

# TRAINING REALLY IS THE LAW: THE RISE OF MANDATORY TRAINING

### § 15.1

## I. RECENT TRENDS & DEVELOPMENTS

### § 15.1.1

#### A. INTRODUCTION

In 2009, nearly every employer in the United States has mandatory employment law training obligations. Thus, the evolution of employment law training from a “nice idea” to legal imperative is now complete. Training is now required on topics such as harassment, business ethics, whistleblower protection and safety. The mandate goes beyond the mere provision of training, as quality standards are also obligatory. Such intensive training on such wide ranging topics will affect nearly every interaction an organization has with its employees.

It would be easy to narrowly focus on these relatively new mandates. Yet, wise employers were conducting employment law training years before the mandates were passed. Why? These employers realized that the investment in employment law training is one that pays for itself through lower litigation costs and less time spent dealing with vexing complaints.

This section summarizes the more recent laws that make training obligatory and the business reasons that make training advisable.

## § 15.1.2

**B. MANDATORY TRAINING**

## § 15.1.2(a)

***California's Mandatory Harassment Training Requirement***

In 2004, California joined Connecticut and Maine in requiring that private employers train their managers on preventing workplace harassment, especially sexual harassment.<sup>1</sup> The California law, Assembly Bill 1825 (“A.B. 1825”), goes beyond the relatively straightforward requirements of these other states by significantly regulating the subject matter, quality, and delivery method of training.

On August 17, 2007, the waiting ended, and the final regulations became effective.

The basic provisions of A.B. 1825 are as follows:

- **50 or More Employees.** A.B. 1825 applies only to organizations that regularly employ 50 or more employees or regularly “receive the services of” 50 or more persons. (Independent contractors and temporary workers are included in the “50 or more” delineation.)
- **Two Hours of Training Every Two Years.** The deadline for the first round of A.B. 1825 training was January 1, 2006. Thereafter, employers must provide two hours of harassment training to each supervisory employee every two years. For employers that began their first round of trainings in early 2005, their next round of required training begins in January 2007.
- **New Hires and Promotions.** Newly hired or promoted employees must be trained within six months of their assumption of a supervisory position, and within every two years thereafter.
- **High Quality Training Required.** The training mandated by A.B. 1825 must be of a high quality<sup>2</sup> and must include the following topics:
  - Information and practical guidance regarding federal and state statutory laws about sexual harassment.
  - Information about corrective measures to be taken after sexual harassment has occurred, and the remedies available to victims of sexual harassment.
  - Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation.
- **Failure to Comply Opens the Door to Harassment Lawsuits.** The good news for employers is that, under A.B. 1825, a claim that training failed to reach a particular individual does not automatically result in liability of an employer for subsequent harassment. If an employer does violate any of the statute’s mandates, the Department of Fair Employment and Housing (DFEH) can issue an order requiring compliance, but there are no automatic fines or penalties. The bad news is that an

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<sup>1</sup> CAL. GOV'T CODE § 12950.1. The text of California's Assembly Bill 1825 is available at <http://www.leginfo.ca.gov>.

<sup>2</sup> With the focus on quality, it is not surprising that classroom training is the only method specifically mentioned in the statute, although the use of “other effective means” is allowed.

employer's compliance with the statute does not automatically insulate it from liability for sexual harassment of any current or former employee or applicant.

Since A.B. 1825 became law in 2004, employers busied themselves with meeting the initial December 31, 2005 deadline. These efforts were taken in a vacuum of regulatory information about what the law requires, a particularly uncomfortable situation for employers trying to meet a legal mandate.

The DFEH is considering a change to the questionnaire sent to employers when a current or former employee files a charge of harassment or discrimination against an employer. Pending adoption of that change, the DFEH will routinely conduct an inquiry of covered employers about the employer's A.B. 1825 compliance. Obviously, a response to this inquiry indicating the employer's noncompliance would be detrimental to the employer's defense against a charge of harassment. Plaintiffs (or plaintiffs' attorneys) will almost certainly argue that the failure to meet this training mandate is evidence of an employer's failure to take all reasonable steps to prevent harassment as required by California law. As the bill's author has stated, "No administrative penalty could match the punitive damages award a good plaintiff's attorney can obtain."<sup>3</sup>

A more comprehensive review of the statute and the final regulations can be found in § 15.2.16 of this chapter.

### § 15.1.2(b)

## *Do State Mandatory Training Laws Create a De Facto National Standard?*

As of this writing, only California, Connecticut, and Maine have statutes mandating workplace harassment training. Do the laws of these three states create a national standard? The limits of prognostication demand the well-worn answer "that only time will tell." However, proactive employers with any operations in either California, Connecticut or Maine would be wise to act as if the answer is a solid "yes."

These laws will apply to many more organizations than employers first anticipated. The regulatory bodies of California, Connecticut and Maine have taken the position that the laws apply to organizations with any in-state operations and at least 50 employees anywhere. The laws also have an extra-territorial effect. The California, Connecticut and Maine statutes require training of out-of-state supervisors who manage in-state employees.

Does an employer expose itself to liability unnecessarily in other states where it has employees, by not training them as well, notwithstanding, the lack of state requirements? Employers must also consider the message sent to employees, judges and juries in other states if training is limited to employees only in one state. A skilled plaintiff's counsel could introduce the fact that a company only trains in states that require it, as some evidence that the company views the issue as a narrow compliance matter only, and not as a subject that deserves proactive attention and prophylactic measures. Imagine the following situation:

An employer with multiple locations across the country implements a robust training program for its California and Connecticut supervisors. A serious

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<sup>3</sup> The Honorable Sarah Reyes, California Assemblywoman, Address at Littler Mendelson's Northern California Employer Conference (Nov. 11, 2006).

harassment incident arises in the organization's Massachusetts location. The allegations reference harassing behavior that was directly addressed in the California training program, but Massachusetts supervisors did not receive the same training. Imagine now that you are the plaintiff's attorney in this case, criticizing the employer's lack of reasonable efforts to prevent and correct workplace harassment. In this instance, a narrowly focused, localized training approach actually creates problems for the employer. The problems are particularly severe in states, like Massachusetts, where there is no cap on punitive damages. A difficult case could be made worse by this sort of argument by plaintiff's counsel. "I thought I'd raise this issue for your consideration given the unlimited risks in Massachusetts, that the company could not provide the protection for your neighbors in Massachusetts that it offered its employees in California and Connecticut — the minimal amount of training required in those states." Accordingly, one national training policy is highly recommended.

It is difficult to believe that other states are far behind California, Connecticut and Maine in making training "mandatory," especially when some of those states already have statutes that "encourage" such training. A.B. 1825's author (The Honorable Sarah Reyes) has received inquiries from state legislatures around the country that are considering mandatory training laws.

In 2000, the authors of this chapter publicly predicted that by 2010, harassment and discrimination training would be statutorily required. The California law is not an aberration; it is part of a long developing trend. It is highly likely that other states will follow, and that the California, Connecticut and Maine statutes will be amended to explicitly cover all forms of prohibited harassment and discrimination.

### § 15.1.2(c)

#### ***Training as a Mandatory Part of the "Faragher/Ellerth Defense" to Workplace Harassment & the "Kolstad Defense" to Punitive Damages***

##### ***Federal Courts & State Supreme Courts Take the Lead in Emphasizing Training***

During 1998 and 1999, the U.S. Supreme Court's triptych of decisions in *Faragher*, *Ellerth*, and *Kolstad* put employment law training on the agenda of any human resources professionals looking to avoid litigation. While the United States Supreme Court has since been relatively quiet on the subject, other federal courts and state supreme courts have taken the lead. These courts show an emerging trend that training may be an essential part of establishing an affirmative defense in harassment litigation or punitive damages in discrimination litigation.

***Failure to Train Means Failure to Establish the Affirmative Defense***

Federal and state courts in certain jurisdictions have held that training managers on preventing workplace harassment is an essential element in establishing the *Faragher/Ellerth* affirmative defense.<sup>4</sup>

The line of cases from these courts hold that merely having a harassment policy is not enough to satisfy *Faragher/Ellerth*. In addition, employers must show, at a minimum, the following:<sup>5</sup>

- training for the company's supervisors regarding harassment;
- an express antiretaliation provision; and
- multiple complaint channels for reporting the harassing conduct.

Note that many courts have gone beyond these basic requirements. In *EEOC v. Smokin' Joe's Tobacco Shop, Inc.*, the plaintiff accused her immediate supervisor of a pattern of sexual harassment.<sup>6</sup> After complaining to human resources, the employee left the company alleging constructive discharge. The Tobacco Shop argued that its antidiscrimination policy, which was disseminated to all employees, established an affirmative defense under *Faragher/Ellerth*. The court disagreed and found that “employees and managers received no training about sexual harassment.” Further, the investigator did not have any “special training” regarding investigations. This lack of training manifested itself in the investigator's failure to keep the complaint confidential. Thus, the court denied the company's motion to dismiss and allowed the claims to go before a jury.<sup>7</sup> In *Carpenter v. AADG, Inc.*, the court held that the paucity of evidence regarding “regular training” on how to handle harassment issues helped doom the employer's effort to establish an affirmative defense.<sup>8</sup>

***Example of “Substantial” Training Efforts Protecting Against Punitive Damages in Federal Discrimination Lawsuits***

Unlike sexual harassment training, broad based discrimination prevention training has not been the norm. This may explain why discrimination claims with the Equal Employment Opportunity Commission increased in 2006 while harassment claims continued to decline. The failure to include discrimination training as a basic management curriculum is a shame because such training also provides critical legal defenses.<sup>9</sup>

In two recent cases, the U.S. Court of Appeals steadfastly adhered to the principle that punitive damages can be avoided by an employer's good faith efforts (in these cases live,

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<sup>4</sup> *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972 (8th Cir. 2005), cert. denied, 546 U.S. 1091 (2006); *Montero v. Agco Corp.* 192 F.3d 856 (9th Cir. 1999), cert. denied, 528 U.S. 1076 (2000); *Shaw v. Autozone, Inc.* 180 F.3d 806, 811-12 (7th Cir. 1999); *Hawkins v. Groot Indus., Inc.*, 2003 U.S. Dist. LEXIS 5051 (N.D. Ill. Mar. 31, 2003); *Soto v. John Morrell & Co.*, 285 F. Supp. 2d 1146 (N.D. Iowa 2003).

<sup>5</sup> *Soto*, 285 F. Supp. 2d at 1162. See also *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1181 (9th Cir. 2001) (training part of “a paradigm of the ‘reasonable efforts’” taken by the employer).

<sup>6</sup> 2007 U.S. Dist. LEXIS 31512 (E.D. Pa. Apr. 27, 2007).

<sup>7</sup> *Id.*

<sup>8</sup> 2007 U.S. Dist. LEXIS 94240, at \*57 (D. Iowa Dec. 24, 2007).

<sup>9</sup> Jeannine Aversa, *Job Discrimination Filings Rise in 2006*, AP ECONOMICS WRITER, Feb. 1, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020101389.html>.

interactive training) to proactively prevent workplace discrimination. Indeed, the court in each case actually overturned significant punitive damages awards.

In *Bryant v. Aiken Regional Medical Center Inc.*,<sup>10</sup> a jury found that the plaintiff had been denied promotions because of her race and because she had complained about discrimination (retaliation). The jury also decided that the employer should be castigated for the actions of its managers and awarded Bryant an extra \$210,000 in punitive damages.

The court agreed with the jury's decision regarding discrimination and retaliation. However, it disagreed with the jury's punitive damages decision. The court noted that employers are not subject to punitive damages when individual manager's unlawful decisions were made "contrary to the employer's good faith efforts" to comply with federal antidiscrimination law. The court emphasized that the employer's good faith efforts, included:

- Issuance and communication of an organization-wide equal employment opportunity policy.
- Training of employees in a "carefully developed" classroom program that included interactive group exercises.
- Voluntarily monitoring departmental demographics to help spot any issues of discrimination.

Contrasting these "extensive" actions with those of employers who never issued antidiscrimination policies or trained their managers, the court reversed the \$210,000 punitive damages award.<sup>11</sup>

In *EEOC v. Caterpillar, Inc.*,<sup>12</sup> the EEOC filed a discrimination lawsuit on behalf of five current and two former employees. Underlying the lawsuit were allegations of widespread sexual harassment and the company's failure to adequately respond to complaints of harassment.

In dismissing the Equal Employment Opportunity Commission's (EEOC) claims for punitive damages before trial, the court extensively reviewed the multiple, consistent steps that the company took to prevent the problem from occurring. These steps included the following:

- Posting its discrimination and harassment policies in "high visibility" places in "every major" building at the facility.
- Distributing several different publications to all employees that focused on workplace harassment and equal employment opportunities.
- Requiring classroom training of employees on numerous occasions, including:
  - new orientation training;
  - follow-up training several weeks into employment;
  - new supervisor orientation;
  - diversity training that included harassment;

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<sup>10</sup> 333 F.3d 536 (4th Cir. 2003), *cert. denied*, 540 U.S. 106 (2004).

<sup>11</sup> See also *Young v. Daimler Chrysler Corp.*, 2004 U.S. Dist. LEXIS 22813 (S.D. Ind. Oct. 25, 2004) (lack of details about training defeated *Kolstad* defense).

<sup>12</sup> 503 F. Supp. 2d 995 (7th Cir. 2007).

- maintaining harassment-free workplace training for all managers and employees; similar training was provided three times in five years;
- an eight-hour diversity training program for managers;
- classroom training for all employees on two different occasions over five years.<sup>13</sup>

In reviewing whether the company took good faith efforts to prevent harassment and discrimination, the court noted the company's "repeated and substantial efforts to train all employees."<sup>14</sup> Because of the training, and other proactive steps, the court granted the company's motion for summary judgment and dismissed the EEOC's claim for punitive damages.<sup>15</sup>

#### § 15.1.2(d)

### *Mandatory Harassment Training on the Full Range of Protected Categories*

Employers who focus their workplace harassment efforts exclusively on sexual harassment expose themselves to liability and damages on harassment based on other protected categories. In recent cases, employers have attempted to use the fact of having conducted sexual harassment training to defend claims based on race or other protected categories. The courts have routinely rebuffed these efforts holding that training on sex does not accredit to the employer's efforts to prevent other types of unlawful harassment.<sup>16</sup>

To that end, in light of the number of states that have passed laws protecting sexual orientation and sexual identity bias, a growing number of companies have increased training efforts to address these issues.<sup>17</sup>

### *Training for Those Conducting the Investigations*

Training programs to prevent discrimination and harassment tend to focus on managers and employees. These programs often recommend that employees call the human resources or legal departments if serious issues arise for a more complete investigation. Thus, the skills of those conducting the investigations and making recommendations on appropriate remedial action must be up-to-date. The failure to do so can ruin any attempt to avoid litigation, as one employer learned in *EEOC v. Smokin' Joe's Tobacco Shop, Inc.*<sup>18</sup> In reviewing the employer's efforts to prevent harassment, the court noted the individual who investigated the

<sup>13</sup> *Id.* at 1003.

<sup>14</sup> *Id.* at 1048.

<sup>15</sup> *Cf. Smokin' Joes*, 2007 U.S. Dist. LEXIS 31512 at \*\*25-26 (the court requires training to establish a *Kolstad* defense to punitive damages).

<sup>16</sup> *Freeman v. Spencer Gifts, Inc.* 333 F. Supp. 2d 1114, 1128 (D. Kan. 2004) (sexual harassment training did not count towards avoiding punitive damages on racial harassment case); *Washington v. Walgreen Co.*, 2004 U.S. Dist. LEXIS 14620 (N.D. Ill. July 28, 2004) (no genuine issue of fact as to the company's good-faith efforts, because training specifically covered discrimination by employees and customers); *Hawkins v. Groot Indus., Inc.*, 2003 U.S. Dist. LEXIS 5051 (N.D. Ill. Mar. 31, 2003) (sexual harassment training does not help establish an affirmative defense to a racial harassment claim).

<sup>17</sup> *See Training Used Against Sexual Orientation Bias*, MO. LAW. WKLY., Mar. 10, 2008, available at <http://www.molawyersweekly.com/archive/>.

<sup>18</sup> 2007 U.S. Dist. LEXIS 31512 (E.D. Penn. 2007).

plaintiff's complaint had no special training regarding sexual harassment investigations."<sup>19</sup> Thus, the employer's attempt to escape liability was denied.

Further, the individual must be able to actually enforce and or recommend discipline. If the individual conducting an investigation is trained, but remains compromised in his or her ability to practically enforce a harassment policy because they cannot act as a decisionmaker, the defense of good-faith compliance with Title VII may not be available.<sup>20</sup>

### *Training as Part of the "New" Affirmative Step to Limit Wage & Hour Damages*

Training managers on the basic requirements of wage-and-hour law has become crucial even though there is no direct requirement to do so. The U.S. Department of Labor has estimated that fewer than 30% of employers are in substantial compliance with federal wage-and-hour laws (this does not include additional state law requirements). The wage-and-hour class action has become the "plaintiff's attorney's best friend." The number of wage-and-hour class actions now outnumber those filed for discrimination. The number of lawsuits under the Fair Labor Standards Act (FLSA or the "Act") climbed a shocking 86% between 2004 and 2006.<sup>21</sup> These class actions can be devastating to employers. Not only do they often result in multimillion dollar verdicts or settlement, they tend to effect large portions of the workforce. For example, the parties settled for \$210 million (including post-judgment interest and other fees) the appeal of a \$90 million verdict against a major insurance company who misclassified 2,400 employees as overtime exempt.<sup>22</sup> Especially frustrating for employers is how quickly failing to pay for only tiny increments of hours worked can accumulate. These issues help to explain why in 2006 alone, five wage/hour class actions settled for more than \$60 million.<sup>23</sup>

This legal environment leaves no room for error for allowing even "minor" violations of wage-and-hour laws. Managers who know the basics about the employers' obligation are the first line of defense in preventing these minor infractions from occurring. In the case involving the national retailer, who would best know if the employees were taking their lunch breaks or if their time records were accurate? The answer is the local managers. However, very few companies train managers on the importance of keeping accurate time records or legal intricacies of what are "hours worked."

This type of training is likely to reduce infractions, and it may also help significantly reduce the chances of liability or damages during litigation.

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<sup>19</sup> *Id.* at \*\*25-26. See also *EEOC v. Rotary Corp.*, 297 F. Supp. 2d 643 (N.D.N.Y. 2003) (In reviewing the employer's efforts to prevent harassment, the court noted "most importantly, . . . trained professionals in place to address [racial and sexual harassment] were nonexistent."); *Ciesielski v. Hooters*, 2004 U.S. Dist. LEXIS 25884 (N.D. Ill. Dec. 23, 2004) (failure to investigate supported a jury's denial of the *Kolstad* defense, even though the company had a policy and did annual training).

<sup>20</sup> *Alaniz v. Zamora-Quezada*, 2005 U.S. Dist. LEXIS 32478 (S.D. Tex. Sept. 8, 2005) (since individual being investigated was the ultimate decisionmaker regarding complaints of sexual harassment, plaintiff not precluded from seeking punitive damages).

<sup>21</sup> Brooke A. Mاسترا & Amy Joyce, *Suits On Overtime Hitting Big Firms*, WASH. POST, Feb. 21, 2006.

<sup>22</sup> *Justices Reject Review of Overtime Case, Leaving Intact \$90 Million Award for Jury*, Daily Lab. Rep. (BNA), Nov. 27, 2001, at AA-5.

<sup>23</sup> *Time Is Big Bucks, Class-Action Wage Lawsuits Show*, WORKFORCE MANAGEMENT, Dec. 21, 2007, available at [www.workforce.com](http://www.workforce.com).

The statute of limitations period for claims brought under the FLSA may also be reduced by training. The FLSA's statute of limitation is two years unless the employer's violation of the Act was willful, in which event the statute of limitations is three years.<sup>24</sup> A willful violation will be found where the employer either knew or showed a reckless disregard for whether its pay policy violated the FLSA.<sup>25</sup> Liquidated damages, if awarded, can double a back-pay award. A two- or three-year liability instantly becomes a four- to six-year liability. Employers can dramatically change their risk profile today by implementing an effective wage and hour training program for managers and employees. It is increasingly common for courts to automatically award liquidated damages if an employer is found to have engaged in willful misconduct under the FLSA. An employer may be able to avoid an award of liquidated damages if it can show that its actions were taken in good faith, and that the employer had "reasonable grounds for believing" its actions did not violate the FLSA.<sup>26</sup> Again, training provides employers with solid evidence of good faith efforts to comply with the law. A solid training program demonstrates an employer's commitment to achieving legal compliance — especially on the front line where many of the most costly mistakes occur.

There is also a strong argument for conducting training once FLSA litigation has commenced. Note that during litigation, damages continue to accrue forward in time until the employer demonstrates that it has corrected the FLSA problem. This means that monetary damages will continue to increase as a lawsuit slowly progresses, which can take years in many cases. For an employer who does not take prompt corrective action, liability can quickly exceed four or five years in tough cases or collective actions. An employer who implements training, even mid-litigation or audit, has taken a significant step forward in demonstrating that a particular problem or error has been corrected.

### *Management Skills Training & the Employment Law Connection*

Several surveys and studies point to one conclusion — managers who fairly and professionally administer the performance and termination process are less likely to be sued and, if sued, less likely to be subject to punitive damages.<sup>27</sup> For example, the American Bar Association recently conducted a mock disability discrimination trial, with evidence strongly favoring the employer. When the jurors retired to consider the case, the acting judge announced that, were this a real trial, he would have dismissed the case because no reasonable jury could find for the plaintiff. Yet, the jury disagreed, finding that the plaintiff was not treated "fairly." Although this consideration that was legally irrelevant, the jury recommended a multimillion-dollar damage award.<sup>28</sup>

Other surveys buttress the key finding of the mock trial. One study of the unemployed found that terminated employees found that only 4% of employees who felt their terminations were fair filed or considered litigation. Contrast that statistic with the statistics of those who felt

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<sup>24</sup> 29 U.S.C. § 255. See *In re Farmers Ins. Exchange*, 300 F. Supp. 2d 1020 (D. Or. 2003) (employer's failure to take action after learning that employees may be misclassified will render failure to pay overtime willful from the date of learning of a potential misclassification); *Wolfslayer v. IKON Office Solutions, Inc.*, 2004 U.S. Dist. LEXIS 22625 (E.D. Pa. Nov. 8, 2004) (company's violation of the FLSA was not found willful where company had numerous compliance policies and audit policies to ensure that it did not violate the FLSA).

<sup>25</sup> *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

<sup>26</sup> See 29 U.S.C. § 260.

<sup>27</sup> Dr. Joni Johnston, *Why Jurors Fire Back During Wrongful Termination Lawsuits*, Nov. 24, 2003, available at <http://www.hr.com>.

<sup>28</sup> *Id.*

that the termination process was insulting or felt that they had been given inaccurate information about the decision. A full 90% of that group either filed or considered litigation. The news is not much better for employers once they are before a jury. In another recent survey, most jurors disagreed with the statement “employees can be terminated without cause” even in states where employment at-will was the norm. Many jurors also disagreed that financial reasons were a legitimate reason for termination.<sup>29</sup>

The lessons from these surveys are clear. Management skills training and employment law basics training are connected. Yes, managers do need training on basic management skills. But this training must be linked with the legal obligations of the organization. Only by linking the two subjects (skills and compliance) can organizations best hope to avoid and defend wrongful termination litigation.

### § 15.1.2(e)

## *Ethics & Compliance Training Under Amended Federal Sentencing Guidelines*

In response to the Sarbanes-Oxley Act of 2002, the U.S. Sentencing Commission amended their Sentencing Guidelines (“Guidelines”) in 2004 to strengthen the requirements for corporate compliance. Several additional, unrelated amendments to the Guidelines went into effect on November 1, 2005. Under the Amended Guidelines, judges were required to consider whether a convicted corporation had established an “effective compliance program” prior to the violation taking place; in other words, whether the corporation had taken appropriate steps to prevent and detect violations of ethics laws. The 2004 amendment imposed the requirement that all employees, including high-level personnel, receive periodic training pertaining to their organization’s ethics and compliance standards.

Consequently, comprehensive and periodic training on workplace ethics to prevent and detect criminal conduct has now become an ever greater imperative. If an organization undergoes scrutiny regarding its ethics and compliance practices under Sarbanes-Oxley or other federal statutes, evidence of an effective ethics and compliance program will significantly reduce liability exposure. Simply demonstrating that you have provided employees with an ethics policy or code of conduct is not legally sufficient; a formal training program is required under the Amended Guidelines.

In January 2005, the U.S. Supreme Court set aside part of the federal sentencing guidelines in a case concerning pronounced sentences for drug offenses.<sup>30</sup> While not addressing the Guidelines’ corporate application in its opinion, the Court’s decision has effectively left the “mandatory” nature of Sarbanes-Oxley sentencing Guidelines unclear. However, the Court did find that judges should continue to consult the guidelines in determining sentences on an advisory basis at least until Congress can reconsider the mandatory nature of the sentencing scheme. Thus, employers looking to keep their officers out of court would be well-advised to consider ethics training as mandatory and carefully review chapter eight of the sentencing Guidelines.<sup>31</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>31</sup> See 2005 FEDERAL SENTENCING GUIDELINE MANUAL (effective Nov. 1, 2005), available at <http://www.ussc.gov/guidelin.htm>.

Until more specific guidance is issued, organizations will be well served to address the following as they implement ethics and compliance standards:

- Can your organization demonstrate a commitment to compliance with ethics law at the “highest levels” of management?
- Is compliance training universally provided to all employees, and is periodic evaluation of the effectiveness of compliance programs taking place?
- Among specific topics to address in the training, are the following areas covered?
  - confidential information;
  - insider trading;
  - conflicts of interest;
  - proper accounting practices;
  - Sarbanes-Oxley Act requirements — particularly, understanding antiretaliation and whistleblower protections of this and other laws;
  - proper financial reporting procedures and financial records maintenance;
  - use of organizational property;
  - handling gifts and favors; and
  - reporting ethical and compliance concerns under your organization’s policies.

#### § 15.1.2(f)

### *Diversity Training in the Age of Globalization & the Reign of Consent Decrees*

Diversity training in the employment arena has resurged recently — required by consent decrees or settlement agreements; or voluntarily pursued in light of business needs, the current state of the workplace, or the ubiquitous concern of globalization. In fact, to render diversity training more effective and enduring, employers often have combined corporate diversity programs with other employee training initiatives.<sup>32</sup> Regardless of the motivation, one thing is certain: diversity training is becoming a staple in the workplace.

Emerging as a necessary component to a harmonious and cutting edge workplace, diversity training is being used to customize the workplace in preparation for the global frontier. According to current statistics, by the year 2050, almost 50% of Americans will be African American, Latino or Asian American.<sup>33</sup> However, unlike the themes emphasized in the past, current diversity training is not limited to race or gender relations. Instead, the range of diversity training has steadily progressed and expanded over the last 20 years, tackling the diversities of disabilities and abilities, sexual orientation and age. Currently, themes of diversity training include: religious differences, “microinequities” (small slights and unconscious behaviors that can result in exclusion), work-life balance and spirituality.

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<sup>32</sup> *Diversity Training Joins Corporate Development Mainstream*, HUMAN RESOURCES MGMT., 2005, at 192.

<sup>33</sup> U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race & Hispanic Origin*, (Mar. 18, 2004) available at <http://www.census.gov/ipc/www/ustinterimproj/>; see also *Changing America: The United States Population in Transition*, 4 U.S. SOCIETY & VALUES 211 (June 1999), available at <http://www.4uth.gov.ua/usa/english/society/ijse0699/capop.htm>.

Moreover, because workplace conflict and tension are expected to build as the age gap widens between Baby Boomers and younger employees (*e.g.*, Gen X and Y), diversity training also addresses differences in perspectives and values.<sup>34</sup>

Admittedly, with the advent of the Internet and other technological developments, the borders between countries have all but collapsed, resulting in a flatter world and yielding a more diverse workplace community. As a result, corporate America is more invested in diversity than ever. For example, companies such as IBM, Starbucks, Google have rigorously undertaken diversity efforts to further their endeavors, understanding it as a corporate strategy to penetrate new markets.<sup>35</sup> This dedication was strongly advocated in an amicus brief written by General Motors to the U.S. Supreme Court in support of the consideration of diversity in university admissions as follows:

To succeed in this increasingly diverse environment, American businesses must select leaders who possess cross-cultural competence — the capacities to interact with and to understand the experiences of, and multiplicity of perspectives held by, persons of different races, ethnicities, and cultural histories.<sup>36</sup>

Clearly, diversity training is a key component in the acquisition of this “cross-cultural competence,” a skill employers are realizing is critical for success in the global marketplace.

Moreover, it is obvious that diversity training, and by extension sensitivity training, endeavors are a natural counterpart to an employer’s efforts to create and maintain a workplace free of harassment, discrimination and retaliation. In recognition of this, employers have begun to include diversity training in their employee development initiatives, often in tandem with harassment or discrimination training.

However, not only have employers recognized the essential function of diversity training in providing an equal employment opportunity workplace, but so have the courts. These days, it is commonplace for a consent decree or a settlement agreement issued in response to an allegation of discrimination or harassment to include, along with EEO training, mandates for diversity training, diversity monitoring and assessments, diversity in hiring and/or the creation and establishment of an executive or board position dedicated to diversity.

For example, as mentioned in § 15.2.5(b) below, in 2005 Abercrombie & Fitch settled a class action discrimination claim for \$40 million. Among other mandates, the consent decree — detailed by the settlement agreement — required: the hiring of at least ten full-time diversity recruiters; the utilization of diversity consultants; hiring benchmarks; and the creation of an Office of Diversity, led by a Vice President of Diversity who directly reports to the CEO or the COO. Among other things, this Vice President of Diversity must oversee the development and implementation of all EEO and diversity training and education programs.<sup>37</sup>

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<sup>34</sup> See generally *The New Diversity*, WALL STREET J., Nov. 14, 2005.

<sup>35</sup> *Id.*

<sup>36</sup> Brief of General Motors as Amicus Curiae in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan’s law school’s use of race as an admission factor because it was a narrowly tailored use of race in admissions decisions which did further a compelling interest in obtaining the educational benefits that flow from a diverse student body.)

<sup>37</sup> See *EEOC v. Abercrombie & Fitch Stores, Inc.*, Nos. 03-2817 SI, 04-4730 & 04-473 (N.D. Cal. 2004) (consent decree approved Apr. 14, 2005).

Additionally, in 2005 Sodexo Marriott Services, Inc. entered into a settlement agreement and consent decree in response to a class action alleging race discrimination in promotions and related employment practices. Settling for \$80 million, Sodexo was also required to provide diversity and EEO training. Notably, the settlement agreement carefully articulated Sodexo's commitment to diversity and featured, among other things, a diversity and inclusion component to its annual bonus plan for bonus-eligible managers.<sup>38</sup>

It is important to note the rise of diversity training and increased employer sensitivity to diversity issues constitutes a big step in the ever evolving process of providing a harmonious and productive workplace. However, this recognition and sensitivity to diversity issues lays the foundation for what is the goal of such considerations: creating a work environment focused on inclusiveness. Organizations, such as IBM, JPMorganChase and Xerox (long considered early pioneers regarding diversity issues in the workplace), have led the way, evolving their diversity agenda into this new endeavor. In short, by becoming more integrative, these organizations have focused on fostering an "inclusive environment."

Building an inclusive environment yields the next leaders of an organization. An inclusive environment is created and guided by broad recruitment and retention strategies, as well as the mentoring and cultivation of individuals through sponsorships, networking opportunities and even stretch assignments. Moreover, inclusiveness not only helps organization leaders expand their pool of talent, but also to get a return on investment and enhance shareholder value.<sup>39</sup> In other words, while sensitivity to diversity recognizes and celebrates differences, inclusion incorporates them into the framework and management of the organization.

In sum, diversity training provides the tools necessary to create and maintain a harmonious and productive workplace. It is among the first steps in creating an inclusive environment. Additionally, due to the realities of the global marketplace and the law's mandate that employees work in an environment free of harassment and discrimination, diversity training has become a workplace "must-have" as employers seek to remain competitive and legally compliant in the 21st century.

### § 15.1.3

## C. THE BUSINESS OF WORKPLACE TRAINING

### § 15.1.3(a)

#### *Employment Law Training Reduced Costs*

The application of basic business principles in large degree has kept the interest in training strong. Even as the economy has recovered somewhat from the recession of the past few years, human resources professionals know that there "will be no money free for all" and that human resources will continue to have to "do more with less."<sup>40</sup> The simple fact remains that fewer resources will be available than in the past and that the organization's remaining

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<sup>38</sup> *Cynthia Carter McReynolds v. Sodexo Marriott Services, Inc.*, D D.C., No. 1:01-CV-00510 (ESH), (N.D. Cal. 2004) (consent decree approved Apr. 10, 2005).

<sup>39</sup> See Nancy DiDia, *Beyond Diversity: Building Cultures of Inclusion*, available at <http://www.didiadiversity.com>.

<sup>40</sup> David Langdon, John McBride & Sharon Lucius, *What Top HR Leaders See for 2004!*, Dec. 22, 2003, available at <http://www.hr.com>.

“human resources” must be better trained to carry out the organization’s objectives.<sup>41</sup> As one expert stated:

I have consistently heard warnings that training budgets will be reduced due to a variety of circumstances. But I’ve never seen a business unit cut training that directly achieves business goals. . . . [Training that] advances business goals isn’t an option; it’s essential.<sup>42</sup>

Employment law training helps meet core business goals, and thus, must be viewed as “essential.” In lean or good economic times, a core goal of any organization must be to reduce unnecessary costs and focus resources on building for the future. The average jury award for wrongful termination claims is \$1.8 million and one-fifth of jury awards now top the \$1 million mark.<sup>43</sup> Indeed the total amount that employers pay out as a result of harassment and discrimination claims has doubled in the last five years.<sup>44</sup>

Safety nets such as Employment Practices Liability Insurance (EPLI) are costly themselves. Surveys show that premiums for this type of insurance have recently risen 50% and that employers can expect additional increases in premiums in the upcoming year.<sup>45</sup> With employment litigation insurance premiums dramatically increasing, employers who cannot effectively manage employment law obligations will find themselves paying a huge bill.<sup>46</sup> Even without litigation, the cost of employment law related disputes is high. One study found that large corporations spend \$6.7 million per year dealing with harassment claims in addition to litigation costs.<sup>47</sup>

The extravagant costs of employment litigation and protective insurance must be reduced to meet the core business goals of reducing nonproductive costs. Employment law training programs, when done correctly, provide such a reduction. For example, after implementing a comprehensive employment law training program run by Littler Mendelson, the state of Washington realized a 37% decrease in employment law related claims. This saved the state an estimated \$2 million per year. These facts comport with the experiences of human resources professionals nationwide. Eighty-two percent of those surveyed found employment law training to be effective or extremely effective in reducing litigation.<sup>48</sup> Indeed, with the average cost to settle a lawsuit hovering at \$300,000, a training program that eliminates even one lawsuit presents an amazing return on investment.<sup>49</sup>

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<sup>41</sup> Lois Webster, *A New View of Corporate Training*, ADVISOR: TECHNOLOGY KNOW-HOW, Jan. 9, 2002; Giovanni Marcelli, *Recession Proof: Managing Risk in an Economic Downturn*, CABLING BUSINESS MAGAZINE, available at <http://www.cablingbusiness.com>.

<sup>42</sup> *Id.*

<sup>43</sup> Reed Abelson, *Surge in Bias Cases Punishes Insurers & Premiums Rise*, N.Y. TIMES, Jan. 9, 2002, available at <http://www.nytimes.com>.

<sup>44</sup> Jonathan D. Glater, *New Guards to Lessen Liability*, N.Y. TIMES, Aug. 8, 2001, available at <http://www.nytimes.com>.

<sup>45</sup> Reed Abelson, *Surge in Bias Cases Punishes Insurers & Premiums Rise*, N.Y. TIMES, Jan. 9, 2002, available at <http://www.nytimes.com>.

<sup>46</sup> *Id.*

<sup>47</sup> Tim Hicks, *Mediation in Sexual Harassment Cases*, Apr. 4, 2001, available at <http://www.hr.com>.

<sup>48</sup> Susan R. Hobbs, *Training Cures Managers’ Ignorance; Helps Prevent Suits*, Daily Lab. Rep. (BNA), June 12, 2001, at C-1.

<sup>49</sup> John J. Donohue & Peter Siegelman, *The Changing Nation of Employment Insurance, Is Harder to Get, More Costly, Insurers Scared by Verdicts*, Jan. 22, 2002, at 711, available at

## § 15.1.3(b)

***Employment Law Training Promotes Productivity***

Employment law training can help reduce litigation costs and it can do more. Such training can improve productivity, a key goal for every employer regardless of the state of the economy. Productivity gains are especially noticeable for the “management lifecycle” programs such as lawful hiring, dealing with problem performance, and terminations. These programs teach managers the core skills needed to hire and retain their best employees and maximizing the performance of the entire workforce. Such efforts can also provide organizations with positive public relations. At the decade’s start, the business headlines sensationalized Coca-Cola’s \$192.5 million settlement of discrimination class action. Last year, after introducing mandatory training for managers on equal employment issues, the company is earning public praise for its diversity efforts.<sup>50</sup> It is not surprising, therefore, that most employers are increasing their training budgets — the investment simply pays for itself.<sup>51</sup>

## § 15.1.3(c)

***Technological Advances***

Training’s continued strength was further promoted by advances in technology, allowing organizations to do more training with less resources. Early predictions that by the year 2000 the primary method of delivering training to employees would be on-line proved overly optimistic.<sup>52</sup> Yet, the future may have finally arrived.

Advancements in “live” on-line training, through virtual classrooms and webinars, have ameliorated some of the concerns with traditional, self-study e-learning. Live on-line learning allows organizations to combine the best features of classroom training (*e.g.*, use of engaging subject matter experts, participants having questions answered in real time, and team building) with many of the cost saving features that self-study e-learning allows. Indeed, one organization reported a \$90,000 savings using live on-line learning to train over 500 employees on harassment prevention.<sup>53</sup> It is this combination of benefits that will likely make live on-line learning the “successor to traditional . . . classroom training.”<sup>54</sup> Such remote instructor based learning accounts for a quarter of all technology-based training.<sup>55</sup>

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<http://www.diversity.com> (“as layoffs mount nationwide, the number of employment-related lawsuits is expected to climb”). This study also reports that the average jury verdict for sexual harassment is \$1 million and \$1.8 million for wrongful termination.

<sup>50</sup> Barney Tumeay, *Coca-Cola Gets Good Grades*, Daily Lab. Rep. (BNA), Sept. 27, 2002, at A-5.

<sup>51</sup> Jessica Marquez, *Half of Employers Will Spend More on Training*, WORKFORCE MAGAZINE, Dec. 19, 2006.

<sup>52</sup> Compare MERRILL LYNCH & CO., THE BOOK OF KNOWLEDGE: INVESTING IN THE GROWING EDUCATION & TRAINING INDUSTRY 151 (Apr. 9, 1999) (a report predicting that on-line learning would account for 51% of employee training by the year 2002), with AMERICAN SOC’Y FOR TRAINING & DEV. (MARK E. VAN BUREN), STATE OF THE INDUSTRY REPORT (2001) (the actual figure was less than 10% in 2000).

<sup>53</sup> *Reducing Costs, Increasing Communication*, Jan. 1, 2002 (an ROI case study from Centra Software).

<sup>54</sup> AMERICAN SOC’Y FOR TRAINING & DEV. (MARK E. VAN BUREN), STATE OF THE INDUSTRY REPORT at 17 (2001).

<sup>55</sup> AMERICAN SOC’Y OF TRAINING & DEV., STATE OF THE INDUSTRY REPORT (2004).

## D. CONCLUSION

Harassment training is now required by the law of many states. Federal and state courts require harassment and discrimination training to avoid punitive damages. The Sarbanes-Oxley Act requires ethics training as part of sentencing guidelines. These mandates further underscore what prudent employers have known for years, training, done correctly, can be a vital part of improving morale and productivity. Fortunately, technology trends have made conducting such training easier and more cost-effective than ever before. For employers looking to do the right thing by their organizations, employment law training serves both compliance and productivity goals.

## II. OVERVIEW OF THE LAW OF TRAINING

### A. MANDATORY HARASSMENT PREVENTION TRAINING FOR PRIVATE EMPLOYERS

Legal authorities, whether the legislatures or courts, have traditionally been reluctant to require employers to provide training. That attitude has changed the last few years have brought a variety of new training mandates.

#### *Mandatory Sexual Harassment Training Under California Law*

The wise course of action to conduct regular harassment training became a legal responsibility when Governor Arnold Schwarzenegger signed Assembly Bill 1825 (“A.B. 1825”) on September 29, 2004.

A.B. 1825<sup>56</sup> requires that employers train supervisors on sexual harassment every two years. At first glance, the statute only seems to codify what many employers are already doing. A close reading of the statute, however, reveals very specific requirements that every employer must now follow.<sup>57</sup>

Since A.B. 1825 became law, employers spent much of 2005 attempting to meet the December 31, 2005 deadline. These efforts were taken without regulatory information about what the law requires, a particularly uncomfortable situation for employers trying to meet a legal mandate. On August 17, 2007 the waiting ended, and the final regulations became effective.

#### *The Theory Behind A.B. 1825*

A.B. 1825’s legislative history provides some explanation of the law’s rationale. The statute was sponsored by Assembly Member Sarah Reyes. Her basic argument was that current laws,

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<sup>56</sup> CAL. GOV’T CODE § 12950.1.

<sup>57</sup> California’s A.B. 1825 is also discussed in § 15.1 above.

while prohibiting sexual harassment, have not done enough to eliminate the problem. Reyes notes that during the 2002-03 fiscal year 4,231 sexual harassment cases were filed with the Department of Fair Employment and Housing (DFEH), totaling 22% of all cases filed. The impact of sexual harassment on businesses is significant, Reyes argued. Harassment costs the average Fortune 500 company \$6.7 million per year in indirect costs alone. Training helps reduce those costs. According to the Hartford Business Journal, “Most legally sophisticated companies provide such training to all supervisory and nonsupervisory employees. That’s the smart thing for small and large employers to do to minimize their legal exposure to [sexual harassment] claims.” For a detailed explanation of the requirements for complying with A.B. 1825 pursuant to the final regulations from the DFEH, see § 15.1.2(a) above.

### *Which Organizations Should Conduct the Training?*

Under A.B. 1825, only supervisory employees must be trained (although there are excellent practical and legal reasons to train all employees. The regulations have adopted California’s Fair Employment and Housing Act’s definition of “supervisor,”<sup>58</sup> which is:

Any individual having the authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action . . . if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.<sup>59</sup>

Contrary to the draft regulations, A.B. 1825 no longer applies to out-of-state supervisors who manage California employees.<sup>60</sup> However, for reasons explained in the Practical Recommendations section that follows, it is advisable to require that out-of-state supervisory employees undergo harassment training similar to that received by their California colleagues. Doing so will help establish the affirmative defense against harassment claims under Title VII.

The regulations also cover growing businesses. Specifically, businesses that expand to 50 employees and/or contractors, and thus become subject to these regulations, must also provide training to supervisors within six months of the enterprise reaching the 50-person threshold, and thereafter biennially.<sup>61</sup>

Some employers may be concerned that providing “supervisory” harassment training compliant with A.B. 1825 indicates that a particular employee will be defined as a supervisor for legal liability purposes. This concern is somewhat mitigated by a “safe harbor” provision in the regulations: “Attending harassment training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.”<sup>62</sup>

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<sup>58</sup> CAL. CODE REGS. tit 2, § 7288.0(a)(8).

<sup>59</sup> See CAL. GOV’T CODE § 12926(r).

<sup>60</sup> CAL. CODE REGS. tit 2, § 7288.0(a)(8); see also California Government Code section 12950.1, as amended by A.B. 2095 (2005-2006 Reg. Session), effective January 1, 2007, sec. 1 (“... all supervisory employees in California . . .”).

<sup>61</sup> See CAL. CODE REGS. tit 2, § 7288.0(b)(3).

<sup>62</sup> *Id.* § 7288.0(a)(8).

### *Who Can Design & Teach the Training?*

A.B. 1825 mandates that trainers must have “knowledge and expertise in the prevention of harassment, discrimination, and retaliation.” The definition of these requirements significantly changed during the regulation drafting process. Indeed, these definitions were the sole basis for the Office of Administrative Law’s rejection of a previous version of the final regulations.

Most previous versions of the regulations made a distinction between “Subject Matter Experts” (content experts) and “Trainers” (facilitation experts). The current final regulations combine both skill sets into a single definition of “Trainer.” This single definition appears to provide a more streamlined and clear approach to answering the question, “Who can train?”

A *trainer* is now defined as someone who meets one of the following three definitions:

1. Attorneys admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964; or
2. Human resource professionals with two or more years practical experience in one or more of the following: (a) designing or conducting discrimination, retaliation and sexual harassment prevention training; (b) responding to sexual harassment complaints or other discrimination complaints; (c) conducting investigations of sexual harassment complaints; or (d) advising employers or employees regarding discrimination, retaliation and sexual harassment prevention; or
3. Professors and instructors in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

The regulations also allow “combination” approaches to training. Individuals who do not meet the qualifications of a trainer as an attorney, human resource professional, harassment prevention consultant, professor or instructor because they lack the requisite years of experience may team-teach with a trainer in classroom or webinar trainings. However, a qualified trainer must supervise these individuals and be available throughout the training to answer questions from training attendees.

All trainers must be qualified to train about the following subjects:

- what unlawful harassment, discrimination and retaliation are (under both California and federal law);
- what steps employers should take when harassing behavior occurs in the workplace;
- how to report a harassment complaint;
- how to respond to a harassment complaint;
- the employer’s obligation to conduct a workplace investigation of a harassment complaint;
- what constitutes retaliation and how to prevent it;

- essential components of an antiharassment policy; and
- the effect of harassment on harassed employees, coworkers, harassers and employers.<sup>63</sup>

These standards also apply to those responsible for writing, reviewing or approving self-study e-learning harassment training programs.<sup>64</sup> Such training programs must be developed and approved by a qualified trainer.<sup>65</sup> Instructional designers (that is, individuals with expertise in current instructional best practices) cannot develop a program on their own. Instead, they must develop the training content based upon material provided by a qualified trainer.<sup>66</sup>

### *What Methodologies Can Be Used to Deliver Training?*

Classroom training is the one method of training directly specified in A.B. 1825. However, the statute anticipates that other types of effective and interactive learning will comply. The regulations further elaborate by naming three approved delivery methods: classroom training, self-study e-learning, and live webcasts (often called webinars). Each delivery method, particularly the two types of e-learning, carries with it certain restrictions.

#### **Requirements for All Programs**

One requirement is common to all three methodologies – interactivity. All training programs must be interactive and “shall” (not “may”) include the following: (1) questions that assess learning; (2) skill-building activities that assess the supervisor’s understanding and application of content learned; and (3) numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain measurably engaged in the training.<sup>67</sup>

Simply put, the regulations now require a variety of interactive exercises. Static training programs, or programs with just one type of interaction (*e.g.*, multiple choice only) likely will not meet regulatory standards.

#### **Requirements Particular to Classroom Training**

The Commission’s confidence in the classroom training methodology is reflected in the regulations because there is only one requirement specific to this method — that it be conducted in a setting removed from the supervisor’s daily duties.<sup>68</sup>

#### **Requirements Particular to Computer or Web-Based Learning**

There are several requirements for e-learning that employers must consider before implementing computer-based learning — either live or self-study.

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<sup>63</sup> *Id.* § 7288.0(c)(1).

<sup>64</sup> *Id.* § 7288.0(a)(2)(B)-(C).

<sup>65</sup> *Id.*

<sup>66</sup> CAL. CODE REGS. tit. 2, § 7288.0(a)(6).

<sup>67</sup> *Id.* § 7288.0(a)(2)(E).

<sup>68</sup> *Id.* § 7288.0(a)(2)(A).

### Self-Study E-Learning

There are three important requirements in the use of self-study e-learning. The first requirement is that learners must have the opportunity to ask questions of a qualified person *while taking the program*. Thus, the program must provide a link or directions on how to contact a trainer directly.<sup>69</sup> Second, after the supervisor asks the question, a trainer must be available to answer and provide guidance and assistance on harassment training issues within a reasonable period of time. *Reasonable period of time* is defined as being no more than two business days after the question is asked.<sup>70</sup>

Employers must remember the questions and answers will likely be discoverable in subsequent litigation. Therefore, the employer must carefully select those who are answering the questions.

The third major requirement is that employers also must ensure attendees spend at least two hours taking the course. Although bookmarking functions are allowed, an e-learning program must contain some way to ensure each learner spends the requisite amount of time actually taking the program.<sup>71</sup>

### Live Webinars or Webcasts

Live webinars, in theory, combine the advantages of classroom training (an instructor who can pose and answer questions in real time) with e-learning (affording learners the convenience of not leaving their location). Like self-study programs, the challenge is to ensure that learners actually attend and participate in the entire program, as opposed to answering their e-mails while the course plays in the background. Therefore, those using webinars must document that each supervisor attended the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities.<sup>72</sup> Simply gathering individuals around a computer while they passively watch another individual participate in a live webinar will not suffice.

### What Subjects *Must* Be Included?

The regulations contain a preamble to the list of mandatory training subjects, which ensures that training programs promote the underlying purpose of A.B. 1825, as opposed to merely providing a defense against litigation. Specifically, the preamble states the learning objectives of A.B. 1825 compliant training and education are:

1. to assist California employers in changing or modifying workplace behaviors that create or contribute to “sexual harassment,” as that term is defined in California and federal law; and
2. to develop, foster and encourage a set of values in supervisory employees who complete mandated training and education that will assist them in preventing and effectively responding to incidents of sexual harassment.<sup>73</sup>

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<sup>69</sup> *Id.* § 7288.0(a)(2)(B).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 7288.0(b)(6).

<sup>72</sup> CAL. CODE REGS. tit. 2, § 7288.0(a)(2)(C).

<sup>73</sup> *Id.* § 7288.0(c).

To achieve these goals, all training programs must present, at a minimum, the following curriculum:<sup>74</sup>

- A definition of unlawful sexual harassment under the California Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, and discuss how harassment of an employee can cover more than one protected category.
- FEHA and Title VII statutory provisions concerning the prohibition against and the prevention of unlawful sexual harassment.
- The types of conduct that constitute harassment.
- Remedies available for harassment.
- Strategies to prevent harassment in the workplace.
- Practical examples of workplace harassment, including but not limited to: role plays, case studies, group discussions, and practical examples that employees will be able to identify with and apply in their employment setting. (It is unclear how employers will utilize role play and group discussion in self-study e-learning.)
- The limited confidentiality of the complaint process.
- Resources for victims of unlawful harassment, such as reporting procedures and proper channels through which, or to whom, alleged harassment should be reported.
- The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- Recommendations on how to respond when a supervisor is personally accused of harassment.
- The essential elements of an antiharassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy should be provided to supervisors. Regardless of whether the employer's policy is used as part of the training, the employer must give each supervisor a copy of its antiharassment policy and require each supervisor to read and acknowledge receipt of the policy.
- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. (This requirement is not mentioned in the regulations but is required by the express language of A.B 1825. Training programs should certainly include such examples.)

### What Subjects *Can* Be Included?

The plain language of A.B. 1825 requires employers to provide two hours of “sexual harassment” training. As the term “sexual harassment” is used 15 times in the statute, the following question naturally results: “May I conduct a two-hour program and discuss harassment on legally protected categories other than sex?” The regulations answer the question in the affirmative. They explicitly allow programs to contain “a definition . . . of

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<sup>74</sup> *Id.* § 7288.0(c) (1) - (11).

other forms of harassment covered by the FEHA, . . . and [to] discuss how harassment of an employee can cover more than one basis.”<sup>75</sup>

### *Tracking Participation*

Employers must now track compliance by keeping records of their harassment training. The certification records must include:

- the name of the supervisor trained;
- the training date;
- the type of training; and
- the name of the trainer, educator or instructional designer.

The records reflecting this information must be maintained for a minimum of two years.<sup>76</sup>

### *Newly Hired & Promoted Supervisors*

A.B. 1825 requires new supervisors be trained within six months of assuming their supervisory position, and once every two years thereafter. The regulations also contain a “duplicate” [“grandfather”] training provision that may be helpful in assessing the training requirements of supervisors hired from other organizations.<sup>77</sup>

A supervisor who has received anti-harassment training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer’s anti-harassment policy within six months of assuming the supervisor’s new supervisory position or within six months of the employer’s eligibility. That supervisor will otherwise be put on a two year tracking schedule based on the supervisor’s last harassment training.<sup>78</sup>

Note that it is the current employer who has the burden of establishing whether the prior training was legally compliant.<sup>79</sup>

### *Re-Training*

A.B. 1825 requires re-training supervisors every two years. For most employers, this means 2007 was the last training year and 2009 will be the next. Employers are allowed to use individual tracking or training year tracking methods.<sup>80</sup>

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<sup>75</sup> *Id.* § 7288.0(c)(1).

<sup>76</sup> *Id.* § 7288.0(b)(2).

<sup>77</sup> *Id.* § 7288.0(b)(4)-(5).

<sup>78</sup> CAL. CODE REGS. tit. 2, § 7288.0(b)(5).

<sup>79</sup> *Id.* § 7288.0(b)(5).

<sup>80</sup> *Id.* § 7288.0(b)(1)(A) - (B).

### *Individual Tracking (IT)*

An employer may track two years from the completion date of each individual supervisor's last training.<sup>81</sup> For example:

- Rosa completes her first training program on January 26, 2005. Rosa must be retrained no later than January 26, 2007, and subsequently no later than January 26, 2009, etc.

### *Training Year Tracking (TYT)*

The final regulations also confirm the availability of the training year tracking method. TYT may be used as an alternative to the IT method. TYT allows an employer to designate a training year in which it trains some or all of its supervisors, and requires supervisors so trained to be re-trained by the end of the next training year. The training year need not coincide with a calendar year; it may be any period of 12 consecutive months.

The regulations also clarify the TYT requirement as it applies to new supervisors:

For newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions and that training falls in a different training year, the employer may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new supervisors beyond the initial two year training year.<sup>82</sup>

Thus, an employer may shorten, but may not lengthen, the two-year re-training requirement for newly trained supervisors. For example:

- Rosa received training on January 15, 2005, during the employer's initial training year. Rosa must be retrained no later than December 31, 2007.
- Stephan was hired as a supervisor on April 1, 2008 and completed his required harassment training on June 1, 2008 (four months before the deadline for his training as a new supervisor). If his employer is using the TYT method, Stephan must be trained during the 2009 re-training year.

Even though the Commission has provided important guidance and clarification, the A.B. 1825 regulations provide significant challenges to employers who seek full compliance with the law.

### *Questions for Employers to Ask of Potential Harassment Training Providers*

Before choosing a training program, employers should ask the following questions of those individuals or organizations (internal or external) that the employer is considering to provide their A.B. 1825 training:

1. What are the specific qualifications of those who are designing and conducting the training program?
2. Can you identify (in less than 10 minutes) all of the training topics that are required to be included within the content of the program?

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<sup>81</sup> *Id.* § 7288.0(b)(1)(A).

<sup>82</sup> *Id.* § 7288.0(b)(1)(B).

3. For computer-based learning:
  - Self Study: What is your process for answering participant questions in less than two business days and in a manner that can withstand jury scrutiny?
  - Webinars: How do you track whether an individual completed an entire program?
4. When was the training program designed and when was it last updated?
5. Are there a variety of different types of interactive activities utilized throughout the program?
6. When using outside vendors, what support will they give you if the training is challenged?<sup>83</sup>

## § 15.2.1(b)

***Mandatory Sexual Harassment Training Under Connecticut Law***

The Connecticut Human Rights and Opportunities Act requires private and public employers with 50 or more employees to provide two hours of sexual harassment training and education to all supervisory employees and to all new supervisory employees within six months of the assumption of a supervisory position.<sup>84</sup> This statute's regulations provide significant detail on how to meet this mandate.<sup>85</sup>

The training must be conducted in a classroom-like setting, using clear and understandable language and in a format that allows participants to ask questions and receive answers. Audio, video and other teaching aides may be utilized to increase comprehension or to otherwise enhance the training process. In 2003, Connecticut's Commission on Human Rights and Opportunities issued an opinion letter stating that online courses will comply if the course "provides an opportunity for students to ask questions and obtain answers in a reasonably prompt manner." Thus live, on-line webinars, for example, would satisfy the Commission's guidelines.

The content of the training must include the following:

1. A description of all federal and state statutory provisions prohibiting sexual harassment in the work place with which the employer is required to comply, including, but not limited to, the Connecticut discriminatory employment practices statute (section 46a-60 of the Connecticut General Statutes) and Title VII of the Civil Rights Act of 1964, as amended.<sup>86</sup>
2. Definition of sexual harassment as explicitly set forth under Connecticut statutes.
3. A discussion of the types of conduct that may constitute sexual harassment under the law, including the fact that the harasser or the victim of harassment may be either a man or a woman and that harassment can occur involving persons of the same or opposite sex.

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<sup>83</sup> For a more comprehensive review of A.B. 1825, including practical recommendations, see David Goldman & Christopher Cobey, *White Paper: California's Mandatory Training Law: In-Depth Analysis and Practical Advice*, available at <http://www.littler.com>.

<sup>84</sup> CONN. GEN. STAT. § 46a-54(15)(B).

<sup>85</sup> CONN. AGENCIES REGS. § 46a-54-204.

<sup>86</sup> 42 U.S.C. §§ 2000e *et seq.*

4. A description of the remedies available in sexual harassment cases, including, but not limited to, cease and desist orders; hiring, promotion or reinstatement; compensatory damages and back pay.
5. A statement advising employees that individuals who commit acts of sexual harassment may be subject to both civil and criminal penalties.
6. A discussion of strategies to prevent sexual harassment in the workplace.

The regulations also encourage employers to discuss the following during the training:

1. Inform training participants that all complaints of sexual harassment must be taken seriously, and that once a complaint is made, supervisory employees should report it immediately to officials designated by the employer, and that the contents of the complaint are personal and confidential and are not to be disclosed except to those persons with a need to know.
2. Conduct experiential exercises such as role playing, co-ed group discussions and behavior modeling to facilitate understanding of what constitutes sexual harassment and how to prevent it.
3. Teach the importance of interpersonal skills such as listening and bringing participants to understand what a person who is sexually harassed may be experiencing.
4. Advise employees of the importance of preventive strategies to avoid the negative effects sexual harassment has upon both the victim and the overall productivity of the workplace due to interpersonal conflicts, poor performance, absenteeism, turnover and grievances.
5. Explain the benefits of learning about and eliminating sexual harassment, which include a more positive work environment with greater productivity and potentially lower exposure to liability, in that employers — and supervisors personally — have been held liable when it is shown that they knew or should have known of the harassment.
6. Explain the employer's policy against sexual harassment, including a description of the procedures available for reporting instances of sexual harassment and the types of disciplinary actions which can and will be taken against persons who have been found to have engaged in sexual harassment.
7. Discuss the perceptual and communication differences among all persons and, in this context, the concepts of “reasonable woman” and “reasonable man” developed in federal sexual harassment cases.

#### § 15.2.1(c)

#### *Mandatory Sexual Harassment Training Under Maine Law*

In workplaces with 15 or more employees, Maine employers must conduct a training program for all new employees within one year of commencement of employment that includes, at a minimum, the following information:

- the illegality of sexual harassment;
- the definition of sexual harassment under state and federal laws and federal regulations, including the Maine Human Rights Act and Title VII;

- a description of sexual harassment, utilizing examples;
- the internal complaint process available to the employee;
- the legal recourse and complaint process available through the commission;
- directions on how to contact the commission; and
- the protection against retaliation.

Employers must conduct additional training for supervisory and managerial employees within one year of commencement of employment. This training includes, at a minimum, the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.<sup>87</sup>

### § 15.2.1(d)

#### *Ethics & Compliance Training Under Amended Federal Sentencing Guidelines*

The Sarbanes-Oxley Act of 2002, one of the most far-reaching pieces of corporate reform legislation in recent memory, is the most important law in this area. The Act contains provisions that received little or no public attention but which have potentially significant implications for employers.

Perhaps the most significant employment law change arising from the Act is the creation of a new federal cause of action entitled “Whistleblower Protection for Employees of Publicly Traded Companies.” Under this section of the statute, an employee of a publicly traded company who provides information about actions that he or she reasonably believes to be a violation of federal securities law, the rules of the Securities and Exchange Commission (SEC), or “any provision of Federal law relating to fraud against shareholders” is given federal statutory protection. To warrant this protection, the employee must provide information, or cause the information to be provided, or assist in an investigation into conduct that the employee reasonably believes violates securities law or the law barring fraud against shareholders.

The disclosures protected include information made available to a federal regulatory or law enforcement agency, a member of Congress, a congressional committee or, more broadly, any person with supervisory authority over the company or any person at the employer with the power to “investigate, discover or terminate misconduct.” The Act also protects an employee who assists in any proceeding actually filed or “about to be filed” relating to securities fraud or fraud against shareholders. The protected assistance includes filings, testimony, participation, and assistance in such proceedings. The employee who engages in this protected activity is entitled to be exempt from discharge, demotion, suspension, harassment or any other type of discrimination.

The far-reaching scope of the Act is emphasized by the fact that it covers not only publicly traded companies, but also their officers, employees, contractors, subcontractors and agents. This language would appear to leave officers and employees open to liability in their individual capacities. In addition, the Act would appear to create a claim against companies or organizations which do business with publicly traded companies.

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<sup>87</sup> ME. REV. STAT. ANN. tit. 26, § 807(3).

In response to the Sarbanes-Oxley Act of 2002, the U.S. Sentencing Commission amended their Sentencing Guidelines in 2004 to strengthen the requirements for corporate compliance. Under the amended guidelines, judges must consider whether a convicted corporation had established an “effective compliance program” prior to the violation taking place; in other words, whether the corporation had taken appropriate steps to prevent and detect violations of ethics laws. The 2004 amendment imposes the requirement that all employees, including high-level personnel, receive periodic training pertaining to their organization’s ethics and compliance standards.

Comprehensive and periodic training on workplace ethics to prevent and detect criminal conduct has now become an imperative. If an organization undergoes scrutiny regarding its ethics and compliance practices under Sarbanes-Oxley or other federal statutes, evidence of an effective ethics and compliance program will significantly reduce liability exposure. Simply demonstrating that you have provided employees with an ethics policy or code of conduct is not legally sufficient; a formal training program is required under the amended guidelines.

In January 2005, the U.S. Supreme Court set aside part of the federal sentencing guidelines in a case concerning pronounced sentences for drug offenses.<sup>88</sup> While not addressing the guidelines’ corporate application in its opinion, the Court’s decision has effectively left the “mandatory” nature of the Sarbanes-Oxley sentencing guidelines unclear. However, the Court did find that judges should continue to consult the guidelines in determining sentences on an advisory basis at least until Congress can reconsider the mandatory nature of the sentencing scheme. Thus, employers looking to keep their managers out of jail should consider ethics training as mandatory.

Until more specific guidance is issued, organizations will be well-served to address the following as they implement ethics and compliance standards:

- Can your organization demonstrate a commitment to compliance with ethics law at the “highest levels” of management?
- Is compliance training universally provided to all employees, and is periodic evaluation of the effectiveness of compliance programs taking place?
- Among specific topics to address in the training, are the following areas covered?
  - confidential information;
  - insider trading;
  - conflicts of interest;
  - proper accounting practices;
  - Sarbanes-Oxley Act requirements – particularly, understanding antiretaliation and whistleblower protections of this and other laws;
  - proper financial reporting procedures and financial records maintenance;
  - use of organizational property;
  - handling gifts and favors; and
  - reporting ethical and compliance concerns under your organization’s policies.

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<sup>88</sup> *United States v. Booker*, 543 U.S. 220 (2005).

## § 15.2.2

**B. FARAGHER & ELLERTH: THE AFFIRMATIVE DEFENSE  
& ITS IMPACT ON THE LAW OF TRAINING**

*Faragher* and *Ellerth* — these two sexual harassment cases grabbed headlines in every daily newspaper across the country. The U.S. Supreme Court concluded that if a supervisor made remarks about a subordinate’s breasts, told her he could make her life “very easy or very hard,” and said she might not get a promotion because she was not “loose enough,” that was sexual harassment even though she was never fired or demoted and in fact got a promotion. The Court also found that when supervisory male lifeguards touched the bodies of female subordinates without invitation, told lewd stories in their presence, and pantomimed oral sex in front of them, that was sexual harassment also. Those who read the newspaper accounts of these decisions and concluded that these rather obvious holdings merely refined the legal definition of sexual harassment missed several important points.

The real focus in these two cases, *Burlington Industries, Inc. v. Ellerth*,<sup>89</sup> and *Faragher v. City of Boca Raton*,<sup>90</sup> was not on what constituted sexual harassment, but on who was liable for it, under what circumstances, and why. The answers to these questions have had a definite effect on the emerging law of training during these last few years.

## § 15.2.2(a)

***Failure to Adequately Train About Sexual Harassment***

In *Ellerth*, the company argued that there could be no supervisory harassment absent a tangible job detriment. The Court rejected that argument. In *Faragher*, the City of Boca Raton argued that it could not be liable for what it did not know. The Court rejected that argument as well.

The Supreme Court held that an employer is *strictly liable* under Title VII for any gender-based harassment by a supervisor that results in a tangible job detriment. If the harassment does not result in a tangible job detriment, the employer is still strictly liable. Under those circumstances, however, the employer can raise an affirmative defense. It can show that: (1) it used “reasonable care” to prevent and correct any harassment; and (2) the employee “unreasonably” failed to complain.

Justice David Souter, writing for a seven-justice majority in one of the two cases, indicated that the root of the City of Boca Raton’s liability was not only the intimidating authority its supervisors wielded, but also the fact that the City had failed in its duty to adequately train these supervisors:

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim’s employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than of common workers; employers have

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<sup>89</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>90</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

greater opportunity and incentive to screen them, train them, and monitor their performance.<sup>91</sup>

The Supreme Court thus sent a clear message in these two linked decisions: The failure to adequately train supervisors regarding all appropriate aspects of sexual harassment creates Title VII liability and may deprive the employer of its best defense.

### *All Protected Categories Covered*

Although these two suits focused exclusively on substantive issues related to sexual harassment, federal courts have applied these principles to harassment claims based on nearly all the protected categories.<sup>92</sup>

The Supreme Court implicitly endorsed that expansion when it explicitly drew a parallel between race and sex harassment in *Faragher*, stating that:

Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.<sup>93</sup>

Indeed, the EEOC followed this line of thinking when it declared that the *Faragher* and *Ellerth* standards apply equally to all forms of harassment forbidden by federal antidiscrimination laws.<sup>94</sup>

The EEOC reported a dramatic rise since September 11th in harassment charges based on conduct targeted at Muslims or those with Arab, Afghani, Middle Eastern or South Asian national origins.<sup>95</sup> Thus, employers may have to rely on the affirmative defense more often in claims including a greater variety of categories. Thus, employers can expect to need to raise the affirmative defense in a wide variety of cases.

### *The EEOC's Mandate to Train*

The requirement to train, implicit in these landmark Supreme Court cases, was further made explicit by the EEOC's 1999 guidelines on establishing an affirmative defense:

If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities [under the laws prohibiting harassment]. . . . An employer should ensure that its supervisors

<sup>91</sup> *Faragher*, 524 U.S. at 803 (emphasis added).

<sup>92</sup> See, e.g., *Flowers v. Southern Reg. Physicians Servs.*, 247 F.3d 229 (5th Cir. 2001) (disability harassment under the ADA); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) (retaliatory harassment); *Wallin v. Minnesota Dep't of Corr.*, 153 F.3d 681 (8th Cir. 1998), cert. denied, 526 U.S. 1004 (1999) (disability harassment); *Tomassi v. Insignia Fin. Group, Inc.*, 398 F. Supp. 2d 263 (S.D.N.Y. 2005) (age harassment under ADEA); *Keaton v. State of Ohio*, 2002 U.S. Dist. LEXIS 19993 (S.D. Ohio June 3, 2002) (racial harassment); *Gotfryd v. Book Covers, Inc.*, 1999 U.S. Dist. LEXIS 235 (D. Ill. Jan. 6, 1999) (national origin harassment); *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998) (national origin discrimination).

<sup>93</sup> *Faragher*, 524 U.S. at 787 n.1.

<sup>94</sup> *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, available at <http://www.eeoc.gov/policy/docs/harassment.html>.

<sup>95</sup> See *Muslim/Arab Employment Discrimination Charges Since 9/11*, available at <http://www.eeoc.gov>.

and managers understand their responsibilities under the organization's antiharassment policy and complaint procedures. Periodic training can help achieve that result. . . . An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. . . . The employer should ensure that the individual who conducts the investigation would objectively gather and consider the relevant facts. Whoever conducts the investigation should be well trained in the skills that are required for interviewing witnesses and evaluating credibility.<sup>96</sup>

The EEOC's position is clear: To have the best chance to avoid liability for workplace harassment, employers must train every employee and every manager on their responsibilities in preventing harassment at work.

### § 15.2.2(b)

## ***Cases Discussing Harassment Training in the Wake of Supreme Court Decisions***

### ***Application of Faragher/Ellerth Affirmative Defense***

In determining if an affirmative defense exists, courts have considered not only whether an employer has an antiharassment policy, but also whether the policy has been effectively communicated to supervisors and employees. The EEOC has taken the position that an employer has a duty to prevent harassment, which extends beyond merely implementing an antiharassment policy.<sup>97</sup> Following this line of thought, courts have found that proof of sexual harassment training can be essential to an employer's ability to assert the affirmative defense. Indeed, some courts have held that training is an essential element in proving that the employer "exercised reasonable care to prevent and correct harassing behavior" under the first prong of the defense.

### ***Training Managers — A Necessary Part of the Affirmative Defense***

Federal and state courts in certain jurisdictions have held that training managers on preventing workplace harassment is an essential element in the establishing *Faragher/Ellerth's* affirmative defense.<sup>98</sup> The line of cases from these courts hold that merely having a harassment policy is not enough to satisfy *Faragher/Ellerth*. In addition, employers must show the following:

1. training for the company's supervisors regarding the harassment policy;
2. the policy permits both informal and formal complaints of harassment to be made; and

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<sup>96</sup> *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, available at <http://www.eeoc.gov/policy/docs/harassment.html>.

<sup>97</sup> "An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an antiharassment policy and complaint procedure." *Id.*

<sup>98</sup> *Clark v. United Parcel Serv., Inc.* 400 F.3d 341 (6th Cir. 2005); *Montero v. Agco Corp.* 192 F.3d 856 (8th Cir. 1999); *Shaw v. Autozone, Inc.* 180 F.3d 806, 811-12 (7th Cir. 1999); *Soto v. John Morrell & Co.*, 285 F. Supp. 2d 1146 (N.D. Iowa 2003); *Hawkins v. Groot Indus., Inc.*, 2003 U.S. Dist. LEXIS 5051 (N.D. Ill. Mar. 31, 2003).

3. the policy provides a mechanism for bypassing a harassing supervisor when making a complaint.<sup>99</sup>

*Soto v. John Morrell & Co.*, shows just how stringent courts have become in requiring the first prong (training) of the above stated test. In that case, the employer promulgated its harassment policy in a separate document in both English and Spanish. All employees received a copy of the policy at orientation and annually thereafter, and were required to sign an acknowledgement. This acknowledgement stated that the employee had received the policy and gave the company's specific contact information for its EEO officer. The personnel and training departments displayed large posters detailing the company's antiharassment policy. Finally, the employer's president sent a letter to all employees, including the plaintiff, reminding them that harassment was against company policy.

This proactive, consistent approach to preventing workplace harassment was impressive. Yet, it failed to include one essential element — manager training. Managers were required to be trained yearly but that requirement apparently went unfulfilled. The Director of Human Resources did speak with managers yearly on the subject, claiming this was “training.” His testimony fell apart upon examination by the plaintiff's attorney:

Q: What guidelines requirements does corporate have for you in terms of what you must do in training, is there any written policy or guideline saying this is what you must do, this is how you must do it?

A: (Director of HR): Not that I'm aware of.

Q: Has corporate ever provided you like a script of what is to be told to employees regarding sexual harassment?

A: No.

Q: Have they ever provided you any policies that say you must do this training with its employees regarding sexual harassment and then provide the training material?

A: No, other than the statements and placards and stuff that I have alluded to earlier.

Q: So they don't have a program that they say this is the program you must teach?

A: No.

Q: So there's no uniform method of communicating the sexual harassment policy to the employees of John Morrell, is that correct?

A: I believe that's correct.<sup>100</sup>

Based on this testimony, the employer could not verify that he had provided training to the plaintiff's manager. Thus, the court denied the employer's request for summary judgment on the affirmative defense and let the case proceed to trial.<sup>101</sup>

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<sup>99</sup> *Clark*, 400 F.3d at 349-50. *See also Soto*, 285 F. Supp. 2d at 1162 (in addition the employer must provide training for the company's supervisors regarding harassment, an express antiretaliation provision; and multiple complaint channels for reporting the harassing conduct).

<sup>100</sup> *Soto*, 285 F. Supp. 2d at 1165.

### *Training Employees — Evidence of Good Faith Compliance with Title VII*

The need to provide antidiscrimination training to employees, as well as managers, has been at issue in several recent cases. For example, in refusing to reverse a punitive damages award in a gender discrimination case, the Court of Appeals for the First Circuit considered the fact that the employer had not provided antidiscrimination training as evidence that the employer's efforts to comply with Title VII were "anemic."<sup>102</sup> And in another decision, a federal district court declined to allow the *Faragher/Ellerth* defense in part because the plaintiff, an hourly employee, never received any antiharassment training.

[A]t this juncture, it is appropriate to mention that the value of sexual harassment training to all employees as evidence that an employer has taken prophylactic action should not be overlooked. At least two district courts have precluded an award of punitive damages where the employer's sexual harassment training program was deemed evidence of employer good faith.<sup>103</sup>

### *Successful Application of the Affirmative Defense*

Compare how the employer fared in the *Soto* decision with those employers who combined proactive harassment prevention measures with training. Federal courts and the EEOC have determined that an employer which distributes an antiharassment policy and which trains its supervisors and employees on harassment prevention can establish the affirmative defense.<sup>104</sup> Indeed, employers who take regular and comprehensive measures to prevent harassment, as opposed to a one-time approach, will find themselves in a good position to have their motions for summary judgment granted.<sup>105</sup> Such a positive result can occur even when the employer's actions were not always perfect.

In *Wyatt v. Hunt Plywood*, Ms. Wyatt alleged that a supervisor committed harassment by referring to her in "vulgar terms" and by continually asking her to have sex.<sup>106</sup> The court found that the pattern of harassment fell into three specific time periods. Throughout the three periods, the company took a proactive approach to preventing harassment. It promulgated to all employees a harassment policy that included multiple ways to report harassment. The company also held regular training sessions with its managers on preventing harassment. Finally, after Ms. Wyatt's complaint of harassment, the company concluded a thorough

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<sup>101</sup> *Id.* See also *EEOC v. Smokin' Joe's Tobacco Shop, Inc.*, 2007 U.S. Dist. LEXIS 31512 (E.D. Pa. Apr. 27, 2007) (affirmative defense failed because no training was conducted); *Kolpien v. Family Dollar Stores of Wis., Inc.*, 402 F. Supp. 2d 971 (W.D. Wis. 2005) (numerous efforts to communicate the policy, including a reference on a paystub, were insufficient to show the employer exercised reasonable care to make employee aware of the policy); *Pierson v. Department of the Air Force Agency*, 2007 EEOPUB LEXIS 2844 (July 23, 2007).

<sup>102</sup> *Rodriguez-Torres v. Carribean Forms Manufactirere, Inc.*, 399 F. 3d 52, 65 (1st Cir. 2005).

<sup>103</sup> *Bauer v. Carson Tahoe Hosp.*, 2006 U.S. App. LEXIS 30909 (9th Cir. Nov. 17, 2006); *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075, 1095 (M.D. Ala. 2005) (citations omitted), *aff'd*, 425 F.3d 1313 (11th Cir. 2005); see also *Hull v. APCOA/Standard Parking Corp.*, 2000 U.S. Dist. LEXIS 1658, at \*15 (N.D. Ill. Feb. 14, 2000); *Woodward v. Ameritech Mobile Commc'ns, Inc.*, 2000 U.S. Dist. LEXIS 7133, at \*16 (S.D. Ind. Mar. 20, 2000).

<sup>104</sup> See, e.g., *Kopczyk v. Amphenol Corp.*, 2003 U.S. Dist. LEXIS 18885 (N.D. Ill. Oct. 22, 2003); *Reed v. MBNA Mktg. Sys.*, 231 F. Supp. 2d 363 (D. Me. 2002), *vacated & remanded by* 333 F.3d 27 (1st Cir. 2003); *Seth v. Postmaster Gen.*, 2002 EEOPUB LEXIS 6546 (Sept. 9, 2002).

<sup>105</sup> See, e.g., *Harper v. City of Jackson Mun. Sch. Dist.*, 149 Fed. Appx. 295 (5th Cir. 2005) (training with regular updates part of an affirmative defense).

<sup>106</sup> 297 F.3d 405, 407 (5th Cir. 2002).

investigation within three days resulting in the harasser being terminated. The court was impressed, holding that the company's approach was "more than adequate" to entitle it to summary judgment regarding the second and third periods of harassment.<sup>107</sup> Regarding the initial period of harassment, Ms. Hyatt had complained to her supervisor, who did nothing in response. The court found that the company had taken reasonable steps to prevent harassment. Because the plaintiff did complain, the company's motion for summary judgment could not be granted.

Continual efforts to prevent harassment, including training, can also help establish the second prong of the *Faragher/Ellerth* defense — the plaintiff's failure to reasonably complain about harassment to the employer. In *Frisk v. Postmaster General*, the plaintiff's failed relationship with a supervisor led to years of sexually harassing conduct.<sup>108</sup> Yet, the plaintiff never availed herself of the several complaint procedures contained in the Post Office's policy. Was the plaintiff's failure to complain reasonable? The EEOC answered "no" based largely on employer's proactive steps to encourage complaints. These efforts included five separate posters relating to harassment being posted at the plaintiff's place of work, three publications were mailed to the plaintiff and other employees on EEO matters, including harassment, and the plaintiff received annual training.<sup>109</sup>

Continual efforts to prevent harassment also paid off for employers even when their remedial measures were not perfect. In *Fisher v. Electronic Data Systems*, the plaintiff alleged that she was subjected to sexual comments, touching, and implications that she would be fired if she refused her former supervisor's advances.<sup>110</sup> However, the plaintiff did not inform anyone about the conduct for over a year. In reviewing whether the employer established the affirmative defense, the court looked at two issues: (1) did the employer attempt to prevent the harassment; and (2) once the harassment occurred did the employer take effective remedial action.

Regarding the first prong, the employer maintained an antiharassment policy and trained the plaintiff and her manager about the conduct. Even the plaintiff acknowledged that this was sufficient to show the employer's good faith efforts to prevent harassment.<sup>111</sup> The plaintiff did question the adequacy of the employer's investigation. However, the court deemed those flaws minor, especially in light of the employer's efforts to prevent harassment. Thus, the employer established the affirmative defense, and the plaintiff's complaint was dismissed.<sup>112</sup>

Conducting training before the harassment claim occurs gives an employer the best chance of showing that it took "reasonable steps" to prevent harassment. Many courts note the fact that training occurring well after the alleged harassment as a reason to deny the affirmative defense.<sup>113</sup> However, conducting training even in the post-complaint stage can help an

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<sup>107</sup> *Id.* at 413-14.

<sup>108</sup> 2003 EEO PUB LEXIS 4998 (Aug. 28, 2003).

<sup>109</sup> *Id.* See also *Gordon v. Shafer Contracting Co.*, 2006 U.S. Dist. LEXIS 24993 (D. Minn. Mar. 22, 2006) (review policy at annual meeting helpful).

<sup>110</sup> 278 F. Supp. 2d 980 (S.D. Iowa 2003).

<sup>111</sup> *Id.* at 990-91.

<sup>112</sup> *Id.* at 990-93. See also *Walton v. Johnson & Johnson Servs.*, 203 F. Supp. 2d 1312, 1324-25 (M.D. Fla. 2002) (training plus prompt remedial actions were sufficient to establish an affirmative defense although the policy did not fully describe to whom harassment should be reported).

<sup>113</sup> *Burford v. McDonald's Corp.*, 321 F. Supp. 2d 358 (D. Conn. 2004).

employer avoid liability.<sup>114</sup> In *Ferencich v. Merritt*, the Board of County Commissioners was not liable for the sexually harassing behavior of a courthouse supervisor, because the evidence showed that the employer did not have a policy of allowing sexual harassment, and it acted quickly to discipline the offender, the Court of Appeals for the Tenth Circuit ruled. There, the plaintiff alleged that almost immediately after she started work at the County her supervisor began making sexual comments and sending her sexually explicit e-mails. The plaintiff finally complained after the supervisor twice placed her hand on his clothed genitals. The County's personnel director and assistant chief deputy took swift, authoritative action. After an investigation, they permanently demoted the supervisor and required him to undergo sexual harassment training. Unfortunately, the supervisor committed another incident of potential harassment, and the county terminated his employment. The court held that the combination of the policy, grievance procedure, and swift remedial action, which included training, were sufficient to insulate the County from liability.<sup>115</sup>

It is interesting that in many of the above cases the employers' actions, while admirable, were less than ideal. In *Wyatt*, the supervisor who fielded the initial complaint did nothing. Yet, this failure did not "poison the well" so that the company's regular training plus prompt reaction to the final complaint were enough to establish an affirmative defense to all but the first period of harassment.<sup>116</sup> In *Walton*, the company policy lacked a clear reporting chain, which was made up for by annual letters to employees and supervisory harassment training.<sup>117</sup> In *Fisher*, the employer's investigation, while quick, did not follow all of the most prudent procedures to ensure effectiveness.<sup>118</sup> The Board of Commissioners' quick response, including training, after harassment occurred was enough to establish a defense in *Ferencich v. Merritt*.<sup>119</sup> The message the courts are sending seems clear. While perfection is not required, employers' harassment efforts, including training, must be consistent and effective to establish an affirmative defense.<sup>120</sup>

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<sup>114</sup> 2003 U.S. App. LEXIS 21951 (10th Cir. Oct. 27, 2003) (unpublished).

<sup>115</sup> *Id.*; see also *Bryant v. School Bd. of Miami Dade County* 142 Fed. Appx. 382 (11th Cir. 2005) (extensive posting of the sexual harassment policy, an immediate investigation, and harassment training as part of remedial action help the employer establish an affirmative defense); *Jones v. Illinois Dep't of Transp.*, 2001 U.S. Dist. LEXIS 20007 (N.D. Ill. Nov. 27, 2001) (the Department of Transportation's immediate action once it became aware of racial jokes, including training employees about the zero-tolerance policy for workplace discrimination and harassment prevented liability for the alleged harassment). Employers should not, however, rely on after-the-fact training as a magic bullet against liability. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002) (evidence of post-harassment training irrelevant to defense of harassment claims brought against a nonsupervisory employee); *Boggs v. Die Fliedemaus*, No. 99-Civ-2451 (S.D.N.Y. Oct. 7, 2003) (training as part of disciplinary action was not enough to establish an affirmative defense when the harassment was tolerated by several managers over a long time period).

<sup>116</sup> *Wyatt*, 297 F.2d at 413.

<sup>117</sup> *Walton*, 203 F. Supp. 2d at 1324-25.

<sup>118</sup> *Fisher*, 278 F. Supp. 2d at 980.

<sup>119</sup> *Ferencich*, 2003 U.S. App. LEXIS 21951.

<sup>120</sup> See also *Shaw v. Autozone*, 180 F.3d 806, 812 (7th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000) (affirmative defense established even though the plaintiff never received the policy when the employer trained employees); *Hare v. H&R Indus., Inc.*, 67 Fed. Appx. 114 (3d Cir. 2003) (failure to train was part of the reason that the court denied the affirmative defense); *Fuller v. Caterpillar, Inc.*, 124 F. Supp. 2d 610 (N.D. Ill. 2000) (employer conducted harassment prevention training two or three times a year for all employees).

### *Employer's Failure to Adequately Train Managers Defeats Application of the Affirmative Defense*

Equally important to consider are those cases in which employers failed to establish the affirmative defense in part due to a perceived lack of or insufficient training about harassment. Often, employers with antiharassment policies have been unsuccessful in raising the affirmative defense because their policies were not effectively communicated to supervisors or employees. This problem could have been corrected by high-quality training.

Training that does not adequately explain to employees how to prevent and report harassment may be insufficient to establish an affirmative defense.<sup>121</sup> In *Elmasry*, the plaintiff alleged sexual harassment by her supervisor. The plaintiff claimed that the supervisor made numerous inappropriate sexual comments, propositioned her on several occasions, inappropriately touched her and fired her when she did not reciprocate. The company's motion for summary judgment regarding the harassment claim was denied. The court reasoned that the plaintiff raised genuine issues of fact as to whether the employer really had taken reasonable care to prevent harassment. Although the plaintiff undisputedly received the company's antiharassment policy and complaint procedure, she was not "effectively made aware of that policy, because no one specifically pointed it out or explained it to her." Further, the company provided just "one training seminar, a portion of which dealt with sexual harassment."<sup>122</sup>

In *Kolpien v. Family Dollar Stores of Wisconsin, Inc.*, the employer proactively attempted to prevent harassment from occurring.<sup>123</sup> The handbook contained both an antiharassment policy and an open door policy, which were given to the employees during employment. The plaintiff herself signed an acknowledgment that she received such policies. Several posters about harassment prevention were placed around the workplace, including at the store where the plaintiff worked. While the employer did provide some training to upper level managers, "there [was] no evidence that anyone below the district manager received sexual harassment training." Instead, the employer simply delegated to store managers the duty to inform employees about harassment prevention. The failure to more aggressively train lower level managers and employees lead the court to deny the employer's request for summary judgment.

In *Williams v. Spartan Communications, Inc.*, the court reversed a grant of summary judgment to an employer, pointing out that although the employer had a policy, the accused harasser/supervisor had not been trained on sexual harassment or the policy, and there was other evidence of upper management harassment.<sup>124</sup> Thus, even though the plaintiff knew of the policy and the employer forced the alleged perpetrator to resign after the allegations, this employer had to continue the costly journey toward trial, in part, because it had not trained its supervisors. Having a sexual harassment policy but failing to disseminate it or train managers

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<sup>121</sup> *Elmasry v. Veith*, 2000 U.S. Dist. LEXIS 340 (D.N.H. Jan. 7, 2000).

<sup>122</sup> See also *Carpenter v. AADG, Inc.*, 2007 U.S. Dist. LEXIS 94240, at \*57 (N.D. Iowa Dec. 24, 2007) (no evidence of "regular training" was one reason why the employer could not establish an affirmative defense); *Miller v. Woodharbor*, 80 F. Supp. 2d 1026 (D. Iowa 2000) (employer did not exercise reasonable care to prevent the harassment since it had failed to train its supervisors and its policy lacked antiretaliation language and a detailed complaint procedure).

<sup>123</sup> *Kolpien*, 2005 U.S. Dist. LEXIS 30060, at \*\*29-32 (W.D. Wis. Nov. 28, 2005).

<sup>124</sup> 2000 U.S. App. LEXIS 5776, at \*6 (4th Cir. Mar. 30, 2000).

and employees on the subject prevented another employer from winning its summary judgment motion in the harassment portion of a lawsuit.<sup>125</sup>

### *Training Internal Investigators Has Become Critical*

In its Enforcement Guidance on avoiding vicarious liability in harassment litigation, the EEOC suggests the following:

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. *Whoever conducts the investigation should be well-trained in the skills* that are required for interviewing witnesses and evaluating credibility. (emphasis supplied)<sup>126</sup>

This view has been supported by the courts.<sup>127</sup> In reviewing the employer's efforts to prevent harassment, the court noted the individual who investigated the plaintiff's complaint had no special training regarding sexual harassment investigations.<sup>128</sup> Thus, the employer's attempt to escape liability was denied.

In addition to invalidating an affirmative defense, mistakes during the investigation can prejudice the employer in subsequent litigation. For example, in *Pierson v. Department of Air Force*, the Air Force's investigation report deemed the accused's conduct as "mild sexual harassment."<sup>129</sup> The court took this statement as an admission that sexual harassment had occurred, that the employer knew about the conduct, and failed to take appropriate remedial action. Thus, the benefit of having properly trained investigators goes beyond establishing an affirmative defense.

### *Training Must Be Effective to Establish an Affirmative Defense*

It should be recognized that while training is an important, possibly indispensable step, in avoiding liability for harassment, it is not a magic shield. In one case brought against Compaq, the company had an antiharassment policy that was posted in the workplace.<sup>130</sup> The plaintiff received training in sexual harassment prevention that included a discussion of ways

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<sup>125</sup> See also *Nuri v. PRC, Inc.*, 13 F. Supp. 2d 1296 (M.D. Ala. 1998) (employer fails to establish the affirmative defense even though it had a "comprehensive, vigorously enforced policy" against sexual harassment, because the plaintiff presented substantial evidence that the policy was not well known and, in fact, was not known at all to employees in her particular office); *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371 (10th Cir. 1998) (plaintiff had not been aware of the harassment policy prior to the alleged harassment); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812 (W.D.N.Y. 1998) (same).

<sup>126</sup> *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, available at <http://www.eeoc.gov/policy/docs/harassment.html>.

<sup>127</sup> *Smokin' Joe's Tobacco Shop*, 2007 U.S. Dist. LEXIS 31512, at \*\*25-26.

<sup>128</sup> *Id.* at \*\*25-26. See also *EEOC v. Rotary Corp.*, 297 F. Supp. 2d 643 (N.D.N.Y. 2003) (In reviewing the employer's efforts to prevent harassment, the court noted "most importantly, . . . trained professionals in place to address [racial and sexual harassment] were nonexistent."); *Ciesielski v. Hooters Mgmt. Corp.*, 2004 U.S. Dist. LEXIS 25884 (N.D. Ill. Dec. 23, 2004) (failure to investigate supported a jury's denial of the *Kolstad* defense, even though the company had a policy and did annual training).

<sup>129</sup> 2007 EEOC LEXIS 2844, at \*4 (July 23, 2007).

<sup>130</sup> *Munroe v. Compaq Computer Corp.*, 2002 U.S. Dist. LEXIS 20821 (D.N.H. 2002).

that an employee could make a complaint. Yet, once she made an apparently valid complaint of sexual harassment against her supervisor, the computer maker did not monitor or limit the manager's authority. Thus, the court held that Compaq could not establish an affirmative defense to harassment liability and denied the company's motion for summary judgment.<sup>131</sup>

Courts are scrutinizing the details of the training before releasing organizations from liability under the affirmative defense. As explained above in *Soto*, the company's failure to provide any detail about what was presented during training barred the application of the affirmative defense.<sup>132</sup> In *Lapenta v. City of Philadelphia*, the court held that "one half day training seminar on sexual harassment, . . . almost ten years prior to the alleged harassment . . . [is] insufficient as a preventative measure."<sup>133</sup> General discrimination training or training focused on protected category will not be a general panacea against liability. In *Freeman v. Spencer Gifts*, the company had conducted sexual harassment training, which the court found irrelevant in the attempt to establish an affirmative defense to a racial discrimination claim.<sup>134</sup>

The lesson from these cases is that training must be consistent and of such good quality that it helps employees change their behavior to comply with the law.

### § 15.2.3

## C. STATES PROVIDING AN EVEN HIGHER STANDARD FOR AFFIRMATIVE DEFENSE

State courts have been even more emphatic in stating that employers who fail to train their employees on preventing harassment evidence negligence in monitoring their workforces, and therefore, will be without a defense to liability.<sup>135</sup> In *Gaines v. Bellino*, the plaintiff, a Corrections Officer, alleged that her shift supervisor grabbed her face and kissed her against her will while the two were alone in the jail.<sup>136</sup> Although the plaintiff reported this misconduct to one of her supervisors, the supervisor did not report this incident to his superiors because the county had not provided him with any antisexual harassment training. (In fact, several corrections officers testified that they had not received any training concerning the county's sexual harassment policy.) The plaintiff's allegations were ultimately brought to the attention of the county's Director of Personnel as a result of the plaintiff's deposition testimony in an unrelated case.<sup>137</sup> Following an internal investigation of her claims, the county suspended the supervisor, who retired shortly thereafter.<sup>138</sup>

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<sup>131</sup> See also *Burford v. McDonald's Corp.*, 321 F. Supp. 2d 358 (D. Conn. 2004) (affirmative defense not available when plaintiff communicated her harassment concerns during a performance review, even though training had occurred); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 956-57 (N.D. Ill. 2001) (affirmative defense denied when the same managers who received training also failed to take action once the warning signs of sexual harassment occurred).

<sup>132</sup> *Soto*, 285 F. Supp. 2d at 1165.

<sup>133</sup> *Lapenta v. City of Phila.*, 2004 U.S. Dist. LEXIS 14308, at \*7 (E.D. Pa. July 20, 2004).

<sup>134</sup> *Freeman v. Spencer Gifts*, 333 F. Supp. 2d 1114, 1127-28 (D. Kan. 2004).

<sup>135</sup> See, e.g., *Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

<sup>136</sup> *Id.* at 324.

<sup>137</sup> *Id.* at 326.

<sup>138</sup> *Id.*

The plaintiff filed suit in 1998 against supervisor and the County Correctional Facility alleging violations of the New Jersey Law Against Discrimination (NJLAD). The county moved for a summary dismissal of the plaintiff's claims without a trial, relying on its antiharassment policy as an affirmative defense to the plaintiff's claims.<sup>139</sup> Both the trial and appellate courts agreed with the county's position, concluding that the county was shielded, as a matter of law, from vicarious liability for supervisor's misconduct.<sup>140</sup> The New Jersey Supreme Court reversed both lower court rulings and remanded the case for further proceedings, questioning, among other things, what training, if any, was provided by the county to reinforce its espoused antiharassment policy.<sup>141</sup> The New Jersey Supreme Court in *Gaines* also reaffirmed the relevant factors to determine whether an employer had acted negligently in failing to establish an antiharassment policy in its workplace, that is, the existence of: (1) formal policies prohibiting harassment in the workplace; (2) complaint structures for employees' use, both formal and informal in nature; (3) antiharassment training, which must be mandatory for supervisors and managers, and must be available to all employees of the organization; (4) effective sensing and monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment to the highest levels of the employer that harassment would not be tolerated, and demonstration of that policy commitment by consistent practice.<sup>142</sup>

In another New Jersey case, *Cerdeira v. Martindale-Hubbell*, the appellate court held that under a theory of negligence, an employer may be held directly liable for sexual harassment of an employee committed by a nonsupervisory coworker, even where the employer has no knowledge of the harassing behavior.<sup>143</sup> The appellate court noted that liability of the employer turned on whether it was negligent for failing to implement effective sexual harassment policies; to avoid liability, an employer should have in place an "effective and well-publicized sexual harassment policy."<sup>144</sup> While the appellate court did not offer an exact definition of what constitutes "effective and well-publicized sexual harassment policy," it did offer that employers, among other things, should conduct mandatory antiharassment training.

### ***Training – Evidence of an “Unequivocal Commitment” to Prevent Workplace Harassment***

The U.S. Supreme Court in *Faragher*, held that in the absence of managerial and supervisory training, triable issues existed as to the effectiveness of the county's antiharassment policy and as to whether that policy could shield the county from vicarious liability for the supervisor's conduct.

In its seminal 1993 decision in *Lehmann v. Toys 'R' Us*, the New Jersey Supreme Court held that an employer may be held vicariously liable under New Jersey Law Against Discrimination for a supervisor's misconduct when the employer was negligent in preventing workplace sexual harassment by that individual.<sup>145</sup> The court in *Lehmann* had explained that the presence of an antiharassment policy would not automatically shield the employer from

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<sup>139</sup> *Id.* at 327.

<sup>140</sup> *Gaines*, 801 A.2d at 327.

<sup>141</sup> *Id.* at 333.

<sup>142</sup> *Id.* at 329.

<sup>143</sup> 955 A.2d 317 (N.J. Super. Ct. App. Div. 2008).

<sup>144</sup> *Id.* at 321.

<sup>145</sup> 626 A.2d 445 (N.J. 1993).

claims of hostile environment workplace sexual harassment unless that policy was an effective one.

The court in *Gaines* emphasized that while *Lehmann* did not establish “a bright-line rule . . . for the standard of negligence required in sexual harassment claims,” numerous factors are relevant to this determination, including whether the employer provided “mandatory” antiharassment training for its supervisors and managers, and also made that training available to all employees in its organization.<sup>146</sup> The court also rejected the county’s argument that Gaines’ failure to file a formal complaint pursuant to the antiharassment policy barred her claims. The court stated that an employee’s inaction must be viewed in the context of whether the employer provided meaningful assistance to the employee who sought to complain about a supervisor’s harassment. Concluding that an antiharassment policy “must be more than the mere words encapsulated in the policy,” the court stated that such a policy must demonstrate an employer’s “unequivocal commitment from the top” to preventing workplace sexual harassment.<sup>147</sup> According to the court, the absence of “effective preventive mechanisms,” such as training, will present strong evidence that an employer was negligent in monitoring and preventing workplace sexual harassment. Based upon the record facts, the court held that Gaines’ complaint should not have been dismissed because factual issues existed concerning the effectiveness of the county’s antiharassment policy.

### *Eliminating the Affirmative Defense & the Greater Need to Train*

The affirmative defense available to claims of harassment under federal antidiscrimination laws may not apply to the parallel state laws. In a major decision regarding sexual harassment by supervisors, the California Supreme Court finally decided whether California’s Fair Employment and Housing Act (FEHA) includes a special or “affirmative” defense to sexual harassment claims recognized by the U.S. Supreme Court in federal employment harassment claims. Ruling in *Department of Health Services v. Superior Court*, the California Supreme Court held that FEHA does not allow the federal *Faragher/Ellerth* defense.<sup>148</sup> The California Supreme Court emphasized that FEHA’s provisions differ from Title VII. The *Faragher/Ellerth* defense was based on the law of agency. The FEHA imposes strict liability for all harassment by supervisors, and thus does not allow defenses based on agency.<sup>149</sup>

The *Faragher/Ellerth* defense spurred many employers to conduct harassment prevention training. Does the rejection of the defense by the California Supreme Court mean that such training is useless in California? No it does not. In fact, employers should draw the opposite conclusion — that harassment training is more important than ever.

There is simply no margin for error when it comes to harassment by California managers. Put another way, the only way California employers can avoid liability for harassment by their managers is to ensure that the managers do not commit harassment. This means that manager training must not only occur but that the training must be effective. “Check the box” training programs will no longer work (if they ever did) because there is no defense box left to check.

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<sup>146</sup> *Gaines*, 801 A.2d at 329-30.

<sup>147</sup> *Id.* at 332-33.

<sup>148</sup> *State Dep’t of Health Servs. v. Superior Court*, 31 Cal. 4th 1026 (2003).

<sup>149</sup> *Id.* (the court did allow employers to reduce damages if they could prove facts very similar to those needed to prove the *Faragher/Ellerth* defense).

Prudent employers will likely re-focus on live training for managers to best ensure the greatest impact. Regular follow-up training for managers will also likely become the norm under this regime of heightened scrutiny.

## § 15.2.4

## D. THE “KOLSTAD DEFENSE” TO PUNITIVE DAMAGES

Training has also become an indispensable tool in the struggle to prevent the crippling costs of punitive damages. In 1999, the U.S. Supreme Court made EEO training more important than ever by making it a part of a defense against punitive damages in discrimination cases.<sup>150</sup>

The Supreme Court’s decision in *Kolstad v. American Dental Association* under Title VII of the Civil Rights Act of 1964 seems to have pleased both employees and employers. An employee is no longer required to show that an employer’s discriminatory conduct was egregious or outrageous for an award of punitive damages. However, an employer will not be held liable for punitive damages if a manager’s conduct is contrary to the employer’s good-faith efforts to comply with Title VII.

Carole Kolstad was one of two employees competing for a promotion in the Washington, D.C. office of the American Dental Association. When the other employee, a male, was selected, she sued the Association in federal court, alleging that she had been passed over because of her gender in violation of Title VII. A jury ruled in her favor, awarding her \$52,718 in back pay. Kolstad appealed, however, contending that the trial court should have instructed the jury that it could award her punitive damages as well. The appeals court agreed with Kolstad. The Supreme Court decided to hear the case to resolve a conflict among the federal appellate courts about the circumstances under which punitive damages (*i.e.*, extra money damages to punish the employer) may be awarded in Title VII cases.

The Supreme Court issued its decision in two equally important parts. The first part was good news for employees; the second part was a pleasant surprise for employers.

In the first part, the Court held that an individual who is successful in an employment discrimination suit might also collect punitive damages if he or she shows the following:

- *The discrimination was intentional.* This means simply that the employer intended to discriminate based on a protected category, not that it knew the discrimination was unlawful. (Remember: not all discrimination is unlawful; only discrimination on an improper basis, such as race, gender, etc., is forbidden. Disparate impact cases in which an employer does not intend to discriminate but where its action has a discriminatory effect, do not qualify for punitive damages.)
- *The employer acted with malice or reckless indifference to the employee’s rights.* According to the Court, this does not mean that an employer’s conduct must be egregious or outrageous before punitive damages may be awarded. Rather, the employee must only show that an employer discriminated “in the face of a perceived risk that [the employer’s] actions [would] violate federal law.” In other words, the employer knew that its actions might violate the law. The Court noted that there would be circumstances where intentional discrimination does not give rise to punitive damages, as where the employer is unaware of the relevant federal prohibition or discriminates with a distinct belief that its discrimination is

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<sup>150</sup> *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999).

lawful, where the underlying theory of discrimination is novel or otherwise poorly recognized, or where the employer reasonably believes that its discrimination satisfies the *bona fide occupational qualification* or other statutory exception to liability.

In part two of its decision, on a much more closely divided 5 to 4 decision, the Court ruled that even if an individual satisfies the criteria described above, he or she cannot collect punitive damages from the employer (as an entity) if the manager’s actions “are contrary to the employer’s good faith efforts to comply with Title VII.” This means that even if the plaintiff shows that an employee, typically a manager or supervisor, engaged in unlawful discrimination with the knowledge that those actions might violate the laws, the plaintiff still may not receive punitive damages.

How does an employer show that it has made “good faith efforts” to comply with the discrimination law? Although the Court did not detail every action that might qualify under this standard, a “good faith” effort clearly includes: (1) adoption and implementation of antidiscrimination policies; and (2) training personnel about what is and is not permitted under applicable laws.<sup>151</sup> The Court’s decision is to encourage “employers to adopt antidiscrimination policies and to educate their personnel.”<sup>152</sup>

Post-*Kolstad* decisions point to training as a necessary part of the defense. The U.S. Court of Appeals for the Sixth Circuit recently reviewed the post-*Kolstad* analysis taken by federal courts. In general, the court found the analysis of punitive damages claims in Title VII cases begins with a review of whether “the supervisors involved in the (adverse employment) decision at issue had antidiscrimination training or even very general knowledge about antidiscrimination laws or an employer’s antidiscrimination policies.”<sup>153</sup>

In another case, the U.S. Court of Appeals for the Fourth Circuit so steadfastly adhered to the principles set forth in *Kolstad*, that it actually overturned a jury’s award of punitive damages because of the employer’s good faith efforts (including live, interactive training) to proactively prevent workplace discrimination.<sup>154</sup>

More recently, a federal District Court in Kansas used the *Kolstad* standard to closely examine the content of an organization’s training to determine its adequacy. In *Rush v. Speedway Buick Pontiac GMC, Inc.*,<sup>155</sup> the defendant brought a motion for summary judgment seeking to dismiss plaintiff’s punitive damages claims, alleging it had satisfied *Kolstad*’s good faith standard by providing harassment prevention training and testing to its employees via the Internet through an outside vendor. The district court denied the summary judgment motion based in large part on the lack of evidence of adequate training; specifically, the lack of evidence that the training addressed how a supervisor was to report harassment. Thus, even though the defendant had provided harassment prevention training and testing to the involved parties, the court denied application of the *Kolstad* defense because “the summary judgment record does not reflect the extent to which [the defendant] educated its managerial employees (via Ethos training or otherwise) about the handling of sexual

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<sup>151</sup> *Kolstad*, 527 U.S. at 544.

<sup>152</sup> *Id.* at 545.

<sup>153</sup> *Sackett v. ITC Deltacom, Inc.*, 374 F. Supp. 2d 602, 612 (E.D. Tenn. 2005) (citations omitted).

<sup>154</sup> *Bryant v. Aiken Reg’l Med. Ctr. Inc.*, 333 F.3d 536 (4th Cir. 2003). For a more detailed discussion of *Bryant* see Recent Trends and Developments section above at § 15.1.

<sup>155</sup> 2007 U.S. Dist. LEXIS 89350 (D. Kan. Dec. 4, 2007).

harassment complaints . . . .”<sup>156</sup> This decision reinforces the need to not only ensure training is taking place, but that its content is carefully designed to address specific organizational needs and legal objectives.

In sum, an employer need not be concerned quite as much about large punitive damages awards if the employer has adopted and implemented adequate antidiscrimination policies. But an employer cannot just sit back once a policy is in place or turn a blind eye to employee actions that might violate the law. The cases make it more important than ever for employers to train all employees, particularly supervisors and managers, about the do’s and don’ts of federal discrimination law and to be ever vigilant in monitoring the workplace to insure that policies are regularly and consistently applied. To do otherwise is an open invitation to liability.

### § 15.2.4(a)

#### *Liability Limited Where Employer Provides Training*

Courts have increasingly used the *Kolstad* decision to ensure that employers who train on harassment and discrimination prevention do not receive punitive damages.<sup>157</sup> In this case, the court refused to let the jury even consider awarding punitive damages against the defendant companies because they had shown good faith efforts to prevent harassment. Although two waitresses complained of vulgar comments and inappropriate touching by managers, the court found that the companies had “a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiff’s complaints” which met the *Kolstad* standards.<sup>158</sup> In this case, although the companies were found liable for compensatory damages for harassment and emotional distress, they completely avoided punitive damages of much higher amounts.

Oddly, in this case, the same steps that earned the employer the *Kolstad* defense, failed to convince the jury that the company should have an affirmative defense under *Faragher* and *Ellerth*. The appellate court allowed this logical inconsistency by stating that it was reasonable for a jury to choose not to believe the company and therefore find the company liable for harassment. It was also reasonable for the judge not to give out a punitive damages jury instruction based on the company’s efforts which satisfied the *Kolstad* good-faith test. Although the judge tried to “overrule” the jury and grant judgment as a matter of law on the harassment claims, the appellate court reversed that decision because a judge’s opinion is not allowed to supplant the jury’s.

The training needed to prevent punitive damages may have to be more extensive than training done to raise an affirmative defense. An employer was found to have insulated itself from punitive damages through its good-faith efforts to adhere to Title VII in a case where the following actions were considered in preventing the availability of punitive damages.

- Employer had a longstanding policy against sexual harassment.
- The policy was posted in glass display cases at the building entrances.

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<sup>156</sup> *Id.*, at \*38.

<sup>157</sup> *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473 (5th Cir. 2002); *reh’g denied*, 2002 U.S. App. LEXIS 24504 (5th Cir. Nov. 5, 2002).

<sup>158</sup> *Id* at 477.

- Employer published several booklets for employees, providing guidance on how to recognize sexual harassment, how to report it, and an explanation of the consequences of harassment.
- Employer required all employees, both supervisory and nonsupervisory, to attend training regarding sexual harassment.
- Employer also required all salaried and management employees to attend an eight-hour diversity training course.<sup>159</sup>

Training of both managers and employees on preventing harassment, plus longer training for managers was key to the employer’s defense. This type of training went well beyond the “check-the-box” approach used by many employers. In a 2005 race discrimination claim, another federal court dismissed an employee’s section 1981 claim for punitive damages with prejudice when it found undisputed evidence of the employer’s good faith efforts to enforce and implement its antidiscrimination policy. These efforts included a well-established antidiscrimination policy and receipt of regular training by staff managers about reporting and handling discrimination issues.<sup>160</sup>

As discussed previously in § 15.1.2(c) of this chapter, in *EEOC v. Caterpillar, Inc.*,<sup>161</sup> the EEOC filed discrimination litigation on behalf of five current and two former employees. Underlying the lawsuit were allegations of widespread sexual harassment and the company’s failure to adequately respond to complaints of harassment.

In dismissing the EEOC’s claim for punitive damages before trial, the court extensively reviewed the multiple, consistent steps that the company took to prevent the problem from occurring. These steps included the following:

- Posting its discrimination and harassment policies in “high visibility” places in “every major” building at the facility.
- Distributing several different publications to all employees that focused on workplace harassment and equal employment opportunities.
- Requiring classroom training for employees on numerous occasions, including:
  - new orientation training;
  - follow-up training several weeks into employment;
  - new supervisor orientation;
  - diversity training that included harassment;
  - maintaining harassment free workplace training for all managers and employees; similar training was provided three times in five years;
  - an eight-hour diversity training program for managers;

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<sup>159</sup> *Fuller v. Caterpillar Inc.*, 124 F. Supp. 2d 610 (N.D. Ill. 2000); see also *Dobrich v. General Dynamics Corp., Elec. Boat Div.*, 106 F. Supp. 2d 386 (D. Conn. 2000).

<sup>160</sup> *Ridley v. Costco Wholesale Corp.*, 2005 Dist. LEXIS 23276, at \*17 (E.D. Pa. Oct. 12, 2005). See also *Hull v. APCOA*, 82 Fair Empl. Prac. Cas. (BNA) 247 (N.D. Ill. 2000) (holding that the employer’s policy prohibiting discrimination and harassment, and its training of managers on that policy, indicated its good faith).

<sup>161</sup> 503 F. Supp. 2d 995 (7th Cir. 2007).

- classroom training for all employees on two different occasions over five years.<sup>162</sup>

In reviewing whether the company took good faith efforts to prevent harassment and discrimination, the court noted the company's "repeated and substantial efforts to train all employees."<sup>163</sup> Because of the training, and other proactive steps, the court granted the company's motion for summary judgment and dismissed the EEOC's claims for punitive damages.<sup>164</sup>

Courts have also applied the *Kolstad* defense where employers have held management training on harassment prevention and the employer was shown not to have had knowledge of the harassing situation.<sup>165</sup> In *Cooke v. Stefani Management Services, Inc.*, a male bartender alleged sexual harassment by his male manager. Although he complained to both the manager and assistant manager at the branch restaurant, he never reported the incidents to the corporate office. The appellate court held that the corporation had met the *Kolstad* good faith defense requirements by instituting antiharassment policies, holding management harassment prevention training which the alleged harasser had attended, and posting an antiharassment poster at the branch restaurant site. The court therefore reversed the award of punitive damages against the restaurant stating that the employer had done everything it could have done given that it never had knowledge of the alleged harassment.

#### § 15.2.4(b)

### *Liability Enhanced Where Employer Fails to Train*

One of the most remarkable legal developments have been decisions in which an employer's inaction regarding training showed willful disregard for the law and was the basis for the award of punitive damages in a harassment or discrimination law suit.<sup>166</sup> In *Phillips*, the job applicant claimed race and age discrimination during the application process. Although the employer never met the applicant, the plaintiff was able to show that the hiring managers had knowledge of his age and race through his resume. The managers admitted that they wanted to hire "bright, young, and aggressive" salespeople and actually hired seven young, Caucasian salespeople in place of the applicant.

Although the employer had an EEO statement on its application, the court found that the employer had discriminated against the plaintiff and that the company had failed to educate its managers about their legal duty not to discriminate. "Leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference" of antidiscrimination laws.<sup>167</sup> The employer here had to pay liquidated damages as a result of not educating its managers appropriately regarding their hiring duties.

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<sup>162</sup> *Id.* at 1003.

<sup>163</sup> *Id.* at 1048.

<sup>164</sup> *Cf. Smokin' Joes Tobacco Shop, Inc.*, 2007 U.S. Dist. LEXIS at 31512, at \*\*25-26 (the court requires training to establish a *Kolstad* defense to punitive damages).

<sup>165</sup> *Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564, 568 (7th Cir. 2001).

<sup>166</sup> *See Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001).

<sup>167</sup> *Id.* at 777-78. *See also Young v. DaimlerChrysler Corp.*, 2004 U.S. Dist. LEXIS 22813 (S.D. Ind. Oct. 25, 2004) (lack of details about training defeated *Kolstad* defense).

Although *Phillips* applies only to the award of liquidated damages under the ADEA, courts routinely harmonize the standards applied under the various major federal EEO laws. Thus, failing to train managers could be used to prove a plaintiff is entitled to punitive damages. At the very least, proving that training has occurred will likely become a required element of showing that an employer implemented “good faith” efforts to prevent discrimination from occurring.

Even without *Phillips*, failing to train employees can result in the loss of the *Kolstad* defense.<sup>168</sup> Karen Romano sued U-Haul for sex discrimination after she was fired from her job as a customer service representative. Romano’s manager told her that upper management did not want women working in the main office and that “the only problem you have is you sit when you pee.” A jury verdict in favor of the plaintiff (\$625,000 punitive damages; \$15,000 compensatory damages) was affirmed on appeal. The court of appeals reviewed the *Kolstad* standard regarding whether to award punitive damages. Noting that a written antidiscrimination policy, without more, is insufficient to insulate an employer from punitive damages liability, the court held that a “defendant must also show that efforts have been made to implement its antidiscrimination policy through education of its employees and active enforcement of its mandate.”<sup>169</sup>

Courts continue to enforce the message that employers who fail to train managers on how to prevent and properly respond to harassment complaints will be liable for punitive damages without recourse to *Kolstad*. In an action alleging that an employee discharge violated the Americans with Disabilities Act (ADA), the court denied an employer’s summary judgment motion to set aside punitive damages.<sup>170</sup> In this case, plaintiff suffered from severe scoliosis of the lumbar spine and related medical conditions. After the employer ordered plaintiff to undergo a functional capacity evaluation (FCE), it placed her on short-term disability leave and ultimately discharged her on Total and Permanent disability. Little evidence of accommodation or interactive attempts was present. In justifying the upholding of the \$300,000 punitive damages award, the court highlighted the employer’s overall failure to engage in good-faith compliance with the ADA’s requirements: “There was no evidence that DuPont had a written or publicized employee antidiscrimination policy. There was no evidence of employee training. There was no evidence of an employee discrimination grievance procedure.”<sup>171</sup>

In another ADA case, a district court denied an employer’s motion as a matter of law after the jury awarded punitive damages for disability discrimination.<sup>172</sup> In that case, the employer introduced evidence of an antidiscrimination policy, but failed to offer evidence that the policy was actively enforced. The employer also “failed to introduce any training evidence in existence at the time of [plaintiff’s] discharge,” prompting the court to state that, “(a) dearth of antidiscrimination training during the time period at issue in [the] lawsuit could actually lead a jury to infer that [the defendant] did not, in fact, make a good faith effort to enforce such policies.”<sup>173</sup>

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<sup>168</sup> *Romano v. U-HAUL Int’l*, 233 F.3d 655 (1st Cir. 2000), *cert. denied*, 534 U.S. 815 (2001).

<sup>169</sup> *Id.* at 670. *See also Koerber v. Journey’s End, Inc.*, 2004 U.S. Dist. LEXIS 5424 (N.D. Ill. Mar 31, 2004).

<sup>170</sup> *EEOC v. E.I. DuPont De Nemours & Co.*, 2005 Dist. LEXIS 11575 (E.D. La. June 6, 2005).

<sup>171</sup> *Id.* at \*\*62-63.

<sup>172</sup> *Kuper v. Empire Blue Cross & Blue Shield*, 2003 U.S. Dist. LEXIS 2362 (S.D.N.Y. Feb. 13, 2003).

<sup>173</sup> *Id.* at \*16.

In *Swinton v. Potomac Corporation*, a section 1981 racial discrimination case, the court affirmed a \$1 million punitive damages award.<sup>174</sup> The employer had argued that it met the good faith *Kolstad* requirement because it had written policies forbidding harassment and had instituted antiharassment procedures. The court rejected this argument. The court stated that the company “could have impressed upon its supervisors . . . whom it tasked with accepting complaints of harassment . . . that repeatedly subjecting a black employee to “nigger” jokes is wholly unacceptable, and at odds with basic antidiscrimination principles. But it chose not to, and [the employer] cannot now be heard to protest . . . .”<sup>175</sup> The court clearly indicated that training and educational measures which further managerial awareness of discrimination and harassment are important components necessary before an employer can invoke the good-faith defense.

A similar decision was reached in *Marrero v. Goya of Puerto Rico, Inc.*<sup>176</sup> There, the court affirmed the punitive damages award against the company noting that defendant Goya’s managers had failed to respond to complaints and “the jury was justified in finding that Goya did not have a sexual harassment policy in effect during the relevant events. . . [and even if it had] Goya did not present any evidence that it had implemented it, either through educating its employees or enforcing its mandate.”<sup>177</sup>

In a particularly reprehensible case, a fuel-hauling company’s East Indian employees filed a racial discrimination and breach of contract lawsuit against ARCO because its managers consistently called the Indian employees and owners derogatory names such as “rag-heads,” “towel-heads” and the like.<sup>178</sup> The managers further demeaned the Indian employees by requesting that fuel be cleaned up with their turbans, making them wait longer to fill their trucks and forcing them to use slower pumps. The court found that ARCO did not present evidence “of the implementation of an effective antidiscrimination policy” and ARCO failed to respond to any complaints made internally and thus failed to assert or establish a *Kolstad* defense. The jury awarded only \$1 in compensatory damages on the section 1981 race discrimination claim, but gave the fuel haulers \$5 million in punitive damages. The court affirmed this award despite ARCO’s protests of gross excessiveness.

The need to conduct effective harassment prevention training may now be more critical than ever in California, due to the decision by the California Supreme Court in *Department of Health Services v. Superior Court*.<sup>179</sup> The court held claims for sexual harassment filed under California’s Fair Employment and Housing Act (FEHA) will not be subject to the federal *Faragher/Ellerth* defense. The court emphasized that the FEHA’s provisions differ from Title VII in that the FEHA imposes strict liability for all harassment by supervisors, and thus does not allow defenses based on agency. The *Faragher/Ellerth* defense is based on the law of agency.

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<sup>174</sup> 270 F.3d 794 (9th Cir. 2001).

<sup>175</sup> *Id.* at 811.

<sup>176</sup> 304 F.3d 7 (1st Cir. 2002).

<sup>177</sup> *Id.* at 30. *See also Thompson v. Altheimer & Gray*, 2001 U.S. Dist. LEXIS 20993, at \*21 (N.D. Ill. Dec. 18, 2001) (rejecting the defendant’s summary judgment motion stating: “[T]here is no evidence indicating that defendant conducted training or otherwise monitored enforcement of its antidiscrimination policy” and these are factors which “bear on the existence of good faith.”).

<sup>178</sup> *Bains L.L.C. v. ARCO Prods. Co.*, 220 F. Supp. 2d 1193 (W.D. Wa. 2002).

<sup>179</sup> 31 Cal. 4th 1026 (2003).

While limiting the application of the *Faragher/Ellerth* defense, this decision affords California employers a significant new defense to claims of harassment by supervisors under the FEHA: the doctrine of avoidable consequences. This defense allows an employer to plead and prove that it took appropriate steps to prevent and address harassment, but that the employee unreasonably failed to take advantage of those protections. It enables employers to limit damages, so that they will not be liable for damages an employee could have avoided by utilizing the employer’s complaint procedures.

In addition to having adequate written policies and procedures, training should be conducted to establish that the company’s policies and procedures have been clearly communicated to all employees. Thus, in the same manner that training helps establish an employer’s “good faith” defense to punitive damages under Title VII, it will also remain a critical part of the avoidable consequences defense in cases of sexual harassment filed under California’s FEHA.

### § 15.2.4(c)

#### *Training That Is Not Enough to Avoid Punitive Damages*

Even in situations where an employer has trained its employees and can prove it, punitive damages may apply if the employer did not train the managers actually responsible for the inappropriate conduct.<sup>180</sup> In *Godinet*, the employer had to pay over \$470,000 in damages and attorneys’ fees, including \$150,000 in punitive damages, even though it had an antidiscrimination policy and had trained some of its supervisors. In this case, a Samoan man was not promoted, and he claimed it was because the company had promoted African Americans instead. The plaintiff failed to receive two different positions with the company and ultimately filed a race discrimination lawsuit. Three employees testified that they had been directed by management to hire African American employees and both the positions the plaintiff wanted were given to African Americans.

Ultimately, although the employer had conducted training, it could not show that the four managers involved in the lawsuit had been trained in how to prevent discrimination. It had also failed to investigate the plaintiff’s exit interview form where he checked “no” to a question regarding the company’s provision of equal opportunity for all employees. The employer additionally failed to follow-up on or investigate a phone call from plaintiff threatening to file a discrimination lawsuit.<sup>181</sup> For all of these reasons, the employer was found liable for \$150,000 in punitive damages and the court stated that “in addition to adopting antidiscrimination policies, an employer ‘must make a good faith effort to educate its employees about these policies.’”<sup>182</sup>

Training every other year is also not enough to prevent liability if the training did not occur during the years that the alleged harassment occurred.<sup>183</sup> In *Greene v. Coach, Inc.*, the employer, Coach, submitted attendee lists of seven antiharassment and antidiscrimination training workshops it conducted from 1996-2000. However, for the two years of the plaintiff’s employment, 1997-98, no attendee lists were submitted. In addition, although Coach apparently had a policy, there was no evidence submitted that indicated the extent to which retail managers were informed of the policy. As a result, Coach’s motion to dismiss the

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<sup>180</sup> *Godinet v. Management Training Corp.*, 2003 U.S. App. LEXIS 184 (10th Cir. Jan. 7, 2003) (unpublished).

<sup>181</sup> *Id.* at \*20.

<sup>182</sup> *Id.* at \*19 (citing *Cadena v. Pacesetter, Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000)).

<sup>183</sup> *Greene v. Coach, Inc.*, 218 F. Supp. 2d 404, 414 (S.D.N.Y. 2002).

plaintiff's punitive damages claim was denied. In part, by not training on an annual basis, Coach lost the ability to claim a good faith defense at the summary judgment stage, and a jury would be allowed to decide whether the company is liable for punitive damages.

Ensuring that the training is legally sound and covers the organizations' own policies is also important to avoiding punitive damages.<sup>184</sup> In *Cadena*, the company had conducted antiharassment training. Yet, because of legally unsound advice given by the trainer (e.g., the trainer's opinion that exposing genitalia to female employees would not be harassment if an apology ensued), the court held that the company had not taken "good faith" efforts to avoid harassment.<sup>185</sup>

Additionally, any delay in the implementation of training may impact the availability of *Kolstad's* defense to a punitive damages claim. In *Johnson v. Spencer Press of Maine, Inc.*, the employer had launched a harassment prevention training program in early 2000, but the implementation of the program did not allow the employer to overcome a claim for harassment subsequently filed by an employee who had worked there since 1991. The accused supervisor alleged to have only realized that his behavior (making religious jokes, viewing Playboy magazines in the workplace and saving nude pictures on his computer) was inappropriate when he attended the training in April 2000. Due in part to the timing of the training, the court concluded that a triable issue of fact remained as to whether the employer had undertaken good faith efforts to comply with Title VII.<sup>186</sup>

In the same vein, employers which give "check-the-box" training will not always escape punitive damages awards either. In *Madison v. IBP, Inc.*, the employer had an antiharassment policy and an affirmative action plan.<sup>187</sup> Yet, it had squeezed "Legal Aspects of Supervision" into a two hour program which apparently included antiharassment training. The court held that these practices were not enough to avoid having the jury deliberate on punitive damages, given the evidence that the corporate policies were not carried out at the plant. Ultimately, managers were found to have ignored complaints of racial and sexual harassment and punitive damages were awarded.

#### § 15.2.4(d)

### *Lessons on Avoiding Punitive Damages*

As most employers already know, punitive damages can far exceed compensatory damage awards, sometimes raising much more serious financial issues for companies than the possibility of having to pay only compensatory damages. Punitive damage awards under Title VII are capped between \$50,000 and \$300,000, depending on the size of the employer. In light of the high stakes, an employer cannot afford to appear ignorant or unconcerned about its responsibilities to avoid discrimination complaints and to remedy the complaints it receives. Prevention through training can go a long way not only to limit an employer's liability under Title VII, but also to prevent discrimination claims from arising in the first place. Additional steps an employer can take include: instituting a policy forbidding harassment or discrimination, ensuring the policy is well-publicized, training new and existing

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<sup>184</sup> *Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000).

<sup>185</sup> See also *EEOC v. Rite Aid Corp.*, 2004 U.S. Dist. LEXIS 12356 (E.D. La. June 30, 2004) (training that failed to review the company's own procedures failed to establish a *Kolstad* defense).

<sup>186</sup> *Johnson v. Spencer Press of Maine, Inc.*, 2003 US Dist. LEXIS 1058, at \*\*71-72 (D. Me. Jan. 24, 2003).

<sup>187</sup> 257 F.3d 780 (8th Cir. 2001).

employees on harassment/discrimination prevention, establishing a grievance procedure for harassment/discrimination complaints, and investigating internal complaints promptly.

The high cost of litigation is often enough to encourage employers to train supervisors and employees about how to avoid acts of discrimination and harassment. However, the possibility of more frequent punitive damages liability in Title VII cases gives employers an additional incentive to timely and regularly train supervisors and employees on how to avoid discriminatory and harassing conduct. Employers cannot afford to shirk their antidiscrimination obligations under Title VII. Nor can they ignore the advantages of providing antidiscrimination training.

### § 15.2.5

## E. UNLAWFUL WORKPLACE HARASSMENT TRAINING: STATE-BY-STATE SURVEY

### § 15.2.5(a)

#### *Introduction*

California, Connecticut, and Maine are the three states placing the most direct harassment prevention training requirements on private employers. The following summarizes the laws of other states regarding such training.

#### § 15.2.5(a)(i)

##### *California*

In addition to the requirements discussed above, the California Fair Employment and Housing Act requires employers to distribute an “information sheet” or provide “equivalent information” to all employees regarding sexual harassment. The information sheet is available from the Department of Fair Employment and Housing.<sup>188</sup>

The California Penal Code also requires that all new law enforcement officers attend a “basic training” course that includes training on sexual harassment in the workplace. Current officers must also be trained on sexual harassment.<sup>189</sup> In 1998, the California Legislature authorized the state’s Judicial Council to “provide by rule of court for racial, ethnic and gender bias, and sexual harassment training for judges, commissioners and referees.”<sup>190</sup> The Judicial Council responded almost instantly, enacting a rule mandating “job-related training and continuing education programs for all [court] personnel concerning . . . sexual harassment awareness . . . [and] discrimination and bias.”<sup>191</sup> The rule took effect January 1, 1999.

#### § 15.2.5(a)(ii)

##### *Colorado*

The Colorado Sex Discrimination Rules, as adopted by the Colorado Civil Rights Commission, “encourage” employers to take all necessary steps to prevent sexual harassment

<sup>188</sup> CAL. GOV’T CODE § 12950; FAIR EMPLOYMENT PRACTICE MANUAL (BNA) § 453:3441 (2002).

<sup>189</sup> CAL. PENAL CODE § 13519.7.

<sup>190</sup> CAL. GOV’T CODE § 68088.

<sup>191</sup> CAL. R. OF COURT, Rule 10.670(c).

from occurring, this includes “affirmatively” raising the subject with employees and “sensitiz[ing]” employees regarding issues relating to sexual harassment.<sup>192</sup>

### § 15.2.5(a)(iii)

#### *Connecticut*

Along with the mandatory harassment training requirements outlined in § 15.2.1(b) above, Connecticut law requires state agencies to provide three hours of diversity training to all supervisory and nonsupervisory employees and to all new supervisory employees within six months of the assumption of a position with a state agency. The diversity training must include information on state and federal discrimination laws as well as hate crimes directed at protected classes.<sup>193</sup>

### § 15.2.5(a)(iv)

#### *Florida*

The Public Personnel Rules of Florida’s Administrative Code requires all supervisors within executive branch agencies to undergo training on the principles of equal opportunity and affirmative action.<sup>194</sup>

### § 15.2.5(a)(v)

#### *Hawaii*

The Hawaii Administrative Rules provide that prevention is the best tool for the elimination of sexual harassment. Therefore, employers should “affirmatively raise the subject . . . inform employee of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring.”<sup>195</sup>

### § 15.2.5(a)(vi)

#### *Illinois*

The Illinois Human Rights Act provides that every public employer shall maintain and carry out a sexual harassment program, including sexual harassment training, as a component of all new employee-training programs.<sup>196</sup> Illinois law also requires that public contractors and eligible bidders for public contracts have a written sexual harassment policy that includes information on the Illinois Department of Labor’s complaint process and provide sexual harassment prevention training as a component of all ongoing or new employee training programs.

### § 15.2.5(a)(vii)

#### *Kansas*

State entities must develop diversity management programs that include “outreach recruitment and hiring, support, mentoring, development, rewards and recognitions for achievement.” Agencies must also develop antidiscrimination programs that include training.<sup>197</sup>

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<sup>192</sup> See 3 COLO. CODE REGS. § 708-1, Rule 80.11(C).

<sup>193</sup> CONN. GEN. STAT. § 46a-54(16)(A).

<sup>194</sup> See FLA. STAT. § 110.112(2)(e).

<sup>195</sup> See HAW. ADMIN. RULES § 12-46-109(g).

<sup>196</sup> 775 ILL. COMP. STAT. § 5/2-105(B)(5).

<sup>197</sup> Exec. Order No. 07-24, (2007).

**§ 15.2.5(a)(viii)*****Maine***

Maine's Sexual Harassment Training and Education in the Workplace Law requires all private and public employers to conduct a sexual harassment education and training program for all new employees in workplaces with 15 or more employees within one year of commencement of employment.<sup>198</sup> Employers must also conduct specialized training for supervisors that addresses their specific roles and responsibilities.

**§ 15.2.5(a)(ix)*****Maryland***

The Maryland Commission on Human Relations encourages employers to take steps to prevent sexual harassment, publicly stating that “. . . to reduce exposure to charges of sexual harassment, all employers should: . . . make staff aware of personnel policies and train staff to recognize and avoid sexual harassment.”<sup>199</sup>

**§ 15.2.5(a)(x)*****Massachusetts***

Massachusetts' Fair Employment Practice Act “encourages” employers to conduct an education and training program for new employees within one year of commencement of employment, and to provide additional training for managers and supervisors.<sup>200</sup> In addition, “Labor organizations and appropriate state agencies are encouraged to cooperate in making such training available.” The Act applies to public and private employers with at least six employees, but not nonprofit, social, fraternal or religious organizations.

Employers are required to prepare and provide all employees with an individual, written copy of the employer's policy against sexual harassment on an annual basis with new employees being provided copies of the policy when they start employment.<sup>201</sup>

**§ 15.2.5(a)(xi)*****Michigan***

Michigan's Disability Bias Law requires the department of civil rights to offer training programs to employers, labor organization and employment agencies to assist in understanding the requirements of the Act.<sup>202</sup>

**§ 15.2.5(a)(xii)*****Nevada***

The Nevada Equal Rights Commission encourages employers to take steps necessary to prevent sexual harassment from occurring: employers should “clearly communicate to

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<sup>198</sup> ME. REV. STAT. tit. 26, § 807(3).

<sup>199</sup> See The Maryland Commission on Human Relations home page, <http://www.mchr.state.md.us/newsexualharrasment2003.html>.

<sup>200</sup> See MASS. GEN. LAWS ch. 151B, § 3A(e).

<sup>201</sup> *Id.*

<sup>202</sup> See MICH. COMP. LAWS ANN., § 37.1212.

employees that sexual harassment will not be tolerated.”<sup>203</sup> The agency website advises employers that “prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated.”<sup>204</sup>

### § 15.2.5(a)(xiii)

#### *New Jersey*

As elaborated upon in § 15.1.2(c), the New Jersey Supreme Court held in 2002 that, in judging an employee’s claim that its employer was negligent in preventing sexual harassment, New Jersey courts should consider whether the employer made sexual harassment training available to all employees in its organization. The court stated that providing sexual harassment training helps demonstrate an employer’s “unequivocal commitment from the top” to preventing sexual harassment.<sup>205</sup>

### § 15.2.5(a)(xiv)

#### *North Carolina*

The North Carolina Administrative Code requires all state agencies to develop a “plan on unlawful workplace harassment.” This plan should include “utilization of training and other methods” to educate state employees. All state employees are required to participate in “Unlawful Workplace Harassment” training programs.<sup>206</sup>

### § 15.2.5(a)(xv)

#### *Ohio*

Ohio’s Administrative Code and the regulations of the Civil Rights Commission provide that since “[p]revention is the best tool for the elimination of sexual harassment, an employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment . . . and developing methods to sensitize all concerned.”<sup>207</sup>

### § 15.2.5(a)(xvi)

#### *Oklahoma*

Oklahoma’s “Fair Employment Practices Act”, through its Rules of Personnel Management and Administration, requires that all state personnel who investigate complaints of discrimination be trained in the areas of equal employment opportunity, discrimination and burdens of proof.<sup>208</sup>

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<sup>203</sup> See The Nevada Equal Rights Commission Home Page, at <http://detr.state.nv.us/nerc/sexharss.htm>.

<sup>204</sup> *Id.*

<sup>205</sup> *Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

<sup>206</sup> 25 N.C. ADMIN. CODE 1J.1101.

<sup>207</sup> See OHIO ADMIN. CODE 4112-5-05(J)(6).

<sup>208</sup> See OKLA. STAT. tit. 74, § 840-2.1(F.1); OKLA. ADMIN. CODE tit. 530, § 10-3-20.

## § 15.2.5(a)(xvii)

*Pennsylvania*

Pennsylvania's Human Relations Act requires that all "Commonwealth employees will be educated in sexual harassment."<sup>209</sup> In addition, the Agency Guidelines on Sexual Harassment provide that "[p]revention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII and the Pennsylvania Human Relations Act, and developing methods to sensitize all concerned."<sup>210</sup>

## § 15.2.5(a)(xviii)

*Rhode Island*

Rhode Island's Sexual Harassment, Education and Training Law "encourages" employers to conduct an education and training program for new employees within one year of commencement of employment, and to provide additional training for supervisors.<sup>211</sup> "Employers and appropriate state agencies are encouraged to cooperate in making such training available."<sup>212</sup>

Supervisory training should at a minimum address the following topics:

1. A statement that sexual harassment in the workplace is unlawful.
2. A statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint for sexual harassment.
3. A description and examples of sexual harassment.
4. A statement of the range of consequences for employees who are found to have committed sexual harassment.
5. A description of the process for filing internal complaints about sexual harassment and the work addresses and telephone numbers of the person or persons to whom complaints should be made.
6. The identity of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact these agencies.

The training should also address the specific responsibilities of supervisory and managerial employees and the methods that these employees should take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.<sup>213</sup>

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<sup>209</sup> 4 PA. CODE § 7.595.

<sup>210</sup> See PA. B. DEC. NO. 81-201.

<sup>211</sup> See R.I. GEN. LAWS, §§ 28-51-2(c), 28-51-3.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* §§ 28-51-2(b); 28-51-2(c)

## § 15.2.5(a)(xvix)

*Tennessee*

The Tennessee State Employees' Sexual Harassment Law obligates the state department of personnel to conduct training workshops for all public employees.<sup>214</sup>

## § 15.2.5(a)(xx)

*Texas*

Texas' Employment Discrimination Law mandates that each state agency provide its employees with employment discrimination training within 30 days after being hired and then on a supplemental basis every two years.<sup>215</sup>

## § 15.2.5(a)(xxi)

*Utah*

The Utah Department of Human Resource Management Rules obligates all public employers to conduct sexual harassment prevention training consistent with standards established by the Department.<sup>216</sup>

## § 15.2.5(a)(xxii)

*Vermont*

The Vermont Fair Employment Practices Act “encourages” employers to conduct an education and training program for new employees within one year of commencement of employment, and to provide additional training for supervisors.<sup>217</sup>

## § 15.2.5(a)(xxiii)

*Washington*

By Executive Order, state agencies are required to provide all employees with training designed to prevent sexual harassment.<sup>218</sup>

## § 15.2.5(a)(xxiv)

*Wisconsin*

The Wisconsin Department of Workforce Development advises employers to “provide training to sensitize employees on the issues of harassment and . . . remind them of your strong desire to maintain a harassment free workplace.”<sup>219</sup>

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<sup>214</sup> See TENN. CODE § 4-3-1703.

<sup>215</sup> See TEX. LAB. CODE § 21.010.

<sup>216</sup> See UTAH ADMIN. CODE R477-15-7.

<sup>217</sup> See VT. STAT. tit. 21, § 495h(f).

<sup>218</sup> Exec. Order No. EO 89-1 (Wash.).

<sup>219</sup> See The Wisconsin Department of Workforce Development Home Page, [http://www.dwd.state.wi.us/er/discrimination\\_civil\\_rights/default](http://www.dwd.state.wi.us/er/discrimination_civil_rights/default); Publications, WI Fair Employment Law #2 in Series, *Harassment in the Workplace*, ERD-7334-PWEB.

## § 15.2.5(a)(xxv)

*Federal Agencies*

Under the Notification and Federal Employee Anti-Discrimination and Retaliation Act (“No FEAR Act”), federal agencies were required to: train all employees on discrimination, retaliation, and whistleblower laws by September 30, 2005; train new employees within 60 days of hire; and provide refresher training at least once every two years. Passed in 2002, the goal of the No FEAR Act is to make federal agencies more accountable for reducing the occurrence of discrimination and retaliation in their workplaces.<sup>220</sup>

## § 15.2.6

**F. OTHER SOURCES FOR REQUIRED TRAINING**

## § 15.2.6(a)

*Judicially Imposed Settlements & Consent Decrees Requiring Training*

Not all workplace training is mandated by legislatures or by executive branch regulators. Training may also be required by the judicial branch as part of the settlement of a lawsuit, or, if the state or federal government has brought suit against the employer, as part of a negotiated “consent decree.” Indeed, requiring training as a part of litigation settlement is now standard operating procedure for the EEOC. For example, a New York-based book wholesaler entered into a consent decree that required the employer to take a variety of proactive steps, in addition to paying compensatory damages.<sup>221</sup> The consent decree specified that managers, including the company’s owner, receive mandatory equal employment opportunity training.

The past few years were notable for the frequency of training being mandated as part of settlement terms. In 2007, the SunWest Federal Credit Union agreed to pay \$250,000 in damages to two female employees who complained that they were subjected to sexual and gender-based harassment and were terminated in retaliation for complaining about the discrimination. The consent decree approved by the court mandated, among other things, live training on sexual/gender harassment by an outside consultant to all employees including executives and top management.<sup>222</sup>

In 2006, Home Depot paid \$125,000 to a former employee to settle a federal complaint that he was subjected to racial harassment and fired from his job in retaliation for complaining. Allegedly, the employee was subjected to being called “black boy,” “black man,” and “black dog” by supervisors, while managers also condoned derogatory comments made by coworkers. In addition to payment, the settlement agreement also required all managers and employees to attend discrimination training.<sup>223</sup>

<sup>220</sup> See PUB. L. NO. 107-174; see also *No FEAR Act Training of Agency Employee Due by End of FY2005 Under OPM Proposal*, Daily Lab. Rep. (BNA), Mar. 2, 2005, at A-10.

<sup>221</sup> *EEOC v. Books for Less L.L.C.*, No. 06-4577, (E.D.N.Y. Mar. 10, 2008) (consent decree approved).

<sup>222</sup> *EEOC v. SunWest Fed. Credit Union*, No. 06-2284, (D. Ariz. Dec. 11, 2007) (consent decree entered).

<sup>223</sup> *Home Depot Pays \$125,000 In Settlement of EEOC Complaint*, Daily Lab. Rep. (BNA), July 31, 2006.

Also in 2006, David Lerner Associates, a Connecticut investment brokerage firm, was mandated to pay \$1.5 million under a consent decree with the EEOC, resolving allegations of sexual harassment by a branch manager dating back approximately 5 years. In addition to requiring annual sexual and antidiscrimination training for all employees, managers and supervisors, the three year decree requires a minimum of four hours of discrimination training and counseling exclusively for the branch manager, the alleged harasser. Interestingly, the firm had engaged in sexual harassment training, but it seems to have not been as effective. Recognizing this, the agreement also mandates the firm revise and expand its antiharassment and antiretaliation policies and its sexual harassment training.<sup>224</sup>

Both JPMorgan Chase & Co and the Jacob K. Javits Convention Center in New York City settled discrimination cases in 2006 for millions. After merging with Bank One, Chase inherited an internal finding by the EEOC of disability discrimination. Agreeing to pay \$2.2 million to settle the case, Chase also agreed to provide training on the ADA and an enhanced policy to all managers, human resource professionals and employees. Similarly, the Javits Center settled a race discrimination class action lawsuit filed by 50 minority and female employees for \$8.4 million. The class charged that an “all-white Irish management staff” maintained a work environment rife with bigotry and discrimination; seniority was used as a pretext for discriminatory promotion practices and racial/sexual slurs from management abounded. Along with having to appoint an EEO compliance manager, form an EEO oversight committee with authority to impose sanctions on senior management for any settlement violations, and furnishing the court with quarterly statistical reports of work records, the Javits Center also was required to provide training to ensure its antidiscrimination policy is followed.<sup>225</sup>

The federal Occupational Safety and Health Administration also continued a long-standing practice of requiring safety training to settle disputes over employer fines. For example, Phillips Petroleum Co. agreed to pay \$2,169,500 in penalties for safety and health violations discovered after an explosion in March 2000 that killed one worker and injured 69 others at a chemical plant. As part of the settlement agreement, Phillips Chemical Co. will conduct comprehensive reviews of the plant’s training program and standard operating procedures.<sup>226</sup>

## § 15.2.6(b)

### *Other Legal Implications of Inadequate Training*

The laws described above impose on an employer both a duty to train and a minimum standard of care. However, even when an employer provides all training that is required by law, a court may find that the employer should also have complied with higher training standards, if such higher standards are common in the employer’s industry. Thus, if other companies in the industry provide training that exceeds the minimum required by law, the higher level will become the new threshold for training.

Training may also be deemed inadequate when a trainee fails to learn the material. For example, under the Federal Occupational Safety and Health Administration (Fed-OSHA), in

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<sup>224</sup> *Connecticut Broker Will Pay \$1.5 Million In EEOC Harassment Settlement*, Daily Lab. Rep. (BNA), Aug. 23, 2006. See also *EEOC v. David Lerner Assocs. Inc.*, No. 3:05-cv-00292, (D. Conn. Oct. 6, 2006) (consent decree approved).

<sup>225</sup> *Chase Pays \$2.2. Million To Settle Leave Policy Case* Daily Lab. Rep. (BNA), Dec. 21, 2006; *Court Approves Settlement In Javits Convention Center Case*, Daily Lab. Rep. (BNA), Sept. 4, 2006.

<sup>226</sup> *Phillips Petroleum to Pay \$2.1 Million*, Daily Lab. Rep. (BNA), Jan. 4, 2002, at A-1.

order to comply fully with HazCom right-to-know regulations, employers must ensure not only that their employees receive the training but that they also understand the information and training that they were given.

An employer who fails to train as required by law or by industry standards may be subject to fines and penalties by the government agency involved, including forfeiture of government funding or exclusion from government contracts. Some statutes also specify criminal sanctions, including incarceration, against an employer or individual trainer when the failure to conduct training results in death or serious injury to an employee or someone else.<sup>227</sup> Of course, employees or third parties injured because of a lack of training (or inadequate training) may file civil lawsuits seeking compensatory and punitive damages from the employer, particularly if they can demonstrate that the employer failed to meet the industry standard for training.

In these civil lawsuits, the plaintiff may try to prove that although the company met the minimum requirements of the statute, the particular circumstances of the workplace required additional training. For example, although Fed-OSHA does not require that training be conducted in more than one language, employers with diverse workplaces should ensure that the training is understood (*i.e.*, that it is conducted in the native language of the employees) not just in English. Similarly, although there is no requirement for employers to pair employees with supervisors who speak the same language, since training often occurs on the job, the employer's failure to pair the employee with a supervisor who speaks the worker's language may result in liability if the employee is injured or disciplined for failure to perform.

#### § 15.2.6(c)

### *Occupational Safety & Health Training Requirements*

Education and training are essential means for communicating practical understanding of the requirements of effective safety and health protection to all personnel. Without such understanding, managers, supervisors, and other employees will not perform their responsibilities for safety and health protection effectively. The U.S. Department of Labor's Bureau of Labor Statistics (BLS) reports that safety instruction represents one of the highest percentage of training activity per employee in the nation.

On January 26, 1989, the Fed-OSHA issued Safety and Health Program Management Guidelines ("Fed-OSHA Guidelines") for use by employers to prevent occupational injuries and illnesses. These Guidelines consisted of program elements distilled by Fed-OSHA from safety and health management practices of employers who, in Fed-OSHA's view, successfully protected the safety and health of their employees.<sup>228</sup>

The Fed-OSHA Guidelines listed four elements for effective occupational safety and health programs: (1) management commitment and employee involvement; (2) worksite hazard evaluations; (3) hazard prevention and control measures; and (4) safety and health training. Employers must implement training programs to ensure that all employees understand the hazards to which they may be exposed and how to prevent harm to themselves and others from exposure to these hazards so that employees accept and follow established safety and health protections.

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<sup>227</sup> 29 U.S.C.A. § 666(e) (1995) (Fed-OSHA).

<sup>228</sup> 54 Fed. Reg. 3904 -3916 (Fed OSHA Jan. 26, 1998).

Supervisors must be trained to carry out their safety and health responsibilities effectively and to ensure that they understand those responsibilities and the reasons for them. This includes training supervisors to analyze the work under their supervision to identify potential hazards, maintain physical protections in their work areas, and reinforce employee compliance through performance feedback and enforcement of safe work practices.

Training is a required component of compliance with virtually all Fed-OSHA standards. However, there are two key compliance areas common to all employment situations that present excellent starting points for implementing safety and health training programs. These are hazard communication and accident prevention plans (injury and illness prevention plans). Providing the required initial and refresher training in these areas can also meet minimum training requirements for a wide range of substance-specific and industry-specific Fed-OSHA standards. See “OSHA Training Requirements Highlights” at the end of this chapter for a detailed, but not all-inclusive, list of other safety and health topics that require employee training.

The minimum elements that must be covered in hazard communication and accident prevention training are as follows.

### ***Employer Personnel Responsible for Safety & Health Program Administration***

Initial and refresher training must clearly designate specific individuals with overall responsibility for implementing and updating hazard communication and accident prevention programs. Employees must be informed as to how to contact these personnel regarding safety and health questions or concerns including a provision for anonymous reporting of such concerns.

### ***Task-Specific Hazards & Control Measures***

Employees must be informed of all chemical, physical and biological hazards involved in their assigned work tasks, as well as additional hazards that may affect their work tasks. This training must include instruction in how employees can recognize such hazards and potential signs and symptoms of overexposure, and what measures the employer has implemented to protect employees from the hazards and to prevent overexposures. Hazard recognition training must include the employer’s container labeling systems, warning signs and how employees can obtain and read Material Safety Data Sheets from chemical suppliers. Where protective measures include special tools or engineering controls, the employees must be taught how to use and maintain those devices. Where personal protective clothing and/or respirators are required, employees must similarly receive training in the proper selection, use, and maintenance of those devices. If employees may periodically be assigned to nonroutine tasks, the training program must include measures that the employer will use to identify and control potential hazards of such nonroutine work assignments and how those measures will be communicated to affected employees.

Fed-OSHA has formalized a directive that addresses workplace violence in the nursing home industry through training and outreach. The directive, CPL 2-2.69, requires all nursing home employees with occupational exposure to the hazards associated with blood and other infectious materials, to receive training at the time of initial employment and at least annually thereafter.

### *Employee Communication*

Training for compliance with hazard communication and accident prevention plans must include a description of the means used to communicate with employees regarding safety and health matters. Communication methods may include workplace postings, written memos or newsletters, training handouts, safety meetings, and/or safety committees, as well as daily interactions between employees and their supervisors.

### *Minimum Safe Work Practices & Enforcement*

Employers should develop and implement written, minimum safe work practices and standard operating procedures for each task assigned to employees. Compliance with these safe work practices and procedures should be a condition of employment. Noncompliance should result in disciplinary action in accordance with the employer's personnel policies and practices. Both the minimum work practices and procedures and the employer's enforcement policy must be communicated to employees in training.

### *Refreshers & Training Updates*

Employees require periodic refresher training in hazard communication and accident prevention. The usual recommended frequency is at least annually. Employees observed violating safe work practices or procedures or behaving in an unsafe manner should also be candidates for additional refresher training. Training updates are required whenever the work area hazards change, the risk of exposure to those hazards increases, whenever new processes, chemicals, or procedures are implemented, and whenever new hazard controls are implemented.

Training in safety-related subjects is already a fact of life in the American workplace. Today, however, the mere existence of a training program is not enough. The adequacy of employee safety training can become an issue in contested cases when the employer raises the affirmative defense of "unpreventable employee misconduct." This may require the use of tests and/or hands-on exercises as part of training programs to demonstrate employee understanding of the materials presented. Employers may also need to consider using translators or presenting training materials in a variety of verbal and written formats to ensure understanding by non-English speakers and employees with learning disabilities or physical disabilities.

Under already well-established case law developed by the Occupational Safety and Health Review Commission and the courts, an employer may successfully defend against an otherwise meritorious Fed-OSHA citation by showing that all feasible steps were taken to avoid the occurrence of the hazard. Proving the adequacy of employee training immediately becomes a hotly contested issue in most such cases. The content of training materials, the dates the trainings were presented, instructors, evidence of employee attendance, and evaluation of employee understanding should all be documented in writing and maintained in employee training records.

Employers should be well aware of additional training obligations under state versions of OSHA. For example, the California Division of Occupational Safety and Health adopted an emergency regulation in September 2005, which was permanently adopted in 2006, covering heat illness prevention in all outdoor places of employment. The regulation has a significant training obligation. All employees are to be trained on the following topics:

- Environmental and personal risk factors for heat illness.
- The employer's procedures for identifying, evaluating and controlling exposures to the environmental and personal risk factors for heat illness.

- The importance of frequent consumption of small quantities of water.
- The importance of acclimatization — allowing the body to adjust gradually to work in the heat.
- Different types of heat illness and the common signs and symptoms of heat illness.
- The importance of immediately reporting to the employer symptoms or signs of heat illness in themselves or in coworkers.
- The employer's procedures for responding to symptoms of possible heat illness.
- Procedures for contacting emergency medical services, including alternative modes of transportation.
- Procedures for emergency communications, including emergency response procedures such as location, local medical services, and communication alternatives.

In this training, employees are to be provided with basic information about risk factors that may affect their vulnerability to heat illness, such as degree of acclimatization, health, water consumption, alcohol consumption, caffeine consumption and use of prescription medications.

In addition, supervisors are to be trained in the procedures to follow implementing the emergency regulation and the procedures to follow when an employee exhibits symptoms consistent with possible heat illness, including emergency response procedures.

#### § 15.2.6(d)

### *Federal Drug-Free Workplace Act Training Requirements*

In response to a growing crisis, Congress enacted the federal Drug-Free Workplace Act (DFWA) a decade ago. DFWA requires employers who receive grants from, or enter into contracts with, the federal government to inform their workers about the hazards of drug use and chemical dependency. These employers must establish programs informing their workers of the dangers of drug abuse in the workplace, must acquaint them with their company's drug-free policy and must point out available resources for drug counseling and rehabilitation. They also must inform employees of the penalties that may be imposed for transgressions. Employers covered by DFWA that fail to conduct such training may forfeit government grants or be excluded from future government contracts. Coworkers or third parties injured as a result of the conduct of inadequately trained, chemically dependent employees can file a civil lawsuit under either DFWA or state law to obtain compensation for those injuries.

Ten years after DFWA was enacted, the nation's workplace drug problem remained enormous. The U.S. government reported that 9.7 million Americans use marijuana each month and 1.9 million use cocaine at least monthly. The government also reported that 66% of those who use illicit drugs are employed. The arithmetic is astounding. It shows that 6.5 million of this country's workers are regular marijuana users and 1.25 million workers regularly use cocaine. The cost to business is astounding as well. Roger Smith, the former board chair at General Motors, once estimated that drug abuse was costing his company \$1 billion per year. (Of course, the cost in terms of human lives and family tragedies dwarfs all other statistics.)

Government has responded to these disturbing statistics by imposing drug-free workplace regulations. Certain drug-free workplace requirements, set forth at Code of Federal Regulations title 48, subparts 9.4, 23.5 and 52.2, apply generally to contractors with all federal agencies and departments. Violations can result in the debarment of a government contractor. Debarment not only results in the forfeiture of the current business relationship with the federal agency, but it also precludes an offending entity from securing any other federal grants or contracts.<sup>229</sup> While most debarments remain in effect for a maximum of three years (*e.g.*, for failure to perform, for fraud or other criminality), violations of DFWA may result in debarment for a period not to exceed five years.<sup>230</sup> Thus, a failure to train employees regarding the dangers of workplace drug abuse in conformity with DFWA's requirements could have economically disastrous consequences for a company.

The Department of Energy (DOE) and the Nuclear Regulatory Commission have extended the reach of DFWA not only to prime contractors but also to subcontractors whose work costs the DOE \$25,000 or more. DOE also requires that employers subject to its regulations submit a detailed written drug-free workplace program to it for review and approval. Each such program must include a plan for instructing supervisors and employees concerning problems of substance abuse, including illegal drugs, and educating employees regarding the availability of assistance through the employer's own employee assistance program and through referrals to other sources. DOE also requires that covered employers explain penalties that may be imposed for drug-related violations occurring on DOE owned or controlled sites.<sup>231</sup>

The U.S. Small Business Administration requires entities receiving grants to formally certify that they are in compliance with DFWA and that they have established ongoing drug-free awareness programs that inform employees about the dangers of drug abuse in the workplace. Covered employees also must be informed of each grantee's policy on maintaining a drug-free workplace. The availability of drug counseling also must be communicated. The existence of rehabilitation and employee assistance programs must be promulgated. In addition, employees must be informed of the penalties that may be imposed for drug abuse violations occurring in the workplace.<sup>232</sup>

The U.S. Department of Labor imposes similar agency-specific requirements for grant recipients.<sup>233</sup>

In addition to these government-wide and agency-specific federal drug-free training requirements for contractors and grant recipients, many states have imposed training requirements of their own. Many of the state requirements have a broader reach, affecting employers whether or not they contract with the state for goods or services.

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<sup>229</sup> 48 C.F.R. § 9.406-2(b)(2).

<sup>230</sup> *Id.* § 9.406-4(a)(i).

<sup>231</sup> 10 C.F.R. § 707.5(a)(2).

<sup>232</sup> 13 C.F.R. §§ 145.600 *et seq.* (see especially Appendix C to Part 145).

<sup>233</sup> 29 C.F.R. §§ 98.600 *et seq.*

## § 15.2.7

**G. IMPLIED TRAINING REQUIREMENTS**

An employer may comply with all mandatory training requirements and provide training that is consistent with industry standards, but still run afoul of a range of “indirect” training requirements that courts have gradually been developing. This section of the chapter identifies some of those “hidden” training requirements and describes how the failure to train, or to train inadequately, creates liability for an unwary employer.

## § 15.2.7(a)

***Nondiscriminatory Selection of Employees for Training***

The EEOC’s Uniform Guidelines on Employee Selection Procedures state that the “selection for training” of an applicant or employee must be done without discrimination on the basis of age, race, national origin, disability, or any other protected category.<sup>234</sup> In addition, if training is used as a basis for employment decisions, those decisions must also be free of unlawful bias. Thus, employers must not discriminate when making decisions such as selecting applicants or employees to attend training, using an individual’s performance during training to determine whether he or she will be retained or laid off, determining which job assignments an employee who has been trained will receive, or using the employee’s performance during training as a component of his or her overall performance evaluation.

Although this nondiscrimination provision appears obvious, it contains a “hidden” training requirement. For example, individuals who are denied jobs, promotions or other job-related benefits on the basis that they were “unqualified” may claim that they were “unqualified” only because their employer denied them training opportunities on the basis of their national origin, disability or other protected status.<sup>235</sup>

In an interesting case of “reverse discrimination,” several Caucasian male employees filed a lawsuit against a state university in Illinois, contending that the university restricted spaces in a janitorial training program to racial minorities and women. The U.S. Department of Justice filed the lawsuit on behalf of the employees.<sup>236</sup> By late 1996, the *Chicago Tribune* had reported not only that U.S. District Court Judge Richard Mills had issued a 19 page decision finding that the university had engaged in reverse discrimination, but also that at the root of the discriminatory activity was the university’s affirmative action training program which (the court found) benefited women and minorities at the expense of Caucasian males. The court also specifically found in this instance that there had been no prior imbalance to rectify through an affirmative action training program.<sup>237</sup>

Nor can training opportunities be denied to a qualified person with a disability simply because of the need to make a reasonable accommodation for the disability. The Equal Employment Opportunity Commission’s (EEOC) Technical Assistance Manual addresses this point. According to the manual, reasonable accommodations for the disabled with respect to

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<sup>234</sup> 29 C.F.R. § 1607.2 (1995).

<sup>235</sup> See, e.g., *Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2004) (lack of training was submitted as evidence of discrimination based on gender).

<sup>236</sup> *United States v. Illinois State Univ.*, No. 95-3067 (C.D. Ill. Mar. 2, 1995).

<sup>237</sup> *United States v. Board of Trustees of Ill. State Univ.*, 944 F. Supp. 714 (C.D. Ill. 1996); *Illinois State Training Plan Found Biased Against White Males*, CHICAGO TRIBUNE, Nov. 8, 1996, at 10.

training include: providing accessible training sites and facilities for persons with impaired mobility; providing training materials in alternate formats such as large print; providing interpreters and note takers for employees who are deaf; providing readers for individuals who have visual impairments or learning disabilities; adding captions to audio/visual materials for workers who are deaf; providing voice-overs for employees who are visually impaired; and offering individualized instruction for employees with mental retardation. Thus, making facilities and materials accessible for disabled individuals is another training requirement that is “implied” rather than explicit.

### *Training that Results in a Disparate Effect*

Federal and state law explicitly prohibits training methods that, while neutral on their face, have the result or effect of adversely affecting individuals in a protected class. In a recent case before the EEOC, for example, the same “neutral” verbal and mathematics test was given to all employees as a prerequisite for advancement. A group of non-English-speaking employees who failed the verbal portion of the test filed suit, claiming that it was discriminatory to require them to pass the verbal test when that test was not job-related (*i.e.*, not correlated to subsequent performance).

Another example of an unintended but adverse effect arises from testing or training materials in English that have the effect of discriminating against employees who are non-English speaking or who are culturally diverse. Thus, the “hidden” requirement is that employment materials be linguistically accessible.

### § 15.2.7(b)

### *Quality Training Required – Negligent Training Issues*

Typically, claims of negligent training arise when a coworker or a third party is injured as a result of the actions of an employee; with the injured person claiming that the employee who caused the injury was not trained or was trained insufficiently. The “hidden” requirement, therefore, is not only that training must be provided, but also that the training must be *adequate*, an adequacy defined with the benefit of hindsight.

The leading case on negligent training remains *City of Canton, Ohio v. Harris*.<sup>238</sup> A woman who claimed police officers were inadequately trained and did not recognize that she needed medical attention while she was in custody sued the City of Canton, Ohio. The plaintiff argued that hers was a classic civil rights case. The city’s facially constitutional policy (*i.e.*, that the city jailer shall have a prisoner needing medical care taken to a hospital), she contended, was unconstitutionally applied by a city employee. She also claimed that the city’s employee was inadequately trained and the constitutional wrong she suffered was caused by that failure to train.

The court in *Canton* stated that plaintiff’s contentions were not legally sufficient because she had sued under U.S. Code title 42, section 1983. The court set a high threshold for plaintiffs bringing negligent training suits under this civil rights statute. Essentially, the court said that the need to train had to be so obvious to key decision makers that its absence evidenced a “deliberate indifference” to the rights of a plaintiff. The *Canton* decision indicated that it was not enough to show that one particular government employee was ill-trained. Moreover, a training program need not provide for every possible eventuality. Under the facts of the *Canton* case, the municipality was required to train officers to respond effectively only in

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<sup>238</sup> 489 U.S. 378 (1989), *limited by Farmer v. Brennan*, 511 U.S. 825 (1994).

“usual and recurring situations.” Finally, the court indicated that training is not legally inadequate simply because harm occurred. It held that the diagnosis of the medical condition of a prisoner is not one of the “usual and recurring” situations with which a municipal police department must regularly deal. The absence of this skill did not establish a “deliberate indifference” to the constitutional rights of the townspeople. Hence, the plaintiff’s negligent training suit was dismissed.

In another negligent training decision, the U.S. Supreme Court reemphasized that where deprivations of constitutional rights are at issue, the burden on the plaintiff is very heavy.<sup>239</sup> A section 1983 plaintiff must establish that the harm suffered at the hands of a government employee resulted from an established policy or custom. This rigorous test, the Court noted, ensures that municipal liability for civil rights violations in connection with negligent training suits will derive only from decisions of the city council or from acts of officials who may fairly be said to have acted on behalf of the government itself.

The implications for private employers from these two section 1983 negligent training cases cannot yet be fully predicted. However, a post *Canton* section 1983 case decided at a lower level suggests that even private employers sued for negligent training may not be able to insulate themselves by contending that the need for training was unforeseeable. In *Thelma D. By and Through Delores A. v. Board of Education of City of St. Louis*, six young girls were molested by their public school teacher.<sup>240</sup> Among other things, the six sued the board of education for negligent training under section 1983, claiming that their civil rights were violated by the district’s alleged failure to train school principals to recognize telltale signs of sexual abuse. The Eighth Circuit Court of Appeals found that, under the *Canton* standard of “deliberate indifference” applicable to such civil rights cases, the school board could not be held liable. “To establish deliberate indifference in such a claim, appellant must show that the Board had either actual or constructive notice of the inadequacy of its training program and failed to take remedial steps.”<sup>241</sup> The *Thelma D.* court stopped just short of such a finding of deliberate indifference; expressing frustration that the school board had apparently insulated itself from information which should have made it aware that employee training was, in fact, inadequate. “Appellants have submitted no evidence of impropriety or bad faith on the part of the Board in setting up its [information] system in such a manner, but this case clearly demonstrates the need for better lines of communication and an increased flow of information to the Board.”<sup>242</sup> The court continued:

The magnitude of the tragedy underlying this litigation compels us to sound a final cautionary note to the Board and other similarly situated public agencies. In the future, this court will closely scrutinize bureaucratic hierarchies which, in their operation, tend to insulate its [sic] policymaking officials from knowledge of events which may subject them to section 1983 liability. This case compels us to provide clear warning to the Board that in the future a defense of no liability due to lack of knowledge may no longer apply to a bureaucracy which continues to block notice to the Board of

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<sup>239</sup> *Board of County Comm’rs of Bryan County, Okla. v. Brown*, 520 U.S. 397 (1997).

<sup>240</sup> 934 F.2d 929 (8th Cir. 1991).

<sup>241</sup> *Id.* at 935.

<sup>242</sup> *Id.* at 935-36.

allegations of sexual abuse of students committed by teachers and others during school related activities.<sup>243</sup>

The Eighth Circuit carefully limited the above warning to public entities defending section 1983 cases. However, private employers should not ignore this case. The lesson for the private sector to be derived from *Thelma D.* is that top management cannot avoid exposure in failure to train cases merely by pleading ignorance. Private sector plaintiffs may just as credibly argue that a need for training would have been foreseeable had top management not (either negligently or intentionally) cut itself off from employee concerns.

Certainly, private employers will not be accorded the protection of *Canton's* very high “deliberate indifference” standard if they are sued for negligent training. If section 1983 suits can be successfully brought under the rigorous *Canton* standard, it is clear that private employers will invite negligent training suits if they ignore reasonably foreseeable workplace training needs.

### § 15.2.7(c)

#### *Providing Inadequate Skills Training*

Employees who are disciplined or discharged for poor performance often claim that the employer prevented them from performing, either by failing to train them in the necessary job skills or by providing training that was inadequate. Thus, even simple wrongful discharge lawsuits have the potential to result in a detailed dissection of the employer's entire training program.

### § 15.2.7(d)

#### *Workplace Violence: Implied Training Requirements*

With the increasing incidences of violence in the workplace, employers who do not provide training to their employees about the signs of incipient violence, or the steps to take to prevent or ameliorate violence, face potential liability from injured parties. Again, although there is no specific law requiring training in workplace violence, the “general duty” clause of Fed-OSHA, guidelines issued by some state safety and health agencies, as well as the common law, all suggest strongly that such training should occur.

Company workplace violence programs have received more attention on a national scale. The United Auto Workers has implemented a violence prevention program as part of its employee assistance program. Emphasizing the risks inherent in the service sector, the program addresses adequate staffing, physical protection and employee training. According to the U.S. Office of Personnel Management, such measures can be a first step in dealing with workplace violence. The office recommends developing a workplace violence prevention team that will be responsible for assessing all risks, developing procedures and training employees on how to deal with the risks.<sup>244</sup>

An important case on this point was decided in California. Unfortunately, the way the case was framed created a situation where the final holding was equivocal from a law of training perspective.

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<sup>243</sup> *Id.* at 936.

<sup>244</sup> *Workplace Violence Company Programs Can Minimize Worker Violence, ABA Panelists Suggest*, Daily Lab. Rep. (BNA), Aug. 15, 2002, at C-3.

An armed robber entered a Kentucky Fried Chicken restaurant and took the wallet of Kathy Brown, a customer. While holding a gun to Brown's back, the robber then told the cashier to open the cash register and give him all the money. The cashier attempted to stall, stating that she did not have the key to the register and would have to get it from the back of the restaurant. The robber shoved the gun harder into Brown's back and told the cashier to open the register immediately or he would shoot Brown. The cashier complied; the robber grabbed the money and left. Brown filed suit against KFC for negligence, claiming that it had failed to properly train its employees on how to deal with robbers. The appellate court found that KFC had a legal duty to "require its personnel to behave reasonably during an armed robbery" in order to avoid increasing the risk to customers, and that KFC should have "foreseen" that if its cashier failed to cooperate with the robber, "the customer would be terrorized and potentially shot to death." A divided California Supreme Court reversed this decision on a 4 to 3 vote, holding that a shopkeeper has no duty to a patron to comply with an armed robber's demand for money in order to avoid increasing the risk of harm to patrons.<sup>245</sup> In doing so, the state's high court avoided the need to deal with the training issue that was an important component of the lower court's decision.

Legal ambiguities have not kept plaintiffs from suing employers when violence occurs at work. In one tragic and well-publicized case, a customer entered his local Wal-Mart, purchased bullets, chased down an employee of the store (the customer's ex-wife), and shot her before turning the gun on himself. The wife survived and sued Wal-Mart for negligently failing to take appropriate measures to provide her with a safe workplace. Since the store's managers allegedly knew about the husband's propensity toward violence, including the existence of a restraining order, it seems likely that Wal-Mart's apparent lack of a policy and training managers on their duties will be an important factor in determining liability.<sup>246</sup>

### § 15.2.7(e)

#### *Wage & Hour Training for Managers in the Age of Class Actions*

Training managers on the basic requirements of wage and hour law has become crucial even though there is no direct requirement to do so. The wage and hour class action has become the "plaintiff's attorney's best friend." The number of lawsuits under the Fair Labor Standards Act climbed a shocking 86% between 2004 and 2006.<sup>247</sup> The number of wage-and-hour class actions now outnumber those filed for discrimination. These class actions can be devastating on employers. Not only do they often result in multimillion dollar verdicts or settlement, they tend to effect large portions of the workforce. For example, the courts approved a \$90 million verdict against a major insurance company who misclassified 2400 employees as overtime exempt.<sup>248</sup> This case was eventually settled for \$210 million. Especially frustrating for employers is how quickly failing to pay for only tiny increments of hours worked can accumulate. Recently, a national chain of electronics stores agreed to pay \$5.4 million to settle a dispute regarding its payment of overtime to employees. This huge dollar amount was generated from allegations that some 70,000 current and former workers were not paid for relatively small amounts of missed time including meal breaks, after

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<sup>245</sup> *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814 (1997).

<sup>246</sup> Shannon P. Duffy, *Employee Sues Wal-Mart Because Store Didn't Protect Her from Husband's Attack*, THE LEGAL INTELLIGENCER, Aug. 24, 2001, available at <http://www.law.com>.

<sup>247</sup> Brooke A. Mastera & Amy Joyce, *Suits On Overtime Hitting Big Firms*, WASH. POST, Feb. 21, 2006.

<sup>248</sup> *Justices Reject Review of Overtime Case, Leaving Intact \$90 Million Award for Jury*, Daily Lab. Rep. (BNA), Nov. 27, 2001, at AA-5.

employees punched out on the time clock, and while they waited for managers to unlock doors at the end of shifts. The problem was exacerbated by the fact that the retailer did not keep an accurate record of hours worked by employees as required by the Fair Labor Standards Act.<sup>249</sup>

This legal environment leaves no room for error for allowing even “minor” violations of wage and hour laws. Managers who know the basics about the employers’ obligation are the first line of defense in preventing these minor infractions from occurring. In the case involving the national retailer, who would best know if the employees were taking their lunch breaks or if their time records were accurate? The answer is the local managers. However, very few companies train managers on the importance of keeping accurate time records or legal intricacies of what are “hours worked.” All indications suggest that the need to develop focused and effective wage and hour training will be critical to employers in coming years.

This type of training is likely to reduce infractions, and it can also help significantly reduce damages during litigation. The statute of limitations period for claims brought under the Fair Labor Standards Act is two years unless the employer’s violation of the Act was willful, in which event the statute of limitations is three years.<sup>250</sup> A willful violation will be found where the employer either knew or showed a reckless disregard for whether its pay policy violated the FLSA.<sup>251</sup> Training is part of the proactive steps an employer can take to show its good faith efforts to comply with the law and possibly toll the statute of limitations.

## § 15.2.8

### H. LEGAL IMPLICATIONS ARISING FROM TRAINING ITSELF

The very group whose responsibility it is to keep others in the organization out of legal trouble — the trainers — may itself cause substantial liability for the employer. Thus, even if the choice of who will receive training has been legitimate and nondiscriminatory, and even if the training is so thorough and comprehensive that it meets all mandatory and implied training requirements, defects in the content, method and delivery of training may result in liability.

## § 15.2.8(a)

### *Wage-and-Hour Issues for On-the-Job Training*

On-the-job training of employees, including newly hired applicants, generally counts as compensable work time under the federal Fair Labor Standards Act. However, time spent by

<sup>249</sup> *Best Buy Will Pay \$5.4 Million to Settle Overtime Dispute, D.O.L Says*, Daily Lab. Rep. (BNA), Jul. 5, 2001, at A-1.

<sup>250</sup> 29 U.S.C. § 255. See *In re Farmers Ins. Exchange*, 300 F. Supp. 2d 1020 (D. Or. 2004) (employer’s failure to take action after learning that employees may be misclassified will render failure to pay overtime willful from the date of learning of a potential misclassification); *Wolfslayer v. IKON Office Solutions, Inc.*, 2004 U.S. Dist. LEXIS 22625 (E.D. Pa. Nov. 8, 2004) (company’s violation of the FLSA was not found willful where company had numerous compliance policies and audit policies to ensure that it did not violate the FLSA).

<sup>251</sup> *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

workers attending employer-sponsored training programs and instructional meetings does not have to be counted as hours worked, provided that:

- the meetings are held outside regular working hours;
- attendance is truly voluntary (the meeting time will count as hours worked if attendance is required by the employer — the hours must be counted if employees are led to believe that their working conditions or employment situation will be adversely affected if they do not attend);
- the training program or meeting is not directly related to the employee's job (training is considered job-related if it is designed to teach employees how to perform their current job more effectively, but not if it prepares them for a different job — for example, a typing course for a typist would be job-related training, but an electronics repair course would not); and
- the employee does not perform any productive work while attending the training session.<sup>252</sup>

### § 15.2.8(b)

#### ***Potential Liability Flowing from Material Collected During Training***

Many training programs also evaluate how well participants have learned the material. This may include pre-training testing to determine the baseline level of the knowledge, post-training testing to determine short-term retention, on-the-job evaluations by supervisors to determine whether employees are applying the information, and follow-up training to correct deficiencies. However, an individual's performance on pre-training and post-training testing, including test answers, test scores, and evaluations of subsequent performance, may provide ammunition to plaintiffs in subsequent lawsuits. For example, in a sexual harassment lawsuit, the plaintiff may contend that the test results of the supervisor who allegedly harassed her show that he failed to understand what constitutes sexual harassment. Or, in a race discrimination lawsuit, the plaintiff may claim that a coworker continued to make racial comments at work, even after he had attended EEO training. Further the employer's post-training testing showed this, but the employer failed to provide immediate retraining. In both situations, test results will be used as evidence of the employer's indifference to the effectiveness of its training, thus leading to liability.

A highly publicized case on this point was *Stender v. Lucky Stores, Inc.*, a class action lawsuit by several female employees alleging systematic gender discrimination by a large grocery store chain.<sup>253</sup> Lucky had hired an outside consultant to conduct antidiscrimination training sessions for supervisors. The consultant assigned company officials to take notes during the sessions, particularly with regard to which supervisors expressed discriminatory views. The notes were preserved in Lucky's files. The plaintiffs wanted the notes to show that the supervisors held discriminatory beliefs and, therefore, were likely to have actually discriminated in the workplace. Lucky objected, stating that disclosure of the notes would discourage future participants from being honest and, therefore, not only undermine the value of EEO training as a whole, but subject the participants to individual liability for being honest enough to reveal their biases. The federal judge in charge of the case ordered Lucky to give

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<sup>252</sup> 29 C.F.R. §§ 785.27-785.29 (1995).

<sup>253</sup> 803 F. Supp. 259 (N.D. Cal. 1992).

the notes to the plaintiffs. Not surprisingly, the attorneys for the plaintiffs then referred to the notes as “the proverbial smoking gun.”

The lawsuit resulted in a monetary settlement of approximately \$75 million, with an additional \$20 million allocated for affirmative action programs for female employees.

### § 15.2.8(c)

#### *Inappropriate Comments Made During Training Session*

Needless to say, trainers must not engage in discriminatory behavior during training. In one case before the EEOC, an air traffic controller who was training a female employee called her a “dumb broad” and stated that “women should stay at home,” resulting in an administrative claim for gender discrimination.<sup>254</sup> In another EEOC case, a trainee alleged race discrimination after the trainer called her “stubborn” and “bullheaded” and told her to “shut up.”<sup>255</sup>

In *Fitzgerald v. Mountain States Telephone & Telegraph Co.*, the misconduct was by a corporate instructor who had been retained to evaluate potential trainers in a course called “Train the Trainer.”<sup>256</sup> The participants were asked to recount an experience that caused them to become interested in being trainers. The plaintiff, who was a Caucasian, told about her relationship with an African American and her belief that the relationship ended because the “black community” was intolerant of interracial relationships. The corporate trainer who was leading the discussion, an African-American female, took offense and began belittling the plaintiff, saying to her: “You white bitches are always taking up the air time, and I’m sick of it.” The plaintiff filed suit, alleging race discrimination on the part of the trainer and the employer.

Inaction by a trainer can also lead to liability. In *Moller v. State Personnel Board*, the plaintiff alleged that she was treated unfairly during training because the trainer ignored racial remarks made by other participants.<sup>257</sup>

Much more troubling, however, are situations where the employer is sued even though the trainer did not intend to be discriminatory and, in fact, was just trying to do the job. For example, role-playing and question-and-answer sessions are common training techniques. Cases have arisen where comments by the trainer, made in the context of a role playing situation, became the subject of litigation. In one case, an employer’s management training course included role playing sessions where participants were given scripts and asked to play certain roles, such as the overbearing boss and the employee who never takes responsibility. The script for a female employee, who was playing the part of a supervisor, called for her to be rude and intimidating. When the training instructor summarized her role as that of a “bitch,” the employee complained and subsequently filed a lawsuit alleging that characterizing her as a “bitch” was evidence of gender bias.

In the *Lucky* case discussed above, the antidiscrimination training called for supervisors to discuss such stereotypes as “black females are aggressive” and “women cry more.” The goal of the discussions was “critical self-analysis” (*i.e.*, for the supervisors to examine whether

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<sup>254</sup> *Rosser v. Pena*, 1995 EEOPUB LEXIS 2915 (Oct. 19, 1995).

<sup>255</sup> *Wojno v. Shalala*, 1994 EEOPUB LEXIS 4317 (Sept. 16, 1994).

<sup>256</sup> 68 F.3d 1257 (10th Cir. 1995).

<sup>257</sup> 1996 U.S. App. LEXIS 34005 (9th Cir. Dec. 3, 1996).

they possessed such opinions). The plaintiffs in *Lucky* used these discussions to suggest that both the company and the supervisors held subjective beliefs that were discriminatory.

These cases make the point that even well-intentioned training programs can form the basis for a lawsuit. Trainers must “sanitize” their hypotheticals and training materials to eliminate any suggestion of bias, or make sure to state that examples and discussion material are for training purposes only and not meant to suggest actual beliefs, or risk exposure. Written disclaimers are not at all inappropriate in a training session.<sup>258</sup>

### § 15.2.8(d)

#### *Issues Related to Retaining Training Materials*

Many employers routinely gather and retain documentation pertaining to training, such as the instructor’s notes regarding the content of discussions during training and trainee performance on pre-training and post-training tests and evaluations. The benefits of retaining such records are obvious. They allow the employer to track who was trained, and whether they actually learned the material. An employer can also assess performance on the job and make determinations regarding promotions and future training. However, as the *Lucky* case demonstrates, such documentation may have to be disclosed in a lawsuit, with potentially unfavorable consequences.

To protect training documentation from being disclosed, two solutions are possible. The first is to have certain training sessions — such as those where participants are asked to voice biases, or where liability issues are discussed — conducted by an attorney and characterized as being confidential. Training sessions which are intended to be confidential, conducted by an attorney acting in the role of an attorney and not primarily as a trainer or consultant, are likely to be classified as attorney-client communications, which, under well-settled state and federal law, would be protected from disclosure during litigation. However, the lower the level of the trainees’ policy-making authority, the less likely that this protection would attach.

The second potential avenue for protecting training materials is the privilege for critical self-analysis. In the employment context, this privilege has been held to protect the subjective evaluative portions of employer affirmative action programs, provided that such evaluative information is required by the government.<sup>259</sup> Thus, to the extent training sessions are required by law, a valid argument can be made that personal beliefs and opinions expressed during such training are protected from disclosure by the critical self-analysis privilege, even where the training is not conducted by an attorney. At present, however, nonmandatory training sessions are not protected by the self-analysis privilege, although the possibility exists (because the courts created the privilege) that the courts may choose to expand the privilege to protect more training materials. Supporting such an expansion are the arguments that training participants should not be discouraged from speaking frankly for fear that their comments will be disclosed and become the basis for liability, and that employers should not be discouraged from conducting training or keeping good records.

In the face of the courts’ apparent unwillingness to develop such a privilege, legislative bodies are beginning to step into the breach.

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<sup>258</sup> At least two disclaimers should be considered. The first should advise participants that humor is used for learning purposes only and not to make light of the subject matter. The second should advise participants that the discussion of offensive topics during the program, such as harassment, is done only to facilitate learning.

<sup>259</sup> See, e.g., *Resnick v. American Dental Ass’n*, 1982 U.S. Dist. LEXIS 14603 (N.D. Ill. Aug. 18, 1982).

An example can be drawn from the Equal Credit Opportunity Act,<sup>260</sup> which was amended to include a provision that establishes a privilege for creditors' reports or results of self-tests, if the creditor is checking its own processes to determine the level of effectiveness of compliance with the Equal Credit Opportunity Act itself. The amendment establishes that reports or results of self-testing "may not be obtained or used by any applicant, department, or [government] agency in any proceeding or civil action in which one or more violations of [the Equal Credit Opportunity Act] are alleged."<sup>261</sup> The Equal Credit Opportunity Act self-analysis privilege, though not an employment-related privilege, certainly suggests that other legislative actions may extend the privilege to areas of employment law for similar policy-related reasons. However, in the absence of clearer and more sweeping pronouncements from the courts and in the absence of broader legislative limitations, it is not yet clear that any employer's efforts to analyze its own compliance with training requirements or to assess its employees' level of assimilation of training will be accorded a privileged evidentiary status, except perhaps on a case-by-case basis.

Until the laws are clarified, employers should assume that any retained training material is discoverable. Employers certainly should retain sign in sheets or other records showing that the employee took the course, and the core training material itself. However, employers are cautioned against keeping material created during the training session itself, such as test results and the results of interactive exercises. Such material will, by its nature, not have been reviewed carefully to determine if would help or hurt the employer at a later time. This approach should also be utilized in regards to programs done via e-learning tools.

#### § 15.2.8(e)

### *Training & Religious Beliefs*

In an effort to seek new ways to motivate employees, stimulate productivity and increase tolerance between workers, nontraditional training methods, including New Age and adventure based training, have been increasingly used. While these types of training can be effective they can also have negative consequences and have been subjected to increased legal scrutiny.

#### *Sensitivity Training*

Teaching coworkers to cooperate effectively with different types of employees, whether that difference is based on work styles or ethnic and religious backgrounds, can improve productivity and reduce discrimination and harassment lawsuits. Yet, such "sensitivity" or "diversity" training can cause litigation if not administered correctly. This is the lesson that the Minnesota Department of Corrections (a public employer) learned in the course of recent litigation.<sup>262</sup> The plaintiffs in *Altman v. Minnesota Department of Corrections*, Thomas Altman, Kristen Larson and Kenneth Yackly, were regularly required to attend training sessions.

One training session was to include a section on "Gays and Lesbians in the Workplace." When the agenda for the training session was published, Altman sent an e-mail to the warden protesting that the training session would "raise deviant sexual behavior for staff to a level of acceptance and respectability." In response to Altman's protest, the warden issued a memorandum to all staff stating that the gay and lesbian training was "part of the facility's

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<sup>260</sup> 15 U.S.C. §§ 1691 *et seq.*

<sup>261</sup> 15 U.S.C. § 1691c-1(a)(2)(B).

<sup>262</sup> *Altman v. Minnesota Dep't of Corr.*, 251 F.3d 1199 (8th Cir. 2001).

strong commitment to create a work environment where people are treated respectfully, regardless of their individual differences.” The training is not “designed to tell you what your personal attitudes or beliefs should be.” The memorandum also stated that attendance at the training session was mandatory.

On the day of the training session, Altman, Larson and Yackly collectively decided they were going to read their Bibles during the program as a silent protest. They did just that. They read their Bibles, copied scripture and participated to a minimal extent. They were not disruptive, nor were they told by supervisors who were present to stop reading the Bible. Other employees also did not give their undivided attention during the training session. Several slept or read magazines.

Following the training session, an investigation was conducted when two of the trainers complained of the three employees’ behavior. As a result, each of the three received a written reprimand making them ineligible for promotions for two years.

Altman, Larson and Yackly then filed suit alleging a violation of their First Amendment free speech and freedom of religion rights as well as for religious discrimination under Title VII.

The Department filed a successful motion to have the lawsuit dismissed. In its motion, the Department argued that the employees were not disciplined for reading the Bible, but rather, for insubordination (refusing to be trained). The employees appealed the dismissal and the Eighth Circuit Court of Appeals (which covers Missouri, Minnesota, Iowa, Nebraska, North Dakota and South Dakota) reversed the lower court and ordered the case to proceed to trial.

The appeals court found that the Department’s reason for issuing the written reprimands was suspect. The court stated that a jury needed to decide what the real reason for the discipline was: the employees’ insubordination, their nondisruptive speech, their religion, or the fact that “they expressed their opposition through religious activity.”

The key fact for the court of appeals was that there was evidence that other employees were also insubordinate during the training and were not disciplined. Evidence was presented that other employees slept, or read other materials such as secular magazines and miscellaneous paperwork. However, only the three employees who read the Bible were reprimanded. Because of the Department’s inconsistent treatment of the insubordinate employees, the court found that there was evidence of religious discrimination and possible violations of the First Amendment right to free speech.

The court also found, however, that the Department did not “substantially burden” the employees’ religious activities. The only burden placed on the employees was “the requirement they attend a 75 minute training program at which they were exposed to widely accepted views that they oppose on faith-based principles. This is not . . . a substantial burden on their free exercise of religion.”<sup>263</sup> Therefore, the employees’ free exercise claims under the First Amendment were dismissed.

### *New Age Training*

New Age programs typically involve techniques such as visualization, self-hypnosis, biofeedback and meditation and are often designed to get employees to rethink how they work and the impact of personal beliefs and philosophies on their work habits. Critics of New

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<sup>263</sup> *Id.* at 1204.

Age training programs object to employers forcing employees to attend programs that attempt to change their view of reality or religious beliefs; others compare New Age training techniques to a form of brainwashing or portray it as an attempt to transplant cultism and mysticism into corporate America.<sup>264</sup>

Several cases have been filed in the last few years by employees who contend that New Age training programs infringe on various rights, including privacy and freedom of religion. In *Grant v. Joe Myers Toyota*, a would-be car saleswoman claimed religious discrimination when she was not hired because she refused to attend a sales training program.<sup>265</sup> The car dealership required new sales employees to attend training where they read, memorized, and recited passages from a motivational sales book. The book incorporated a biblical theme where Paul, Jesus Christ's apostle, becomes the greatest salesman on earth after receiving the ten main sales principles printed on scrolls. The plaintiff contended that the book conflicted with her Christian religious beliefs and complained to the employer. Toyota told her she had to take the class or she would not be hired. The court reversed summary judgment to the employer finding that under Title VII and state law, the plaintiff had stated a claim of religious discrimination. The court held that New Age trainings had been controversial for years and that Toyota had not offered a reasonable accommodation to applicants who could not attend the training for religious reasons.

Another highly publicized matter involved a public utility. Reportedly, the company spent \$147 million to send its 67,000 employees to a training seminar called "Leadership Development," which was designed to teach people to "think about thinking." The seminar derived from the teachings of Russian philosopher George Gurdjieff, who created his own language and taught concepts that were later adopted by training consultants. As a result of employee complaints, the California Public Utilities Commission investigated the training program and concluded that it created fear, decreased productivity, wasted time and resulted in an intimidating environment.<sup>266</sup>

### *Adventure or Wilderness-Based Training*

Also subject to potential scrutiny are so-called adventure and wilderness training programs. These programs are typically provided not by the in-house training department, but by outside vendors. Examples include fire walks, parachute jumps, rope climbing, white water rafting, and other physically and mentally challenging activities. The objectives of these programs include using physical and mental stress to develop teamwork and leadership skills and to encourage risk taking. There is very little legal precedent in this area. Obviously, physical and mental injuries to employees are covered by workers' compensation. However, there are many exceptions to the rule that workers' compensation is the exclusive remedy for injuries within the course and scope of employment, particularly where there is a claim that the employer intentionally inflicted emotional distress on the employee, or discriminated with respect to who could participate in the program. If an adventure program is mandatory and physically or mentally demanding, an employee could allege that he or she suffered severe emotional distress as a result of being forced to participate; an employee with physical limitations could allege that selection (or nonselection) for the training, or his or her performance during the training, was discriminatory in purpose or effect.

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<sup>264</sup> Jeremy Main, *Trying to Bend Managers' Minds*, FORTUNE, Nov. 23, 1987; *Gurus Hired to Motivate Workers Are Raising Fears of Mind-Control*, N.Y. TIMES, Apr. 17, 1987, at A10.

<sup>265</sup> 11 S.W.3d 419 (Tex. App. 2000).

<sup>266</sup> CALIFORNIA PUBLIC UTILITIES COMMISSION, REPORT ON PACIFIC BELL'S LEADERSHIP DEVELOPMENT PROGRAM 5-7 (June 10, 1987).

## I. CONCLUSION

The law of training has emerged as a body of law that can be described, analyzed and discussed. More importantly meeting the challenges posed by this body of law should be an essential component of meeting every organization's goals. In light of recent trends that equate failure to train with willful neglect, employers simply cannot afford to ignore the need for workplace training, especially in areas related to employment law. The question is no longer whether to train one's employees regarding the many facets of employment law described above. The question is how to train them effectively, in order to promote a harmonious workforce and prevent unnecessary litigation.

## III. PRACTICAL RECOMMENDATIONS FOR HUMAN RESOURCES PROFESSIONALS ON THE LAW OF TRAINING

### A. COMPLYING WITH CALIFORNIA'S MANDATORY HARASSMENT TRAINING LAW

#### *An Overall Approach to Compliance*

The authors' overarching approach to A.B. 1825 is to make compliance as easy as possible. We use the term "easy" in two ways. First, it should be easy to show compliance. The law is technical and specific, containing many "hidden" requirements. When the Department of Fair Employment and Housing (DFEH) or a plaintiff's attorney is aggressively pursuing settlement, it is likely that the employer's training efforts will be closely examined. Thus, employers would be wise to ensure that their training programs obviously meet A.B. 1825's mandates without outsiders having to pick through materials to find the mandated learning points. Second, easy refers to the methods that can be used to deliver the training. As will be explained below, there are a variety of ways to deliver the required training. Employers should feel free to pick the method or methods that provide the best fit for their culture.

The new training law is probably more detailed than most employers would like. Even so, even the Chamber of Commerce, which initially opposed the bill, supports the idea that harassment training is generally a good idea and will work to benefit employers. Employers who follow the spirit of the law will have a better chance in showing compliance and reap the positive benefits that such training can sow.

There are several steps employers should take to ensure compliance with California's A.B. 1825. Consider the following approach:

**Step One: Audit the organization's past harassment training efforts.** Do this to ensure that all covered supervisors were trained by the end of 2005 and that training was again conducted in 2007. Training must again be provided in 2009.

**Step Two: Examine who is conducting the training.** Regardless of whether the training is conducted with internal or external resources, live or on-line (or a combination thereof), employers must remember the quality standards mandated by the statute. Namely, that those who present the training must have “knowledge and expertise” regarding the prevention of harassment, discrimination, and retaliation. The two words in quotes, taken together, likely mean that trainers must know about harassment, discrimination, and retaliation in law and have practical experience dealing with such issues.

**Step Three: Review the training program — topics and timing.** The law requires a minimum two hours of sexual harassment training covering specific topics including California law and remedies available to victims of harassment. Because of these details, employers should be very careful when selecting programs designed before A.B. 1825's passage. Such programs often do not include state law specific topics such as the additional categories protected under California law or the remedies available. Even if programs contain all the required topics, the coverage may not be readily apparent, giving the DFEH or plaintiff's counsel reason to investigate the program in greater detail. This level of scrutiny certainly “fails” the suggested “make compliance easy” standard.

Employers should also seriously consider conducting more than the bare minimum of two hours of training required by law. By lengthening the training program slightly (a half-hour, for example), employers can avoid a plaintiff's attorney accusation that “they have done nothing but the least amount required by law.” Longer classes also allow the coverage of harassment prevention based on the other categories protected under federal and state law (such as race, age, and disability). Covering these extra topics will help limit workplace disputes and create a stronger defense against liability or damages if litigation arises. Finally, longer classes give employers a margin for error when compliance is questioned. For example, if a participant in a live on-line class logged in a few minutes late to a two and one-half hour webinar that person will still receive the requisite two hours of training.

**Step Four: Decide who needs to be trained.** The statute requires training all supervisory employees. At a minimum, employers need to list all of those who meet the FEHA's definition of a supervisor regardless of job titles or where a person fits within an organization's structure. Also note that it is possible that term “supervisory employee” as used in A.B. 1825 is broader than the term “supervisor” defined in FEHA's general sections.

A.B. 1825 is silent on the issue of whether supervisors outside of California must be trained. Based on previous court decisions, the answer is likely that out of state supervisors probably do not have to be trained unless they actively manage California employees. However, multistate employers should consider providing the same training to all supervisors. Doing so will help enforce a consistent model of behavior that the organization desires. Organizations that train managers in California, but not elsewhere, also open themselves to attack. Assume there is a sexual harassment claim in Kentucky and only California supervisors were trained. The plaintiff's attorney in this hypothetical case would likely argue that such a dichotomy clearly showed that the employer, by just training where legally mandated, was not taking reasonable steps to avoid harassment.

**Step Five: Decide training delivery methods.** The only training method specifically sanctioned by A.B. 1825 is classroom training. However, the statute allows unspecified other delivery methods if such methods are “interactive and effective” as required by the statute. The following briefly recaps the delivery methods available and their benefits and problems under the statute.<sup>267</sup>

- *Classroom Training:* This method is specifically approved by A.B. 1825 on the theory that it remains the most powerful way to ensure compliance with an organization’s antiharassment efforts. Employers using classroom training will, however, have the administrative burdens of scheduling and tracking compliance manually.
- *Live Webinars:* Webinars combine a live instructor with voice and visuals being presented on the learner’s computer. If done using technology that allows the instructor to pose questions to the audience and for the audience to pose their own questions to the instructor, such webinars will almost certainly meet A.B. 1825’s requirements either because it is considered “virtually” classroom training or because it is effective and interactive. Webinars also allow organizations to electronically monitor compliance efforts.
- *Self-Study Learning Without a Live Component:* Self-study learning is most typically done via the web, video tape, or workbook. Without any live component, this method has been the most questioned by organizations and lawyers. The draft regulations promulgated by California’s Fair Employment and Housing Commission explicitly state that e-learning, both by live webinars and by self-study methods, is permissible. Such approval, however, is predicated on the training satisfying several requirements. Such non-classroom training must:
  - Be created by a qualified “instructional designer.” Webinars must also be taught by a qualified trainer.
  - Incorporate learner feedback or a participation component at least once every 15 minutes, so that employees are “measurably engaged” in the training and acquisition of knowledge is tested.
  - Provide an opportunity for feedback.
  - Give the learner the opportunity to ask questions and have them answered.
- *Blend of Live & Self-Study:* Organizations could provide an hour of training through a self-study computer based program and an hour via live (in-person or webinar) program, for example. This approach allows for the many efficiencies that e-learning presents with the assurance that students receive information from and can ask questions of an expert. Therefore, it is very likely, that the unblended solution would comply with A.B. 1825’s mandate as a “virtual classroom.”
- Many employers have used a combination of all three methods. For example, one nationally recognized health care provider is using the following methodologies:
- Divisional managers: A full day class on employment law basics, including two hours of harassment training.

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<sup>267</sup> Discussions on the delivery method assume that the training program contains the content required by A.B. 1825 and is delivered by those with the requisite knowledge and expertise.

- Managers: A 2.5 hour in-person training program.
- Line-supervisors: A 1.5 hour self-study e-learning program and a 1 hour webinar
- Employees: A self-study e-learning program

**Step Six: Draw up a training schedule.** Employers must ensure that all supervisors received training before January 1, 2006 and every two years thereafter. Employers must also retain records that the supervisors took the course. Learning management systems or data tracking systems that come with some high quality e-learning products can help with this process.

Employers are reminded that newly hired or promoted supervisors must be trained within six months of the assumption of a supervisory position. Thus, employers must develop a procedure to identify when a new supervisor is “activated.”

**Step Seven: Establish a procedure for the ongoing training requirement.** There are several extremely helpful provisions in the draft regulations that lessen the burden on employers managing their ongoing compliance obligations. Under the regulations, employers can use either of two methods to meet A.B. 1825's periodic retraining requirement:

1. Individual Tracking.
2. Training Year Tracking.

*Individual Tracking* measures the two-year time period from the date each individual supervisor completed his or her last training. For example, Chris completes his first training program on October 26, 2007. Chris must be retrained no later than October 26, 2009.

*Training Year Tracking* allows employers to designate a “training year” in which to train supervisors. The employer must retrain supervisors by the end of the next training year. Practically speaking, this allows for more than two years to pass between some training sessions.

For example, 2005 was designated as a “training year.” Chris took his first training program on January 5, 2005. Chris should have been retrained no later than December 31, 2007.

New supervisors must be trained within six months of assuming their supervisory position, and every two years thereafter, measured either by the individual or training year tracking method. If an employer uses the Training Year method, some supervisors may need to be retrained sooner than once every two years. For example, if an employer has created a training year schedule designated as 2005, 2007, 2009, etc. and the supervisor is hired and receives harassment training in 2006, then the supervisor should have been trained again in 2007 — along with the other supervisory employees — and thereafter follow the employer's two-year training schedule.

The Training Year method seems infinitely easier to manage than the Individual Tracking method. Assume an organization had 100 managers. In 2005, the organization held two classroom training sessions — one in June and the other in September. Fifty managers took one of these two courses. The remaining

50 lower-level supervisors took a self-study e-learning course at their own pace, completing the course at different times. Using the Individual Tracking method, the organization would have to track the completion dates for the e-training taken for each e-learner. In this scenario, the employer could have as many as 50 separate Individual Tracking deadlines to monitor, in addition to the June and September 2005 training anniversaries. Those who took the July 2005 course should have been retrained by July 2007, and would have to be trained again in 2009. Those who took the September 2005 course should have been retrained by September 2007, and would have to be retrained again by September 2009. Plus, the organization would have to manage a separate training deadline for each of the e-learners.

Under the Training Year method, all supervisory employees would be trained by the end of 2009. The training date would be the same regardless of whether the employee took the July or September classroom training or the e-learning. The one drawback with the training year method is that new supervisors trained in the “off year” must be trained again during the next training year.

**Step Eight: Establish record retention procedures.** Keep track of which supervisors have taken and completed the training by creating and maintaining physical records, such as sign-in sheets. An employer that diligently trains all its supervisors with appropriate content in a timely manner, but cannot produce the physical evidence confirming it has done so, faces the possibility that it will be disbelieved by a jury, court, or administrative fact finder, and thus reap none of the benefits of its diligence. The certification forms should reference the specific requirements of A.B. 1825.

## § 15.3.2

### **B. ESSENTIAL STEPS TO AVOID TRAINING-RELATED LITIGATION**

The points presented below suggest essential steps that should minimize an employer’s exposure to litigation arising from its training program.

#### ***Step One: Identify Training Needs & Goals***

Conduct a comprehensive labor-relations audit:

- Identify applicable laws that require training set forth in federal, state and local statutes, regulations and ordinances including laws that are specific to the particular industry and case law.
- Identify the level of training needed by executives, human resources professionals, managers, and nonsupervisory employees.
- Identify “hidden” training requirements, such as skills training, workplace-harassment training, workplace-violence training, and occupational safety and health training.
- Identify industry practices regarding the provision of additional training.

- Audit claims and litigation experience in the areas of workers' compensation, EEO, OSHA, sexual harassment, wrongful discipline, wrongful discharge, negligent hiring, training and supervision, and workplace violence.
- Survey supervisors and employees to determine the areas in which they believe training is needed.

### *Step Two: Select the Training Platform*

The decision regarding when to conduct training using live instructors or e-learning training technologies will depend on factors such as the organization's goals, budget, and access to technology. For example, highly experienced managers or human resources professionals can be trained using live trainers, while web-based training can be used to quickly train large numbers of new managers, front line supervisors, and nonsupervisory employees. Another method is called blended learning. One type of blended learning utilizes live instructors working with students via the Internet or a satellite system. Technology advances have made blended learning much more practical. There are now several providers of on-line "virtual classrooms" that maximize student participation, including virtual "breakout" sessions. Blended solutions can also include using self-study web learning to quickly cover the basics and then follow-up with a live session to ensure that difficult concepts are adequately explained. This solution will generally reduce the duration of the live program because participants already know the basic learning points. Listed below are advantages of each type of training.

#### *Advantages: In-Person Training*

- Allows employees from various parts of the organization to learn from each other in an interactive environment.
- Builds teamwork along organizational or departmental lines.
- Provides instant feedback from trainer to trainees especially when the trainer is a subject matter expert.
- Leverages employee's questions by allowing participants to learn from each other.
- Allows for "on the fly" changes whereby the trainer can adjust to the needs of a particular group during the presentation based on participant responses.
- May be easier and quicker to customize than technology-based training.
- May be more economical for small groups of employees.
- Currently there are more high quality programs available on a wider variety of issues, especially for higher-level programs geared towards experienced managers, executives, and human resources professionals.
- Trainers with significant authority or prestige can convey difficult concepts or convince participants about the importance of the subject matter (e.g., attorneys can often speak with authority on employment law issues such as harassment prevention and convince even those who initially do not "buy into" concepts).
- Courts have favorably mentioned live training in reviewing an employers' defenses to litigation, and there is more data to support the conclusion that live training changes the behavior that reduces litigation.

***Advantages: Computer/Web-Based Training Self-Study or Asynchronous***

- Allows large numbers of employees to be trained contemporaneously and quickly, even in remote locations.
- Can provide “just in time” training.
- More economical for training large groups of employees, especially when the expense of travel and time away from work are considered.
- Allows an individualized learning experience, at the learner’s own pace.
- Because of the individualized learning experience, course length may be reduced while retention is increased.
- Requires that each learner perform tasks to complete training.
- Provides a consistent message without variation over the entire range of employees.
- Provides consistent evidence of training if training is an issue during litigation.

***Advantages: Blended Solutions***

Blended solutions, as the name implies, seek to combine the advantages of traditional classroom training and web-based training. Blended solutions allow expert trainers to communicate with learners on-line without either instructor or learner having to go farther than the nearest computer. Recent technological advancements have moved this type of training far beyond the traditional “webinars.” Now learners can raise their “virtual hands” to ask real time questions, teachers can give learners tasks to perform, and learners can even work in virtual groups to solve problems together. The primary advantages of blended solutions are as follows:

- Allows employees from various parts of the organization to learn from each other in an interactive environment, without travel costs.
- Builds teamwork along organizational or departmental lines.
- Allows instant feedback from trainer to trainees especially when the trainer is a subject matter expert.
- Leverages employee’s questions by allowing participants to learn from each other.
- May be easier to customize than asynchronous technology-based training.
- Allows employees in remote locations to join in with other employees.
- Trainers with significant authority or prestige can convey difficult concepts or convince participants about the importance of the subject matter.
- Allows large numbers of employees to be trained more quickly than live training, even in remote locations.
- More economical for training large groups of employees, especially when the expense of travel and time away from work are considered.

### *Step Three: Select Qualified Training Providers*

Quality should be more than a buzzword when applied to the area of employment law training. As cases have frequently shown, improper training may be inadequate to provide the legal defenses allowed by the courts. (See section above “Failure to Adequately Train About Sexual Harassment”)

- Carefully review each outside trainer’s skills and experience in providing the specific training involved. This is especially important when the training involves legal issues. For live training, it is imperative the trainer have legal knowledge of the subject matter, experience assisting organizations solve the legal issues being addressed, and expertise in the area of training. For computer-based training, quality means that the program must be based on content provided by legal experts with outstanding reputations. Be cautioned that training programs that are not legally sound may result in the employer being unable to establish a legal defense.
- Ensure the training program is interactive and requires participants to engage in the learning process rather than being passive recipients of information. Passively receiving information simply means that participants will likely not retain key learning points.<sup>268</sup> For example, using a story-based approach vastly improves retention, especially in computer based training.
- If the training is provided from inside the organization, ensure that the latest training methodologies are used. Internal trainers should have significant experience with the legal subject matter (in-house counsel or human resources managers) and have gone through a “train-the-trainer” program.
- Ensure the training focuses on the needed skills and is not a legal lecture. Detailed explanations of case law and statutes are more often confusing and counter-productive, especially when training employees and managers.
- Solicit the recommendations and views of other employers regarding the training provider.
- Review the experience the outside trainers might have in testifying or otherwise participating in the litigation process.
- Ensure that the topics covered in the training program are appropriate for the audience. For example, employees should receive training on preventing and reporting harassment, but they generally should not be made familiar with liability issues. Yet, these issues are important for managers.
- Use training providers whose material has been reviewed by attorneys experienced in labor and employment law issues.
- If using a mix of live and computer-based training, ensure that the message of both types of programs is consistent.
- Ensure that the training provider can track program completion.

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<sup>268</sup> THOMAS JUSTICE & DAVID W. JAMIESON, PH.D., *THE FACILITATOR’S HANDBOOK* 11 (1999) (learning occurs best when people’s attention and energy stay engaged and focused).

***Step Four: Decide on a Training Process***

- For training provided internally, include the legal department in the design process.
- Match the curriculum to the goals of training.
- When applicable, preserve the attorney-client privilege and the confidentiality of business information.
- Offer training on a nondiscriminatory basis and reasonably accommodate trainees with disabilities.
- Be sensitive that the training itself does not create a higher standard of care than is necessary.
- Provide written course outlines.

***Step Five: Monitor the Training***

- Spot-check training sessions to ensure compliance with the curriculum, agency or company policies, and legal requirements.
- Keep accurate records regarding the location and physical facilities where training is provided.
- Keep accurate records of attendance, and ensure that those selected for training have been allowed to attend.
- Have trainees' complete written evaluations of the program and the instructors.

***Step Six: Assess & Follow-Up***

- Evaluate the effectiveness of training by using written and performance testing, as well as on-the-job observations of supervisors.
- Discourage the use of pre- and post-training tests. These results can be used in subsequent litigation against the employer.
- If material has not been learned, retrain immediately. Decide in advance how the assessment will be used.
- Document training to the extent required by specific laws (e.g., OSHA) and consider the legal implications of retaining test scores and other evaluative data.

## § 15.3.3

**C. FIVE CAUTIONS & SIX RECOMMENDATIONS FOR EMPLOYERS CONDUCTING ANTIDISCRIMINATION & ANTIHARASSMENT TRAINING**

Antidiscrimination and antiharassment training are vital for setting standards of appropriate behavior. However, as highlighted earlier in this chapter, unless a trainer is careful, the legal problems that result from the training itself can be worse than no training at all.

To be effective, training about discrimination and harassment can involve a level of personal disclosure about participants' attitudes and feelings about race, gender, disabilities, sexual orientation, age, and other such categories. This is especially true for employers that conduct training specifically to shift attitudes of managers that an employer suspects are not appropriate in today's workplace. Providing an opportunity for employees and managers to explore and change their attitudes about different groups, including their own groups, can go a long way toward ensuring a nondiscriminatory workplace, free of harassment.

To lessen the risk of litigation resulting from the training itself, an employer should carefully review the training curriculum beforehand. The employer may wish to let the trainers maintain overall control over the diversity or harassment training program, but the employer should provide guidelines, nonetheless. The following is a list of five cautions and five recommendations for employers regarding how to conduct — and not conduct — antidiscrimination and antiharassment training.

### ***Five Cautions: What Not to Do When Conducting Training***

#### ***1. Do Not Let Trainers Ask Managers About Their Own Stereotypes or Biases***

Many antidiscrimination and antiharassment training programs ask managers to agree that they will be open and honest in discussing their “feelings” on diversity issues or expressing their “comfort level” with particular groups. In some situations, this kind of “self examination” can be effective in addressing prejudice and bias. However, courts recognize no “soul searching” privilege for comments made in training sessions. If managers are revealing their stereotypes and biases, even indirectly, these statements can be used later against the company. Debunking stereotypes is important, but have the trainers volunteer these stereotypes — not the managers.

#### ***2. Do Not Rely on Participants' Promises of Confidentiality***

Even if participants agree in training to keep confidential what is said, everything said or written can often be revealed in subsequent litigation. Employers should not be lulled into a false sense of security.

#### ***3. Do Not Let Trainers Draw Legal Conclusions***

If a trainer says, “This conduct is sexual harassment,” — he or she is drawing a legal conclusion that could compromise future legal defenses. It is better to describe the hypothetical conduct used in training as “inappropriate.” Trainers should be wary of trainees who pose supposedly hypothetical situations and ask whether such conduct is unlawful. The conduct described may be that of the next plaintiff.

#### ***4. Do Not Forget that Training Materials Can Be Discoverable***

Employers should draft and review training materials with an eye to their possible discoverability during litigation. If an employer later becomes involved in litigation, these materials may have to be provided to the plaintiff. For example, retaining test results in employment law training courses could be used by opposing counsel to “prove” that the employer kept a manager knowing of the manager's propensity to harass employees (e.g., “Ladies and gentlemen of the jury this manager got every question wrong the first time around on a ‘what is harassment test’ immediately after taking a training class. The employer received those results but kept him on as a manager without doing anything!”).

### ***5. Do Not Just Rely on Training Alone—Audit***

Effective training is crucial, but employers must not see it as a “magic pill.” Employers should also undertake a comprehensive audit of the company’s official policies and actual practices, and the almost inevitable gaps between the two. The audit should identify policies and practices that may be barriers to the recruitment, retention and promotion of a diverse workforce and begin to take the steps necessary to remove those barriers. Be sure to work closely with your attorneys so that an attorney-client privilege is maintained, if possible. (However, see the discussion earlier in this chapter regarding the probable nonavailability of a self-analysis privilege.) The more an organization honestly investigates its own policies and practices, the better its defense if it is later sued for discrimination or harassment.

## ***Six Recommendations: What to Do When Conducting Training***

### ***1. Do Focus on Providing Tools to Change Conduct & Not Just Legal Obligations***

Managers who understand the connection between good management practices and legal compliance can have an amazing impact on reducing litigation. A 2003 study of the unemployed found that terminated employees found that only 4% of employees who felt their terminations were fair filed or considered litigation. Contrast that statistic with the statistics of those who felt that the termination process was insulting or felt that they had been given inaccurate information about the decision. A full 90% of that group either filed or considered litigation. The news is not much better for employers once they are before a jury. In another recent survey, most jurors disagreed with the statement “employees can be terminated without cause” even in states where employment at-will was the norm. Many jurors also disagreed that financial reasons were a legitimate reason for termination.<sup>269</sup>

Employers should teach managers what the law requires of them. Such training should include information about who is protected by the law and should give examples of conduct that is inappropriate. Training topics should be kept specific to the employer’s work environment, such as issues that may arise around interviewing job candidates in protected classes, managing performance in a nondiscriminatory and consistent way, and avoiding retaliation. Again, while training is an opportunity to debunk common stereotypes, skilled trainers should volunteer these stereotypes — not the managers who are the trainees.

### ***2. Do Train Managers Regarding How to Respond to Complaints***

Managers need to know how to respond to complaints of discrimination and harassment under both the law and your policies. A prompt, effective response to a complaint can not only limit liability, but it can also “nip problems in the bud” by demonstrating to complainants that the company takes their concerns seriously. The perception that a company does not take complaints of its own employees seriously is part of a recipe for instant litigation.

### ***3. Do Teach About the Company’s Own Policies***

Managers and employees need to know about the employer’s own antiharassment and antidiscrimination policies and the consequences of failing to abide by them. In many cases where employers have been found liable for discrimination or harassment, the employer had a

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<sup>269</sup> Dr. Joni Johnston, *Why Jurors Fire Back During Wrongful Termination Lawsuits*, Dec. 2, 2003, available at <http://www.hr.com>.

policy in place but did not insure that the company's managers and employees were aware of its existence. In other cases, employers were found liable because managers did not follow the procedures outlined in the policy. Employers should disseminate these policies widely and make sure that both managers and employees know how to invoke and use them.

#### ***4. Do Provide Tools for Continued Awareness***

Training can lay important groundwork for attitudinal change, but attitudes do not change overnight. Thus, it is important to train employees how to challenge conduct that is inappropriate, discriminatory or harassing. Most employees do not want to condone discriminatory and harassing conduct, but they need to understand how to appropriately respond to it.

#### ***5. Do Keep Records of Who Is Trained***

Employers should make sure they keep records regarding who has been trained, and what the curriculum was. Training can be an effective defense. If employees are trained to report harassment, are provided with a clear channel for reporting, and then fail to report offending conduct, the *Faragher/Ellerth* affirmative defense may well be available, in the absence of a tangible job benefit or detriment. Keeping inadequate training records could turn out to be substantially more expensive than the cost of good training.

#### ***6. Repeat!***

From a legal basis, courts are more frequently examining the regular nature of an employer's efforts. For example, in *EEOC v. Caterpillar, Inc.*, the court noted 13 separate training events over an 11-year period as a basis for the decision to reject the EEOC's punitive damages claim.<sup>270</sup> Practically speaking, memories simply fade. Students will likely retain only the most general impression of key learning points after one to two years.

### § 15.4

## **IV. ESSENTIAL TOOLS FOR IMPLEMENTING A TRAINING PROGRAM**

### § 15.4.1

#### **A. COMPLYING WITH A.B. 1825: FOUR LEGAL LANDMINES & HOW TO AVOID THEM**

There is a common misconception that compliance simply means "follow the law." It is much more than that. Indeed, companies that structure their compliance programs to meet statutory requirements may inadvertently place themselves at greater risk. The following four "landmines" illustrate how an effective compliance program entails much more than a narrow focus on the mandates of A.B. 1825 (or similar such laws). Yet, laws such as A.B. 1825 provide a mandate and allocation of corporate resources that can be used wisely to create an effective compliance program. The challenge is to avoid the classic mistakes, and

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<sup>270</sup> 503 F. Supp. 2d 995 (7th Cir. 2007).

affirmatively use A.B. 1825 as additional motivation to build a workplace of mutual respect that keeps and attracts productive employees.

### ***Landmine #1: Sex Only – Viewing A.B. 1825 as Only Requiring Training on Sexual Harassment & Limiting Programs to this Single Topic***

A.B. 1825 is not just about sexual harassment! While the focus is on sex, the language of the bill affirmatively requires training on practical skills need to prevent “harassment, discrimination and retaliation.” Moreover, it specifically leaves in place all existing requirements to train on other unlawful forms of harassment and discrimination (such as age, race, and religion). The draft regulations clarify this requirement. Training “may provide a definition of other forms of harassment covered by the FEHA, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis.”

There is a serious danger that A.B. 1825’s focus on “sexual harassment,” if taken literally, may actually set employer training back ten years — to the early 1990’s. During those years, employer training efforts focused on sexual harassment prevention as an outgrowth of the case law following the confirmation hearings involving Supreme Court Justice Clarence Thomas. Many managers wrongly perceived that the term “sexual harassment” had the same meaning as “unlawful harassment.” The obsession with “sex” left uncovered the serious problems associated with other forms of unlawful harassment. Racial harassment, harassment based on age, national origin or disability, and harassment associated with one’s religious beliefs were not only illegal, but very significant workplace challenges.

In 1999, the EEOC issued guidance reprimanding the employer community for its failure to broaden training to cover the full range of prohibited harassment: “[V]icarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability.” Thus, employers should establish antiharassment policies and complaint procedures covering all forms of unlawful harassment.

An employer should ensure that its supervisors and managers understand their responsibilities under the organization’s antiharassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer’s antiharassment policy, the seriousness of the policy, the responsibilities of supervisors and managers when they learn of alleged harassment, and the prohibition against retaliation.<sup>271</sup>

Gradually, employers responded with increasingly effective training — educating employees and managers about how harassment could be associated with several prohibited categories, not just sex. However, California’s “sexual harassment” training law has set back some employers’ overall legal compliance efforts as they focus narrowly on the mandates of the statute to the exclusion of other forms of unlawful harassment, discrimination and retaliation. It is a serious mistake to interpret the California law so narrowly that an employer does not pay attention to broader forms of harassment and discrimination prevention.

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<sup>271</sup> *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, available at <http://www.eec.gov/policy/docs/harassment.html>.

Comprehensive unlawful harassment training is so important that an employer may actually face a greater risk of liability and damages, including punitive damages, having conducted only sexual harassment training as opposed to no training at all. Envision the conclusions that could be reached by a juror in a race, age, religion, national origin, disability, or sexual orientation harassment case, where the employer had conducted extensive sex harassment training but totally ignored these other protected categories. Plaintiff's counsel in such a case will remind the jury (again and again) that the employer must not have found these concerns "important" as it intentionally chose not to train in these areas. Moreover, even the sexual harassment training will be discounted, branding the employer as an uncaring "minimalist" that carries out only what is absolutely mandated by statute. This impression could be devastating. This is not a hypothetical argument, but rather one that we have encountered and anticipate in current litigation.

Clearly, adding 30 minutes to the two-hour training requirement, and integrating the full range of protected categories is the highly preferred way of complying with A.B. 1825, of reducing overall risk, and, perhaps most importantly, of making a statement to employees that the organization does not tolerate prohibited harassment and discrimination in any form.

### ***Landmine #2: California Only – Providing Specialized Training Only to Supervisors in California Because A.B. 1825 Does Not Apply in Other States***

California occasionally experiments with employment practices that are outside the national mainstream. Other times, California's practices are indicative of national trends. While A.B. 1825 is unfortunately focused on only one form of unlawful harassment, it is putting into law an employer practice that should have been well established. For responsible employers, such education for its managers has long been required. Nonetheless, A.B. 1825 (not unlike the seatbelt laws) makes a definitive statement specifying a deadline and a minimum requirement for compliance. To apply this statute solely to employees in California would be a major mistake for many multistate employers.

First, the California statute makes explicit what has been an EEOC requirement for several years under federal law. Indeed, as presented above, training needs to cover all prohibited forms of harassment and discrimination. Clearly this is a national concern, if not a core value that organizations may elect to apply internationally.

Second, the organization must consider the message sent to employees, judges and juries in other states if training is limited to California. Imagine the following situation:

An employer with multiple locations across the country implements a robust training program for its California supervisors. A serious harassment incident arises in the organization's Dallas office. The allegations reference harassing behavior that was directly addressed in the California training program, but Dallas supervisors did not receive the same training. Imagine now that you are the plaintiff's attorney in this case, criticizing the employer's lack of reasonable efforts to prevent and correct workplace harassment. In this instance, a narrowly focused, localized training approach actually creates problems for the employer. Accordingly, one national training policy is highly recommended.

Finally, California now joins Connecticut and Maine with a mandatory training statute reaching the private sector. (Many states have mandatory training requirements for various

categories of public employees.) It is difficult to believe that other states are far behind in making training “mandatory,” especially when some of those states already have statutes that “encourage” such training.

### ***Landmine #3: Supervisory Employees Only – Not Providing Training to Employees Because A.B. 1825 Only Covers Supervisors***

Nonsupervisory employees in California and beyond benefit and need training for at least three critical reasons:

1. A review of federal case law post the landmark 1998 U.S. Supreme Court’s *Faragher*<sup>272</sup> and *Ellerth*<sup>273</sup> decisions suggests that both managers and employees should be trained to better ensure the availability of an affirmative defense to harassment claims brought in federal court.
2. California Government Code section 12940(k) requires employers to take “all reasonable steps necessary to prevent discrimination and harassment from occurring.” Basic harassment prevention training for *all* employees is part of a reasonable step necessary to prevent workplace harassment and discrimination.
3. In the 2003 *State Department of Health Services v. Superior Court* decision,<sup>274</sup> the California Supreme Court held that the Fair Employment and Housing Act (FEHA) does not allow the federal *Faragher/Ellerth* defense in harassment claims. Instead, for cases brought in state court, California employers may assert a different defense under the FEHA: the doctrine of avoidable consequences. This defense allows an employer to limit damages by proving that it took appropriate steps to prevent and address harassment.

According to *State Department of Health Services*, to establish the avoidable consequences defense, a California employer must:

- Show that it adopted appropriate antiharassment policies and communicated essential information to employees.
- Ensure a strict prohibition against retaliation for reporting alleged policy violations.
- Ensure that reporting procedures protect employee confidentiality as much as is practical.
- “Consistently and firmly” enforce antiharassment policies.<sup>275</sup>

None of these factors identified by the court are limited in scope to supervisors. The court further stated that in establishing the avoidable consequences defense, potentially relevant evidence includes “anything tending to show that the employer took effective steps” to encourage individuals to report harassment and for the employer to respond effectively. Clearly, this broader directive, in addition to the specific requirements listed above, strongly supports training for *both* employees and supervisors

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<sup>272</sup> 524 U.S. 775 (1998).

<sup>273</sup> 524 U.S. 742 (1998).

<sup>274</sup> 31 Cal. 4th 1026 (2003).

<sup>275</sup> *Id.*

***Landmine #4: Poor Quality – Thinking that Any Training Will Do***

A.B. 1825 mandates that the training be of high quality and presented by “trainers or educators with knowledge and expertise” in preventing harassment, discrimination, and retaliation. If classroom instruction is used, the qualifications of the trainers must be established. Train-the-trainer programs may be appropriate, but the actual instructors still need to meet the knowledge and expertise requirements. Accordingly, human resources professionals and California licensed attorneys are specifically mentioned by the Fair Employment and Housing Commission’s (FEHC) draft regulations as qualified trainers. These quality standards apply to both the trainers and those developing the training programs. If your organization is in doubt, it should consult qualified legal counsel to review the planned program. Articles on A.B. 1825 may be informative, but they are not a substitute for proper legal advice.

## § 15.4.2

**B. ASSESSING EMPLOYMENT-LAW TRAINING PROGRAMS  
“MUST HAVES” & COMMON PITFALLS*****Choosing the Best Employment-Law Training***

Given the need to use the best employment-law training program in your organization, the purpose of this section is: (1) to identify the essential components of an effective training program; and (2) to identify some of the most common pitfalls in employment law training programs.

The following “checklist” is an essential tool in evaluating both live and on-line employment-law training. Some of the issues pertain to on-line training only, as noted.

***Is the Program Highly Interactive?***

If the program does not require participants to interact, it is difficult to argue that learners were effectively trained and educated. A plaintiff’s counsel and jury assessing the program may wonder whether learners “tuned out,” calling the degree of learner retention into question.

For live training, highly interactive programs using quizzes, case studies, or role-plays are highly recommended. These activities allow the process of self-discovery needed for participants to internalize the key learning points. Such activities also allow participants to learn from their colleagues, which builds teamwork and trust. The interactive sessions must be spaced appropriately throughout the program to ensure that the participants’ attention never fades.

In e-learning, one of the greatest challenges is overcoming the phenomenon of low-completion rates. If the program is not engaging and interactive, users will not want to finish the course. E-employment law training is only effective if an organization can prove that learners actually finished the course.

For these reasons, an employment law training e-learning program should have the following:

- Screen functionality that ensures the user is constantly interacting with the program. The learner should be constantly clicking and/or scrolling, as opposed to passively listening to long audio clips and/or viewing long video clips.
- Mandatory questions that force the user to put the information on screen into practice.
- A detailed explanation of why wrong answers are incorrect.
- A detailed explanation as to why right answers are correct.
- The inability to move forward until questions are answered correctly.
- The ability to consult with onscreen resources to learn more about each topic presented (*e.g.*, a detailed content guide).
- A variety of media elements – text, audio, photos, animations, graphics. When programs are too text heavy, users are unlikely to read through all of the content and are unlikely to want to finish the course.

### ***Is the Learner Asked to Make Legal Conclusions?***

An effective employment law training program should ask questions, but those questions should not ask the learner to make a legal conclusion. An example would be when a program presents a scenario, and then asks the user “Is this harassment?”

Questions that ask for legal conclusions are problematic for two reasons. First, the legal conclusions can be used as evidence against the company in the event of a future lawsuit. Take the example above. A scenario is presented of “bad” manager behavior, and the user is asked whether that behavior “is” or “is not” harassment. The response from the teacher or e-learning program is that the behavior “is” indeed harassment. Keep in mind that this conclusion may be highly dubious given the myriad of complex and subtle factors that influence a court’s decision in determining legal liability.

Second, suppose that the organization using the course is sued because one of its managers engages in behavior similar to that portrayed in the program. The company tries to defend the claim. Plaintiff’s counsel points to the training program as an admission on behalf of the company that the type of conduct the manager engaged in “is harassment.” Essentially, the company’s hands may be tied because of evidence it created against itself.<sup>276</sup> The learning points that such a question is trying to cover can be communicated just as effectively without making a legal conclusion.

### ***Does the Program Increase the Organization’s Employment Law Liability by “Setting the Bar Too High?”***

In an attempt to be “politically correct” and to cleanse the organization of any behavior that could expose the company to complaints, many employment law training programs set the “bar” of acceptable behavior too high. In other words, the program deems almost any kind of potentially questionable behavior be unlawful.

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<sup>276</sup> See *Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000) (legally unsound information giving during a training program contributed to the employer not being able to establish a defense to punitive damages).

For example, in workplace harassment training, a program may state that any discussions of personal relationships in the workplace are inappropriate. While this approach is well intended, it can actually be damaging to the organization for the following reasons:

- If the program “concludes” that such behavior is unlawful, then it has made a legal conclusion that could be used against the organization in the event of a future lawsuit.
- While an organization may want to set standards that are higher than those required by law (*e.g.*, indicating that while something may not be unlawful, it is still against company policy), it must do so extremely carefully. If the higher standard is communicated improperly, it may cause hypersensitivity to conduct and communications in the workplace. This hypersensitivity damages the concept of the “reasonable person” which is foundational in determining whether unlawful conduct has occurred, and which from a business perspective should still be included in company policy.
- An overly “sanitized” message may also spark an unwillingness on behalf of the learner to take the content in the program seriously. If the program presents an unrealistic and overly politically correct standard, its contents will likely be ignored.

### ***If the Program Is About Workplace Harassment, Does It Only Address Sexual Harassment?***

The Courts and the EEOC have made clear that a harassment prevention program should address all of the “protected categories.” The heightened attention to religious, ethnic, and national origin harassment after September 11th only reinforces this point.

To be effective, a workplace harassment training program should:

- Address harassment related to race, national origin, color, disability, age, religion and other protected categories.
- Recognize that there may be additional “protected categories” under state law (*e.g.*, sexual orientation).
- Provide the capacity to customize the program to highlight additional state protections.

### ***If the Program Addresses Workplace Harassment, Does It Use the Outdated Term “Quid Pro Quo?”***

“*Quid Pro Quo*” is an outdated term. The legal definition of *sexual harassment* has been evolving for a number of years. In the past, two types of harassment were recognized: “*quid pro quo*” and “hostile work environment.” The Supreme Court’s decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* changed the terminology.<sup>277</sup> Sexual harassment is now defined by the harm caused to the victim rather than the nature of the offensive conduct. The court identified two categories of harassment: those involving a “tangible employment action” and those involving a “hostile work environment.”

Tangible employment action harassment normally involves some type of monetary loss for an employee or significant changes in workload or work assignment. Therefore, it can more

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<sup>277</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

accurately be referred to as “economic harassment.” Economic harassment is different from “*quid pro quo*” harassment because economic harassment focuses on the harm to the victim rather than the conduct of the harasser. It requires that the threat of job detriment or promise of job benefit actually result in some sort of employment action, such as a termination, promotion, demotion or reassignment to a considerably different job. Employers are strictly liable for conduct by managers that constitutes economic harassment.

A harassment training program that uses the outdated term “*quid pro quo*” and that implies or states harassment occurs even with the threat of tangible job action is incorrect and sets a standard for the organization that is actually higher than that set by federal law. In this respect, the program may actually expand liability, rather than reduce it.

### ***Are There Separate Manager & Employee Versions of the Course That Ensure Employees Are Not Exposed to Potentially Volatile Information?***

One of the greatest challenges in creating an employment law training program is ensuring that the content communicates the correct information, while not encouraging employees to bring lawsuits.

When a training program focuses on terms and concepts such as “lawsuits,” “claimants,” “suing,” “litigation” and “damages,” the content may focus the learner’s attention on how to bring a claim against the company, rather than focusing his or her attention on the expected standard of conduct, and the duty to report. Furthermore, it is highly questionable whether the user gains any educational value from being exposed to such material.

An effective employment law training program should shield employees from this type of content. A thorough discussion of legal liability is really only appropriate for managers, who need to know more detailed information about the law, and the specific risks that misconduct poses to both them and the company.

A fear of exposing employees to any kind of information associated with employment law should not, however, prevent an organization from training their employees. Both the EEOC and state and federal courts require periodic training of both managers and employees on harassment and discrimination.

### ***Does the Program Focus on Legalese?***

Employment law training programs are designed to educate employees and managers — not create lawyers or human resources experts. Therefore, when discussing “the law,” a training program should focus on the practical learning points associated with the content, rather than the details behind the statutory or case-based legal content. The program should be focused upon teaching learners how to prevent and correct misconduct — not upon the details of the legal language.

### ***Can the Program Be Customized to Reflect Your Organization’s Specific Workplace Policies?***

An employment law training program should include customization options that allow for the incorporation of an organization’s specific workplace policies. This capability is important for the following reasons:

- In addition to regular training, periodic dissemination and redissemination of workplace policies associated with legal obligations is an important part of an

organization's compliance measures. If a training program can include company policy, then the program performs the dual function of training and policy dissemination.

- Inclusion of workplace policies allows the program to reflect and highlight specific mandates and procedures within the organization.

### *Does the Program Replicate a Realistic Working Environment?*

Many employment law training programs use vignettes and case studies that seem very unrealistic and “hokey.” This can be especially problematic when using videos or e-learning when participants are likely used to very high production used in Hollywood or major websites.

Such unrealistic scenarios cause two problems:

- A hokey program that causes chuckles from employees will not be very effective in showing the seriousness of the problem.
- A jury who has to review the program as part of an employer's defense will likely have the same reaction. Thus, the program's effectiveness as part of a legal defense is jeopardized.

### *If the Program Purports to Address “Discrimination,” Does It Have Sufficient Content, or Is It Simply a Re-Named Harassment Program?*

Harassment is one form of workplace discrimination. A “Workplace Discrimination” or “EEO” program for managers should address a wide range of content beyond economic and environmental harassment. This content would include all of the various forms of disparate impact and disparate treatment discrimination that can occur throughout the employment lifecycle — from hiring, to managing performance and to lawful terminations.

Proper training on discrimination can provide a company with a different type of defense from the “affirmative defense” associated with harassment training. In 1999, the U.S. Supreme Court issued a decision, *Kolstad v. American Dental Association*, in which it emphasized the importance of employers maintaining a written policy prohibiting harassment and discrimination as a defense to liability for punitive damages.<sup>278</sup> Under *Kolstad*, an employer will not be held liable for punitive damages if a manager's conduct is contrary to the employer's good faith efforts to comply with Title VII.<sup>279</sup>

A good faith effort clearly includes:

- adoption and implementation of antidiscrimination policies;
- training personnel about what is not permitted under applicable laws; and
- a commitment to “adopt antidiscrimination policies and to educate . . . personnel.”<sup>280</sup>

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<sup>278</sup> 527 U.S. 526 (1999).

<sup>279</sup> *Id.* at 545.

<sup>280</sup> *Id.*

### *Are Learners' Test Scores or Personal Information Through Questions or Assessments Retained?*

Classroom learning always allowed employers to retain test results and student comments from tests and case studies. When an employment law course is delivered online, the capacity of the program to capture vast amounts of personally identifiable information is even greater. This information can be used to show proof of training and proof that the learner “got” the message.

The downside of retaining this information is significant because the information could be used against the organization at a later date to show evidence of workplace discrimination or harassment. How practically does this potentially damaging information capture occur? The most obvious way is when training programs “score” participants on test or quizzes. If a learner scores poorly on a test and then engages in misconduct, the poor score could be found to have put the company “on notice” that it had a problem employee on its hands, and that it should have taken greater efforts to prevent the misconduct from occurring.

In the same vein, the information captured during pre and post-course assessments could be extremely damaging. In diversity training, for example, pre-course assessments will often ask a learner to identify any personal biases or stereotypes that he or she may have. While this introspective exercise can be extremely useful from a learning perspective, the information that is gathered can be like a litigation landmine waiting to explode. If evidence of self proclaimed bias gets into the wrong hands, a company could essentially be building an employment law case against itself.

Because of the damaging risks associated with assessments and scoring, organizations should not retain this type of information. This lack of scoring and assessments in no way detracts from the quality of the programs' content, or the effectiveness of the training.

### *Can the Learner Skip Through the Course? (e-learning only)*

The course should force the user to proactively engage the content on each screen. This means that:

- Foundational content should not be optional (e.g. case studies or exercises).
- From a course functionality perspective, the “next” button, arrow etc. should only become active after the user has been made to digest and interact with the content on each screen.

### *Does the Program Have a Certification & Tracking System? (e-learning only)*

The course should be able to:

- Track individual users when they log onto the course, when they log off the course and when they complete the course.
- The course completion should capture a proactive agreement on behalf of the learner that:
  - He or she has understood and read all of the content in the program;
  - He or she agrees to abide by the principles set forth in the program; and
  - If applicable, that he or she acknowledges receipt and acceptance of any organization-specific workplace policies included in the program.

## § 15.4.3

**C. FED-OSHA TRAINING REQUIREMENTS: HIGHLIGHTS**

The following training requirements are by no means all inclusive. Employers should refer to the title 29 of the Code of Federal Regulations (“29 C.F.R.”) for complete training requirements or to “Training Requirements in OSHA Standards and Training Guidelines,” OSHA Publication 2254, available at [www.osha.gov](http://www.osha.gov). In addition, employers should refer to individual state OSHA standards for additional state-specific training requirements.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.1030	Bloodborne Pathogens Program	Yes	<p>Minimum elements:</p> <p>General explanation of the epidemiology and symptoms of bloodborne diseases and methods of recognizing, preventing and reducing exposure</p> <p>Modes of transmission of bloodborne pathogens</p> <p>Employer’s exposure control plan and availability of copies</p> <p>Information on the types, proper use, location, removal, handling, decontamination and disposal of personal protective equipment</p> <p>Information on the hepatitis B vaccine, including information on its efficacy, safety, method of administration, the benefits of being vaccinated, and that the vaccine and vaccination will be offered free of charge</p> <p>Information on the appropriate actions to take, procedures to follow, and persons to contact in an emergency involving blood or other potentially infectious materials</p> <p>Information on the post exposure</p>

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
			<p>evaluation and follow-up that the employer is required to provide for the employee following an exposure incident</p> <p>An explanation of the signs and labels and/or color coding required</p> <p>Opportunity for interactive questions and answers with the person conducting the training session</p> <p>Record-keeping procedures</p> <p>Procedures for periodically evaluating program effectiveness</p>
<p>OSHA Guidelines for: Meatpacking; Shipyards; Poultry Processing; Retail Grocery; and Nursing Homes</p>	<p>Ergonomics Program</p>	<p>Yes</p>	<p>Minimum elements: Methods used to perform hazard assessments/inspections Engineering &amp; work practice controls used to reduce exposure Procedures/frequency of re-evaluating exposures Content &amp; frequency of employee training/instruction Procedures for periodically evaluating program effectiveness</p>
<p>Part 1910.151</p>	<p>First Aid/ Medical Services</p>	<p>No</p>	<p>In absence of infirmary clinic or hospital in near proximity to workplace, a person or persons shall be adequately trained to render first aid.</p>
<p>Part 1910.1200</p>	<p>Hazard Communication</p>	<p>Yes</p>	<p>Educate employees about nature of hazards with which they work &amp; train them in measures to protect their health.</p>

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.120	Hazardous Waste Operations and Emergency Response	Yes	Employee training is required for all employees potentially affected by any release of any hazardous substance; as well as actual emergency responders & those involved in hazardous waste operations.
Part 1910.95	Hearing Conservation Program (noise)	Yes	<p>Minimum elements:</p> <p>Provided to each employee exposed to noise at or above an 8-hour time weighted average of 85 decibels</p> <p>Effects of noise on hearing</p> <p>Purpose of audiometric testing, and an explanation of the test procedures</p> <p>Purpose of hearing protectors, the advantages, disadvantages, and attenuation of various types, and instructions on selection, fitting, use and care</p> <p>Procedures for periodically evaluating program effectiveness</p>
Part 1910.178	Industrial Trucks, Forklifts and Tow Tractors	No, but recommended	Employer must train on operation and hazards of specific equipment and intended loads as well as anticipated work area conditions.
Part 1910.147	Lockout/Tagout (Control of Hazardous Energy)	Yes	Equipment-specific safe operating procedures are required. Employer must be able to prove equipment-specific employee training.
Part 1910.303	Low Voltage Electrical Safety Requirements (< 600 volts)	No	Employer must be able to document safety training for employees who work on or near this equipment.
Part 1910.212	Machine Guarding in General Industry, Including Slicers, Mixers, etc. Used in Kitchens.	No, but recommended	Employer must be able to document periodic inspections and maintenance are done and employees have equipment-specific safety training.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.146	Permit-Required Confined Space Entry	Yes	Written equipment-specific work practices, training certificates permits and documentation of air monitoring required.
Part 1910.132	Personal Protective Equipment Standards (PPE), Including Gloves, Aprons, Safety Glasses, etc.	Yes	Minimum elements: Designated program administrator When PPE is necessary What PPE is necessary How to properly don, doff, adjust, and wear PPE Limitations of the PPE Proper care, maintenance, useful life and disposal of PPE Procedures for periodically evaluating program effectiveness
Part 1910.119	Process Safety Management (PSM)	Yes	Equipment-specific work practices & emergency control required as well as employee training.
Part 1904	Recordkeeping	No	Inform employees of how they are to report injury or illness

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.134	Respiratory Protection Program	Yes	<p>Minimum elements:</p> <p>Designated program administrator</p> <p>Methods used to perform task-specific hazard assessments &amp; inspections</p> <p>Engineering &amp; work practice controls used to reduce employee exposures</p> <p>Medical evaluation/examination &amp; fit testing procedures for employees</p> <p>Procedures for selecting, fitting, using &amp; maintaining respirators</p> <p>Cleaning, storage &amp; maintenance procedures</p> <p>Content &amp; frequency of employee training/instruction</p> <p>Procedures for periodically evaluating program effectiveness</p>
Part 1910.106	Storage and Handling of Flammable and Combustible Liquids, including Cooking Oils and Cleaning Solvents	No	Employers must be able to document employee training and understanding of safe work practices. Advisable to have written safe work practices for these activities.
Part 1910.252	Welding and Cutting Safety Requirements. General Requirements for Safe Use, Handling and Storage of Compressed Gas Cylinders, Including Welding Gases	No, but recommended	Written safe work practices advisable. Employer must be able to prove task-specific employee training.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
OSHA Guidelines	Workplace Violence Prevention Program	Yes	<p>This program is recommended by OSHA guidelines for Health Care and Social Service Workers, Late-Night Retail Establishments, and Taxicabs.</p> <p>Recommended elements:</p> <ul style="list-style-type: none"> <li>Designated program administrator</li> <li>Responsibilities for each job title</li> <li>Measures to ensure employee compliance</li> <li>Methods used to communicate with employees</li> <li>Content &amp; frequency of employee training/instruction</li> <li>Method for anonymous hazard reporting</li> <li>Methods used to perform hazard assessments/inspections and to correct hazards</li> <li>Incident reporting &amp; investigation</li> <li>Emergency response procedures</li> <li>Recordkeeping procedures</li> <li>Procedures for periodically evaluating program effectiveness</li> </ul>