



## LAW UPDATE LABOR AND EMPLOYMENT

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### ***CALIFORNIA LEGISLATURE MAKES SIGNIFICANT CHANGES TO SEXUAL HARASSMENT TRAINING APPLICABLE TO SCHOOL DISTRICTS (UPDATED GUIDANCE)***

Since 2005, Assembly Bill 1825 has required California public (and private) employers to provide sexual harassment training to supervisors within six months of hire and every two years thereafter. As previously reported by Schools Legal Service (SLS), Senate Bill (SB) 1343 was enacted in 2018 and makes several substantial changes to sexual harassment training requirements. SB 1343 amended Sections 12950 and 12950.1 of the Government Code effective January 1, 2019. Most notable, SB 1343 reduces the employment threshold for harassment training from 50 to five employees and expands the training requirement from just managers and supervisors to ALL employees.

#### **Proposed Timeline**

Initially, SB 1343 caused a significant amount of confusion with its original deadlines for employee training in that all training would need to be completed by January 1, 2020. SB 1343 went on to provide that “if training was provided after January 1, 2019 the employee need not be retrained to meet the January 1, 2020 requirement.” The Department of Fair Employment and Housing (DFEH) interpreted this timeline to mean that although employees who were trained in 2019 would not need to be re-trained, employees trained in 2018 would have to be re-trained before their two-year schedule in order to remain compliant. On February 26, 2019, SB 778 was introduced. This bill is moving through the Legislature and may clear up the confusion. SB 778 provides that employees trained after January 1, 2018 are not required to undergo refresher training “again until two years thereafter,” effectively allowing employees to remain on a two-year training schedule. It also extends the train-by deadline for all employees from January 1, 2020 to January 1, 2021. We will keep clients updated on SB 778 as it remains in committee process, pending ratification. For now, SLS recommends that clients continue their current two-year training schedule as it pertains to supervisory employees.

#### **Supervisors and Non-Supervisors**

In addition to some specific substantive changes to the law regarding the definition of sexual harassment, one of the most significant changes is the requirement that non-supervisors be trained on the topics of sexual harassment and abusive conduct prevention. By January 1, 2021, if SB 778 becomes law, an employer shall provide at least two hours of interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of

interactive training to all non-supervisory employees in California within six months of their assumption of a position. Thereafter, refresher training is to be provided to each employee once every two years. There has been no guidance from the Legislature as to whether the substance of the training relating to supervisors and non-supervisors is different, except for the time requirements (1 vs. 2 hours). It is likely that DFEH will at some point clarify these requirements, but no timeline has been introduced for this. SLS, as well as other legal entities, recommend that the training closely mirror the supervisory training, except where the training requirements are specific to supervisors.

### **Seasonal, Temporary and Other Employees**

Beginning January 1, 2020, employers shall provide training for seasonal, temporary, or other employees that are hired to work for less than six months within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services employer (temp agency) to perform services for employers, the training shall be provided by the temporary services employer.

### **Volunteers**

Under DFEH's regulations, "Unpaid interns and volunteers" include any individual that works without pay for an employer or covered entity in an internship or other program providing unpaid work experience, or as a volunteer. (2 CCR § 11008(k).) Further, unpaid interns and volunteers may or may not be "employees." For harassment claims, interns and volunteers are considered "employees." (2 CCR § 11019(b).) Nowhere in the text of either SB 1343 or SB 778 is the word "volunteer." Although "volunteer" is not mentioned in either SB 1343 or SB 778, Administrative Regulation 4119.11 applicable to school districts regarding sexual harassment applies to "all allegations of sexual harassment involving employees, interns, volunteers, and job applicants." (Emphasis added.) It would therefore make sense, at least initially, with the change in the law requiring all employees to be trained, that volunteers would also need to be included in the training pool.

There are many levels of volunteers who assist school districts and county offices of education with their day-to-day operations. The only common attribute between them is that volunteers are unpaid and all enjoy protections regarding sexual harassment under Government Code section 12940. Many district positions that are considered "volunteer" have their own requirements under the Education Code such as criminal background and Megan's Law checks, fingerprinting, Activity Supervisor Clearance Certificates, and TB risk assessments. An example of some of these positions include: Volunteer for Facilities Improvement Programs, Volunteer Nutritional Supervisor, Volunteer Instructional Aide, and Volunteer Coach. These district-advertised volunteer positions by their nature require constant interaction with students and staff, and may also lead to paying positions with the district, should the volunteer so apply. On the other hand, some volunteer positions have little to no student or staff interaction at all. For example, a parent who volunteers to bring water to a school sponsored event such as their child's football game or a volunteer to mend sporting uniforms in their own home. It is assumed that many of these behind the scenes volunteers would simply refuse to offer their services if required to undergo the training.

SLS contacted DFEH and requested guidance regarding who they believed should be included in the pool of volunteers requiring sexual harassment training. DFEH's short response was "all volunteers require training." With this in mind, another issue discussed was the possibility that potential volunteers could supply their volunteer site with a certificate of compliance training from their own employer or outside agency, if any. Since the Legislature has mandated that all employees in California be trained, this solution may be helpful. DFEH indicated that this "mobile compliance" is only a talking point and no hard and fast rule has been established. Because of the uniformity of the training requirements, SLS sees no reason why districts could not accept a training certificate from an outside source as long it is current and issued from a legitimate training entity. As with all employees, districts will also need to provide those volunteers with district-specific policies regarding sexual harassment and discrimination and ensure that the volunteer reads and acknowledges receipt of those documents.

Without further clarification from the Legislature or DFEH, SLS believes that the one-hour harassment training for volunteers is mandatory for the protection of volunteers and districts, either by district-sponsored training or at the very least, acceptance of compliance certificates from outside sources. Lastly, SLS recommends that volunteers fall under the "Seasonal, Temporary or Other Employee" timeline with mandatory training beginning effective January 1, 2020.

### **Training Options Going Forward**

Because of the number of employees affected, the new harassment training obligation for non-supervisory employees puts added pressure on employers to become compliant within the allotted time frame. Districts should start preparing now in determining how and when their employees will need to be trained. We suggest creating a table of employees who have already been trained and who need training, and by what date. Employers will want to include in the table, the classifications of employees both supervisory and non-supervisory and whether they will require the one-hour or two-hour training session. Attached to this update are templates that may be useful for this purpose. To assist in facilitating this increased training requirement, DFEH has indicated that they will develop an online training course and make it available on the DFEH website. However, DFEH "estimates" that the release of their course will not be available until the end of 2019. SB 1343 permits an employer, in order to comply with the training requirement, to develop its own training module instead of using the online training course developed by DFEH.

SLS is currently developing a one-hour program that its clients can provide for their employees. This training program will be available in the summer of 2019. We will have several formats for districts to choose from depending upon their needs to include an on-line self-paced version, webinar, and like our two-hour program, in-person group training. In the meantime, we will continue to provide interactive harassment training for managers and supervisors, as well as the other quality trainings the districts need.

**– ERIC K. ALFORD**

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