FPLG
FOR PURPOSE LAW GROUP
A Professional Law Corporation

EMPLOYMENT LAW

CA Sexual Harassment Training Mandates

07.11.18 | Linda J. Rosenthal, JD

The explosion of sexual harassment allegations and verified charges in recent weeks and months has brought this urgent topic to public attention in a way that makes us all eager for action to combat it. It's a problem that must be attacked in a variety of ways: prevention, education, transparency efforts, exposure, and punishment. But probably few people outside law firms and human resources departments of large employers are aware of what, if any, laws are already on the books that either encourage or mandate a better organizational culture.

California's Harassment Laws

California has been among just a few jurisdictions leading the way to better workplaces through state-mandated training of supervisory employees of private employers. Rules like this generally apply to *all* non-governmental employers with at least X number of employees; it's one of the instances where nonprofits must remember that they are subject to many and varied laws beyond the those directly connected with federal tax-exemption requirements.

"Furthermore, not only is training employees on sexual harassment in the workplace a required measure by California employment law, but it is also arguably the first and foremost best practice in preventing legal risks associated with sexual harassment."

California's Fair Employment and Housing Act (FEHA) and the federal Title VII of the Civil Rights Act of 1964, together, make sexual harassment in the workplace illegal. In 2005, the California legislature enacted AB 1825, which makes training and certain other employer duties mandatory.

Effective January 1, 2015, an amendment (AB 2053) requires all California employers subject to the mandatory training requirement under AB 1825 to

include a component on preventing "abusive conduct" as well as sexual harassment. Next, the FEHA regulations were revised, effective April 1, 2016, to increase and better explain the training and other requirements. Another change was made, effective January 1, 2018; SB 396 expands required training for supervisors on sexual-harassment prevention to include "gender identity", "gender expression", and "sexual orientation".

Training to Prevent Harassment

The California statute on mandatory, regular, anti-harassment training for supervisory employees of mid-size and large employers is codified at California Government Code section 12950.1. Subsection (a) reads: "An employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California within six months of their assumption of a supervisory position. An employer covered by this section shall provide sexual harassment training and education to each supervisory employee in California once every two years."

The quoted language above is the part of the statute that purportedly answers "who" and "when." It's not very long, which may account for its ambiguity and vagueness. The remaining language describes "what" and "how": "The training and education required by this section 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. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." This part of the statute, too, is also rather short on details.

"California has long required sexual harassment prevention training, but many employers have questions about how it works." There are regulations as well, at 2 Cal Code Regs section 11024, which include definitions but they are not as comprehensive as needed.

An Example of Ambiguity

As an example of just one of the ambiguities in this statute, consider the first substantive phrase in the statute; that is, "[a]n employer having 50 or more employees…." – defining which employers are subject to this mandate. Anyone who spends more than a small amount of time in and around statutes knows that this purported definition of a "covered employer" is rife with uncertainty.

The regulations – section 11024(a)(4) – add some needed detail to the definition of “employer.” It means either: “(A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly” or “(B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section, governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered ‘political subdivisions of the state.’”

That clear its up, right? No, not exactly, according to the next subsection (5). “‘Having 50 or more employees’ means employing or engaging 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.” So, what’s described as a “mandate” applies “only to entities that regularly employ at least 50 employers or regularly contract for the services of at least 50 people.”

Conclusion

An important point to keep in mind in connection with this statute is that the 2-hour training requirement is a “floor, not a ceiling.” Employers should certainly go above and beyond this minimum requirement. It’s hard to imagine that two hours could possibly be enough to cover the required content set out in the statute, much less in lay language understandable to the employees.