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Fair Employment Housing Commission Issues Draft Regulations For California Law Requiring Mandatory Harassment Prevention Training For Supervisors

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California Government Code §12950.1, enacted September 30, 2004, as AB 1825, requires employers that do business in California and have 50 or more employees to provide harassment prevention training to all supervisors who supervise any employee(s) in California. The law requires that the first round of training occur by December 31, 2005, and requires further training at least once every two years thereafter.

On December 16, 2005, the California Fair Employment and Housing Commission ("FEHC") issued draft regulations intended to clarify the requirements under this law. These are draft regulations that are likely to undergo revision before becoming final.¹ Nonetheless, they provide important guidance to employers in the following areas:

1. *The draft regulations define "supervisor" for purposes of the required training.* The draft regulations adopt the definition of "supervisor" that appears in the Fair Employment and Housing Act: Individuals with 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 ... if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The draft regulations further state that a supervisor need not be based in California to be subject to the training requirement. Rather, employers must train all supervisors who supervise at least one employee in California.
2. *The draft regulations clarify the meaning of "50 or more employees."* According to the draft regulations, only employers "employing fifty or more employees for each working day in any twenty consecutive weeks in the current calendar year or preceding calendar year" must comply with the harassment prevention training law. Employees include full-time, part-time, temporary, and contract workers. In addition, as currently drafted, employees outside of California count toward the "50 or more employees" threshold for application of the law. (If this provision remains unchanged, even employers with only one employee in California will be required to train the supervisor of that employee.)
3. *The draft regulations specify the content of the training that is required.* The draft regulations require that training, at a minimum, cover the following: a definition of unlawful harassment (under the FEHA and Title VII of the Civil Rights Act of 1964); FEHA and Title VII statutory provisions and case law concerning the prohibition against and the prevention of unlawful harassment; the type of conduct that constitutes harassment; remedies available for harassment; strategies for preventing harassment in the workplace; practical examples of workplace harassment (including but not limited to role plays, case studies, group discussions, and relevant examples); the confidentiality of the complaint process; resources for victims of unlawful harassment (including to whom they should report any alleged harassment); effective investigation of a harassment complaint; action to take if the supervisor is personally accused of harassment; and the contents of the employer's anti-harassment policy and how to use it if an employee files a harassment complaint. The draft regulations also suggest that training should provide definitions for types of illegal harassment other than sexual harassment (e.g., harassment based upon race, religion, disability, etc.).
4. *The draft regulations provide guidance with regard to computer-based harassment prevention training ("e-learning").* The regulations explicitly allow training to be conducted via computer so long as the training gives learners the opportunity to ask questions and have them answered. (There are no express guidelines for employers about answering questions posed by computer learners, but presumably employers must answer such questions within a reasonable period of time.) In addition, e-learning must include some interactive component at least once every 15 minutes in order to show that employees are "measurably engaged in the training."
5. *The draft regulations explain what is meant by "two hours" of training.* Under the draft regulations, the required training must consist of either two hours of seminar-type training (whether in person or via the internet (i.e., a "webinar")), or "the amount of time that the same content may be covered in an e-learning program for an average learner." The draft regulations expressly state that e-learning programs need not have a built-in timer so long as the program is designed to take an average learner two hours. In addition, the draft regulations clarify that the two hours of training need not occur in one session,

but should occur in increments of at least thirty minutes for classroom training and increments of at least fifteen minutes for e-training.

6. *The draft regulations set forth qualifications for trainers, educators, and developers of e-learning in the area of harassment prevention.* The draft regulations permit California licensed attorneys, human resource professionals, psychologists, and other individuals to serve as trainers, educators, and developers of e-learning in the area of harassment prevention so long as they have legal education or practical experience in harassment training and knowledge of California laws prohibiting unlawful harassment. Specifically, any trainer, educator, or developer must be qualified to provide substantive training on the following subjects: what is unlawful harassment; how to intervene when harassing behavior occurs in the workplace; how to report harassment complaints; how to investigate harassment complaints and the employer's obligation to do so; the illegality of retaliation for filing a harassment complaint and how to prevent retaliation from occurring when an employee has filed a harassment complaint; and the employer's anti-harassment policy.
7. *The draft regulations provide guidance for scheduling ongoing harassment prevention training for current supervisors.* The draft regulations provide two ways to track required training: (1) individual tracking, and (2) training year tracking. With individual tracking, the employer must train each supervisor within two years of the date that supervisor completed his or her most recent training. (For example, a supervisor initially trained on December 15, 2005 must receive subsequent training before December 15, 2007.) With training year tracking, an employer can designate a "training year" in which to train all supervisors – e.g., 2005, 2007, 2009, etc. Under this training method, a supervisor trained at any time during 2005 must receive subsequent training before the end of 2007 (i.e., some supervisors may receive their second training somewhat more than two years after their first).
8. *The draft regulations also provide guidance for training new supervisors.* The existing law requires that new supervisors receive their first harassment prevention training within six months of becoming a supervisor, and every two years thereafter. According to the draft regulations, an employer can use "individual tracking" or "training year tracking" to schedule a new supervisor's second training session. If the employer uses training year tracking, some new supervisors might receive their second training in fewer than two years from their first training – e.g., if a new supervisor has his first training in 2006 and the employer uses "training year tracking" that is on a 2005, 2007, 2009 schedule, the new supervisor's second training

will occur in 2007. His or her subsequent trainings would then be on the same track as the employer's other supervisors.

Practical Pointers

Initial supervisor training *must be completed by December 31, 2005*. The draft regulations explicitly state that employers who have made a substantial, good faith effort to comply with the current law by completing supervisory training prior to the effective date of the regulations will be deemed to be in compliance with the harassment prevention training law. Going forward under the draft regulations, we recommend the following:

- Carefully assess whether employees meet the definition of a "supervisor" under the law in order to determine who should be trained. Err on the side of over-inclusiveness – the draft regulations provide that an individual will not be deemed a supervisor simply because s/he has received harassment prevention training.
- Be sure to train anyone with supervisory responsibility for an employee in California, regardless of where the supervisor is based.
- Review your in-person training programs to ensure that (1) you are using instructors whose qualifications meet the requirements in the draft regulations, (2) the training includes the required content, and (3) the training lasts for at least two hours (though not necessarily two consecutive hours).
- Review your e-training to ensure that (1) it was designed by a qualified designer, (2) it includes the required content, (3) it allows supervisors to ask questions, (4) it includes an interactive component at least once every 15 minutes, and (5) it includes content that is designed to take "an average learner" two hours to review.
- Adopt a schedule for conducting ongoing training under either of the permitted methods, and keep accurate records of all training conducted.

Conclusion

The FEHC's proposed regulations provide significant clarification of some aspects of the California law requiring harassment prevention training for supervisors. Hopefully, we will get even more clarification after the FEHC incorporates comments from the public and issues final regulations.

Note:

1. The FEHC has asked for public comment on the proposed regulations. It has scheduled public hearings on the regulations for February 1 (San Francisco) and February 10, 2006 (Los Angeles).

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