



7 Compelling Reasons Why California Employers Must Provide Harassment/Discrimination Training To *All Employees*

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Having conducted harassment/discrimination training for literally hundreds of supervisors both under AB 1825¹ and otherwise, the question often is asked whether or not such training also should be made available by employers to all employees. Our answer is always an emphatic: “Yes!” Here are some of the compelling legal, operational and human resources risks and costs for failing to train all employees on this key subject:

1. Not to do so renders the employer’s Harassment/Discrimination Policy far less effective than it otherwise would be.

The cornerstone of any effective Harassment/Discrimination training is the employer’s written policy on that subject. It constitutes the “law” for that employer on Harassment/Discrimination prevention and resolution.

Not to teach all employees their full rights and responsibilities under that “law” is: first, to miss the chance to prevent the damaging misconduct described in it; and, second, if the misconduct occurs, to miss the chance to effectively correct it by applying the policy, rather than through costly litigation.

An effective policy directs employees to take prompt action to report the prohibited misconduct to their supervisors and/or Human Resources whether it happens to them or to others. Such a policy also informs the employee specifically how all such misconduct will be promptly, fairly and thoroughly investigated, dealt with and resolved by the employer.

For an employer not to educate all its employees on how to report such misconduct and when reported how the information will be effectively processed is to ignore the very purposes for having such a policy in the first place; namely, prevention and resolution.

2. The employer loses the ability to utilize the “avoidable consequences” doctrine to full advantage.

Employers in California are held strictly liable for unlawful harassment/discrimination that occurs in their workplace.² That means that if an employee proves that they were “harassed” in the employer’s workplace the employer is liable regardless of whether or not they either knew or should have known that the misconduct took place.

¹ See California Government Code Section 12950.1. Also see “5 Reasons Why Employers Must Comply With AB 1825”, by P. Anthony Burnham, Esq., in the November, 2005 issue of Employers Group’s Newsletter

² State Department of Health Services v. Superior Court (McGinnis), 31 Cal 4th 1026 (2003)

However, the California Supreme court has held that: 1) if a written policy exists prohibiting harassment/discrimination; and, 2) if the employer has trained its employees on that policy, then such evidence can be used by the employer to show that they attempted to take reasonable steps to “avoid the consequences” of such misconduct which can constitute a significant part of the employer’s affirmative defense.³ If successful, such a defense can help reduce the amount of monetary damages awardable from the employer to the harassment victim.

3. The employer loses the opportunity to inform employees that engaging in unlawful harassment will result in personal liability to them under California law.

The California Government Code provides that an employee is *personally liable* for any harassment perpetrated by them *regardless* of any action or inaction on the part of their employer to prevent or correct such misconduct.⁴ Knowing that not only their jobs but also their personal assets are in jeopardy if they engage in prohibited harassment are both powerful deterrents against such workplace misconduct.

To inform employees that they and not just their employer have some “skin in the game” if harassment takes place at work is a critical ingredient in effective harassment prevention training. Delivering that important message is a significant incentive for employers to invest in making such training mandatory for all employees.

4. The employer exposes its business to entirely avoidable legal risks/costs, wasted resources and adverse publicity.

As seen, employers are strictly liable in California for unlawful harassment that takes place in their workplaces. An effectively written Harassment/Discrimination Policy that is: 1) well (and often) communicated and consistently enforced by the employer; and, 2) understood and accepted by all employees, serves as a valuable “shield” for the employer and its employees against such misconduct. That “shield” should prevent much of the unlawful harassment that might otherwise occur in that workplace.

But, if nonetheless an allegation of harassment is made, the policy can also serve as a “sword” to be wielded when necessary by the employer and any affected employees as a means of fairly resolving such claims by internal means. To be effective, the policy should provide for a fair and impartial investigation of all harassment claims by experienced professionals who report their objective findings of fact and recommendations to the employer, the accuser and the accused. When administered fairly, consistently, honestly and in good faith, such a procedure should entirely do away with the need for any of the parties involved to resort to the judicial process for resolution of a harassment claim.⁵

An Arbitration Policy also can add an extra safety net for keeping harassment/discrimination claims from being contested outside the procedures established for resolving such allegations internally. An employment policy that establishes mandatory arbitration as the exclusive method for resolving most employee-employer disputes, including harassment/discrimination claims, has been approved by both the California and federal Supreme Courts, so long as the policy contains minimal substantive and procedural “due process” elements.⁶

³ Ibid., at page 1044.

⁴ California Government Code Section 12940 (j) (3)

⁵ Cotran v. Rollins Hudig Hall International, Inc. 17 Cal 4th 93 (1998).

⁶ Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal 4th (2000), Circuit City v. Adams, 121 S. Ct. 1302 (2001).

5. The employer provides a “safe haven” for “blamers and complainers” who belatedly allege they were victims of harassment/discrimination to excuse their poor performance and/or misconduct.

Properly communicated and understood an effective Harassment/Discrimination Policy invites alleged victims to immediately come forward with their claims for resolution under the policy. It also protects them from any form of retaliation for exercising their clear rights under the policy.

Because the effect of such a policy is to encourage rather than discourage the making of what are perceived by the accusing employee to be legitimate claims, there is little excuse for an employee not to make their allegations in a timely manner. This “no reluctant victims” approach to administration of the policy makes late claims suspect.

If every employee is made aware of the prompt reporting and retaliation protection aspects of the policy, claims made late and only after negative performance appraisals or corrective action has taken place become especially suspect. Though such claims still would have to be thoroughly investigated under the policy, a relevant part of that investigation would be to determine specifically why the accuser, in violation of the very policy under which they are claiming protection, made the harassment allegation belatedly. The answer to that key inquiry well may have a direct bearing on the outcome of the investigation.

6. The employer loses the opportunity to “deputize” its entire workforce to help it rid the workplace of unlawful and productivity-inhibiting harassment/discrimination.

An informed workforce is a strong deterrent for the kinds of misconduct described in an effective Harassment/Discrimination Policy. Educating employees on the policy and making them aware in no uncertain terms that they can be sued individually for engaging in the type of misconduct described in the policy adds an additional layer of protection for the employer against workplace discrimination.

The more “deputies” an employer can engage in complying with and actively policing its non-harassment/discrimination policy the less risk there is for that type of misconduct to occur in their workplace. Clearly, the adage “the more the merrier” has direct application both to the prevention of harassment/discrimination in the workplace and the effective enforcement of this key policy.

7. The employer loses the opportunity to both promote and benefit from a workplace that practices and values mutual employee respect.

Part of an effective training process puts the kind of negative misconduct described in a harassment/discrimination policy squarely before the employee attendees as choices with dire consequences associated with engaging in them to the employees, their colleagues and their employer. Given those negative consequences and the positive alternative of having the “golden rule” applied by and to them in their workplace, invariably, informed employees consistently will choose the latter. Everyone wins.

Finally, aside from reducing the legal risks involved in having to process and/or defend harassment/discrimination allegations, training employees on this subject lets them know that the employer is actively promoting a workplace that is based on mutual employee respect. The importance of that support pays measurable dividends in terms of individual and group commitment and productivity. In an environment of mutual trust where employees are truly engaged in their work

employees, minimally, stay longer, produce more results while there and are safer.⁷ Talent is attracted to such workplaces as well.

Given the clear upside to training all employees and the equally clear downside to not doing so, not to engage the entire workforce in harassment/discrimination prevention could constitute management malpractice per se.

Enough said!

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⁷ According to over 6 years of research, involving over 3 million employees, over 200,000 managers, 300,000 business units and hundreds of organizations world-wide covering all major industries, The Gallup Organization has concluded that employees "engaged" (as opposed to both "disengaged" and "actively disengaged") in their work are: 56% more successful with customers/clients; 44% more retainable; 50% more productive; 48% safer; and, 33% more profitable. See "Follow This Path: How The World's Greatest Organizations Drive Growth By Unleashing Human Potential", Curt Coffman and Gabriel Gonzales-Molina, Warner Business Books, 2002.