## Sexual Harassment Training Mandatory in California

For the first time, California now mandates that employers with fifty (50) or more employees provide sexual harassment training to all supervisors. On September 29, 2004, Governor Arnold Schwarzenegger signed into law a statute that requires sexual harassment training for supervisors, consisting of "at least two hours of classroom or other effective interactive training" from "trainers or educators with knowledge and expertise" in preventing harassment.

The clock started running on January 1, 2005 for implementing the training: 1) any supervisors already employed as of January 1, 2005 must be trained no later than January 1, 2006, and 2) supervisors hired after January 1, 2005 must be trained within six months of their hire date. After January 1, 2006, employers must provide the two-hour training to all supervisors at least every two years.

Many employers in California with at least fifty employees will grumble about this statute. They will complain that this new law just adds to their already prodigious "cost of doing business" in the State. But perhaps they should take a different perspective. California leads the nation in exposures to employment law claims. The average cost to defend and pay out on an employment claim in California exceeds $300,000. The average jury verdict in a sexual harassment case in California exceeds $1 million. These staggering numbers do not even account for the internal costs to the company, such as diminished morale, loss of productivity, higher turnover, and damage to the reputation of the company.

While the new law will certainly add a modest "up front" cost for California employers with at least fifty employees, this State-created "risk management" tool should ultimately reduce exposure for these employers, at least insofar as sexual harassment complaints are concerned. The new law does not impose any monetary penalties for violating the statute. If the employer fails to provide the training, however, the real "penalty" will occur in the undermining of an employer's defenses in the event of a sexual harassment claim. Suffice it to say, employers must heed the warning and take immediate steps to ensure they comply with this statute. The mandate applies with equal force to insurers providing Employment Practices Liability ("EPL") coverage in California.

The real dilemma facing employers and insurers alike is – what is the most effective method by which to comply with the new statute? To comply, any training program must: 1) satisfy the two-hour length requirement; 2) 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"; 3) be "interactive" in nature; 4) include "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation"; and 5) be "presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation."

One thing is for certain – simply showing a videotape to supervisors on the topic of sexual harassment compliance is not interactive and insufficient under the new law. So what alternatives do employers have? Many employment lawyers and human resource specialists in California have already jumped on the bandwagon in marketing their "live" anti-harassment training sessions.

In many cases, perhaps that is the most logical solution, so long as the training comports with the requirements of the statute. But this type of training has drawbacks. Trying to gather all the supervisors of one company in one room at one time, even for smaller companies, seems like a difficult feat. Even if

feasible, unless the training session is videotaped, the employer will not be able to demonstrate the actual training to a jury in the event of a sexual harassment lawsuit. Then there is the issue of supervisor turnover, which would trigger another training session within six months. In addition, with a "live" training session, unless a scored testing component is provided, the company will be unable to show that its supervisors were paying attention during the session. Finally, the cost of having a law firm or human resources company provide such training may be prohibitive, particularly for smaller employers.

Another viable alternative is using one of the computerized interactive training programs now on the market, including web-based training. While the California Department of Fair Employment and Housing has not issued regulations interpreting the new statute, particularly in defining what would satisfy the "interactive" component, it seems logical that a computerized question and answer format would qualify as interactive. In addition, having human resource or other employment law specialists involved on the front end in the development and implementation of a computerized training program should satisfy the requirement that the training be "presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation."

So long as the other requirements of the statute are met, cost efficiencies, ease of implementation, training consistency, and the ability to demonstrate compliance to a jury would all seem to favor computerized training. Regardless of the training method chosen, for those employers affected by this statute with facilities both inside and outside California, it is best to implement training for all facilities to promote consistent companywide practices. In addition, it is important for affected employers to update their employee handbooks by providing notice that the employers are comporting with the requirements of this new anti-harassment law.

While eradication of sexual harassment in the workplace remains a formidable task, educating supervisors on how to recognize and appropriately address sexual harassment situations is certainly a step in the right direction. California will undoubtedly continue to lead the nation in employment law exposures. The State, however, has at least taken a positive step in providing some employers with a "risk management" tool for sexual harassment claims.

Employers and insurers alike should be delighted with this State-mandated "roadmap for success" so long as they heed the statutory requirements. Using a pure economics analysis, California employers and insurers should end up adding to their "bottom line" by being forced to implement this training for supervisors. The new training requirements should also serve to foster healthier, more productive work environments for many employees throughout the State.

Indeed, the benefits of this training are so clear, companies with less than fifty employees would be wise to voluntarily implement the same type of training for their managers. Kevin Ribble is the President and one of the founders of Comply America, Inc. Comply America provides web-based EEO compliance training for managers and employees. Martin LaPointe heads the labor and employment practice of Burke, Warren, MacKay & Serritella P.C.

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