

AB 1825 Mandates Sexual Harassment Training for California Supervisors: Questions and Answers on the New Law

Sexual harassment training has long been an important component of any California employer's anti-harassment program. Such training may prevent sexual harassment lawsuits in the first place, and it can help an employer launch a successful defense or limit damages if a claim is filed.

Now, for the first time, many California employers will be *required* to conduct sexual harassment training for supervisors. AB 1825, recently signed into law by Governor Schwarzenegger, amends the California Fair Employment and Housing Act (FEHA) to require biennial sexual harassment training and education for supervisory employees. The new law contains some specific requirements regarding which employers are covered, which employees must be trained, the content and timing of the training, and the repercussions for failing to comply.

This Newsletter provides answers to employers' most common questions regarding their obligations under AB 1825, as well as steps employers should undertake *now* to get their training programs ready and meet the compliance deadlines.

Questions and Answers Regarding AB 1825

Which employers are covered by AB 1825?

AB 1825 applies to public and private employers that employ 50 or more employees or independent contractors. Specifically, the law states that it applies to "any person regularly employing 50 or more persons or regularly receiving the

services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

Note that the law doesn't specify whether all 50 employees or contractors must be located in California for an employer to be covered. Until this point is clarified, either by a court or subsequent legislation, employers with 50 or more workers should assume they are covered by the new training mandate, even if fewer than 50 of the workers are in California.

Which supervisors must receive the new sexual harassment training?

The law states that the sexual harassment training must be provided to "supervisory employees." While AB 1825 doesn't supply a definition for the term "supervisory employee," the definition contained in the FEHA will likely apply.

Under the FEHA, a supervisory employee is anyone with authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct other employees, adjust their grievances, or to effectively recommend that action. The exercise of authority must require independent judgment and not be merely routine or clerical.

Note that this definition is very broad and applies regardless of whether you have classified an employee as exempt or nonexempt under the California or federal wage and hour laws.

What is the timeline for providing the training?

AB 1825 requires that supervisory employees who are employed as of July 1, 2005, receive a minimum of two hours of sexual harassment training and education by January 1, 2006, and once every two years thereafter. An employer that has already provided sexual harassment training to its supervisory employees after January 1, 2003 is not required to provide training a second time by the January 1, 2006 deadline. Also, as of January 1, 2006, new supervisory

employees must receive the training within six months of assuming their new position.

What are the requirements for the content of the training?

The law requires that the training must consist of at least two hours of classroom or other "effective interactive" training and education regarding sexual harassment. More specifically, the training and education must cover all of these elements:

- Information and practical guidance regarding the federal and California laws concerning the prohibition against and the prevention and correction of sexual harassment.
- Information on the remedies available to workplace sexual harassment victims.
- Practical examples aimed at instructing supervisors on the prevention of harassment, discrimination, and retaliation. It is important to note that this last provision *expands* the training requirements beyond sexual harassment to include anti-bias and retaliation more generally.

Employers should be aware that AB 1825 only establishes a minimum threshold for sexual harassment training. It does not prevent employers from providing additional or more elaborate training as the employer may deem necessary to address the problem of workplace harassment and unlawful discrimination.

Who can conduct the training?

AB 1825 requires that the training and education be presented by trainers or educators with knowledge and expertise in the prevention of workplace harassment, discrimination, and retaliation.

Does the training have to be conducted in-person?

The training required under AB 1825 probably does not have to be delivered during live, in-person sessions. Specifically, the law states only that the training must consist of "classroom or other effective interactive training and education." The requirement that the training be interactive strongly suggests that having supervisors simply view a video presentation would not be sufficient. On the other hand, web-based training or live audio/video presentations would probably satisfy the statute's requirements, provided the sessions give participants an opportunity to ask questions and/or respond to practical problems.

Must the training consist of two-hour sessions?

AB 1825 states that supervisory employees must receive two hours of training every two years. However, the legislation does not specifically state that the training must be conducted in continuous two-hour blocks. Thus, it appears that it may be permissible for employers to conduct more frequent, shorter sessions, provided the training adds up to at least two hours over a two-year period.

What are the repercussions for an employer that fails to comply?

If an employer violates the provisions of AB 1825, the California Fair Employment and Housing Commission may issue an order requiring the employer to comply. The statute does not specify any monetary penalties for violations.

Will compliance with AB 1825 insulate an employer from sexual harassment liability?

Compliance with AB 1825 alone will *not* insulate an employer from liability for sexual harassment, whether committed by a supervisory or non-supervisory employee. Conversely, a claim that the training required by the new law did not reach a particular supervisor will not automatically result in an employer's liability for sexual harassment. Note, however, that should an employer be sued for sexual harassment, evidence that the alleged harasser did not receive training could have a strong influence on the outcome of the case.

What should employers do to get ready?

AB 1825 sets an initial training deadline of January 1, 2006, but employers must begin their preparations now to ensure that they will be fully compliant by that date. Here is a checklist of steps employers should take.

1. Determine who qualifies as a supervisory employee.

As discussed, employers must provide training to "supervisory employees," which is a very broad term. If you are in doubt as to whether a particular employee qualifies as a "supervisory employee," the prudent approach is to include them in the training.

Also, your training program should extend to supervisors who, even though they are not personally located in California, supervise your employees who do work in California.

2. Draft a timeline for training current supervisors.

Under AB 1825, the initial training for supervisors employed as of July 1, 2005, must take place by January 1, 2006, except that you do not have to retrain supervisors who received training after January 1, 2003. It will be critical to evaluate any training already provided to current supervisors to determine whether that training program met the specific content requirements of AB 1825. If not, the supervisors must attend AB 1825-compliant training by the end of this year.

3. Implement a recordkeeping system.

You should keep accurate records regarding who has been trained, the dates of training, and the duration of each training session. You should also build in a reminder system to ensure that supervisory employees receive the requisite training every two years, as well as a way to ensure that new supervisors receive training within six months of their promotion or hire.

In addition, maintain full records as to the content of the training program, program materials, and the identity, background, and qualifications of the presenters.

4. Evaluate training programs.

Whether you're looking for a new program or evaluating one that you already have in place, be sure to assess whether the program covers all of the required content under AB 1825 and meets the requirement that the training be interactive.

Any program you are considering should also cover all other types of harassment (including sexual orientation, gender, religion, race, national origin, color, age, and disability), workplace discrimination and retaliation, and your own policies and procedures. Note that, beyond the specific mandates set by AB 1825, the federal Equal Employment Opportunity Commission has published guidelines recommending that employers train supervisors and managers on the company's anti-harassment policy and complaint procedures, including the types of conduct that violate the policy, the seriousness of the policy, the responsibilities of supervisors and managers when they learn of alleged harassment, and the prohibition against retaliation.

5. Assess qualifications of the presenters and compare costs.

AB 1825 requires that trainers/presenters have knowledge and expertise in the area of sexual harassment, discrimination, and retaliation prevention. It will be critical for employers to evaluate whether trainers meet these qualifications, whether the trainer is from the employer's human resources department, an attorney or a training program vendor. A presenter that is experienced in training, yet has no practical expertise in handling workplace harassment matters, likely would not meet the qualifications set by AB 1825.

You already may have received information from various vendors about training compliant with AB 1825. The cost of such training varies widely from vendor to

vendor. You may also receive requests from vendors to respond to surveys about harassment training and complaint procedures in your workplace. Please bear in mind that responses to these surveys are not privileged, could be discoverable, and might even be used against an employer in the event of litigation.

6. Consider expanding training to all employees.

Although the new training mandate applies specifically to supervisory employees, employers that require all staff members to undergo comprehensive anti-harassment and anti-bias training will be in a stronger position to defend claims and to prevent them in the first place.

7. Periodically reevaluate the effectiveness of your program.

As discussed, AB 1825 sets only a floor, not a ceiling, for an employer's efforts to create a workplace free of illegal harassment. Thus, employers are encouraged to continually evaluate their internal programs to determine whether they need to do more to educate employees in order to prevent and correct instances of unlawful harassment and discrimination.

Please feel free to contact Michele Ballard Miller, Maki Daijogo or Kristin Pedersen at (415) 464-4300 if you would like information regarding AB 1825 compliance. Miller Law Group also has developed content for a comprehensive, three-part sexual harassment training program for managers, employees and investigators. The program is offered by Parachute, and it is AB 1825-compliant. For further information about this program, we invite you to visit the Parachute website at <http://www.parachute.com>.

Miller Law Group is a Bay Area law firm that specializes in representing management in all facets of employment litigation and counseling. For more information about these new developments, or for general employment advice, please call Michele Ballard Miller, Maki Daijogo or Kristin Pedersen at (415) 464-4300 or e-mail us at mbm@millerlawgroup.com.

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