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Rebecca Newman, Esq.

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California's New Anti-Bullying Training Law and Addressing Workplace Bullying

By Rebecca Newman

We typically think of schoolyards, playgrounds, and locker rooms as the breeding ground for bullies. Most of us can probably recall unpleasant experiences dealing with or witnessing bullies in middle school or high school, and have followed recent news coverage of cyberbullying involving social media websites. But what becomes of schoolyard bullies as they advance from childhood to adulthood? All too often, perhaps, they become cyberbullies and even workplace bullies. How often do we see bullying behavior in the workplace? We may not know it when we see it, but its victims know it when they feel it, and the California Legislature, like the recess monitor of days of yore, has stepped in, albeit with cautious baby steps as compared with other potential legislative remedies.

California has become the first state to enact a workplace bullying prevention and training law. AB 2053, which takes effect on January 1, 2015, amends California Government Code Section 12950.1 to include "prevention of abusive conduct" as an additional component of the existing statutory requirement for employers with fifty or more employees to provide sexual harassment training and education to all supervisory employees once every two years.

Abusive conduct is defined by Cal. Gov. Code Section 12950.1(g)(2) as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile,

offensive, and unrelated to an employer's legitimate business interests." The new law further explains that abusive conduct "may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."

This phrase contrasts with Title VII of the Civil Rights Act of 1964 and federal courts' approach generally, in particular the concept that Title VII does not set forth "a general civility code for the American workplace" as articulated in a famous U.S. Supreme Court harassment case, *Oncale v. Sundowner Offshore Services, Inc*. However, the AB 2053 states that a single act will not constitute abusive conduct, unless it is especially severe and egregious. The required training under the new law must be presented "by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation," suggesting that such trainers will have to broaden their expertise and address "abusive conduct" in addition to traditional explanations of harassment, discrimination, and retaliation.

Meanwhile, across the country, New York's and New Jersey's state legislatures also have introduced a pending anti-workplace bullying law called the Healthy Workplace Bill ("HWB"). Additionally, more than twenty other states have introduced related versions of the HWB, according to www.healthyworkplacebill.org, an advocacy movement for the proposed law. A recent survey by the Workplace Bullying Institute ("WBI"), which advocates for legislative action on the HWB, illustrated the seeming prevalence of the problem: 27% of Americans have suffered abusive conduct at work; another 21% have witnessed it; and 72% are aware that workplace bullying occurs. The survey also explores the gender, race, and personality-based components of bullying in the workplace, from the perspectives of perpetrators, targets, and witnesses.

As employers and defense attorneys know, many employee complaints of harassment made may not actually be illegally based on an employee's protected characteristic, but driven by other antagonistic and unprofessional workplace behavior and employee interaction, and can be based on no more than a personality conflict or a perceived slight. Conversely, the proposed HWB is "status-blind," meaning that the employee does not need to be a member of any protected status group. This will likely raise further questions about how to distinguish between illegal, status-based harassment and bullying. Conceivably the proposed HWB would create a new type of litigation related to abusive work environments, but it is also likely that such lawsuits would also include causes of action for discrimination, harassment, failure to investigate, failure to prevent harassment, negligent retention, and other related claims. The

proposed HWB does not require exhausting administrative remedies, though states may choose to introduce such a step.

California's new anti-bullying training law recognizes the tension in and impact on employers when attempting to regulate acceptable and unacceptable behavior in the workplace. Ultimately, an employer's best defense against potential lawsuits is to enact and enforce clear, written procedures to prevent such conduct. Employers may want their handbook policies and procedures to include blanket prohibitions of unprofessional and other unacceptable conduct, such as the use of abusive, threatening, or unduly rude comments and behavior. Though, given the National Labor Relations Board's broad stance regarding concerted activity and complaints about workplace conditions, such policies should include a caveat that such restrictions are not intended to interfere with, coerce or restrain any employee from exercising his or her rights under National Labor Relations Act, or any similar state or federal law. Employers may want to consider including in their employee handbooks examples of unacceptable abusive conduct.

Employers should also train human resources and supervisory personnel to identify bullying behavior and recognize its signs and manifestations, as well as what is *not* bullying. AB 2053's definition of abusive conduct may be a guide, but it isn't foolproof: for example, a more direct communication and supervisorial style, with constructive criticism of work performance, would likely not constitute bullying. One tip employers may want to provide to managers is to focus on addressing specific performance issues and their tangible consequences for legitimate business interests, as opposed to making general criticisms or complaints about an individual's personality or character.

Complaints of bullying conduct should be investigated, addressed, and documented through applicable disciplinary policies and procedures in order to protect against future claims. This is important because an early and comprehensive investigation could be the key to demonstrating a proactive, prevention-emphasized employer response and afford a solid defense in litigation.

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