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Ten Things You Need to Know About Mandatory Sexual Harassment Training in California

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Employers in the live entertainment business must comply with the law of the workplace in every state in which they operate. California, Connecticut and Maine currently have statutes mandating that employers train their managers on preventing workplace harassment, particularly sexual harassment. The California statute, Assembly Bill 1825 (A.B. 1825), which was enacted in 2004, requires employers to provide at least two hours of effective training to all "supervisory" employees on the prevention of sexual harassment, discrimination and retaliation. A.B. 1825 applies to employers that regularly employ 50 or more employees or regularly receive the services of 50 or more persons (including independent contractors and temporary workers). Failure to comply with the mandatory training can be powerful evidence against an employer confronted with a sexual harassment or discrimination claim because it can be used to try to show, among other things, that the employer condones or is indifferent to harassment and discrimination or does not properly supervise and train its supervisors. Here are "Ten Things You Need to Know" about such training.

1. Know when training is next due.

California's initial sexual harassment training deadline was December 31, 2005. Since then, management must provide two hours of sexual harassment training to each supervisory employee every two years. New supervisors must be trained within six months of assuming their supervisory position and then once every two years, which can be measured either by an individual or "training year" tracking method.

You may designate a "training year" in which you train some or all of your supervisory employees and then you must retrain those supervisors by the end of the next training year two years later. Thus, supervisors trained in 2009 must be retrained in 2011. For newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions (and

whose training follows in a different training year), you may include them in the next group training year even if it occurs sooner than two years later. You cannot extend the training year for the new supervisors beyond the initial two-year training year.

2. Be overly inclusive when determining whom to train.

For purposes of mandatory training, the definition of "supervisor" is extremely broad. It includes any individual who has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or the responsibility to direct them, adjust grievances or effectively recommend that action, provided the exercise of that authority requires the use of independent judgment.

Luckily, the California Fair Employment and Housing Commission (FEHC) regulations covering the training provide that attending the training does not create an inference that an employee is a "supervisor" or that an "independent contractor" is an employee or a "supervisor." Thus, you should be overly inclusive in determining who should attend the sexual harassment training. While it is not required, consider training your supervisors who work in offices or locations outside California if they have any connection with employees who work in California. This can help prevent any potential sexual harassment litigation.

3. Consider your supervisors' prior training.

A supervisor who has received training in compliance with California requirements within the prior two years either from a current, former or joint employer need only read and acknowledge receipt of your anti-harassment policy within six months of assuming a new supervisory position. You can then put the supervisor on a two-year tracking schedule based on their last training. The burden of establishing that the prior training was compliant with California requirements is on the current employer.

4. Contractors and non-California employees 'count.'

California's training requirements apply to organizations that regularly employ 50 or more employees or independent contractors for each working day in any 20 consecutive weeks in the current or

preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or work or reside in California. Thus, if you have 10 employees and five independent contractors, such as a road crew, in the state of California and 35 employees outside the state, you are required to train your California "supervisors."

5. Know what needs to be included.

The training mandated by California must be of a high quality, must be conducted via classroom or "other effective interactive training" and must include:

(1) practical guidance regarding federal and state statutes concerning the prohibition against and prevention of sexual harassment;

(2) information about the correction of sexual harassment and remedies that are available to victims of sexual harassment; and

(3) practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

The training can be done in person, through interactive computer-based training or through a "webinar." In addition, audio, video or computer technology may be used in conjunction with classroom, webinar and/or e-learning training.

The FEHC regulations require that numerous hypothetical scenarios about harassment (each with one or more discussion questions) be provided so that supervisors remain engaged during the training. Qualified attorneys, professors, instructors or HR professionals may deliver the training. Trainers in each category need to have two or more years of experience. For example, if you hire an HR professional, he or she must have a minimum of two years of practical experience conducting discrimination, retaliation or sexual harassment prevention training, responding to complaints, conducting investigations of sexual harassment complaints or advising employers regarding discrimination, retaliation and sexual harassment prevention.

The training required by California law is a minimum threshold. It should not discourage you from providing longer, more frequent or elaborate training and education regarding workplace harassment

or other forms of unlawful discrimination. Consider expanding the subject to include respect in the workplace or "on the road," discrimination and harassment based on other protected categories (such as age, disability, race and religion) or also providing a one-hour training session tailored to nonsupervisory employees and contractors.

6. Review your sexual harassment policy.

Before conducting supervisory training, have legal counsel review your sexual harassment policy to ensure it complies with California law. In addition, provide the policy to your trainer so it can be reviewed and circulated to your supervisors during the training session. This is also a good time to make sure you have the required California Department of Fair Employment and Housing discrimination and harassment in employment posters displayed on your bulletin boards or available for your employees to review.

7. Have senior management emphasize the importance of training.

Have your senior management or owners attend and speak before the training to introduce it and emphasize its importance to the company. This can reinforce the "zero tolerance" toward harassment message your company seeks to communicate. Nothing can undermine an employer's efforts to comply with California's training law more than not having the owner or president of the company present during the training sessions.

8. Provide employees with a handout.

The training should include not only a copy of your harassment and discrimination policy, along with the complaint procedure, but also a copy or summary of the training so your supervisors can refer to it throughout the year. Keep a copy of all handouts distributed. If you use computer-based training, obtain a hard copy or disk of the training so you can maintain it as evidence of compliance with the statute's subject-matter requirements.

9. Keep a list of attendees.

Make sure each of your attendees "signs in" before the training. HR should keep the sign-in sheet for an indefinite period of time in the event you are ever challenged in a civil action or are the subject of an investigation by the Department of Fair Employment and Housing.

10. Encourage questions.

A good training program should generate questions and concerns by employees and review "real life" examples. You and your trainer should be available to answer questions during the training. Questions frequently arise after the training as well. Be receptive to those questions, and answer them as soon as possible, preferably in writing. Keep a record of the questions and answers so that, if you are confronted, you can show that the company took steps to ensure that its training was effective.

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