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Labor & Employment Law Update

Mandatory Supervisory Harassment Training: Status of the Regulations

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California employers have been waiting for the Fair Employment and Housing Commission ("FEHC") to issue regulations clarifying the 2004 amendment to the Fair Employment and Housing Act ("FEHA") which mandated supervisory harassment prevention training. It appears that the long wait may finally be over because the regulations are expected to be adopted and effective in August 2007. The regulations clarify what training is required, including which employers must provide it, who is qualified to be a trainer, the mandatory content of the training, and the employer's recordkeeping obligations.

Background

In 2004, the California Legislature passed AB 1825, which amended the FEHA to require that employers with fifty (50) or more employees, and all public employers, regardless of size, conduct harassment prevention training for all supervisors. Employers were required to complete this training by January 1, 2006. Thereafter, employers are required to conduct this training every two (2) years, and within six (6) months of a new supervisor assuming the supervisory position. These requirements are set forth in Government Code section 12950.1. While they have been providing this training, California employers have been simultaneously awaiting the release of new regulations by the FEHC interpreting the mandatory training provision.

After the Office of Administrative Law rejected the FEHC's first attempt, the regulations were modified, and the FEHC released those revised regulations for public comment on February 27, 2007. The FEHC received seventeen (17) public comments, and again revised the proposed regulations. The FEHC adopted those proposed modified regulations at its March 27, 2007 Hearing. Under administrative procedure, the regulations are subject to a second public comment period which lasts for fifteen (15) days. The FEHC submitted the

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regulatory package to the OAL on June 5, 2007. The OAL has 30 working days (July 18, 2007) to approve or disapprove the regulations. As the OAL was involved in the most recent revisions, it is anticipated that the OAL will approve these regulations this summer. Once approved, the OAL will send the regulations to the Secretary of State and the regulations become effective 30 days thereafter.

Covered Employers and Timing of Training

The FEHA requires that employers provide training to supervisors every two years, and provide training to newly hired or newly promoted supervisors within six months of their appointment. This requirement applies to all employers with fifty or more employees, and to the state of California, counties, all political or civil subdivisions of the state, and all cities, regardless of the number of employees. There was initially some confusion about whether multi-state employers included their non-California employees in the calculation of "fifty or more employees," and questions about employers that only occasionally have more than fifty employees.

The regulations make clear that "having fifty or more employees" means that the employer engages or employs fifty or more employees or contractors for each working day in any twenty consecutive weeks in the current calendar year or the preceding calendar year. The regulations also state that there is no requirement that the fifty employees or contractors work at the same location or all work or reside in California. However, "supervisor" is defined as supervisors who are located in California, and thus multi-state employers are not required to provide the training to non-California supervisors.

In addition, for public agencies, the regulations state that governmental and quasi-governmental entities, such as boards, commissions, local agencies, and special districts are considered to be political subdivisions of the state, and are thus required to provide supervisory training, regardless of the number of employees.

For employers who wish to provide training to non-supervisors, but are concerned that doing so would raise an inference that the employee is a supervisor, the regulations expressly state that this inference is not created simply because the employee attends training.

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Finally, businesses established after January 1, 2006, must provide training to its supervisors within six months of establishment and biennially thereafter.

Development of Training and Qualifications

The proposed regulations provide that a "trainer" and an "instructional designer" will develop the training materials. The trainer provides material to the instructional designer who will then develop training materials based on the material provided. The trainer will then present the training based on the material developed by the instructional designer. The trainer and the instructional designer can be the same person, as long as that person is qualified to hold both positions.

A person is qualified to be an "instructional designer" if he/she has expertise in current instructional best practices. The following individuals are qualified to be "trainers":

- An attorney who has been admitted to the bar for at least two (2) years, and whose practice includes employment law under the FEHA or Title VII.
- A human resources professional or a harassment prevention consultant who possesses a minimum of two (2) years of practical experience in one or more of the following: (a) designing and conducting discrimination, retaliation, and sexual harassment prevention training; (b) responding to sexual harassment complaints or other discrimination complaints; (c) conducting investigation of sexual harassment complaints; or (d) advising employers regarding discrimination, retaliation, and sexual harassment prevention.
- A law school, college, or university professor or instructor who has a post-graduate degree or California teaching credential and either twenty (20) instruction hours or two (2) or more years of experience teaching in law school, college, or university about employment law under the FEHA or Title VII.

The revised regulations also provide that a person who does not meet the qualifications to be a trainer solely because he/she lacks the requisite years of experience may team teach with a qualified trainer in

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order to gain the experience necessary, provided that the trainer supervises and is available to answer questions from the attendees.

At a minimum, trainers must be able to train supervisors on the following subjects: (1) what constitutes unlawful harassment, discrimination, and retaliation under California and federal law; (2) what steps to take when harassing behavior occurs in the workplace; (3) how to report harassment complaints; (4) how to respond to a harassment complaint; (5) the employer's obligation to conduct a workplace investigation of a harassment complaint; (6) what constitutes retaliation and how to prevent it; (7) essential components of an anti-harassment policy; and (8) the effect of harassment on harassed employees, co-workers, harassers, and employers.

Content of Training

The regulations require employers to provide "effective interactive training." This training can take place in a classroom, through e-learning, or through a webinar. Regardless of the form of the training, the instruction must include the following elements: (1) questions that assess learning; (2) skill-building activities that assess the supervisor's application and understanding of content learned; and (3) numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training.

Training must last for at least two (2) hours, but it does not have to be consecutive. Classroom and webinar training must be presented in at least thirty (30) minute segments.

The regulations provide for two learning objectives that the training should achieve: (1) to assist employers in changing or modifying workplace behaviors that create or contribute to sexual harassment; and (2) to develop, foster, and encourage a set of values in supervisors that will assist them in preventing and effectively responding to incidents of sexual harassment. To achieve those objectives, the training must include, but is not limited to, the following topics:

- A definition of sexual harassment under both the FEHA and Title VII. The employer may also define and train supervisors about other types of harassment under FEHA, and how an employee can fall under more than one basis.

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- FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination, and retaliation.
- The types of conduct that constitutes sexual harassment.
- Remedies available for sexual harassment.
- Strategies to prevent sexual harassment in the workplace.
- Practical examples, such as factual scenarios taken from case law or news reports; hypotheticals based on workplace situations; and other sources which illustrate sexual harassment, discrimination, and retaliation using training modalities such as role playing, case studies, and group discussions.
- The limited confidentiality of the complaint process.
- Resources for victims of sexual harassment, including to whom reports should be made.
- The employer's obligation to investigate harassment complaints.
- Training on what to do if a supervisor is personally accused of harassment.
- The essential elements of a policy against harassment, and how to utilize it if a complaint is filed.

Finally, a copy of the employer's policy or a sample policy must be distributed to the supervisors during training. Regardless of whether the employer's policy is used during the training, employers must provide every supervisor with a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

Recordkeeping and Tracking Requirements

The employer must track its compliance using individual tracking, training year tracking, or a combination of the two. "Individual tracking" means that the employer tracks the training requirement for each individual supervisor, measured two (2) years from the date of completion of the last training. "Training year tracking" means that the employer may designate a "training year" in which it trains all or some

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of its supervisors, and it must thereafter retrain those supervisors by the end of the next "training year," two (2) years later. Thus, supervisors trained in 2005 will be retrained in 2007. For new supervisors who receive training who receive their within six (6) months training in a different training year, the employer can include them in the next training year. For example, if all supervisors are trained in 2005, and a new supervisor is trained in 2006, the new supervisor can be included in the 2007 retraining with the other supervisors.

The employer must keep documentation to track compliance for at least two (2) years. This documentation must include supervisor's name, date of training, type of training, and the name of the training provider.

Conclusion

We will continue to monitor the progress of the harassment training regulations and keep you apprised of any material changes. The proposed regulations include a safe harbor for employers who made substantial, good faith efforts to comply with the FEHA's mandatory training requirement. Clients who previously used Burke to conduct their training should be pleased to know that our prior harassment training substantially complied with these regulations. In anticipation of the adoption of the regulations, we are in the process of reviewing our training to determine whether changes to the training are necessary, and, while you may have thought you would never be subject to a pop quiz again, we are developing questions to "assess the learning" of the supervisors.

While the regulations only require that employers train supervisors, we encourage all employers to provide training to both supervisors and non-supervisors because it assists employers in meeting its obligation to prevent harassment from occurring. Burke has a number of qualified trainers who provide training for both supervisors and non-supervisors for public and private entities. Please contact us with any questions about the harassment regulations or about providing harassment prevention training to your employees.

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