

NIESAR & VESTAL LLP

Law Alert

February 11, 2019

California's Anti-Harassment Training Requirements Now Apply To Employers Of Five Or More Employees

California's new anti-harassment training provisions require that all employers of 5 or more employees (whether full or part-time) provide 1 hour of sexual harassment and abusive conduct prevention training to non-supervisory employees and 2 hours of sexual harassment and abusive conduct prevention training to supervisory employees once every 2 years.

What has changed?

The sexual harassment and abusive conduct prevention training provisions are not new. Since 2005, California law has required employers having 50 or more employees to provide at least 2 hours of sexual harassment training to supervisors every 2 years. The new law, effective January 1, 2019, lowers the employer threshold down to 5 or more employees and requires 1 hour of harassment training for non-supervisory employees.

Who is required to undergo harassment training and how long should it take?

Employers with at least 5 employees must provide: (1) at least 2 hours of sexual harassment prevention training to all supervisory employees; and (2) at least 1 hour of sexual harassment prevention training to all non-supervisory employees within 6 months of their assumption of either a supervisory or non-supervisory position. The training must be provided once every 2 years.

The definition of "supervisors" that applies is very broad and includes 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 requires the use of independent judgment. Therefore, there could be potentially a large number of employees who could qualify as supervisors and who would have to undergo the 2 hours of trainings. However, in its Sexual Harassment and Abusive Conduct Prevention Training Information for Employers, DFEH uses a "managerial" and "non-managerial" distinction. In the absence of a ruling of a court or a clarification by DFEH, it is unclear whether DFEH intends the 2 hours of sexual harassment prevention training to be applied only to managers, and thus not to persons having incidental supervisory responsibilities, or if it simply uses this distinction as a synonym for "supervisory" and "non-supervisory".

Under DFEH's regulations, the definition of "employee" includes full-time, part-time, and temporary employees. Employers must provide sexual harassment prevention training to temporary or seasonal employees within 30 calendar days after the hire date or within 100 hours worked if the employee will work for less than six months.

How should employers provide the required training?

The new law requires that DFEH make online training courses available. Specifically, DFEH must develop, obtain, and make available on its website the 1-hour and 2-hour anti-sexual harassment training courses. We understand there will be no cost associated with accessing those courses by employers and employees. Employers may also develop their own training platforms, as long as they comply with the law's requirements.

In its Sexual Harassment and Abusive Conduct Prevention Training Information for Employers, DFEH announced that it expects to have the training courses available by late 2019. In the interim period, DFEH is offering a [sexual harassment and abusive conduct prevention toolkit](#), including a sample sexual harassment and abusive conduct prevention training. Employers may, but are not required to, use the training in conjunction with an eligible trainer to provide sexual harassment and abusive conduct prevention training.

The anti-sexual harassment training may be conducted with other employees, as a group, or individually. It can also be broken up into shorter time segments, as long as the 2-hour requirement for supervisory employees and 1-hour requirement for non-supervisory employees is respected.

Finally, DFEH clarified that employees may not be required to take such training during their personal time. The training must be "provided by the employer as part of an individual's employment" and it is the employer's responsibility to provide the required training, including any costs that may be incurred.

When/by what date must employees be trained?

Both supervisory and non-supervisory employees must receive training by January 1, 2020. After January 1, 2020, employees must be retrained once every 2 years.

The law requires that employees be trained during calendar year 2019. Employees who were trained in 2018 or before will need to be retrained.

Because DFEH expects to have the online trainings available by late 2019, companies may choose to delay training until the online courses are available. Of course, companies are still technically required to respect the new law and provide this training earlier in the year by using the services of an eligible trainer if they employ temporary or seasonal employees. In addition, employers should be prepared to have an alternative in case DFEH makes the online trainings available very late in the year.

Are there any penalties for not training employees?

In its Sexual Harassment and Abusive Conduct Prevention Training Information for Employers, DFEH clarifies that complaints filed with DFEH after January 1, 2020, regarding an employer's failure to provide required sexual harassment and abusive conduct prevention training "will be reviewed in light of the totality of the circumstances, which may include the availability of DFEH's online training courses or the availability of qualified trainers." If DFEH finds that the law has been violated, "it will work with employers to obtain compliance with the law." It does not appear that monetary sanctions or other civil or criminal penalties are

contemplated at the present time in case employers do not provide the required training by January 1, 2020.

If you have questions concerning the new harassment training requirements, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com), Oscar Escobar (oescobar@nvlawllp.com), Peter Vestal (pvestal@nvlawllp.com), or Carolina Aricu (caricu@nvlawllp.com).

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