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Law Hikes Requirements for Sexual-Harassment Training

By Anthony J. Oncidi

Although the Legislature passed a number of laws this year that would have had a profound impact on the California work place, Gov. Arnold Schwarzenegger vetoed almost all of them. One exception was AB1825, a bill mandating sexual-harassment training and education of supervisors by employers with at least 50 employees.

The new law, which will be codified as Section 12950.1 of the state Government Code and will take effect Jan. 1, 2006, is a companion piece of legislation to Government Code Section 12950, which, since 1993, has mandated that employers post in the workplace and distribute to employees information defining and describing sexual harassment, its illegality and the means by which it can be remedied. (The sexual-harassment information sheet can be downloaded from the Department of Fair Employment and Housing Web site at www.dfeh.ca.gov)

The legislative counsel's digest accompanying AB1825 makes clear that, along with the posting and distribution requirements of existing law, the Legislature has determined that training is a "minimum requirement" necessary to ensure a workplace that is free of sexual harassment.

Employers must provide the training required under the new statute by Jan. 1, 2006, to all supervisors who are employed by July 1, 2005. Supervisory employees who are hired or promoted after July 1, 2005, must receive training within six months of their assumption of the supervisory position.

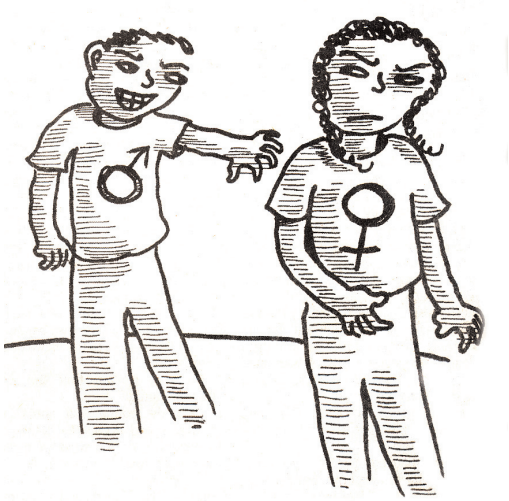
After Jan. 1, 2006, employers must provide training and education to each supervisory employee at least once every two years.

Any employer who has provided training and education to a supervisory employee since Jan. 1, 2003, is not required to provide additional training and education by the Jan. 1, 2006, deadline. Although this language is somewhat ambiguous, it probably means that a supervisory employee who has been trained since Jan. 1, 2003, need not be retrained before Jan. 1, 2006.

The statute further requires the state to incorporate the required education into the 80 hours of training provided to all new supervisory employees of the state under Government Code Section 19995.4(b).

Although training is not mandated under Title VII of the federal Civil Rights Act of 1964, the Equal Employment Opportunity Commission has recommended since at least 1999 that employers "provide training to all employees to ensure that they understand their rights and responsibilities" under anti-harassment policies and complaint procedures.

The new statute defines an "employer" as "any person regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities." Since the law does not require that the 50 or more employees or contractors be located in California, it presumably applies even if only one employee is in the state and 49 or more are elsewhere.



Not much in the statute specifically defines the curriculum of the mandated "training and education," other than the requirement that it shall consist of at least two hours of "classroom or other effective interactive training and education regarding sexual harassment" and shall include information and practical guidance regarding "the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment."

Also, it shall include "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation."

The statute's express approval of "effective interactive training" suggests that online training through the Internet or a company's own intranet, offered in conjunction with live training, may be an efficient and effective means of complying with the requirements of the new law.

The training and education must be presented by "trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation." This requirement doubtlessly will encourage employment lawyers (plaintiff's side and defense), human resources professionals and others to offer their services to employers as appropriate "trainers and educators" with the requisite expertise to do the training.

The existence of such training is compelling evidence that the employer exercised reasonable care to prevent and correct sexually harassing behavior.

Somewhat surprisingly, the training mandated by the statute need be provided only to "supervisory employees," not to all employees. Although the new statute does not define a "supervisory employee," a "supervisor" is defined in Section 12926(r) of the Government Code as "any individual having the authority ... 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."

Although this is a relatively broad definition that may include many more employees than the "boss," nothing in the new law requires that subordinate non-supervisorial employees — perhaps the ones who are most likely to be alleged victims of sexual harassment — receive training.

This aspect of the statute presents certain strategic options for an employer. Perhaps one of the greatest benefits to an employer of providing training to its employees (supervisors and subordinate employees alike) is that the existence of such training is compelling evidence that the employer exercised reasonable care to prevent and correct sexually harassing behavior. Under the sexual-harassment affirmative defense enunciated by the United States Supreme Court in 1998, an employer must be able to show that (1) it exercised reasonable care to prevent and correct sexual harassment and (2) the employee unreasonably failed to take advantage of such preventive or corrective opportunities. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The *Ellerth/Faragher* affirmative defense available to employers under Title VII has been adopted (and modified) by the state Supreme Court for sexual-harassment cases arising under the state Fair Employment and Housing Act. In *State Department of Health Services v. Superior Court (McGinnis)*, 31 Cal.4th 1026 (2003), the Supreme Court grafted onto the *Ellerth/Faragher* affirmative defense the additional requirement that "reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."

The *McGinnis* court concluded that the affirmative defense, if established, would serve to reduce the damages that a harassed employee would be able to recover from his or her employer, but it would not bar liability in the way that such a defense might under federal law.

In order for an employer to take advantage of the affirmative defense (either under Title VII or the Fair Employment and Housing Act), it must establish that the employee unreasonably failed to take advantage of measures provided by the employer to prevent and correct sexual harassment. Obviously, producing evidence of an employee's failure to take advantage of preventive measures will be more difficult for an employer if the complaining employee never received sexual-harassment training.

Therefore, even though AB1825 does not mandate training of all employees (subordinates as well as supervisors), many employers may choose to provide such training to their entire work force if for no other reason than to enhance their chances of establishing the affirmative defense set forth above.

The penalty for violating the new statute is the same as that found in Section 12950(e): The Fair Employment and Housing Commission shall issue an order requiring the employer to comply with the requirements of the statute. Importantly, because this new provision will not be housed within the Labor Code, it is not subject to the enforcement mechanism of the Labor Code Private Attorneys General Act of 2004 (also known as the "Bounty Hunter Law"), codified at Labor Code Section 2698, et seq.

Like Section 12950, the new law references subdivisions (j) and (k) 12940 (requiring employers, labor organizations and employment agencies to "take all reasonable steps to prevent harassment from occurring") and states that the fact the mandated training and education did not reach a particular individual shall not in and of itself result in liability to an employer. Conversely, providing such training and education does not insulate an employer from liability.

Although the penalty for noncompliance would seem to be relatively minor, the implication in the litigation setting of not having done the training could be significant. A plaintiff's lawyer likely will seek and be entitled to receive during discovery evidence of any training that was done in compliance with AB 1825. If the employer is unable to produce evidence that it has complied with the training requirements of the law, the plaintiff's lawyer will argue that the jury should consider that fact in its deliberations.

Even though noncompliance standing alone does not establish liability, the employer probably will not be able to prevent the jury from learning of the non compliance and giving whatever weight it wishes to such an admission.

The statute further provides that the training and education mandated by the law is "intended to establish 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."

This language suggests that it is in the employer's best interest to educate and train its supervisors and other employees not only about sexual harassment but also about the provisions of Title VII, the Fair Employment and Housing Act and other statutes prohibiting harassment, discrimination and retaliation on the basis of race, religion, color, national origin, disability, sexual orientation and age.

Before next summer, employers should, at a minimum, begin planning and developing their training programs, including the systems necessary to accurately record and track compliance by all new and existing supervisory employees. Furthermore, employers should revise their policies, procedures and employee handbooks to reflect the mandatory training requirements of the new law, including a general description of the necessity, content and frequency of such training.

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