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The Case for Revising California's Harassment-Prevention Training Law

Employers should be free to cover what is most needed and appropriate at their workplace and should be held accountable for how effective the training is in preventing harassment—not for checking the boxes.

By Judith Droz Keyes

Since 2004, California law has required that companies with 50 or more employees (regardless of where the employees are located) provide anti-harassment training for all California supervisors.[i] Training must be provided within six months of a supervisor's being hired or promoted into the position, and every two years thereafter. Training must be two hours long and, although it does not have to be in person, it must be interactive.

The list of topics that the training must cover has been expanded several times over the years (as recently as 2018), by both legislative and regulatory action.[ii] A few examples of what must be covered under current rules are:

- The "definition of unlawful sexual harassment" under both state and federal law.
- "Case law principles" concerning harassment and retaliation.
- The "limited confidentiality" of the complaint process.
- What to do if the "supervisor is personally accused of harassment."
- "Abusive conduct" (aka bullying) and its negative consequences in the workplace.
- "Gender identify, gender expression and sexual orientation" harassment.

Has the training been effective? Not very. Not only do recent events suggest that, so too does my experience. Having been engaged for years in the anti-harassment effort both as a trainer and as an attorney-adviser to companies, I am convinced of a few things. For one, most online offerings leave much to be desired. Although online training can impart valuable information, like online traffic school it is inevitably generic, can be over-simplified, and is too easily "attended" half-heartedly.

Training by webinar and video-conference is better, but the medium inhibits meaningful engagement. In-person training is by far the best option in that it does allow for company-specific content and real, human interaction, but it can be logistically challenging and expensive.

I am convinced that the interests of all stakeholders—companies, supervisors, human resource professionals, employees and society at large—would be better served if California lawmakers took stock of the realities of the training they have mandated,

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and went back to the drawing board. Here are the changes I recommend—as a package, not piecemeal.

- Shorten the duration. Two hours is too long. Everything that needs to be covered can be covered effectively in 60 minutes. In addition to making it less tedious, the shorter time would make it more likely that training would be in-person, which is vastly preferable to the online alternative.
- Increase the frequency. Two years between trainings is too long. Make the requirement annual. Of course,

companies are already free to train more frequently than the legal minimum, but when the law says two years, human nature being what it is, and corporate budgets being what they are, training will continue to be a biannual event unless the law is changed.

- Lower the threshold. Training should be required if the company has 15 employees or more—in California. Because only supervisors who are located in California must be trained, the lower threshold should be manageable, and would be a step toward addressing harassment at startup companies, restaurants and other such businesses that tend to be smaller. Intimate contact is just as likely at smaller companies as at larger ones—perhaps more so.
- Be realistic about new supervisors. Mandating that new supervisors be trained within six months of hire or promotion virtually guarantees that the training will be online. Training simply can't be done in-person on an individualized schedule. Instead, the law should require that within a month of hire or promotion, new supervisors confirm having read the company's harassment policy and understanding the responsibilities to refrain from engaging in it and to report it. These supervisors will then participate in the next annual training.
- Train rank-and-file employees. Publishing written policies, posting government notices, and distributing agency pamphlets are worthy efforts, but they do not deliver the message to employees as effectively as does training—especially live training. Like their supervisors, nonmanagement employees should be trained annually. One hour once a year devoted to reinforcing the message that harassment won't be tolerated, and reminding employees what they should do if they see or experience it, would be a big step in the right direction. (And, parenthetically, it would help the company's defense if an employee who received this training failed to report harassing behavior).
- Allow more leeway as to trainers. Currently, an in-person trainer has to be either an employment-law attorney, a human resource representative with at least two years of experience handling sexual harassment matters, or a professor or instructor who teaches discrimination law in college or law school. Many companies, especially smaller and newer companies, are not likely to have ready access to any of these, so it's virtually guaranteed that they'll resort to online training as the only viable option. A human resource or management representative who has been trained by an employment attorney and/or who uses materials prepared by the company's attorney should be an authorized trainer.
- Don't require legalese. It's not only mind-numbing, but it's also counterproductive to have to cover such material as the federal and state definitions of sexual harassment, for example. Pointing out that conduct isn't illegal unless it is "severe or pervasive" is hardly helpful. Explaining who can recover what measure of damages according to what legal definition is pointless—or worse. These requirements, and others like them, should be dropped.
- Don't dictate the minutiae. The obligation should be to train on the unacceptability of sexual harassment and other forms of illegal harassment—full stop. It should be OK to focus on the company's policy and process and expectations, not on legal fine-points. Employers should be free to cover what is most needed and most appropriate at their workplace in that year. They should be held accountable for how effective the training is in preventing harassment, not for checking the boxes.

Training by itself won't eliminate harassment any more than it will wipe out discrimination or retaliation or other bad behavior in the workplace. Policies, human resource oversight, enforcement, courts, public opinion—all have a role to play in curtailing illegal and repugnant conduct. But training is an important piece of the puzzle. It is to be hoped that employers across the country will provide training even when it is not required. But where training is required, the law shouldn't be an impediment to having the training be effective and meaningful.[iii] I submit that, in its current form, California law is just such an impediment. It needs to be changed.

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[i] Cal. Gov't Code Section 12950.1

[ii] 2 CCR Section 11024

[iii] In addition to California, Maine and Connecticut currently require sexual harassment training. New York will join the list in 2019.

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