SEYFARTH SHAW
MANAGEMENT ALERT

December 22, 2005

California's Proposed Sexual Harassment Training Regulations

On December 16, 2005, California's Fair Employment and Housing Commission (FEHC) issued its proposed Harassment Training Regulations. This package is a welcome year-end gift for employers, with some notable exceptions that employers can and should address during the comment period on the proposed regulations (which expires February 10, 2006).

The proposed regulations interpret Government Code section 12950.1 [A.B. 1825], which requires sexual harassment training for supervisors of employers of 50 or more employees. (See our One Minute Memo dated October 11, 2004). The first compliance deadline for the California law is January 1, 2006.

In several respects, the proposed regulations use reason and good common sense. For example, they provide an employer need not comply with the final regulations if the employer's prior training was a "substantial, good faith effort" to comply with the statute. Certain other aspects of the regulations, however, are disappointing. (See comments below.)

The proposed regulations address the following subject matters.

Definition of Employer and Employee

Employers with 50 or more employees must train supervisory employees.

Out-of-State Employers Beware. The proposed regulations define covered employers to include all employers who do business in California and have 50 or more employees anywhere, regardless of how few employees work in California.

Count Everyone. In counting the 50 employees, employers must include full-time, part-time, temporary and "contract workers."

Training Non-California Supervisors. Employers must train any person who supervises a California employee, even if the supervisor does **not** reside in California.

No Inference of Supervisory Status Created. Displaying some good common sense, the proposed regulations state that providing supervisory training to an individual will not create an inference that the individual is a supervisor. Employers thus need not worry that providing training to leadpersons and other individuals of uncertain status will amount to an admission that the trainees are supervisors (whose harassing conduct can make an employer automatically liable). Employers thus have a legal incentive to err on the side of inclusion in deciding whom to train.

Type and Content of Training

Employers must provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment.

E-Learning and Webinars are Acceptable Training. The definition of "other effective interactive training and education" includes e-learning and webinars, so long as these methods of education include an opportunity for feedback, the opportunity to ask questions and have them answered, and testing to measure progress and acquisition of knowledge. For e-learning and webinars, the feedback or participation must occur at least once every fifteen minutes.

A Content Checklist. The proposed regulations specify items of content that the training must cover. The proposed regulations clarify that the two hours of training is to cover sexual harassment but may also cover other forms of unlawful harassment. Other items of required content include what types of conduct constitute harassment, remedies available for harassment, strategies to prevent harassment, the confidentiality of the complaint process, how to report harassment, what a supervisor should do if accused of harassment, and how to use the employer's anti-harassment policy. The training must also include practical examples involving such activities as role play, case studies, and group discussion. Required training also includes some degree of legal discussion, as trainers are to discuss statutory provisions and "case law." Yet another proposed regulatory requirement, worth special note, is that the training include "training on how to conduct an effective investigation of a harassment complaint."

Two Hours or 120 Minutes. The training need not be completed in two consecutive hours. For classroom training or webinars, the minimum duration of a segment can be as little as one-half an hour. E-learning training segments can be as short as fifteen minutes. E-learning need only consist of content that would take two hours to cover in a live or webinar training; an e-learning trainee does not have to sit in front of a computer for a minimum of two hours.

Who Can Be Trainers?

Training shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation.

Who's Qualified to Train? The proposed regulations state that trainers must have practical experience in harassment training and California law. Human resource professionals are among those who qualify as long as they meet this requirement. The proposed regulations also list "undesirable qualities" of trainers; this list implies that trainers should not engage in or be known for hugging, sexual conduct, flirtations, aggressive or arrogant or abusive behavior, demeaning conduct towards women or men, or offensive joke-telling.

How Often to Train

After January 1, 2006, each employer covered by this section shall provide sexual harassment training and education to each supervisory employee once every two years.

Tracking the Training. An employer may track the training of supervisors in one of two ways-individual tracking or training-year tracking. Individual tracking simply means tracking two years from the date of the individual's training. Training-year tracking involves the designation of a supervisor training year. By this method, an employer who trains all its supervisors by December 31, 2005 must again train all its supervisors by December 31, 2007.

New Supervisors. The proposed regulations clarify that employers must train new supervisors within their first six months of supervisory status and within each two years thereafter. Employers who use the training-year method may need to re-train new supervisors sooner than once every two years to fit the training within that method.

What's Wrong With The Proposed Regulations

While different employers will find different provisions of particular interest, certain proposed provisions are likely to trigger concern. One is the proposed requirement that all supervisors be taught "how to conduct an effective investigation of a harassment complaint." Making this item part of required content is a mistake. Many employers purposefully do NOT expect supervisors to conduct harassment investigations and in fact forbid them to conduct harassment investigations. These employers expect the supervisors instead to recognize and forbid harassment and to forward any investigative issues to human resources specialists. Additionally, a two-hour course on preventing harassment cannot practically cover means to recognize and prevent harassment **and also** how to conduct effective investigations. Finally, this content requirement appears to exceed the mandate of the statute, which merely requires that supervisors be given information and practice guidance regarding the prevention of harassment.

Other likely areas of contention include the proposals to have the statute apply to employers who have fewer than 50 California employees and to have the statute apply to supervisors who do not reside in California. By the FEHC's proposed interpretation, a large employer with only a single California employee must train all persons who supervise that employee. It is not likely that the Legislature intended that result. In other contexts, such as the five-employee threshold that applies to coverage of the California Fair and Employment and Housing Act, at least one court has held that the Act does not cover large employers who employ fewer than the threshold of California employees. While it is certainly prudent to train all supervisors as part of the employer's efforts to "prevent and correct" harassment, the issue remains whether the regulations can mandate such training for non-California employers and supervisors.

What Can Employers Do?

As the FEHC considers whether to make the regulations final, it has asked for public comment on the proposed regulations and will hold two public hearings on February 1, 2006 (San Francisco) and February 10 (Los Angeles). Employers are encouraged to examine the regulations and provide comments at the hearings or in writing. At its website, www.fehc.ca.gov, the FEHA has posted the proposed regulations, as well as contact information for the hearings and information about how to submit written comments.

As a practical matter, employers who will complete California compliance training before the statutory deadline of January 1, 2006, still must pay attention. Training is an ongoing requirement — both for new and existing supervisors. The final regulations will affect existing training programs in terms of content, trainer-qualifications issues, and decisions about whom to train. It is important to audit training programs in light of the proposed regulatory requirements to ensure compliance.

Finally, the emphasis of the proposed regulations on legal aspects of harassment should not deter employers from focusing training and compliance on well-written policies that cover more conduct than what the law forbids. For practical and legal reasons, a narrow focus on legal requirements alone can undermine the employer's ultimate objective of ensuring a productive, harassment-free workplace.

For more information about California's new training law or the proposed regulations, please contact your Seyfarth Shaw attorney or any attorney on our website at www.seyfarth.com. For immediate training assistance, please contact Seyfarth Shaw's training subsidiary — Seyfarth Shaw At Work at 877-828-8683 or www.ssawtraining.com.

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