

AB 1825 (Gov code section 12950.1) clarified by the Fair Employment & Housing Commission Regulations (CCR, Title 2, section 7288.0)

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SUMMARY

AB 1825 requires employers to provide every two years at least two hours of effective training to all supervisory employees on the prevention of sexual harassment, discrimination and retaliation.

1. DEFINITIONS

1.1 Employer

1.1.1 Private Employer: any business in California that employs (salary or wage) or engages 50 or more employees or contractors for each working day for at least 20 consecutive weeks in the current or preceding calendar year. The count includes out-of-state employees and contractors.

Note: If the employer had the requisite 50 plus employees and contractors in the prior year, but less today, the employer still must train its supervisors.

1.1.2 Government Employer: the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. Political subdivisions include governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts.

1.2 Employee

An employee is any full time, part time, or temporary worker. This includes leased employees.

1.3 Contractor

A contractor is any person performing services pursuant to a contract (an independent contractor) for each working day for at least 20 consecutive weeks in the current or preceding calendar year.

Note: If a contractor attends the supervisor training, it does not create an inference that the contractor is an employee or a supervisor.

1.4 Supervisor

A supervisor is anyone who, exercising independent judgment, directs other employees, or has the authority (or recommends when) to hire, transfer, suspend layoff, recall, promote, discharge, assign, reward, adjust grievances, or discipline other employees.

Note: Only supervisors "located" in California must be trained. Also, if a non-supervisor employee attends the supervisor training, it does not create an inference that the employee is a supervisor.

1.5 Trainer

Any one of the following individuals is a Trainer and can create courses, train, and answer questions.

1.5.1 Attorney: 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.

1.5.2 Human Resource Professional or Harassment Prevention Consultant: who worked as an employee or independent contractor with a minimum of two or more years of practical experience in one or more of the following:

- ❖ designing and conducting discrimination, retaliation and sexual harassment prevention training;
- ❖ responding to sexual harassment complaints or other discrimination complaints;
- ❖ conducting investigations of sexual harassment complaints;
- ❖ advising employers regarding discrimination, retaliation and sexual harassment prevention.

1.5.3 Professor and Instructor (law schools, colleges or universities): who has a postgraduate 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 or the content specified below.

1.5.4 Training Qualifications: A trainer must be qualified to train on the following:

- ❖ What are unlawful harassment, discrimination and retaliation under both California and federal law;
- ❖ How to report harassment complaints;
- ❖ How to respond to a harassment complaint;
- ❖ What constitutes retaliation and how to prevent it;
- ❖ Essential components of an anti-harassment policy;
- ❖ What steps to take when harassing behavior occurs in the workplace;
- ❖ The employer's obligation to conduct a workplace investigation of a harassment complaint; and
- ❖ The effect of harassment on harassed employees, co-workers, harassers and employers.

1.5.5 Non-qualified Trainer (classroom & webinar training): individuals who do not meet the qualifications of a trainer (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. This is permitted only if the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

1.6 Instructional Designer

An instructional designer is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.

2. TRAINING REQUIREMENTS

2.1 Training Methods

The following methods qualify as effective training:

2.1.1 Classroom – training is in-person, trainer-instruction:

- ❖ created by a trainer.
- ❖ provided by a trainer in a setting removed from the supervisor's daily duties.

2.1.2 E-learning – training is individualized, interactive, computer-based:

- ❖ created by a trainer and instructional designer.
- ❖ provides a link to or directions on how to contact a trainer. The trainer must be available to answer questions and provide guidance and assistance about the training within a reasonable time, but no more than two business days after the question is asked.

2.1.3 Webinar – training is an Internet-based seminar:

- ❖ created by a trainer and taught by a trainer,
- ❖ transmitted over the internet or intranet in real time,
- ❖ employers must document and demonstrate that each supervisor who was not physically present in the same room as the trainer did in fact attend the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities.
- ❖ provide supervisors an opportunity to ask questions and get answers.

2.1.4 Other Effective Training: includes the use of audio, video, or computer technology with classroom, webinar, and/or e-learning.

2.2 Training Duration

2.2.1 Classroom and Webinars: Training must take at least two hours, but it does not have to be completed in two consecutive hours. The minimum segment is half an hour.

2.2.2 E-learning: the training must take the supervisor no less than two hours to complete the training. It does not have to be completed in two consecutive hours. The supervisor can pause and return without any minimum, provided the actual e-learning program is two hours.

2.3 Training Content

All methods of training (classroom, e-learning, and webinar) must contain:

2.3.1 Learning Objectives:

- ❖ 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
- ❖ 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.

2.3.2 Subjects Covered:

- ❖ a definition of unlawful sexual harassment under California and federal law, other forms of harassment, and how harassment can cover more than one basis.
- ❖ FEHA and Title VII statutory provisions and case law concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.
- ❖ The types of conduct that constitutes sexual harassment, strategies to prevent harassment.
- ❖ The remedies available to harassed victims.
- ❖ The limited confidentiality of the complaint process.
- ❖ Strategies to prevent sexual harassment in the workplace.
- ❖ Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.
- ❖ The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- ❖ What the supervisor should do if personally accused of harassment.
- ❖ The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed.

2.3.3 Interactive Elements:

- ❖ **Practical examples** such as factual scenarios from case law, news and media accounts.
- ❖ **Hypothetical Scenarios:** based on workplace situations, and other sources which illustrate sexual harassment, discrimination and retaliation using role plays, case studies, and group discussions.
- ❖ **Questions:** assess learning and keep supervisors engaged in the training.
- ❖ **Skill-building Activities:** that assess the supervisor's application and understanding of content learned.

2.3.4 Anti-harassment Policy: Either the employer's policy or a sample policy must be provided to supervisors. Whether the employer policy is included in the training, the employer must give each supervisor a copy of its anti-harassment policy and require each supervisor to acknowledge receipt.

2.4 Training Frequency

2.4.1 Current Supervisors: An employer must provide two hours of training, using the mandated content, once every two years. An employer may use either or both of the following methods to track compliance.

- ❖ **Individual Tracking:** You must re-train each supervisor within two years from the date the supervisor was last trained. You need good records for this method.
- ❖ **Training-year Tracking:** You need not track each supervisor, but must designate a "training year" during which you train your supervisors. Then, you must re-train these supervisors by the END of the next "training year," two years later.

Example: the employer trained supervisors in 2005 and adopts 2005 as the training year. These supervisors must be re-trained by the end of 2007 (the next training year).

Many employers mistakenly think they can adopt different training years. They CANNOT. You can only have one training year.

Example: If 2007 is your training year and you trained some supervisors in '06, you cannot adopt 2006/2008 as another training year. If you want the '06 supervisors in your training year, they must be re-trained by the end of 2007.

However, if you want to re-train the '06 supervisors in 2008, you must re-train each one within two years from the date the supervisor was last trained in '06 (individualized tracking).

Caution: If you trained supervisors in '05 and '06 and make 2006 the training year, you cannot wait until the end of 2008 to re-train the '05 supervisors. You must re-train them by the end of the 2006 training year or individually train each one during 2007.

2.4.2 Newly Hired or Promoted Supervisors:

- ❖ **Not Previously Trained:** a newly hired or promoted supervisor who has not received training within two years of the hire/promotion date -- must be trained, using either or both tracking methods:

Individual tracking: train within six months of the hire/promotion date and retrain within two years from the date the supervisor completed the training. These supervisors are tracked individually.

Training-year tracking: Assume the Employer trained supervisors in 2005 and adopts 2005 as the next training year and wants to include new supervisors in the training year. If the employer hires or promotes a supervisor in:

- May 2006 . . . train by Nov 2006 and retrain by end of 2007 training year;
- Oct 2006 . . . train by Apr 2007 and retrain by end of 2009 (next TR yr), but if trained during 2006, must retrain by end of 2007 training year;
- Feb 2007 . . . train by Aug 2007 and retrain by end of 2009 (next TR yr);
- Oct 2007 . . . train by Apr 2008 and retrain by end of 2009 (next TR yr);

❖ **Previously Trained:** a newly hired or promoted supervisor who received AB 1825 training at the current or another employer (includes joint employer) within two years of the hire/promotion date – need NOT be trained within the six-month window. However, the supervisor must be:

- given a copy of the current employer's anti-harassment policy within six months of the hire/promotion date,
- required to acknowledge that the supervisor received and read the policy, and
- trained by either of the following:

Individual Tracking: no later than two years from the date last trained, or

Training-year Tracking: by the end of the current training year, unless the two-year window comes first.

Examples: assume 2007 is the training year:

- Hired/promoted May 2007 and trained 21 months ago (Aug '05): must train by August 2007 (2 years from last training). Cannot wait until end of 2007;
- Hired/promoted October 2007 and trained 12 months ago (Oct '06): must train by end of 2007. Cannot wait until October 2008;
- Hired/promoted May 2007 and trained 3 months ago (Feb '07): may train by end of 2007 because within the two-year window or can train February 2009 (training year) and retrain 2011;

Note: The employer should require evidence of the training such as a certificate of completion. And, the training must have met the specific requirements of AB 1825 to qualify. The burden is on the current employer to demonstrate the training complied.

**** RECOMMENDATION**** To avoid any of the issues discussed above, the employer should treat the supervisor as not previously trained and train the supervisor within six months of the hire/promotion date or if adding to the training year, by the end of the year, provided it's within six months.

2.4.3 New Businesses with 50 plus employees/contractors:

- ❖ **Newly Created:** businesses created after January 1, 2006 with 50 plus employees and contractors must train supervisors within six months of the employer's establishment date and retrain the supervisors every two years, measured either from the individual or training-year method.
- ❖ **Newly Expanded:** businesses that expand to the 50 employee/contractor threshold must train supervisors within six months of the date the employer reached the threshold and retrain the supervisors every two years, measured either from the individual or training-year method.

3. DOCUMENTATION & RECORD KEEPING

3.1 Training Information

Employers must keep the following documentation of the harassment training to track compliance.

- ❖ name of the supervisor trained,
- ❖ date of training,
- ❖ type of training, and
- ❖ name of the training provider.

3.2 Retention of records (2 years)

Employers must retain the records for a minimum of two years. Therefore, if the employer uses classroom or webinar training, the employer needs to be sure it can find the trainer and a copy of the course if litigation occurs. For e-learning, it's should not be an issue because all this information is stored electronically.

4. COMPLIANCE & REMEDIES

An employer who made a substantial, good faith effort to comply with the statute by completing the supervisor training prior to the effective date of these regulations shall be deemed to be in compliance.

Employers who fail to train are not automatically liable in any action alleging sexual harassment. But, the FEHC Commissioner can issue an order that requires the employer to comply with AB 1825 within 60 days of the effective date of the Commission's order according to the Regulations.

Note: When the author of AB 1825 (Sarah Reyes) was asked why there were not tougher sanctions for a failure to train, she replied that the "best penalty is a plaintiff's lawyer." This is a warning to employers. Failure to train will be plaintiff's EXHIBIT ONE should an employer be sued for harassment.

If an employer complies with the new law, it does not protect the employer from liability for sexual harassment of any current, former employee or applicant.