, must be *at least* two hours long, but need not be completed in two consecutive hours. Classroom and webinar training can include separate segments of no less than 30 minutes each. E-learning training must take no less than two hours to complete, but can

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have a bookmark feature allowing supervisors to pause the training prior to completion.

## Training Content Requirements

The regulations offer the following minimum requirements for training content:

- A definition of unlawful sexual harassment under the FEHA and Title VII of the federal Civil Rights Act of 1964. Definitions and training on other forms of harassment also are permitted;
- FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation;
- Types of conduct that constitute sexual harassment;
- Remedies for sexual harassment;
- Strategies to prevent sexual harassment;
- “Practical examples,” like factual scenarios from case law and media accounts; hypotheticals illustrating sexual harassment, discrimination and retaliation using training techniques such as role-play, case studies, and group discussions;
- The limited confidentiality of the complaint process;
- Resources for victims of unlawful sexual harassment, including how to report alleged harassment;
- The employer’s obligation to conduct effective workplace investigations of harassment complaints;
- What to do if the supervisor is personally accused of harassment; and
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Whether the employer’s policy is used in the training, each supervisor must be given a copy of it and be required to read and acknowledge receipt of it.

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**Q: ARE THERE LEARNING OBJECTIVES FOR THE MANDATED SEXUAL HARASSMENT TRAINING?**

**A: YES. THE TRAINING IS TO ASSIST EMPLOYERS IN CHANGING OR MODIFYING WORKPLACE BEHAVIORS THAT CREATE OR CONTRIBUTE TO SEXUAL HARASSMENT AND TO DEVELOP, FOSTER, AND ENCOURAGE A SET OF VALUES IN SUPERVISORY EMPLOYEES THAT WILL ASSIST THEM IN PREVENTING AND EFFECTIVELY RESPONDING TO INCIDENTS OF SEXUAL HARASSMENT.**

**Q: IF AN EMPLOYER HAS PROVIDED SEXUAL HARASSMENT TRAINING WITHIN THE LAST TWO YEARS, BUT THAT TRAINING DID NOT COMPLY WITH EVERY PROVISION OF THE NEW REGULATIONS, MUST IT RETRAIN ITS SUPERVISORS?**

**A: IF AN EMPLOYER HAS MADE A SUBSTANTIAL, GOOD-FAITH EFFORT TO COMPLY WITH AB 1825 BY COMPLETING TRAINING OF ITS SUPERVISORS PRIOR TO THE EFFECTIVE DATE OF THE REGULATIONS, IT SHALL BE DEEMED IN COMPLIANCE WITH AB 1825. SUBSEQUENT TRAINING SESSIONS, HOWEVER, MUST COMPLY WITH THE NEW REGULATIONS**

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