

Restaurant Newsletter

[Presented by the Law Offices of Ashley A. Baron]

Legal News for the Restaurant Ind.

SEXUAL HARASSMENT TRAINING REQUIRED

Restaurant owners have long realized that they are prime targets for sexual harassment claims and have done some training for sexual harassment. California Gov't Code Section 12950.1 requires employers of 50 or more to provide at least two hours of interactive classroom training and education in the prevention, identification, and correction of sexual harassment to all supervisory employees within one year of January 1, 2005.

The statute seems to require that the training be provided in person. The statute also requires that the training must be made by a person with "knowledge and expertise" in preventing harassment, discrimination, and retaliation. Thus, restaurant owners in California need to take a careful look at their current training practices and decide if they need revamped to comply with the statute.

The statute also requires that employees promoted to a supervisory position must be trained within six months of promotion.

The statute provides that merely because one person was not trained it does not automatically result in employer liability. Further, compliance with the statute does not prevent liability by the employer. However, when a lawsuit comes, as they inevitably do, the employee will use the fact that the required training did not take place to convince a jury that the employer did not take all reasonable steps to prevent and correct workplace harassment.

It is recommended that not only supervisory personnel be trained, but that all employees be trained. The California Supreme Court in State Department of Health Services v. Superior Court (McGinnis), 31 Cal.4th 1026 recognized an "avoidable consequences" defense in sexual harassment actions for employers who take "all reasonable steps to prevent and correct workplace harassment" and an employee unreasonably fails to use the employer's preventative measures and thereby suffers harm which reasonably could have been avoided.

What that means is while employers remain strictly liable under the FEHA for sexual harassment by a supervisor, an employee's recoverable damages in sexual harassment cases does not include damages that the employee could have reasonably avoided by reporting harassment to his or her employer.

By providing sexual harassment training to all employees, giving them a test and then getting them to sign an acknowledgment that they know what

sexual harassment is and how to report it an employer can prevent the employee from later claiming they weren't sure of how to deal with sexual harassment.

While the statute only requires sexual harassment training be performed, it is recommended that employers also educate their employees regarding discrimination, retaliation, and harassment based upon race, age, disability, religion and other protected criteria so that a claim is not made that you had training for sexual harassment but did nothing to prevent the other forms of discrimination. Jurors do not want to hear that the only reason you conducted the training was it was required by law.

Ashley Baron, a U.S.C. graduate, has been a lawyer for the past 25 years and spent the last 10 years as in-house counsel for a nationwide restaurant corporation. Her practice is limited to advising and defending restaurant owners. She performs sexual harassment seminars, conducts investigations, provides labor, business and litigation support to restaurants in Orange, Riverside, San Bernardino and Los Angeles Counties. For further information contact her at (714) 974-1400

CONTENTS

Sexual Harassment Training Required	1
Meal Breaks Still an Issue	2

MEAL BREAKS STILL AN ISSUE

Meal and rest breaks continue to plague California employers. The California Labor Commissioner had proposed regulations regarding meal and rest breaks in order to clarify the employer's duties, but he withdrew them recently. California employers are left with the Industrial Welfare Commission Wage Orders regarding meal breaks.

Those rules require that non-exempt employees who work more than 5 hours in a day must be given at least one 30 minute unpaid meal break. The employer must make sure the employee takes the meal break and that they evidence that the meal break was taken. It further requires that non-exempt employees be paid for rest breaks. It also requires that a non-exempt employee who works from 4 to 6 hours receive one break, 6 to 10 hours two breaks and 10 to 14 hours 3 breaks.

Employers should not clock employees in and out for the breaks, override the point of sale or time clock system to provide documentation of the meal or rest breaks or in anyway coerce an employee to clock in and out and not take the meal or rest break. Such can create credibility issues in any future trial or Labor Board investigation. Likewise if management is aware that an employee is on a meal or rest break they should not require the employee to perform any work during that period of time. To do so will create problems with employees claiming that they were not given the period although they were forced to clock in and out.

Further, Employers can not allow an employee to miss their meal break in order for them to come in later or

leave early. If an employee refuses to take a meal break he/she should be written up. It is imperative in Wage and Hour lawsuits that their be proper documentation of all meal and rest breaks of all non-exempt employees.

Failure to maintain the proper documentation in the form of Point of Sale or Time Clock systems may result in substantial liability. The Labor Commission imposes a penalty of one additional hour of pay for each day a non-exempt employee is denied a meal period in addition to any overtime liability. Likewise, the Labor Commission imposes a penalty of one additional hour of pay for each day a non-exempt employee is denied a rest break.

That means that if your employee worked 40 hours in a week and it is shown that they did not get a meal break one day they get an extra hour of pay but that hour creates a situation where they worked 41 hours and they are entitled to overtime pay for that week in addition to the one hour. Further, if they missed a meal break and a rest break on the same day they are entitled to two hours and thus it does not take many of these days to increase the likelihood that they will receive overtime pay for the week.

It should also be noted that such sums also accrue interest and waiting penalties and the Labor Board is empowered to award attorneys fees as well.

Employers should also be aware that improperly classifying an employee as "management" and therefore as exempt and not giving him/her the required meal and/or rest breaks may result in liability as well.

It is a question of fact as to whether the employee spent more than half of his time engaged in "managerial duties". The Labor Board and to a lesser extent Courts bend over backwards to classify middle level employees as non-exempt when they complain after the fact, therefore make sure you can prove that your

management employees were performing at least half the time as managers. This is extremely important with middle level management such as assistants, bar managers, catering managers, maitre d, banquet managers and sous chefs.

The classification is a matter of fact but if you have job descriptions for these employees so that they are required to perform management functions for more than half of the time they are working, if they later testify that they did not, employers can point to the job description and contend that the employee if they were not doing what was required were not doing their jobs.

Note, if this Newsletter is being sent to the wrong person and you wish to correct the error please call us so we can update our mailing list. Likewise, if you do not want to receive future issues of this Newsletter, contact us and we will remove you from future mailings. Should you have someone you know that would benefit from receiving our Newsletter, please feel free to call us or have them call us and we will place their name on our mailing list. Also, if you would like this Newsletter sent to you by e-mail, please contact us with your e-mail address. As always, if you have any legal questions please feel free to telephone us and we will be glad to provide an initial consultation free of charge. Thank you!