California Law Requires Sexual Harassment Training for Supervisors

On September 30, 2004, the California Fair Employment and Housing Act (FEHA) was amended to require that employers with 50 or more employees provide sexual harassment training to supervisors every two years. Under the new law, covered employers must, by January 1, 2006, provide at least two hours of training on the topic of sexual harassment to supervisory employees employed as of July 1, 2005 and to all new supervisory employees within six months of their assuming a supervisory position. Employers who have provided this training and education to supervisory employees since January 1, 2003 are not required to meet the January 1, 2006 deadline. After January 1, 2006, all covered employers must provide sexual harassment training and education to each employee in a supervisory position at least once every two years.

Which Employers Are Covered?

The training requirements apply to employers who regularly employ 50 or more persons or who regularly receive the services of 50 or more persons pursuant to a contract. Therefore, in determining coverage, employers must count all workers, without distinction between either full-time and part-time employees or temporary employees and independent contractors. For employers with 50 or more employees, but with fewer than 50 working in California, the applicability of the new law remains unclear because the statute provides no guidance regarding whether out of state employees should be counted to determine coverage. While there is case law holding that other similar coverage provisions in the FEHA only count employees working in California, the new law itself has not been interpreted, so the issue remains unsettled.

Which Employees Must Receive Training?

The new law requires that all "supervisory employees" receive sexual harassment training. While the new statute does not define this term, the FEHA already defines "supervisor" as "any individual having the authority, in the interest of the employer, 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, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Given the broad sweep of this definition, employers are advised to consider employees' actual responsibilities and duties rather than their titles and positions when determining which employees must be trained.

What Must the Training Involve?

The law requires two hours of "classroom or other effective interactive training" covering the following topics:

- Information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention of sexual harassment;
- Information about the correction of sexual harassment and the remedies available to victims of sexual harassment; and

- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation.

While the law does not provide any guidance regarding what constitutes "other effective interactive training," it is clear that employers are, at a minimum, required to structure the trainings to facilitate participant discussion and encourage questions from trainees. The law also requires that the training be conducted by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.

What are the Penalties for Failure to Comply?

The law provides that, in the event of an employer's violation, the Fair Employment and Housing Commission will issue an order requiring compliance. No other statutory penalties are provided for non-compliance. In terms of litigation, a claim of non-compliance will not, in and of itself, result in employer liability. Non-compliance will, however, likely influence a court, agency or other factfinder's judgment of claims of discrimination or harassment that are asserted against the employer. Conversely, an employer's compliance with the new law will not insulate it from liability for sexual harassment; but it is apt to have some influence on the consideration accorded to the employer's defense to a harassment claim.

Employers should remember that the requirements of the new law establish only a minimum threshold. Therefore, employers may provide longer and more frequent trainings regarding harassment and discrimination in the workplace. Employers are also encouraged to incorporate training on all other types of unlawful harassment, discrimination and retaliation.