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Effective Anti-Harassment Training

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Benjamin Franklin's declaration that "an ounce of prevention is worth a pound of cure" rings true today as it did in the 1700's. In the workplace context, for example, anti-harassment and discrimination training (i.e., "EEO" training) is the "ounce of prevention" that helps prevent unlawful discrimination, harassment and retaliation claims. Even employers who do not believe in Franklin's idiom may be required to heed it.

Assembly Bill 1825, now nearly six years old, requires employers to train supervisors every two years to prevent unlawful harassment, discrimination and retaliation. Of course, many California employers were already training employees on these issues, long before Governor Schwarzenegger signed AB 1825 into law in 2004. The law is now codified as California Government Code Section 12950.1.

Anti-harassment training can take different forms, and the law is flexible regarding how training may be provided. But training that complies with the letter of the law is not necessarily the most effective training. Moreover, some employers' training efforts remain ineffective and perfunctory. Recent cases and headlines illustrate this point.

Going to the Videotape is Not Sufficient Anymore

A recent news story recounted the October 2009 settlement reached in EEOC v. California Psychiatric Transitions. There, a male supervisor allegedly sexually harassed a group of female employees over the course of several years. The alleged crude sexual comments, derogatory sex-based epithets and physical conduct were all cause for concern.

CPT's training efforts became the central focus of the case. According to published reports, CPT's anti-harassment training consisted of little more than showing a video to the staff. To make matters worse, CPT allegedly allowed employees, including the supervisor at issue, to talk on their personal mobile phones during the video training.

The Equal Employment Opportunity Commission, which rarely acts as plaintiff on behalf of employees, decided to litigate the matter. The EEOC apparently believed that CPT did not take its prevention obligations seriously. Accordingly, as part of the settlement, the EEOC required CPT to update its anti-harassment policies and provide effective training to its workforce and managers regarding their responsibility to address harassing behavior. As one headline about the case succinctly put it, "Videos Aren't Enough."

So, it was not the amount of money CPT paid that thrust the case into the headlines. A $145,000 settlement, while certainly not chump change, is not an extraordinary figure in employment law cases. What made this case interesting was the EEOC's focus on the training methods used by the employer.

Training Obligations Under AB 1825

As courts begin to wrestle with the adequacy of employers' prevention efforts, whether or under AB 1825, it is worthwhile to review employers' basic obligations under the law. It also is important to point out how going above and beyond the minimum can be the ounce of prevention employers need to help avoid costly lawsuits.

AB 1825's text and the Department of Fair Employment and Housing's regulations are relatively straightforward when it comes to baseline requirements. In short, they break down into four areas: (1) which employers are required to provide training, (2) what employees are required to receive training, (3) who is qualified to conduct training, and (4) the substance and delivery methods

AB 1825 does not require an employer to provide training unless it regularly employs 50 or more workers. In determining whether an employer meets this threshold, all persons who provide services to the employer must be counted, regardless of whether they are located within California or another state, and regardless of whether they are temporary employees, regular

employees, full-time or part-time employees, or independent contractors.

The law requires that supervisory employees (as defined by California Government Code Section 12926(r)) receive two hours of training every two years.

Those individuals conducting the trainings must have specific experience and expertise in the areas of employment law and the prevention of unlawful harassment and discrimination. This is true whether the individual is a licensed attorney, a human resources professional, or a college-level professor.

The law and regulations specify the substance and manner of training. The training essentially must provide practical guidance and information regarding both federal and state laws concerning sexual harassment, discrimination and retaliation. The training also must include certain information, including an employer's actual policies regarding how to address and correct sexual harassment and what remedies are available to victims of sexual harassment. In addition, employers are encouraged to address forms of unlawful discrimination, harassment and retaliation based on characteristics other than sex, such as race, age, disability, etc.

As for the manner of training, the law demands "effective interactive training." However, training may be furnished via live in-person class room training, live webinars, or "e-learning" (individualized and interactive computer-based training). Audio and video materials may be used, but only in conjunction with one of these three methods. Fundamentally, the "effective interactive training" component requires participants remain actively engaged in the training, answering questions and addressing hypothetical scenarios drawn from real life experience that require application of teaching points. In addition, no matter what format the trainings take, participants must have access to a live person, with whom they may raise further questions or issues. For obvious reasons, this is most easily achieved through live classroom trainings, facilitated by an experienced instructor, where the instructor may assess whether the participants understand the materials covered and, if needed, modify the examples to illustrate a point that participants are struggling with. However, technology has created opportunities for effective webinars and electronic training as well.

Going Beyond the Minimum

AB 1825 does not require employers to train non-supervisors, does not apply to smaller employers, and does not require more than bi-annual training. So, why would an employer want to do anything more than the minimum when it comes to taking time away from other productive activities? Simple. It saves money down the road when defending EEO lawsuits. For example, employers may be able to use an effective training program as a defense to liability or damages. Evidence of strong policies and other good faith compliance with EEO laws also may help prevent punitive damages liability.

An employer is expected to "take all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Govt. Code Section 12940(k). Complying with AB 1825 may be helpful to defeat a claim under this section, but it is not a complete defense. AB 1825 expressly states that "[t]he training and education required by this section 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." Employers wishing to avoid liability under Section 12940(k) can take "reasonable steps" above and beyond AB 1825 compliance by, for example, training non-supervisors, and providing more frequent or more comprehensive training.

In choosing to provide EEO training to all, an employer is sending a clear and consistent message to employees regarding expected standards of conduct and reporting procedures when there is misconduct. That has an admittedly unquantifiable but significant benefit in at least two respects. First, the resulting workplace culture will likely be one that is far less permeated with problems of unlawful harassment, discrimination and retaliation. Second, issues will arise no matter how well-intentioned an employer is or how well-educated the employees may be. However, to the extent they do arise, the employer that effectively communicates rights, responsibilities and reporting avenues will be much more likely to identify and address problematic conduct before it gets to the point where there are significant workplace disruptions – whether morale issues or litigation related to this conduct.

Live Training to the Extent Feasible Remains Preferable

The best way for an employer to guarantee it is providing "effective interactive training" is through live, class room training. It is the most direct way to engage employees, which leads to more meaningful learning. Live class-room training provides a forum for individual employees to start talking with each other, wrestling with some of these issues through hypothetical scenarios where the discussion is facilitated by an expert. As mentioned above, if the group is struggling with a particular issue, the facilitator can identify that and respond to it immediately by providing additional guidance and hypothetical examples. Live webinars and other methods certainly may be effective, and may not be avoidable if live training is not feasible. However, there is no substitute for live training, delivered well. Just ask any employee who has been through both a live class-room training and a webinar or e-learning experience to share their thoughts on the subject.

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