



White Paper Series

Legal Mandates for Training Managers in Employment Law

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In today's economic climate, training is more important than ever. Studies show that the higher the unemployment rate, the greater the number of employment lawsuits filed – just a 1.5% increase in unemployment can lead to a 21% increase in lawsuit filings.¹ In a 2008 survey of corporate counsel commissioned by a major U.S. law firm, nearly a third of the in-house attorneys predicted an increase in litigation in this economy, and half said that labor and employment cases were their biggest concern.²

Training can prevent lawsuits, but even if it doesn't, it can prevent companies from being hit with punitive damages. Thus, every employer should have a comprehensive training program.

As an attorney who has conducted training programs inside companies for more than 20 years, I would like to offer some perspectives “from the trenches.”

Is Training Legally Required?

Generally, there is no federal legal requirement for private sector employers to train managers or employees on employment law issues. (Employers may have training duties under Sarbanes-Oxley, the U. S. Sentencing Commission Guidelines, OSHA and the Federal Acquisition regulations; these are outside the scope of this article.) However, section 202 of the Notification and Federal Employee Antidiscrimination and Retaliation Act (No FEAR Act) requires federal agencies to train all employees about their rights and remedies for violations of discrimination and whistleblower protection laws.³

At least three states, Connecticut, California and Maine, require managers to be trained in harassment prevention. Virtually every state requires employers to take all steps necessary to prevent harassment. For example, Hawaii statute provides, “Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring.”⁴

Although Title VII, the basic federal anti-discrimination statute, does not require training, according to the U.S. Supreme Court, the law's “primary objective is a

¹ The Changing Nature of Employment Discrimination Litigation, 43 Stan. Law. Rev. 983 (1991)

² www.fulbright.com/litigationtrends

³ 5 CFR 724

⁴ HAR 12-46-109(g)

⁵ Albemarle Paper Co. v. Moody, 422 U. S. 405, 417 (1975)

prophylactic one.”⁵ It aims, chiefly, “not to provide redress but to avoid harm.”⁶ With regard to sexual harassment, “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.”⁷ “The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”⁸

An employer’s responsibility is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court noted, to guard against misconduct by supervisors the employer can “screen them, train them, and monitor their performance.”⁹ The court also held that employers with effective anti-harassment policies, procedures and practices, including training, have made “good-faith efforts” and are not vicariously liable for punitive damages.¹⁰

There are a growing number of cases holding that employers who do not provide employment law training for managers are not acting in good faith. In a 2008 case against Federal Express, a manager with a disabled employee requested ADA training. He was denied training, then failed to reasonably accommodate the employee, who sued. The company was unable to prove good faith and was ordered to pay punitive damages.¹¹

In a 2007 case, an employee had 12 years of complaints of harassment against him, the U.S. Department of Defense did not investigate the complaints, speak to the employee, nor give him training. The Third Circuit Court of Appeals held the Department failed to prove it had taken immediate and appropriate corrective action.¹² Similarly, the Tenth Circuit upheld a punitive damage award based in part on failure to train.¹³

Even if the training is given after the alleged harassment or discrimination occurred, it may still be admissible at trial to reduce punitive damages. As one federal appeals court has stated: “Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.”¹⁴

⁶ Faragher v. City of Boca Raton, 524 U. S. 775, 806 (1998)

⁷ Burlington Industries, Inc. v. Ellerth, 524 U. S. 742, 764 (1998)

⁸ Kolstad v. American Dental Association, 527 U.S. 526 (1999)

⁹ Faragher, 118 S. Ct. at 2291.

¹⁰ Kolstad v. American Dental Association, 527 U.S. 526 (1999)

¹¹ EEOC v. Federal Express Corp., 513 F.3d 360 (4th Cir., 2008)

¹² Andreoli v. Gates, 482 F.3d 641 (3rd Cir., 2007)

¹³ Godinet v. Management and Training Corp., 5 Fed. Appx. 865 (10th Cir., 2003)

¹⁴ In re Exxon Valdez, 270 F.3d at 1242-43 (9th Cir. 2001)

The same court noted that training held immediately after the employer receives notice of a claim of discrimination is admissible to show good faith. But, because the employer waited to have training until seven months after it first received notice, and never disciplined the harassers, the court upheld a punitive damage award of \$1 million.¹⁵ And in an Eighth Circuit case, the male victim of sexual harassment filed a complaint against his female supervisor. In response, the company conducted investigations and required the accused to attend both a supervisor training program and a harassment prevention program. The company was not liable for punitive damages.¹⁶

The Swinton court also noted that when an employer policy places responsibility for receiving complaints of harassment on supervisors, the employer should “impress” upon them their duties when they observe harassment or receive a complaint.

EEOC Training Requirements

As part of its standard practice, the federal Equal Employment Opportunity Commission regularly requires employers under consent decree to conduct training programs.

For example, in *EEOC/Landers v. Wal-Mart Stores*¹⁷, the consent decree entered to settle a class action disability discrimination case required the company to “provide nationwide [ADA] training to all managers, supervisors and people involved in hiring committees.”

Similarly, the U.S. Department of Labor requires companies under consent decree to institute training.¹⁸

In addition, in its enforcement guidance documents, the EEOC highly recommends that **all supervisors**, managers and employees be trained¹⁹ periodically,²⁰ in the event of an internal complaint,²¹ and if an individual is found to have engaged in harassment.²²

¹⁵ *Swinton v. Potomac Corporation*, 270 F.3d 794 (9th Cir., 2001).

¹⁶ *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968 (8th Cir., 2007)

¹⁷ *EEOC/Landers v. WalMart*, United States District Court, Eastern District of California, Civil Action No. 99-0414 GEB DAD, http://www.eeoc.gov/court/walmart_decree.html

¹⁸ See, e.g., http://ofccp.blogspot.com/2007_01_01_archive.html

¹⁹ “Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors”; EEOC’s “Best Practices for Eradicating Religious Discrimination in the Workplace”; EEOC Compliance Manual, Section 15, Race and Color Discrimination

²⁰ “Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors”; EEOC Compliance Manual, Section 15, Race and Color Discrimination

²¹ “Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors”

²² *ibid*

What Content Should be Covered

According to the EEOC, all supervisors and managers should learn how “to **address or report** to appropriate officials complaints of harassment ... regardless of whether a complaint was framed in a way that conforms to the organization’s particular complaint procedures.”²³

“Such training should explain **the types of conduct** that violate the employer’s anti-harassment policy; the **seriousness** of the policy; the **responsibilities of supervisors** and managers when they learn of alleged harassment; and the prohibition against **retaliation**.”²⁴

“An employer should have effective and clearly communicated policies and procedures for addressing complaints of **national origin harassment** and should train managers on **how to identify and respond effectively** to harassment.”²⁵

“Employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and **encouraging them to consult with more experienced managers or human resources personnel** when addressing difficult issues.”²⁶

“Employers should train managers and supervisors on how to **recognize religious accommodation requests** from employees.... Managers and supervisors should be trained to **consider alternative available accommodations** if the particular accommodation requested would pose an undue hardship.”²⁷

“Employers should train managers to be aware that, if the requested accommodation would violate the CBA or seniority system, they should **confer with the employee** to determine if an alternative accommodation is available.”²⁸

“Employers should train managers to **gauge the actual disruption posed by religious expression** in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to **identify alternative accommodations** that might be offered to avoid actual disruption (e.g., designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).”²⁹

²³ *ibid*

²⁴ *ibid*

²⁵ EEOC Compliance Manual, Section 13, National Origin Discrimination

²⁶ EEOC’s “Best Practices for Eradicating Religious Discrimination in the Workplace”

²⁷ *ibid*

²⁸ *ibid*

²⁹ *ibid*

“Managers and employees should be trained **not to engage in stereotyping** based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.”³⁰

“Employers should incorporate a **discussion of religious expression**, and the need for all employees to **be sensitive to the beliefs or non-beliefs of others**, into any anti-harassment training provided to managers and employees.”³¹

“**Employers can reduce the risk of retaliation claims by training managers and supervisors to be aware of** their anti-retaliation obligations under Title VII, including specific actions that may constitute retaliation.”³²

Although many of these requirements relate specifically to religious discrimination, they can be more broadly applied to all forms of discrimination and harassment.

Americans with Disabilities Act Training

In the nationwide consent decree Wal-Mart entered into with the EEOC, the ADA training must include:³³

- ♦ overview of ADA
- ♦ employer obligations
- ♦ applicant and employee rights
- ♦ non-discrimination in hiring and recruitment
- ♦ reasonable accommodation in the application and hiring process
- ♦ procedures for addressing reasonable accommodation requests
- ♦ examples of accommodations in the application and hiring process
- ♦ awareness of issues affecting employees and applicants who have disabilities
- ♦ understanding that only the ADA Coordinator can deny a reasonable accommodation
- ♦ Wal-Mart’s commitment to meeting legal requirements
- ♦ Wal-Mart’s commitment to engage in the interactive process of accommodation.

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ EEOC/Landers v. WalMart, http://www.eeoc.gov/court/walmart_decree.html

Harassment Prevention Training

In addition to these federal guidelines, states may mandate what must be covered. For example, California requires the following to be covered in the mandatory harassment prevention training.³⁴ Whether or not an employer is in California, this is a good list to use to assess the efficacy of any harassment prevention program.

harassment, discrimination and retaliation Not only sexual harassment, but all forms of illegal harassment are required to be covered. Training must include the definition of harassment, legal principles concerning the prohibition against and the prevention of unlawful harassment, discrimination and retaliation, and the types of conduct that constitute harassment.

remedies for victims of harassment

strategies to prevent harassment

effect of harassment Explain the effect of harassment on harassed employees, coworkers, harassers and employers.

practical examples Include factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources. Role plays, case studies and group discussions are recommended.

obligation to investigate Training must include the employer's obligation to conduct an effective workplace investigation, but not how to conduct an investigation, since that is outside the scope of most supervisor's responsibilities.

anti-harassment policy Supervisors must learn about the employer's own policy, or the essential elements of a sample anti-harassment policy. Either way, the employer must give each supervisor a copy of its anti-harassment policy, not a link to a policy, but a physical copy. Each supervisor must read the policy and acknowledge receipt. This acknowledgement should be kept in the supervisor's personnel file.

retaliation Clarify what is retaliation and how to prevent it.

limited confidentiality Inform employees of the limited confidentiality of the complaint process.

³⁴ Fair Employment and Housing Commission's Sexual Harassment Training and Education Regulations, TITLE 2, Division 4, section 7288.0, <http://www.fehc.ca.gov/act/harass.asp>

resources for victims Supervisors must know the resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.

supervisors personally accused of harassment Training on what to do if the supervisor is personally accused of harassment.

Training Methods – Computer-based vs. Live Classroom

Just as important as the content of the training is the method used. Employers are flocking to cheap methods of training, often with disastrous results. A Training Director at a Fortune 500 company told me they were doing all their legal compliance training on-line. “How’s that working for you?” I asked. He said, “People hate it, and the number of employee relations complaints we get has increased.” I was delighted. “When do you want to go back to live training, then?” He said, “We’re not going back. I was told to reduce my budget. I did. These other problems don’t come out of my budget.” Perhaps it should come as no surprise that the company was saved from bankruptcy a few years later only because it was swallowed up by another company.

So the method used can be very important. Generally, there are 5 methods of training:

Interactive classroom training. Can be taught by one or more instructors. May include videos, either scenario case studies or content videos. Interaction may include small group discussion, quizzes, large group discussion, role plays, case studies, and, most importantly, the ability to ask questions and have them answered. Often covers the hard questions and gray areas. Goes beyond fact memorization and answers the question ‘Why?’ The only method that allows students to learn from each other’s experience and knowledge. Requires skilled, knowledgeable instructors.

Non-interactive classroom training. Usually involves showing a content video by a person who is marginally qualified to answer questions. For example, a sexual harassment video may be shown by an in-house HR manager who knows company policy but not necessarily the legal requirements. Alternatively, could be lectures by lawyers whose manner of presenting discourages interaction.

Interactive webinar. Students see slides on their computers while they hear the instructor in real-time. They answer polling-type questions; for example, they are given a scenario and asked to vote if it is or is not harassment. They can watch video segments, and type in questions which instructor can see and answer.

Instructor must be qualified to answer substantive questions. To insure full participation, students should be asked questions every two or three minutes, and must be required to respond to every question in order to pass.

Non-interactive webinar, teleseminar. These are one-way programs in which the instructor talks and/or shows slides, but students cannot or do not ask questions.

On-line, e-learning, computer-based learning, CD-ROM. These may involve interaction by students responding to quiz questions either throughout the program or at the end. Self-paced programs allow the students to rapidly click through the program without reading and just answer the questions at the end. Timed programs have an audio track that must be listened to and does not allow the slide to be changed until the audio is complete. New e-learning programs for the California harassment compliance training are on a two-hour timer to meet the law's requirements.

What kind of training is best? It depends. An excellent webinar is better than a bad live training.

To give an example of how e-training works in real life, a manager recently told me that three years ago when she took the California harassment compliance training, she just clicked through the slides without reading them, then took the quiz at the end. The quiz was so simple she got 100%. Two years later, when the employer switched to a timed program, she had the training running in one window while she answered email and wrote a report. Each time the audio stopped she switched back to the window to answer the questions, then switched back to her work.

Although this particular manager is unlikely to violate the law or company policy, how many of her co-workers who really need to learn are doing the same thing?

I am reminded of a VP in one of my live classroom trainings who walked in and said, "You have to get me out of this class! I'm too busy for this. I've been in management for 30 years! I know this already!" I said, "Your boss is the one who told you to be here, so I can't let you go. But I'll tell you what. You sit through the first two hours, participate, be a role model for the other managers. If by the first break you don't think you are getting value out of this, I'll talk to your boss." He agreed. At the break he came up and said, "I am so lucky I've never been sued. I've been doing everything wrong!" He stayed through the day and the CEO later told me the VP completely turned his behavior around.

And that's the best test of training. Since the purpose of the training is to prevent violations of the law, the question is which method best prevents violations?

What is the Best Type of Training?

Although this question has not yet been the subject of an appellate court decision, it has been resolved in a matter before the U.S. Chemical Safety and Hazard Investigation Board (CSB).

The matter involved one of the worst industrial disasters in U.S. history. On March 23, 2005, at the BP Texas City Refinery, the third-largest oil refinery in the United States, explosions and fires killed 15 people and injured another 180. Houses were damaged as far away as three-quarters of a mile, and 43,000 neighbors were locked down in their homes until toxic fumes passed by. The incident resulted in financial losses of more than \$1.5 billion.

After a two-year investigation by the CSB involving nearly 400 witnesses and more than 30,000 documents, the independent federal agency concluded that a combination of cost-cutting, production pressures, and failure to invest caused a progressive deterioration of safety at the refinery, leading to the explosion.

One of the key findings of the CSB was that BP's cost-based decision to replace live trainers with computer-led training was a substantial contributing cause of the disaster. In the seven years leading up to the explosion, the budget for the Texas City refinery training department was cut in half and its staff reduced from 28 to eight. To make up for fewer trainers, BP Texas City went to computer-based tutorials.

The CSB found that computer-led training effectively provided factual information such as which alarm corresponded to which piece of equipment, but they did not give operators an understanding of the processes they were performing, or the ability to ask questions about abnormal situations. What was lacking, said the CSB, was "training that goes beyond fact memorization and answers the question 'Why?'"

One of the CSB's key recommendations was that BP Texas City should replace the computer tutorials with "face-to-face training conducted by personnel with process-specific knowledge and experience who can assess trainee competency."³⁵

In the area of harassment and discrimination prevention, there are at least as many "abnormal situations" than in the operation of an oil refinery—probably a lot more. When we teach managers the skills and information they need to avoid employee lawsuits, we don't try to turn them into lawyers. Instead, we teach them an approach to handling employee situations and to recognize when they need to get help from upper management, legal, or HR. They need to be able to ask questions, to go beyond fact memorization and to understand "why?"

In a recent case, a federal appeals court struck down a punitive damage awards because of the employer's good faith efforts (including live, interactive training) to prevent discrimination and harassment.³⁶ The jury found that a hospital employee was denied a promotion due to her race and awarded more than \$200,000 in punitive damages, which were thrown out on appeal. The appeals court found that the hospital had made good faith efforts by having a well-publicized policy and grievance procedure, supported by “a training program that included formal training classes and group exercises for hospital employees.”

Litigation Considerations

Savvy plaintiff's attorneys will send written interrogatories asking whether the employer offered any management training on discrimination, harassment, or other employment law issues in the case. If there was no training, or the managers didn't attend, they can demand punitive damages!

If a training program took place, employee attorneys may also send a request for documents for all related materials – announcements sent out, course descriptions in catalogs, and all materials used in the program including workbooks, slides, videos, and handouts. The notes in the course workbook made by the particular manager(s) involved in the case may be revealing.

In addition, employers may receive written interrogatories about the qualifications of the trainers. What is their formal educational background? What continuing education courses have they taught? What articles or books have they published? Have they even read an article or book? What is their experience in handling these types of situations? Some in-house trainers have minimal formal education in HR, take few courses, read little and have handled perhaps one or two situations in their lives. Their competence to teach legal compliance may be questioned.

Other questions that may be asked: How long did the training last? What types of interaction were built into the training? How many managers or employees attended the program over what period of time?

Most importantly: what steps did the employer take to reinforce the training after it was completed?

The course materials may be reviewed during litigation, and found to be lacking. For example, is retaliation covered in the harassment training? If the case involves

³⁵ “U.S. Chemical Safety And Hazard Investigation Board Final Investigation Report,” Report No. 2005-04-1-TX http://www.csb.gov/completed_investigations/docs/CSBFinalReportBP.pdf

³⁶ Bryant v. Aiken Regional Medical Center, 333 F.3d 536, 548 (4th Cir. 2003)

gender harassment, does the course material cover that as well as sexual harassment?

On the other hand, the course materials may help the employer. Our Fair Measures workbooks have been introduced into evidence in at least two cases, and both times the company's attorneys were able to use them to drive home the point that the employees were "at will." In both cases, the company won.

Once plaintiff's attorneys have obtained the course material, they can question managers in detail. What do they remember about the program? How did they change their behavior as a result of taking the program? This latter question is almost a no-win for managers. If they didn't change their behavior, perhaps the training wasn't effective. If they did change their behavior, were they in violation of the law before?

Finally, plaintiff's attorneys may ask the manager whether anything unusual or outrageous happened during or after the training. Did anyone contradict the training, or make jokes about it? Although not necessarily fatal to the case, bad behavior can set the stage for punitive damages.

Training Considerations in Settlements

Assuming the employer has entered into a consent decree or settlement agreement requiring training, the first instinct might be to bring in the cheapest training available. However, it is in the company's best interest to get good training, because good training prevents lawsuits. Even if it doesn't prevent a particular lawsuit, good training minimizes the likelihood of punitive damages. Surely an employer's worst nightmare is having managers on the stand testifying to the jury that the only training they got was a video or on-line training.

Bad training not only doesn't prevent lawsuits, it also builds resentment.

I remember being called by a steel mill that had brought in a labor busting law firm to conduct harassment prevention training. Not only did they tick off the rank and file with their attitude, they also tried to scare the men by telling them that everything and anything was harassment. As a result, the women filed grievances over everything and anything. After a year, the union was swamped with frivolous claims and demanded new training.

We came in to do a pilot program for the company executives and union officials. At the beginning of the program, I mentioned we were looking for a title for the program, so if anyone had any ideas, I'd ask for them at the end. A big fellow in the back yelled, "Why don't you call it a waste of time?" I smiled and said, "How about

if you wait until the end of the program and see if you still want to call it that?” After three hours, when I asked for title ideas, the same man said, “You should call it Values to Work By.” We got the contract. Management and the union were thrilled with the results. Not only did the rank and file enjoy the training, they learned appropriate behavior, and the number of complaints decreased significantly.

Who Should Conduct the Training?

Many corporate counsel enjoy speaking and training. They think they can save their clients money by doing the training themselves. Obviously, in a large organization this simply isn't possible. But if the employer is rather small, counsel may wish to conduct the training themselves. Alternatively, a company's outside law firm may offer to provide training as part of their services.

There are a few problems with this. First, it puts counsel in a potential conflict of interest. If there is litigation, how can counsel argue the training was effective if counsel was the one providing it? In many courts, the judge will not allow the attorney who did the training to participate as a lawyer in the trial.

Second, although in-house and outside counsel clearly have the substantive background to provide legal training for managers, developing and presenting training for laypeople calls for additional skills that few attorneys have. We were contacted by a Fortune 50 company whose corporate counsel wanted to do the training himself. The training department wanted us. The decision was made to have him present to one group, have me present to another, and then counsel and training would come to an agreement.

I attended counsel's training and frankly, it was deadly. People were falling asleep as he went through his slides. The next day he came to my training. During the first small group exercise (5 minutes into the program) he pulled me aside and expressed his surprise that I didn't use slides. Instead, participants had a 200 page manual with outlines, exercises, case studies and background material that they worked through as the day progressed. Two hours later, at the first break he came up and said, “You're much better than I'll ever be! You can have the contract.” 18 years later, that company still requires all its managers to attend our training. And by the way, during that time they went from being under an OFCCP consent decree to having an average of 15 EEOC claims a year out of more than 10,000 employees.

Over the past 20+ years I have interviewed more than a hundred attorneys with years of employment law experience, but only a few became successful trainers

with Fair Measures. Beyond their extensive knowledge of employment law, among the skills they have are the ability to present legal concepts in plain English, answer questions directly, “hear” the question behind the question, facilitate small group discussions, use humor and stories, integrate company values into the program, facilitate participants learning from each other, and more.

Incidentally, I coach our presenters to use language that can be understood by 4th graders. Although the majority of our participants in Silicon Valley have advanced degrees, and more than a few have been Nobel Prize winners, for many of them English is their second or third language. Even for native English speakers, simplicity is important because it paints vivid pictures that are easy to remember. For example, one of our attorneys on her first day of training described a case and said, “The individuals engaged in an altercation.” I coached her to say instead, “The guys got into a fight.”

Our attorney-trainers have worked together for twenty years to develop courses that are fun and engaging. A full-day program includes eight small group activities to get people involved so they remember the content. The course is structured to take advantage of people’s natural bio-rhythms as they peak and ebb during the day. We produce our own video scenarios so they are up-to-date and make the exact points we want to cover. Most important, we integrate the employer’s policies, procedures and values into the training.

What Should You Do Now?

Mandate employment law training for all managers, and harassment prevention training for all employees. The issue is how to train them effectively, in order to promote a respectful and productive workplace and prevent litigation. Although technology provides some alternatives, for managers and select employees, classroom training provided by skilled presenters is best. The reason? Good training prevents lawsuits.

