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As Calif. Quadruples Employers' Sexual Harassment Training Mandate, Lawyers Should Be Part of the Solution

Training works when it reflects current events and real situations that have occurred within 18 months of taking the training.

By Janine Yancey

With the newfound attention on issues of sexual harassment and our culture's mishandling of it, California Sen. Holly Mitchell introduced SB 1343 to help address these problems.

This week, the California Legislature is expected to pass SB 1343. SB 1343 modifies the current employer harassment training mandate (AB 1825) by significantly expanding its scope. If signed into law, SB 1343 will more than quadruple the scope of the current law as it will apply to the whole workforce (not just managers) and it will apply to virtually every California employer, not just those with 50 or more employees.

In June, I was able to provide expert testimony to the Senate on the proposed bill and helped persuade lawmakers to change their proposed requirement from two hours to one hour for employee training. I also testified on the importance of keeping a record that each person has participated in training. The Senate ended up changing the language and adopting those recommendations, which will significantly benefit both employers and employees. Asking employers to pay for two hours of training for their entire workforce is expensive and there's not an obvious benefit to an extra hour for nonmanagers. Conversely, directing employers to provide training to employees without requiring them to document that training is a rule in name only and would not help employees who do need access to this information and guidance.

Since 2005, employers have had to comply with a harassment training mandate: California AB 1825, which requires that managers in organizations with 50 or more employees actively participate in two hours of sexual harassment training every other year. Employment lawyers (like myself) shifted their focus to address this new market need.

Courtesy photo

Janine Yancey, Emtrain founder and CEO

However, in the last 13 years we've seen what works and what doesn't work. Let's start with what works.

What Does Work

We know that training works when it is a component of a larger, integrated plan of supporting a healthy workplace rather than relying on the initiative as a "one and done" compliance

effort. Training works when it reflects current events and real situations that have occurred within 18 months of taking the training. Training works when participants can ask questions and receive answers from neutral experts. Training works when truth-telling is allowed and even encouraged. Training works when leaders are engaged and actively sponsor the program as a component of workplace culture, not as a compliance program.

But even though we've had mandated harassment training for over a decade, the #MeToo movement shows harassment continues to be a wide social problem. We don't seem to be making much progress in changing workplace behavior.

What Doesn't Work

- **Check the box/compliance mentality does not work:** Focusing only on legal compliance and/or conducting the training as an Exhibit "A" to defending a harassment claim does not work; in fact, it often backfires.
- **Episodic training does not work:** If the training is an episodic workshop and not part of a wider program that addresses the workplace culture, the training by itself won't work.
- **Content matters; unrealistic examples do not work:** If the workplace scenarios (live or via online training) show only examples that are obvious and clear-cut (sleep with me to receive this promotion) and lack nuance and/or lack actions reflecting the early indicators of a situation that could turn into a problem, then employees get bored and disengage (in fact, this flawed content often results in the training being counterproductive).
- **Lack of discussion or focus on behavior change:** Training that does not spark facilitated debate or dialogue within a learner community does not move the needle. Focusing only on whether behavior is legal or not also misses the point. As lawyers, we know the behaviors that will cause conflicts and lead to claims, regardless of whether the claims have merit. Often those are the more interesting illustrations to discuss.

So how can lawyers be part of the solution and not the problem?

In the last year, employers have experienced "trials" in the court of public opinion through social media. Those risks can be far more costly and evolve more quickly than litigation matters. So lawyers need to widen their lens beyond claims and help clients manage a broader social and reputational risk. Managing a broader risk means lawyers cannot just focus on litigation risks and prevailing on a claim—while ignoring underlying organizational problems and hoping they go undetected. In today's social media environment, there's no "hiding" organizational problems and it certainly doesn't take a legal claim to take down an executive or drop shareholder value.

So the lawyers who address this widely expanded harassment training mandate by focusing on compliance and litigation risk management will not actually change behavior or solve workplace problems—they will be just be perpetuating and expanding a very costly "check the box" for their clients.

Janine Yancey *is the founder and CEO of Emtrain, a San Francisco culture tech company that provides online training, guidance and analytics on workplace topics such as harassment, bias and ethics to Bay Area employers such as Workday, Netflix, Dolby, Pinterest, Chevron and others who want to create healthy workplace cultures.*