

Question & Answer Summary

February 12, 2009 Webinar

Discrimination and Sexual Harassment: Trends, Recent Developments, and Training Requirements

Large workplace discrimination and harassment verdicts and settlements continue to make the daily headlines. And as the economy continues in a tailspin, employees who are laid off or have their pay or hours reduced are more likely than ever to file bias lawsuits. On February 12, 2009, Miller Law Group and Parachute presented an in-depth webinar, "Discrimination and Sexual Harassment Trends, Recent Developments and Training Requirements," designed to inform employers about legal danger zones and how to prevent and respond to problems. The following are answers to questions asked by webinar attendees.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

Miller Law Group is the leading women-owned employment law firm in California, specializing in representing management in all facets of employment litigation and counseling. If you have questions about your discrimination, harassment, or other workplace legal obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com), Kerry McInerney Freeman (kmf@millerlawgroup.com), or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

Q. HOW LONG DOES AN EMPLOYEE HAVE TO FILE A CHARGE OF DISCRIMINATION UNDER CALIFORNIA OR FEDERAL LAW?

A. Under the California Fair Employment and Housing Act (FEHA), an individual has one year from the date of the alleged unlawful practice to file a charge of discrimination. Charges under Title VII must be filed with the federal Equal Employment Opportunity Commission (EEOC) within 180 days of the occurrence. However, if the charge was initially filed with the California Department of Fair Employment and Housing (DFEH), the individual has until the earlier of 300 days after the alleged unlawful practice or 30 days after receiving notice that the DFEH terminated its proceedings.

Q. WHEN MUST A CALIFORNIA EMPLOYER DISTRIBUTE THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING SEXUAL HARASSMENT FACT SHEET (DFEH 185)?

A. All California employers must distribute the sexual harassment fact sheet to all employees upon hire. Although not required, it is a good business practice to regularly re-distribute the notice to all employees, although the fact sheet is not a replacement for an employer's own comprehensive anti-harassment policy and complaint procedure.

Employers may use the fact sheet prepared by the DFEH, or can design their own fact sheet that contains the following information: (1) the illegality of sexual harassment; (2) the definition of sexual harassment under state and federal law; (3) a description of sexual harassment, with examples; (4) the employer's internal complaint process; (5) the legal remedies and complaint process available through the DFEH and Fair Employment and Housing Commission (FEHC); (6) directions for contacting the DFEH and FEHC; and (7) the protections against retaliation.

Q. IF AN EMPLOYEE WHO HAS COMPLAINED ABOUT SEXUAL HARASSMENT SUBSEQUENTLY ENGAGES IN MISCONDUCT, DOES THE LAW PROTECT THIS INDIVIDUAL FROM DISCIPLINE OR TERMINATION FOR A SPECIFIED PERIOD OF TIME?

A. California and federal law protect an employee who complains about sexual harassment from retaliation for having made the complaint. The retaliation protection does not automatically protect the victim from discipline if he or she engages in subsequent misconduct. The problem the employer will have in this situation, however, is that the discipline may appear to be related to the victim's harassment complaint. If the employer is charged with retaliation, a trier of fact will consider the proximity of the disciplinary action to the harassment complaint, how the employer has handled similar misconduct in the past (for example, was this employee more harshly disciplined than other employees who committed similar offenses), as well as any

other evidence suggesting that the adverse action may be retaliatory. Employers are advised to seek legal advice before taking any adverse action against an employee who has recently complained about discrimination or harassment.

Q. UNDER WHAT CIRCUMSTANCES DOES AN EMPLOYER WITH HEADQUARTERS OUTSIDE CALIFORNIA, WHETHER IN ANOTHER STATE OR ABROAD, HAVE TO COMPLY WITH THE A.B. 1825 SEXUAL HARASSMENT TRAINING REQUIREMENTS?

A. California's supervisor sexual harassment training law, A.B. 1825 (Cal. Gov't Code § 12950.1), applies to all employers engaged in business or enterprise in California that have 50 or more employees or contractors. This is true regardless of where the employees/contractors are located or where the company is headquartered or has most of its employees. Covered employers, however, are only required to train supervisors who are located in California (although we recommend that employers provide A.B. 1825-compliant training to any supervisor, regardless of location, who supervises employees in California). Therefore, an employer that has at least 50 employees nationwide or worldwide but just a handful of employees in California must train any supervisors located in California.

Q. ARE EMPLOYERS COVERED BY A.B. 1825 REQUIRED TO HAVE A POLICY SPECIFYING WHICH TRAINING TRACKING METHOD(S) THEY HAVE CHOSEN TO USE?

A. A.B. 1825 requires employers to provide two hours of harassment training to supervisors once every two years. To track compliance with the frequency of training, employers can use an "individual" method, a "training year" tracking method, or a combination of the two. For the training year method, the A.B. 1825 regulations state that an employer must "designate" a training year. We recommend that employers using a training year method document the designation, in writing. This is particularly important because, under the training year method, it is possible to have more than two years elapse between training sessions -- for example, if 2007 was a training year and the employer conducted training in February 2007, the employer would be required to complete the next training by December 31, 2009. Thus, if questions are raised as to whether the employer has complied with A.B. 1825 frequency requirements, the employer will need evidence that it has elected to use the training year tracking method. Note that an employer using the individual tracking method would not be in compliance with A.B. 1825 if more than two years elapse between training sessions for an individual supervisor.

Other A.B. 1825 documentation employers must retain, for two years, includes: the name of the supervisory employee trained, date of training, type of training, and name of training provider.

Q. FOR A.B. 1825 WEBINARS AND E-LEARNING, DOES THE LAW REQUIRE THAT THERE BE A LIVE PERSON AVAILABLE TO ANSWER SUPERVISORS' QUESTIONS?

A. Webinars, which are conducted over the internet or intranet in real time, must provide supervisors with an opportunity to ask the trainer questions during the course of the webinar. For E-learning programs, supervisors must be provided with a link or directions on how to contact a trainer who can answer questions and provide guidance and assistance about the training; the responses must be provided within a reasonable amount of time after the supervisor asks the question, but no more than two business days after the question is asked. Note that individuals in the employer's own HR department could qualify as trainers (see below).

The law specifies that a trainer must be one of the following: (1) an attorney admitted for at least two years whose practice includes California and/or federal employment discrimination law; (2) an HR professional or harassment prevention consultant with at least two years of experience in discrimination, retaliation or sexual harassment training, investigation, or advising/consulting; or (3) a professor or instructor with 20 instruction hours or at least two years of experience teaching in a law school, college or university about California and/or federal employment discrimination law.

***This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar, and should not be considered legal advice.**