

DFEH Provides Guidance on Impact of New SB 1343 Harassment Training Requirements



Some Questions Answered, Many Still Remain – Including Possibility that ALL Supervisory and Nonsupervisory Employees Need to Be Trained or Retrained Again in 2019
January 8, 2019

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Since 2005, Assembly Bill 1825 has required that all public employers, and all private sector employers with 50 or more employees, provide two hours of sexual harassment training to supervisory employees within six months of assuming a supervisory position and again at least every two years. This has commonly been referred to as “AB 1825” supervisor harassment training and is codified under Government Code section 12950.1 and interpreted in the Department of Fair Employment and Housing’s (DFEH) regulations at 2 C.C.R. § 11024.

As part of the 2018 Legislative Session, Governor Jerry Brown signed into law Senate Bill 1343. SB 1343 expands existing harassment training requirements to mandate one hour of harassment training for nonsupervisory employees of qualified employers, which includes all public agencies (including school districts and community college districts). SB 1343 also lowers the private sector employer threshold for required training down to 5 or more employees.

While the law becomes effective January 1, 2019, it requires most existing nonsupervisory employees to undergo harassment training by January 1, 2020. In the case of temporary and seasonal employees, such training must be provided within certain timelines after January 1, 2020. To assist employers in satisfying this obligation, SB 1343 also directs the DFEH to develop and make available two interactive, online training courses – a two-hour training for supervisory employees and a one-hour training for nonsupervisory employees.

On November 26, 2018, the DFEH announced a [new online resources page](#) for employers that provides information on required postings and other tools for addressing California’s discrimination and harassment laws. This new resource also includes a “[Sexual Harassment Prevention Training and SB 1343 FAQ](#)” to assist with SB 1343 compliance. However, while the FAQ addresses some SB1343 interpretation questions, it leaves others unanswered. In addition, the FAQ implies that all supervisory and nonsupervisory public employees (with the exception of temporary or seasonal employees) must be trained or retrained in 2019, regardless of whether they attended compliant harassment training in 2018.

Below we provide our understanding of the law as written and initially interpreted by the DFEH in its SB 1343 FAQ sheet:

Who is now required to undergo harassment training under SB 1343?

Under SB 1343, most California employees must undergo harassment training. Supervisory employees who have already been covered by AB 1825 harassment training requirements must continue to receive at least two hours of harassment training within six months of becoming a supervisor, and at least every two years thereafter. Nonsupervisory employees now must receive at least one hour of harassment training within six months of hire and at least every two years thereafter.

Seasonal and temporary employees, or *“any employee that is hired to work for less than six months”* are required to undergo the applicable supervisory or nonsupervisory training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. SB 1343 clarifies that temporary employees provided by an outside temporary services employer (e.g., temp agency) must be provided any applicable harassment training by that temporary services employer.

When is the deadline to provide harassment training under SB 1343?

SB 1343 requires that most public employees – supervisory and nonsupervisory – receive the harassment training between January 1, 2019 and January 1, 2020. After the initial training, follow-up training must be provided to employees every two years thereafter. In addition, any new supervisory or nonsupervisory employees who assume such positions on or after January 1, 2019 are required to undergo their initial harassment training within six months of assuming such a position.

The only exception to this rule applies to seasonal and temporary employees who are hired to work for less than six months – the obligation to provide training to such employees does not become effective until January 1, 2020. On or after that date, SB 1343 requires the employer to provide training to seasonal or temporary employees hired to work less than six months within 30 calendar days from the date of hire, or before the employee reaches 100 hours worked, whichever comes first.

When will DFEH issue the online interactive training courses ?

SB 1343 requires the DFEH to develop and make available to employers on its website online, interactive training courses that satisfy the two-hour supervisory and one-hour nonsupervisory training requirements. However, the DFEH’s SB 1343 FAQ sheet indicates that the DFEH expects to have these courses available by *“late 2019”*, and it does not provide a more specific date for the release of the online training materials.

In the meantime, the DFEH has issued a *“toolkit”* for sexual harassment prevention, which includes a sample training presentation that employers may use in conjunction with a qualified trainer, as defined in the existing DFEH regulations at 2 C.C.R. § 11024.

In short, the obligation to provide training under SB 1343 does not appear contingent on DFEH's provision of its on-line training programs. That DFEH has released a toolkit in the interim indicates DFEH's expectation that public employers develop and administer trainings while awaiting the DFEH online programs. Thus, to ensure compliance, employers may not wish to wait for DFEH's on-line programs, as the target release date is late 2019.

What is the difference between the one-hour nonsupervisory training and the two-hour supervisory training required under SB 1343?

Other than the shorter training time, SB 1343 does not specify how the new one-hour harassment training for nonsupervisory employees should differ from the existing two-hour harassment training for supervisory employees.

The required content in the existing two-hour AB 1825 supervisory harassment training – including requirements specific to supervisory employees – is set forth in the DFEH's regulations at 2 C.C.R. § 11024. The DFEH's SB 1343 FAQ sheet references these existing regulations but does not note that the regulations have not been revised relative to SB 1343. It is likely that future DFEH rulemaking will result in revised regulations, but no regulatory changes have been proposed at this time, and the DFEH has not announced a timeline for any such changes. Absent further clarification from the DFEH, the only insight into what content is required in the new one-hour nonsupervisory harassment training will be the DFEH's own online training course, which is scheduled to be released in "*late 2019*" as mentioned above.

At this time, we recommend modeling the one-hour training for nonsupervisory employees closely after the existing DFEH regulations for AB 1825 supervisor trainings at 2 C.C.R. § 11024. However, where the existing regulations are specific to supervisory employees, we believe such content does not need to be included in a nonsupervisory employee training.

If my district provided the AB 1825 supervisory harassment training in 2018, does SB 1343 require retraining those employees again in 2019?

Based on the DFEH's SB 1343 FAQ sheet, the answer appears to be "Yes". However, as discussed below, affected employers may wish to wait for clarifying language from DFEH or the Legislature.

SB 1343 amends Government Code section 12950.1(a) to add the following new sentence:

An employer who has provided this training and education to an employee after January 1, 2019, is not required to provide training and education by the January 1, 2020, deadline.

The sentence is confusing, as it does not distinguish between existing AB 1825 supervisory training that employers are already mandated to provide every two years and the new SB 1343 nonsupervisory training. **As a result, a possible interpretation of Section 12950.1(a) is that employers who provided the required supervisory training in calendar year 2018 believing such supervisory employees would not need to be trained again until calendar year 2020 would now have to retrain the same employees a year earlier in calendar year 2019.**

Indeed, that is how the DFEH's SB 1343 FAQ sheet interprets this revision. The FAQ provides the following question/answer:

What if employees were trained from January 1 and December 31, 2018?

The law requires that employees be trained during calendar year 2019. Employees who were trained in 2018 or before will need to be retrained.

As a result of this initial interpretation from the DFEH, some employers who provided the required every-two-year supervisory training in calendar year 2018 may now have to provide the training again, one year sooner in calendar year 2019.

While this is the DFEH's initial interpretation of SB 1343, we believe there is a strong possibility that either DFEH will provide additional clarification, or that the Legislature will provide clean-up legislation to address this scenario. This is because nothing in SB 1343 changes the length, timing or substantive requirements for supervisory training established by AB 1825. Thus, to require supervisory employees who were provided the required harassment training in calendar year 2018 to be retrained the next year (i.e. a year earlier than required) does not seem necessary or consistent with the intent of the original law. It also creates additional expense and operational challenges for affected employers. LCW is actively working to seek such clarification. It is our understanding that a number of other employer groups impacted by this interpretation are doing the same thing.

Therefore, districts that have supervisory employees who were trained in calendar year 2018 may want to wait to see if the DFEH or Legislature provides clarification on the impact of SB 1343 before scheduling affected employees for retraining in calendar year 2019.

My district has already been providing harassment training to nonsupervisory employees. Are we already in compliance with SB 1343?

This is also an issue that is not entirely clear under SB 1343's bill language and the DFEH's interpretation of the new law. Prior to SB 1343, many employers voluntarily chose to require nonsupervisory employees to attend harassment trainings. In many instances, employers had nonsupervisory employees attend the same AB 1825-compliant, supervisor trainings.

However, as noted above, SB 1343's bill language and modifications to Government Code section 12950.1 does not provide any indication of what type of training will satisfy the obligations of the new non-supervisor training. It would seem reasonable that any harassment training provided to nonsupervisory employees prior to SB 1343 that is otherwise in compliance with existing DFEH regulations at 2 C.C.R. § 11024 would be compliant with this new law. However, this is not entirely clear based on SB 1343's statutory language.

Furthermore, as noted above, to the extent any such compliant harassment training was provided to nonsupervisory employees in calendar year 2018 or before, it appears that the DFEH's initial interpretation of SB 1343 requires that all nonsupervisory employees be retrained in calendar year 2019. Absent further clarification from the DFEH or the Legislature, it appears that any previous harassment training provided to nonsupervisory employees will not satisfy SB 1343's requirements, and such employees should be retrained in calendar year 2019.

If my district hires new employees who were provided SB 1343-compliant harassment training at their previous employment, are we required to provide the new-employee harassment training, or may we calendar them for their first training to occur two years from the date of their training with their prior employer? What about seasonal and temporary employees who return to our district each year and were previously provided harassment training? Does our have to provide them harassment training each time they are re-hired as a seasonal or temporary employee?

The answers to these questions are also not entirely clear based on SB 1343's statutory language. However, existing DFEH regulations regarding supervisory employees who were previously trained provides some guidance that may be extended to these other scenarios. As noted under 2 C.C.R. § 11024(b)(5):

(5) Duplicate Training. A supervisor who has received training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's new supervisory position or within six months of the employer's eligibility. That supervisor shall otherwise be put on a two year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.

Since the DFEH's SB 1343 FAQ sheet references and incorporates these existing regulations, there is a strong argument that 2 C.C.R § 11024 (b)(5) would also apply to new employees who were trained previously or to previous seasonal or temporary employees who were trained at previous employment within the past two years. In such a scenario, the employer would need to provide the affected employee a copy of the employer's anti-harassment policy and then ensure that any follow-up harassment training be provided otherwise in accordance with the law. Nonetheless, we caution employers to await further clarification on this issue from the DFEH.

In conclusion, there is a lot about the application of SB 1343's new harassment training requirements that remains to be settled. While the DFEH's SB 1343 FAQ sheet provides some guidance, it appears that many unanswered questions remain. As noted, LCW is actively working to seek clarification from the DFEH and the Legislature and will provide further updates as the information becomes available.