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Effective Employee Training Programs: Money in the Bank

by Jennifer Brown Shaw

"We've been sued." Those few words can strike panic in employers, particularly in California, where multi-million dollar verdicts in favor of employees are not uncommon. What can employers do to reduce their potential exposure for workplace related claims? Adopting and fairly administering lawful policies and procedures is a good start, of course. However, employers also must take the next step to train employees about what is expected of them and the options available for resolving workplace issues within the organization.

In some circumstances, employee training is legally required. For example, California Government Code section 12950.1 requires supervisors employed by organizations with 50 or more employees to be trained on equal employment opportunity principles (i.e., the prevention of harassment, discrimination, and retaliation in the workplace) for two hours every two years (this is generally referred to as "Assembly Bill 1825" or "AB 1825" training). Similarly, employers in certain industries, such as construction, are required to provide safety training to employees.

Simply offering training to employees, however, will not protect an employer if the training is not effective and appropriately tailored to the workplace. So what is "effective" training, and what can employers do to ensure they get the most "bang" from their training bucks?

Why Train?

Training is not only the right thing to do; it can provide the basis for effective defenses to lawsuits alleging harassment and

discrimination. The law of training effectively began in 1998 with the United States Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*. In those cases, the Court created an "affirmative defense" available to employers when harassing conduct under Title VII does not result in a "tangible employment action" (e.g., "a significant change in employment status").

There are two elements to the affirmative defense: (1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior in the workplace, and (2) that the plaintiff-employee failed to take advantage of any preventive or corrective opportunities provided by the employer (or otherwise avoid harm). If the employer can establish both elements, then the court may dismiss the case.

California created a similar defense to harassment claims under the Fair Employment and Housing Act called the "avoidable consequences doctrine" with its 2004 decision in *Department of Health Services v. Superior Court (McGinnis)*. Although employers are strictly liable under California law for harassment perpetrated by supervisors (unlike Title VII), the avoidable consequences doctrine precludes a plaintiff-employee from recovering any damages on a harassment claim if the employer proves: (1) it took reasonable steps to prevent and correct workplace harassment, (2) the employee unreasonably failed to use the preventive and corrective measures, and (3) the reasonable use of the employer's procedures would have prevented at least some of the plaintiff's harm.

Both the *Faragher/ Ellerth* affirmative defense and the avoidable consequences doctrine require employers to train employees on the organization's harassment prevention policy, what constitutes appropriate conduct under the policy, and the procedure for reporting perceived violations of the policy. Without such training, employers will be hard-pressed to prove they took steps to prevent harassment at work.

The United States Supreme Court reinforced the need for training in *Kolstad v. American Dental Association*. There, the Court considered the standard for awarding punitive damages (that portion of a jury verdict that is intended to "punish" the employer) in cases brought under federal anti-discrimination laws. The Court recognized that corporations, as separate legal entities, should not automatically be "punished" for their managers' conduct. Rather, when a corporation demonstrates "good faith" intent to comply with anti-discrimination laws, punitive damages are not appropriate.

Good faith measures include not only implementing anti-discrimination policies, but also affirmative steps such as effective training. Lower courts have put the burden on employers to demonstrate their good faith efforts to comply. So, conducting training for employees on sensitive subjects such as harassment prevention, even if not legally required, can help insulate employers from punitive damage awards.

Key Training Topics for Reducing Legal Exposure

It is tempting for employers with limited resources to provide only legally required

training to employees, such as Assembly Bill 1825 compliance training for supervisors. That can be a costly mistake, however.

In the area of equal employment opportunity, for instance, the most effective way to reduce potential harassment, discrimination, and retaliation claims is to ensure all employees understand the expectations for workplace conduct and how to resolve perceived violations of the organization's policies. Is an employer that only provides such training to supervisors truly committed to harassment prevention? A jury may say "no."

Legal exposure in other areas can be reduced with appropriate training. With the dramatic increase in disability-related lawsuits filed by employees, for example, supervisors should be trained on how to appropriately respond to an employee who requests a reasonable accommodation of a disability or medical condition. While a short answer, such as "punt" to human resources, is simple, training supervisors to do so may not be so simple. Without a basic understanding of the legal requirements in this area, supervisors are more likely to make costly and easily avoidable mistakes.

Workplace violence prevention is another area ripe for employee training. According to the FBI, the vast majority of "mass" workplace violence incidents that occur (these are defined as violent incidents in which an employee, former employee, or third party comes to the workplace with a weapon and injures employees) could have been avoided. The perpetrators of these incidents often leave clues as they are planning the attack, and employees can be trained to recognize these clues and take appropriate preventive action, including contacting management and/or law enforcement when necessary and appropriate.

Employee training can provide a significant pay off in other areas as well. These include managing employee leaves of absence, avoiding wage-hour violations, labor relations (particularly for employers who wish to remain "union free"), and general super-

visory skills (the hiring process, principles of effective discipline, etc.)

What is "Effective" Training?

The passage of AB 1825 created significant "buzz" about the most effective employee training methods (e.g., "live" training, on-line training, etc.) and who should conduct workplace training. The proposed Fair Employment and Housing Commission regulations implementing AB 1825 (which should be final by mid-February 2007) address both of these issues, and the principles reflected in the regulations are applicable to employee training programs on any topic.

The new regulations, permit "live," training, "webinars," on-line, any other "interactive training and education." "Webinars" and on-line training, however, are permitted only if the employees have an opportunity to ask questions and receive feedback during the session or immediately thereafter. Training on subjects not covered by AB 1825, and even sexual harassment training not required by AB 1825 (such as for small employers and non-supervisors), may be conducted via any of these methods. However, as the drafters of the regulations recognize, effective training must be interactive. Online, videotape, or printed training may be easier to administer and less expensive, but there is an associated decrease in interactivity.

A live session with an engaging and knowledgeable trainer will be more effective than one in which the employee is not an active participant. While live training requires more of a commitment by the employer and the employee, it is generally more successful because it does not allow employees to "check out" during the session and employees can interact with one another and the trainer during the session. Additionally, an experienced live trainer can adjust the pace or content of the presentation based on the audience's interest level, sophistication, and participation. Employers should balance these advantages when considering the method of delivery.

The AB 1825 regulations also address the quality of the trainer: the training must be developed and conducted by a "subject matter expert." A subject matter expert is defined as someone who has "legal education coupled with practical experience" or "substantial practical experience" providing *training* in harassment, discrimination and retaliation prevention. So, the trainer not only must be familiar with the principles of equal employment opportunity, but also have substantial experience *conducting training sessions* on the topic. In addition, the trainer must utilize tools, such as hypotheticals, quizzes, and role playing, to directly involve the participants in the session.

The above requirements do not necessarily preclude in-house trainers from conducting AB 1825 compliance and other types of training. However, subject matter expertise is important even when it is not required by statute. Smaller employers who do not have dedicated trainers, or any employer conducting training not required by law, should ensure trainers have sufficient credibility and facility with the material to ensure learning occurs. The trainer's presentation skills are nearly as important as her expertise. A skilled presenter is important to ensure delivery of the material is effective, and to avoid providing inaccurate information or inappropriate messages (e.g., using off-color "jokes" to make a point, etc.)

How to Choose an Effective External Trainer

Employers who decide to utilize the services of external trainers should carefully screen potential vendors before bringing them into the workplace. The number of law firms and other service providers claiming to offer training "solutions" is legion, and has grown significantly since AB 1825 became law in 2005. The competition for access to employers' training dollars has encouraged less qualified vendors to enter the market and offer training services.

So, what steps should an employer take to choose an effective external trainer? First,

seeing is believing. If possible, employers should observe the trainer in action before committing to bringing her into the workplace. This can be accomplished by attending “public” training sessions offered by the trainer, or by requesting to “audit” a session being provided to another employer. Also, word spreads quickly when a trainer does (or doesn’t!) a good job. Word-of-mouth can be a valuable way of learning about trainers and selecting the most appropriate person for the working environment.

Employers should avoid generic, pre-packaged training sessions that are not updated to reflect current cases and legal developments. “Off-the-shelf” training quickly becomes stale, and may conflict with existing workplace policies, practices, and the employer’s unique qualities.

It is also important for employers to keep in mind that non-supervisory employees have different training needs than management. Certain topics are not appropriate for non-supervisory sessions (e.g., managing employee leaves of absence). Also, offering separate sessions for non-supervisors and management on topics such as equal employment opportunity compliance often will encourage more dialogue among the participants. A quality trainer will be able to adapt to any arrangement the employer requests, and tailor the course content accordingly.

Conclusion

The bottom line is that effective training for employees does not come cheap, but can provide a worthwhile return on the investment. Good training may well reduce employers’ legal risk, create a more positive working environment, and enhance employee morale. For all of these reasons, employers should take employee training seriously, and carefully evaluate the training needs in their organization. Once the needs have been identified, employers can decide what topics should be covered and who should deliver the content.

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