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Refresh Anti-Harassment Training Following Law Barring Mandatory Arbitration

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Anti-harassment training is as important as ever now that there is a law—signed earlier this year—banning enforcement of pre-dispute arbitration pacts for sexual-harassment claims. Here is an overview of what should and shouldn't be included in the training.

"The fact that there is no more mandatory arbitration of sexual-harassment claims may lead to a proliferation of cases being filed, as juries are perceived to be a much more employee-friendly litigation environment than an arbitrator," said Louis Chodoff, an attorney with Ballard Spahr in Mount Laurel, N.J. "Conventional wisdom is that in the event the employer is found liable, juries tend to impose larger damage awards than an arbitrator."

Kristine Kwong, an attorney with Musick Peeler in Los Angeles, added that "employers are nervous of litigating sexual-harassment cases in front of the jury because of the fear of the runaway jury verdict."

However, Preston Pugh, an attorney with Crowell & Moring in Washington, D.C., and Chicago, questioned the conventional wisdom, saying, "Exposure under arbitration is the same now" as before juries. "Anti-harassment training is as needed today as it was before the enactment of the law."

Nonetheless, Andrew Sherrod, an attorney with Hirschler in Richmond, Va., said, "While anti-harassment training has always been best practice for mitigating risk and building a workplace culture based on mutual respect, companies now have an added incentive to avoid the reputational damage that can come with an allegation of sexual harassment."

Anti-harassment training can prevent lawsuits from being filed, Chodoff noted. In addition, if a lawsuit is filed, the training might provide the employer with a defense.

What Should Training Include?

Renee Inomata, an attorney with Casner & Edwards in Boston, said anti-harassment training should include these main points:

- Explanation of the behavior that constitutes harassment, as recognized by the law and as understood within the organization.
- Emphasis on the fact that the anti-harassment policy and law apply to all employees regardless of level within the organization.
- Explanation that the perpetrator's intent rarely matters—it is the victim's reasonable perception that matters more.
- Education on the written policy that employees can refer to when they need to report instances of harassment.
- Explanation that reports will be kept as confidential as possible but that complete confidentiality cannot be promised.

- Description of what types of acts or omissions can constitute retaliation and that retaliation is prohibited.
- A clear and simple reporting mechanism of any instance of harassment.
- Emphasis that harassment will not be tolerated and that a rapid resolution will be reached for victims who report harassment, prioritizing respect for the victim.
- Explanation that perpetrators and victims can be anyone. The gender, gender identity or expression, or sexual orientation of the perpetrator may be the same or different from that of the victim.

Carolyn Rashby, an attorney with Covington in San Francisco, said anti-harassment training should include examples and be:

- Interactive.
- Tailored to the specific audience. Managers, for example, will need specific training to cover their reporting responsibilities.
- Compliant with state-specific training requirements. California and New York specify topics an employer must cover in anti-harassment training. A particular state's requirements may apply to employees working remotely in the state even if the employer does not otherwise have operations there.
- Regularly reviewed so the content is current.

Managers should be quick to recognize harassment in the workplace and involve HR, said Tim McConnell, an attorney with Bass, Berry & Sims in Knoxville, Tenn.

"The training should be interactive and engaging and not a lecture," he added. "The more the managers and supervisors and employees are talking and asking questions, the better."

In addition to California and New York, anti-harassment training also is required in Connecticut, Delaware, Illinois, Maine, Washington state and Washington, D.C., noted Rebecca LaPierre, an attorney with Morgan, Brown & Joy in Boston. Other states, like Massachusetts, Rhode Island and Vermont encourage anti-harassment training, she said.

"Training should be updated frequently to adjust for continuing and constantly changing social norms and technology," said Sara Jodka, an attorney with Dickinson Wright in Columbus, Ohio.

"When social media was new, employers had to adjust policies and trainings to account for harassment occurring via social media platforms outside the onsite work environment," she noted. "In the last two years, the workforce has vastly changed to include remote work, so new training should focus on how sexual harassment looks in a remote-work environment."

Jodka said that this training should include discussion of how sexual harassment may arise over newer technologies such as Slack and Zoom.

Tamsin Kaplan, an attorney with Davis Malm in Boston, added that all anti-harassment training should empower employees to avoid discrimination and harassment; inform employees about how to handle inappropriate conduct when it occurs; address misconceptions about sexual harassment; and promote appropriate, respectful behavior.

What Shouldn't Be in the Training?

Inomata said that some main points not to include in anti-harassment training are:

- Specific real-life incidents of harassment that occurred at that employer or with a particular employee.
- Role-playing sexual harassment.
- Use of offensive language.
- Debate over the correctness of any law.
- Favoring managers over nonmanagers.

Training should not harp too much on what is not harassment, Pugh said. This kind of harping might stifle internal complaints and make employees feel like they have no place to go but to complain externally, he noted.

"Employers should avoid using inapplicable, outdated or cliché examples of harassment in their trainings," Rashby said. Otherwise, an employer may inadvertently be signaling to employees that it has not prioritized the training recently.

For example, don't always have a man as the supervisor in examples and don't overlook same-sex harassment scenarios, Chodoff said.

"Employers should ensure that everyone attends the training," Rashby said. "Company leaders should not get a free pass to skip training due to busy schedules or other priorities."