

ATTACHMENT B

Fair Employment & Housing Council Changes without Regulatory Effect to 2 CCR 11024 (Sexual Harassment Training and Education)

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 2. Particular Employment Practices

TEXT

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§ 11024. Sexual Harassment Training and Education.

(a) Definitions. For purposes of this section:

(1) “Contractor” is a person performing services pursuant to a contract with an employer, meeting the criteria specified by Government Code section 12940(j)(5), for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year.

(2) “Effective interactive training” includes any of the following:

(A) “Classroom” training is in-person, trainer-instruction, whose content is created by a trainer and provided to a supervisor by a trainer, in a setting removed from the supervisor's daily duties.

(B) “E-learning” training is individualized, interactive, computer-based training created by a trainer and an instructional designer. An e-learning training shall provide a link or directions on how to contact a trainer who shall be available to answer questions and to provide guidance and assistance about the training within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.

(C) “Webinar” training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, polls, quizzes or tests, and

activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance. For a period of two years after the date of the webinar, the employer shall maintain a copy of the webinar, all written materials used by the trainer and all written questions submitted during the webinar, and document all written responses or guidance the trainer provided during the webinar.

(D) Other “effective interactive training” and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training. These, however, are supplemental tools that cannot, by themselves, fulfill the requirements of this subdivision.

(E) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor's application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training. Examples include pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios, use of brief scenarios discussed in small groups or by the entire group, or any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the supervisor's work environment.

(3) “Employee” includes full time, part time, and temporary workers.

(4) “Employer” means any of the following:

(A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly.

(B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section, governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered “political subdivisions of the state.”

(5) “Having 50 or more employees” means employing or engaging 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

(6) “Instructional Designer” under this section is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.

(7) “New” supervisory employees are employees promoted or hired to a supervisory position after the date the employer last provided sexual harassment prevention training.

(8) “Supervisory employees” or “supervisors” under this section are supervisors located in California, defined under Government Code section 12926. Attending training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.

(9) “Trainers” or “Trainers or educators” qualified to provide training under this section are individuals who, through a combination of training and experience have the ability to train supervisors about the following: 1) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) supervisors' obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 5) how to respond to a harassment complaint; 6) the employer's obligation to conduct a workplace investigation of a harassment complaint; 7) what constitutes retaliation and how to prevent it; 8) essential components of an anti-harassment policy; and 9) the effect of harassment on harassed employees, co-workers, harassers and employers.

(A) A trainer shall be one or more of the following:

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” or “harassment prevention consultants” working as employees or independent contractors with a minimum of two or more years of 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 or 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.

(B) 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 accordance with 1. through 3. immediately above, in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

(10) "Training," as used in this section, is effective interactive training as defined at section ~~11023~~11024(a)(2).

(11) "Two hours" of training is two hours of classroom training or two hours of webinar training or, in the case of an e-learning training, a program that takes the supervisor no less than two hours to complete.

(b) Training.

(1) Frequency of Training. An employer shall provide two hours of training, in the content specified in section ~~11023~~11024(c), once every two years, and may use either of the following methods or a combination of the two methods to track compliance.

(A) "Individual" Tracking. An employer may track its training requirement for each supervisory employee, measured two years from the date of completion of the last training of the individual supervisor.

(B) "Training year" tracking. An employer may designate a "training year" in which it trains some or all of its supervisory employees and thereafter must again retrain these supervisors by the end of the next "training year," two years later. Thus, supervisors trained in training year 2005 shall be retrained in 2007. 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. Thus, with this method, assume that an employer trained all of its supervisors in 2005 and sets 2007 as the next training year. If a new supervisor is trained in 2006 and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in 2007 with the employer's other supervisors.

(2) Documentation of Training. To track compliance, an employer shall keep documentation of the training it has provided its employees under this section for a minimum of two years, including but not limited to the names of the supervisory employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider.

(3) Training at New Businesses. Businesses created after January 1, 2006, must provide training to supervisors within six months of their establishment and thereafter biennially. Businesses that expand to 50 employees and/or contractors, and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.

(4) Training for New Supervisors. New supervisors shall be trained within six months of assuming their supervisory position and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(5) Duplicate Training. A supervisor who has received 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 shall otherwise be put on a two year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.

(6) Duration of Training. The training required by this section does not need to be completed in two consecutive hours. For classroom training or webinars, the minimum duration of a training segment shall be no less than half an hour. E-learning courses may include bookmarking features, which allow a supervisor to pause his or her individual training so long as the actual e-learning program is two hours.

(c) Objectives and Content.

(1) The learning objectives of the training mandated by Government Code section 12950.1 shall be: 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; 2) to provide trainees with information related to the negative effects of abusive conduct (as defined in Government Code section 12950.1(g)(2)) in the workplace; and 3) to develop, foster, and encourage a set of values in supervisory employees who complete mandated training that will assist them in preventing, effectively responding to incidents of sexual harassment, and implementing mechanisms to promptly address and correct wrongful behavior.

(2) Towards that end, the training mandated by Government Code section 12950.1 shall include, but is not limited to:

(A) A definition of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the federal 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, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis.

(B) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.

(C) The types of conduct that constitutes sexual harassment.

(D) Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability.

(E) Strategies to prevent sexual harassment in the workplace.

(F) Supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware.

(G) Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.

(H) The limited confidentiality of the complaint process.

(I) Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.

(J) In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an employer's obligation to conduct an effective workplace investigation of a harassment complaint.

(K) Training on what to do if the supervisor is personally accused of harassment.

(L) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

(M) A review of the definition of "abusive conduct" as used in this context (and as defined by Government Code section 12950.1(g)(2)). The training should explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace. The discussion should also include information about the detrimental consequences of this conduct on employers - including a reduction in productivity and morale. The training should specifically discuss the elements of "abusive conduct," including conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests (including performance standards). Examples of abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. Finally, the training should emphasize that a single act shall not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.

(d) Remedies. A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance.

(e) Compliance with section 12950.1 prior to effective date of Council regulations. An employer who has made a substantial, good faith effort to comply with section 12950.1 by completing training of its supervisors prior to the effective date of these regulations shall be deemed to be in compliance with section 12950.1 regarding training as though it had been done under these regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12950 and 12950.1, Government Code.