THE LITTLER REPORT

Strategic Initiatives for Countering the Class Action Epidemic

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Class Action Waivers in Arbitration Agreements

What Employers Can Do to Maximize Enforcement of Arbitration Agreements and Prevent Class Actions

Adopting Employment Law Compliance Metrics

Integrating Employment Law Issues, Including Mandatory Training, into General Corporate Compliance Initiatives

Garry G. Mathiason, Esq.
David Goldman, Esq.
Tamara Freeze, Esq.
Janelle Milodragovich, Esq.

LITTLER MENDELSON, P.C.

IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. This white paper is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues which inevitably arise in any employment-related dispute.

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On July 14, 2005, Bernard Ebbers, WorldCom's former CEO, was sentenced to 25 years in prison for his role in WorldCom's demise. Similar stories dominate the headlines and on any given day the Internet is alive with details from ongoing criminal and civil trials of former executives. Even Board of Directors' members are being called upon to contribute personal funds to compensate for alleged fiduciary failures, such as the $36 million settlement paid by WorldCom's directors. A well known executive being taken away in handcuffs is the public image of the challenge facing organizations seeking to build ethically and legally compliant organizations. Clearly, the need to have transparency in corporate governance and reliable financial disclosures is critical. But this is far from disclosing the full story. The media coverage masks a larger struggle taking place in the workplace involving billions of dollars and millions of people. The daily challenge is to provide employees an ethical workplace grounded on compliance with a tapestry of employment and labor laws.

A focus of this Report is the rising epidemic of employment law class actions and the challenge they reflect and create for the employer community. In responding to these claims both a procedural and a substantive solution is outlined in the form of two 2006 initiatives reflecting very different and challenging perspectives. First this report explore the growing case law support for properly written arbitration agreements to exclude class claims. Second, is an overview of how to establish a system of compliance metrics designed to stem the rising tide of employment law class actions illustrated through mandatory training requirements both under employment and corporate governance statutes and regulations. While many other weapons and defensive shields exist in battling the class action wars of 2006 and beyond, attention is drawn to these two initiatives as they have for the first time gained sufficient momentum that their consideration is no longer optional.

I. The Massive Epidemic of Employment Law Class Actions

Without any close contenders, employment and labor law issues are the workplace's most common legal compliance challenges. A recent Open Compliance and Ethics Group (OCEG) survey of hotline providers revealed that 60% to 80% of all complaints received focused on Human Resource (HR) issues. This should not be a surprise. Hiring, background checks, performance management, benefits, confidential personnel information, downsizing, terminations, and defining the boundaries of acceptable workplace behavior all fall within the scope of HR. While many of these concerns usually relate to individual situations, a substantial number involve issues common to many employees. Ten years ago when the General Counsel received a complaint of alleged sexual harassment or discrimination, it was typically a single plaintiff claim. While the matter was of urgent concern and threatened the organization's reputation, the direct dollar value of the case rarely threatened the continuation of the entity. Today multi-million dollar class action claims and settlements have become common place, adding them to the exclusive list of "bet your company" litigation categories. For example, our law firm (Littler Mendelson) has doubled the number of class actions it is defending in just the last twelve months.

A. Every Week Another Eight-Figure Award or Settlement of an Employment Law Class Action is Announced

In March 2006, Morgan Stanley agreed to pay $42.5 million to settle claims for failure to pay overtime and other expenses to approximately 5,000 financial advisors in California. This settlement resolved only one of four overtime lawsuits pending against Morgan Stanley relating to compensation of its financial advisors. On February 8, 2006, Swiss financial services giant UBS reached an agreement to settle class action suits brought in several federal courts by current and former employees who charged that the bank underpaid them for overtime work. The company said it will pay as much as $89 million to resolve the suits at the federal and state level. The action involved claims that financial advisers and trainees were improperly classified as exempt under the wage and hour laws. The company explained that settlement avoided the lost time and risk associated with litigation throughout the nation. Approximately 25% of the funds will go for plaintiffs' attorneys' fees and administrative fees.

At the end of 2005, a jury in Northern California awarded $172 million for alleged meal, break and rest period violations under California law. In another well-publicized case, over 10,000 class members received checks in actual payments, totaling more than $40 million in *Gonzalez v. Abercrombie & Fitch*. The class in *Gonzalez* alleged discrimination against Latino, African American, Asian American and female applicants. In addition to cash payments, the settlement included the institution of a range of policies and programs to promote diversity among the company's workforce and to prevent future discrimination based on race or gender. The company was required as part of the settlement to establish a new Office and Vice President of Diversity who reports directly to the CEO. Twenty-five recruiters were also required to be retained to seek women and minority candidates for employment. Equal employment opportunity and diversity training was mandated. Performance evaluations for managers were changed, and a new internal complaint procedure was directed. Further, Abercrombie's marketing materials were altered to include members of minority racial and ethic groups. While many of these measures would likely have been undertaken voluntarily by a progressive employer, it is clear that outside intervention had a far heavier influence than merely the payment of $40 million dollars plus an additional $10 million in attorneys' fees and costs.

The impact of this new wave of class action litigation and failed compliance is illustrated by another settlement of a class action lawsuit brought against Home Depot. While no admission of wrongdoing occurred, payment was made for $87.5 million plus a seven year plan of mandated improvements. The plaintiffs' counsel estimates that the noneconomic relief could cost the employer well in excess of an additional $100 million including the value of hiring tens of thousands of employees. The lawsuit had alleged gender discrimination and sought to increase women in sales and management positions.

One need not look far to find instances where a company's failure to maintain an effective harassment policy has resulted in substantial costs. In *EEOC v. Consolidated Freightways Corp.*, the Equal Employment Opportunity Commission (EEOC) filed a Title VII lawsuit alleging Consolidated Freightways, formerly one of the largest freight carriers in North America, subjected African American employees at its Kansas City, Missouri facility to a racially hostile work environment. The harassment included the presence of nooses and racist graffiti in the workplace, physical assaults of African American workers by Caucasian coworkers, threats of violence and vandalism toward African American workers, and disparate discipline of African American employees. According to the EEOC, the company conducted no investigation into the matter even though it was aware of the allegations. The parties settled the case in January 2005 for a total of $2.75 million.

In July 2004, the Boeing Company agreed to pay $72.5 million to settle a class action lawsuit in which approximately 29,000 female employees claimed they suffered discrimination in pay, promotions, overtime, assignments, bonuses and other conditions of employment. In addition to the large monetary amount, Boeing agreed to undergo an extensive review of its company policies to determine whether such policies had an illegal disparate impact on female employees. The particular policies that Boeing had to review, and revise if necessary, included: job descriptions; salary levels; performance evalua-

tion processes; employee compensation policies and procedures; internal complaint procedures; hourly overtime policies; and promotion, interview, and testing processes. The costly settlements in these cases clearly demonstrate the importance of continued review of internal policies and procedures.

As shown above, self-audits of employment policies (*e.g.*, analysis of employee compensation policies and procedures for conformity to legal requirements) to identify potential problems before claims are filed, limit the risk of future litigation. In particular, self-audits can greatly reduce the possibility of future wage and hour class action lawsuits. For example, in June 2004, Longs Drugs Store Corporation agreed to pay $11 million to resolve two lawsuits alleging that it violated California's wage and hour laws by failing to pay overtime earned by store managers in approximately 400 locations across the state. Under California law, managers who are exempt from wage and hour protections can receive overtime pay if they spend more than 50% of their time performing nonexempt duties. The named plaintiffs in the Longs' cases each declared that they routinely worked more than 10 hours of overtime per week without being paid, and that they spent more than half of their time performing nonmanagerial tasks. Longs denied liability, but settled in order to avoid protracted litigation. Conducting regular self-audits to ensure compliance with state and federal laws could have prevented the Longs' suits from ever being filed or at least provided some defensible claims.

Abercrombie & Fitch, whose $50 million settlement over EEOC policies was discussed above, also faced difficulties on the wage and hour front. The California Division of Labor Standards Enforcement alleged that Abercrombie's requirement that its employees buy Abercrombie clothes, albeit at a discount, without reimbursement reduced the employees' pay below the state's minimum wage requirement. A compliance audit of payment practices and wage deductions would likely have raised some red flags in this situation. Under the settlement, Abercrombie agreed not to compel or coerce any California worker to buy and wear its clothes, nor to discourage, penalize, or discriminate against any worker for wearing a non-Abercrombie item to work. As demonstrated in both instances, routine wage and hour audits, and a checklist of HR metrics as part of an effective compliance function, can help protect the company from litigation.

B. The New 2006 Employment Law Class Action Challenges

The remainder of this report could be consumed with story after story of allegations, settlements and judgments displaying the importance of employment law compliance. What has changed is that the occasional massive class action case (such as the ones faced by Farmers Insurance in 2001[1] and Coca Cola Company in 2000[2]) have been replaced by a parade of weekly filings and announced settlements. Indeed in 2006, dozens of new employment law compliance issues are being pursued through class actions. These range from lawsuits regarding unlawful service charges for cashing paychecks, to alleged unlawful coercion of foreign national employees to sign over tax returns to the employer, and class actions on behalf of workers outside the United States alleging violations of their local labor laws including in some instances kidnapping and false imprisonment. This last class action example advances the novel theory that a major U.S. employer knew its suppliers were violating local laws in breach of its own written standards for those suppliers. While these theories are still in development, traditional claims are in full blossom. This year was greeted with a class action against IBM alleging failure to pay overtime to tens of thousand of computer installers and maintenance workers. This case follows a well-traveled road showing the computer industry as a primary target of plaintiff wage and hour class action lawyers.

It is estimated that over 4,000 employment and labor laws cover the average employer and that compliance challenges exist in a majority of workplaces. At the same time, employees are better informed about their rights and quickly learn about settlements and judgments through the media. Additionally, a new powerful force is working to attract reports of any perceived weaknesses in employer compliance practices. The Internet now hosts over 1,000 class action websites set up by plaintiffs' counsel to gather such reports from disgruntled employees. While the focus is on egregious violations of employment and labor laws, increasing interest is directed at any inequities in

1 In 2002, jurors awarded the plaintiffs more than $90 million in unpaid overtime. At the time, it was the largest overtime pay class action ever tried in the United States. In 2004, the case settled for over $200 million, including attorneys' fees and accumulated interest.

2 In 2001, Coca Cola settled a class action race discrimination lawsuit for $192.5 million. *See Ingram v. Coca Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001).

workplace procedures or benefits based on a protected category such as race, sex, religion or disability. More and more sophisticated plaintiffs' counsel are exploring "micro-inequities" as a basis for class action litigation. Dress codes, weight requirements, and grooming standards are being explored. In a Littler-litigated case where a full panel of the Ninth Circuit declined to recognize many of these "micro-inequities," the court held that on the record before them men and women were held to comparable although different dress and grooming standards.[3] Several specialized websites have appeared seeking to collect potential plaintiffs associated with issues ranging from transgender discrimination to anti-Christian employment practices.

Returning to the mainstream of employment law class actions, one of the most prominent plaintiff's law firms in the nation at (referencing the Abercrombie & Fitch settlement) stated:

> Our attorneys have prosecuted and continue to investigate large-scale employment discrimination class actions. We have represented individuals and large classes of workers and applicants against companies in retail, financial services, food & beverage, transportation, and other industries who have discriminated on the basis of race, ethnicity, gender, and other grounds.
>
> If you are aware of widespread discrimination by a company anywhere in the United States, please contact us via email or by telephone at . . . .[4]

The above is powerful advertising that suggests that it should be the employer seeking such concerns and addressing them before an employee defaults to the growing number of alternatives now available on the Internet.

How does an organization evaluate the risks it faces? What is the likelihood of an average-sized employer becoming involved in a class action claim? Where does it apply its limited resources? How does an employer make compliance a part of its culture? What is enough when it comes to preventing harassment and unlawful behavior? How does an organization conduct a meaningful and preferably privileged self-audit and then fix identified gaps? Are there any silver bullets? How does employment and labor law compliance fit into the corporate compliance initiative, while at the same time balancing the need for proper financial reporting, governmental control and environmental compliance? What are the employment law training requirements and how do these fit into the overall compliance efforts of an employer?

II. Responding to the Class Action Epidemic from Two Different & Challenging Perspectives: Mandatory Arbitration That Precludes Class Claims and Comprehensive, Measurable Compliance Through Employment Law Training

The growth of class action claims in employment law has drawn two very different sets of reactions from the employer community. On the one hand there is an increased recognition that in the 21st century, broad compliance is achievable, increasingly measurable, and can build the type of work environment necessary to keep the best talent and maximize performance. The full-compliance defense to litigation is much like the "star-wars" defense. For every incoming claim there is a unique targeted defense showing individual compliance. For example, if it is contended that an assistant manager in a retail store is nonexempt under applicable wage and hour laws, the employer would be able to respond showing that the individual and his or her position was reviewed as part of a compliance program, and the job description, as well as the actual everyday duties, qualified the assistant manager for exempt status. The "compliance" or "star-wars" defense is closely associated with the Open Compliance and Ethics Group's (OCEG) framework and detailed compliance mapping associated with all the different areas of legal compliance. This broad defense strategy is grounded on the philosophy that an ethical and compliant organization has greater long-run value and survivability than its less compliant counterpart.

The second reaction of the employer community to the explosive growth of class action litigation is to recognize that the list of organizations facing such lawsuits includes some of the

3 *Jespersen v. Harrah's Operating Co.*, No. 03-15045, 2006 U.S. App. LEXIS 9307 (9th Cir. Apr. 14, 2006).
4 *See* http://www.AFjustice.com.

world's most successful and careful employers. Organization's making a serious and sustained compliance effort can still become the target of class-based litigation. This neither means that they are in violation of the law nor that they would ultimately lose the litigation. Instead, it shows a dark reality of the class action process imbedded in our legal system. Massive claims such as those experienced in wage and hour, glass ceiling, and race discrimination cases are extremely expensive to defend and could place a huge contingent liability over the financial future of the organization. A $200 million wage and hour claim is a serious threat even if great care has been taken in the classification of each position. If several hundred or a thousand assistant managers are grouped together and isolated examples of alleged noncompliance aggregated, a jury could receive a very distorted picture. Meanwhile, the cost of defense and the impact of the "contingent liability" lasting for years have created a window of great opportunity for the plaintiff's bar. If a class action claim can survive the certification motion, the potential for settlement is very high. If the claim is weak, a multimillion dollar settlement may still make economic sense to the company as it ends the claimed liability and is largely funded by saved defense costs. The plaintiffs' attorneys receive full compensation for their investment regardless of the recovery of individual members of the class. Of course should the liability evidence be substantial, the post-certification settlement negotiations quickly can reach eight digits. In short, once a class is certified in the employment law area, justice often takes a backseat to the economic realities of the process.

The large number of employment law class action claims has resulted in some legislative efforts to cap damages and better ensure access to the federal courts (through the Class Actions Fairness Act). These efforts have been substantial and will undoubtedly continue, but they are outside the reach of an individual employer. Nonetheless, a procedural tool within the reach of every employer that has the potential to eliminate class action employment claims in favor of individual cases is binding arbitration that explicitly rejects class claims in favor of individual cases. Several recent federal and state cases provide increasing support for this proposition provided that arbitration agreements meet strict tests for procedural fairness and the amount in controversy justifies the individual cases. Often employment laws have fee-shifting statutes making it easier to show that the individual can obtain representation and full relief through the arbitration process.

In identifying initiatives for 2006, it is impossible to ignore the impact of class action claims or to embrace all of the systems and responses needed for full compliance. In this Report two initiatives have been identified: one procedural and the other substantive. First, corporate counsel and human resources professionals need to re-examine the role of alternate dispute resolution (ADR) for internal dispute resolution. If an ADR program is in place - that includes binding arbitration and precludes class claims - the task involves only reviewing the language to ensure that it is consistent with current cases. If ADR including binding arbitration is used without excluding class claims, it is increasingly difficult to justify this exclusion based on current cases. For employers who previously looked at ADR and passed on its implementation, a second examination is now justified. The same conclusion may be reached but employers need to factor in the class action litigation threat and planned defense. The ADR strategic initiative is fully presented below in Section A.

The second initiative is substantive and focuses on the employers' compliance efforts. For the past two years Littler has recommended examination of the efforts of the Open Compliance and Ethic's Group (OCEG) in designing and building legal compliance and ethics systems.[5] This recommendation remains with the complete Employment and Labor Law Domain of OCEG first being made available through a webinar on May 11, 2006. A subset of this Domain deals with mandatory and recommended employment and labor law training. In this undertaking many organizations are now taking advantage of how training obligations exist in addition to those well established under employment and labor law statutes. Mandatory training complying with the Federal Sentencing Guidelines and Sarbanes-Oxley have strong human resource components that are often overlooked. In developing an overall compliance program, an integrated solution is highly recommended. This is also consistent with Littler's 2005 strategic initiative regarding the growing role of the Chief Compliance Officer and its impact on employment and labor law compliance.[6] The Mandatory Training strategic initiative is fully presented below in Section B.

5 *See* http://www.oceg.org for complete information.
6 *Strategic Initiatives for Countering the Class Action Epidemic* available at www.littler.com/collateral/12154.pdf.

A. Alternative Dispute Resolution Procedures to Exclude Class Action Claims

1. Reasons for the Class Action Epidemic

A broad survey of major class action lawsuits indicates that 90% of Fortune 500 companies have had one or more claims. This was a prediction made by Littler in 1994 and unfortunately has become a reality. One may inquire why these suits are so frequently filed.

One reason for the surge in class action litigation is the lack of compliance by employers. However, class action suits are often a method used to make the litigation so expensive that the case will settle and the attorneys involved receive compensation far above what could be earned on an hourly basis. Some theories put forth by plaintiffs' counsel involve very technical violations that have little impact on workers. Some of the theories go to an issue of unsettled law (*i.e.*, bonus claims).[7]

The class action certification procedure provides additional insight. The most critical step in a class action litigation is certification. If the case is not certified, the case can be litigated or settled for the value it represents. If the case is certified, then it will often be settled for far more than it is worth simply to avoid risk and large attorneys fees. For example, the California Supreme Court's decision in *Sav-On Drug Stores, Inc. v. Superior Court* complicated the class certification standard for employers. *Sav-On* involved challenging the exempt status of 1,400 store managers under California law.[8] In a decision filed in August 2004, the California Supreme Court reversed the appellate court and found that the trial court was justified in certifying the class.[9] The court determined that common questions predominated and held that: (1) California does not require all class members to have identical claims and (2) a class action is not inappropriate simply because each class member may have to make an individualized showing of damages. The clear message sent to employers and attorneys alike is that California courts favor resolution of claims brought as class actions if that will promote judicial economy. In other words, the important comparison lies between the costs and benefits of adjudicating the plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions — *not* between the complexity of a class suit that must accommodate some individualized inquiries.

2. Alternative Dispute Resolution Defense - Mandatory Arbitration

For over a decade employers have monitored the ability to preclude class action claims through mandatory arbitration agreements. While the inevitable enforceability of properly written mandatory arbitration agreements has been decided by the U.S. Supreme Court (and was long predicted) the fate of provisions precluding class actions has not been decided with certainty. Nonetheless, the many federal and state decisions that have considered this issue have been sufficiently supportive to justify an employer's immediate review regarding whether such procedures should implemented.

— The History of Mandatory Arbitration and Class Actions

An evolving area of employment class action law involves arbitration agreements. In a 5-4 decision in 2003, the U.S. Supreme Court in *Green Tree Financial Corp. v. Bazzle*, held that questions concerning whether class actions are permitted under a seemingly silent arbitration agreement should be decided by the arbitrator and not the court.[10] While this was not an employment law case, but rather a consumer lending claim, there are clear implications for future employment law claims. The Court's decision did not answer the question of whether an agreement's silence necessarily means class actions are permissible, and more importantly, did not answer questions regarding the appropriateness of such claims.[11] The decision does give significant control to the arbitrator.

In response to the Supreme Court's decision, the organizations that provide the vast majority of arbitrators recently implemented rules governing arbitration of class actions. The American Arbitration Association (AAA) specified that it will provide class arbitration if: (1) the arbitration agreement specifies that disputes shall be resolved by arbitration in accordance with any of AAAs rules; and (2) the agreement is silent with respect to class action arbitrations.[12] AAA declared it will not provide class action arbitration where the arbitration agreement

7 In 2003, a California Court of Appeals in *Ralph's Grocery Co. v. Superior Court* held that the company's incentive compensation plan violated the Labor Code because the calculation of employee bonuses impermissibly considered the store's profits and certain losses, including cash shortages, merchandise shortages, shrinkage and workers' compensation costs. California Labor Code section 221 and applicable wage orders make it unlawful for employers to make any deduction from an employee's wages for cash shortages, breakage, etc. For further information on this case, see Littler's ASAP *Ralph's Grocery v. Superior Court: Does This Signal the End of Incentive Compensation Plans for Employers?* available at www.littler.com/collateral/12790.pdf.

8 Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319 (2004).

9 *Id.*

10 *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

11 The EEOC has maintained since 1997 that mandatory arbitration is incompatible with Title VII, but this position has been rejected by every circuit court in the country that has considered it and the EEOC is no longer actively pursuing such cases.

12 *American Arbitration Association Policy on Class Arbitration,* http://www.adr.org/Classarbitration policy (last visited Apr. 20, 2006).

prohibits class claims, consolidation, or joinder unless a court orders the parties to arbitrate their claim. On November 12, 2004, JAMS took a contrary position, maintaining that companies should not be able to restrict the right of a consumer to be a member of a class action and announced it will not enforce clauses in which a consumer purports to waive the right to file or be a member of a class action arbitration. However, JAMS later rescinded that policy on March 10, 2005, and stated that "we are retracting the previously announced policy and reaffirm that JAMS and its arbitrators will always apply the law on a case by case basis in each jurisdiction."[13] Absent further guidance from the courts, these guidelines will govern class action arbitration when arbitration agreements are subject to AAA or JAMS rules.

3. Consolidation of Arbitration Claims

— *Arbitration Under the FAA*

Generally, in both state and federal courts, arbitration agreements, like other contracts, will be enforced according to their terms. However, where the written agreement fails to specify the law or rules under which the arbitration is to be conducted *and* the contract relates to a transaction involving interstate commerce, the Federal Arbitration Act (FAA) governs the agreement to arbitrate.[14] If, on the other hand, the agreement to arbitrate specifies that state law or other rules (e.g. , the Commercial Rules of Arbitration of the American Arbitration Association, are to govern the conduct of the arbitration) the FAA *mandates that the arbitration shall be governed under the law or rules so specified*, irrespective of whether the contract involves interstate commerce.[15]

Most federal courts called upon to determine the issue concluded that there was no right to classwide arbitration under the FAA unless the agreement to arbitrate specifically provided for it.[16] The Supreme Court's decision in *Bazzle*, however, moots these cases. It is now up to the arbitrator to decide whether or not classwide arbitration will proceed.[17]

Similarly, most federal courts have determined that consolidation of arbitration proceedings is permitted under the FAA only if the arbitration agreement includes a consolidation provision.[18] The First Circuit, however, has held that consolidation may be appropriate even in the absence of a provision for consolidation.[19] The Seventh Circuit has also broken ranks with the majority, holding in *Connecticut General Life Insurance Co. v. Sun Life Assurance Co.* that where the FAA-governed agreement to arbitrate clearly neither permits nor forbids consolidation of arbitrations, the court may resort to the usual methods of contract interpretation to determine whether consolidation is proper.[20] Judge Posner's conclusion in *Connecticut General Life* was surprising in light of the Seventh Circuit's prior opinion in *Champ v. Siegel Trading Co.*[21] In *Champ*, the Seventh Circuit concluded that class wide arbitration is not permitted unless the agreement expressly provides for class proceedings because there was "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration."[22]

— *Consolidation of Arbitration Claims in California*

Unlike the FAA, the California Arbitration Act[23] expressly provides for the consolidation of arbitrations where the disputes arise from the same transactions or series of related transactions and there are common issues of law or fact creating the possibility of conflicting rulings. In *Keating v. Superior Court*,[24] the California Supreme Court analogized class proceedings to consolidated actions and recognized:

> It is unlikely that the state Legislature in adopting the amendment to the Arbitration

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13 *JAMS Takes Steps to Ensure Fairness in Consumer Arbitrations,* http://www.jamsadr.com/press/show_release.asp?id=198 (last visited Apr. 20, 2006).

14 *See* 9 U.S.C. § 2; *Volt Information Sciences v. Board of Trustees* 489 U.S. 468, 477-479 (1989).

15 *See* 9 U.S.C. § 4 (party to an arbitration may "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement").

16 *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001) (arbitration agreement must be enforced according to its express terms); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (absent a provision in the parties' arbitration agreement providing for class treatment of disputes, district court has no authority to certify class arbitration under the FAA); *Furgason v. McKenzie* 2001 U.S. Dist. LEXIS 2725, 2732 (S.D. Ind. Jan. 3, 2001) (same); *McCarthy v. Providential Corp.*, 1994 U.S. Dist. LEXIS 10122, 10123 (N.D. Cal. 1994), *cert. denied*, 525 U.S. 921 (1998) (same); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (same); *see also Horenstein v. Mortgage Market, Inc.*, 2001 U.S. App. LEXIS 9267 (9th Cir. May 10, 2001) (class proceedings and arbitration are not inconsistent under the Fair Labor Standards Act claims); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (rejecting the argument that if an arbitration clause effectively waives the statutory right to class proceedings, the arbitration clause is unenforceable); *Kennedy v. Conseco Fin. Corp.* 2000 U.S. Dist. LEXIS 17704, 17705 (N.D. Ill. Nov. 29, 2000) (same).

17 *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

18 *See Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 73-74 (2d Cir. 1993); *American Centennial Ins. v. National Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curium); *Del E. Webb Const. v. Richardson Hosp. Auth.*, 823 F.2d. 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

19 *See New England Energy Inc. v. Keystone Shipping Co.* 855 F.2d 1, 5 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

20 *See Connecticut General Life Ins. Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771, 774 (7th Cir. 2000).

21 *Champ v. Siegel Trading Co.* 55 F.3d 269 (1995).

22 *Id.* at 275.

23 Cal. Civ. Proc. Code §§ 1281 *et seq.*

24 31 Cal. 3d 584, 612-13 (1982).

> Act authorizing the consolidation of arbitration proceedings, intended to preclude a court from ordering class wide arbitration in an appropriate case. We conclude that a court is not without authority to do so.

The U.S. Supreme Court reversed the *Keating* decision on other grounds.[25] However, the Supreme Court did not address whether claims brought as a class action could be ordered to arbitration on a class basis because there did not appear to be a federal question. The Court noted that the appellant had not argued that the FAA preempted state class action procedures, but that the California Supreme Court's decision was based solely on state law.

The issue whether the FAA precludes class arbitration was presented in *Blue Cross of California v. Superior Court*.[26] The *Blue Cross* court held that classwide arbitration is available under California law and that such a provision is not precluded by the FAA.

The court distinguished *Champ v. Siegel Trading Co.*[27] (discussed above) by finding:

> Under federal law, as articulated in *Champ* and the cases on which the Seventh Circuit relied, there is no authority for class wide arbitration. Under those circumstances, the *Champ* court refused to read such authority into the parties' arbitration agreement. Here, on the other hand, state law authorizes class wide arbitration. In the absence of an express agreement not to proceed to arbitration on a class wide basis, ordering the parties to arbitrate class claims as authorized by state law does not conflict with their contractual arrangement.[28]

The clear suggestion made in *Blue Cross* is that there can be an express agreement not to proceed to arbitration on a classwide basis, even though the state arbitration act allows for it.

4. Three Types of Employers: Where Do You Fall?

— Employers Who Do Not Have Any ADR Policy

Some employers do not have an ADR policy in their employment agreements. This may be because a company carefully considered advantages and disadvantages of arbitration and decided against it. For example, employers may have considered a risk of potential abuse by employees in the form of increased claims, inability to dismiss a case on summary judgment, reduced appellate rights, employee resistance, legal uncertainty of arbitration, and potential for unionization, all weighed against implementing an ADR program.

Recently, however, another advantage of arbitration has taken center stage: the potential to *preclude* class actions, not merely to shift the forum for resolving class claims from the courthouse to the arbitral conference room, but instead to preclude class actions altogether. Since, employers who do not have any ADR policies are at the greatest risk of costly class action litigation, the potential for a class action waiver in an ADR policy may tip the scales in favor of adopting such a policy.

Even though the success of using an arbitration agreement as part of an ADR policy to eliminate class actions has been mixed, there are promising trends that portend the enforceability of class action waiver clauses at least in certain categories of employment cases.

— Employers Whose Arbitration Agreements Are Silent Regarding Class Action Lawsuits

Though class actions were first recognized under the federal rules of civil procedure decades ago, class actions, like arbitration agreements, have become increasingly popular within the last ten years. And, until recently, it may be that employers did not see the need to address class actions in the arbitration agreements or policies that they had promulgated. This is not surprising because litigants bound by an arbitration agreement may have assumed that class actions were not permitted.

Ordinarily, whether a particular arbitration agreement precludes class actions arises in the context of an agreement that is "silent" on the issue (*i.e.*, one that does not directly address the issue with specific language, or, alternatively, an agreement that

25 *Southland Corp. v. Keating*, 465 U.S. 1 (1984).
26 67 Cal. App. 4th 42 (1998), *cert. denied*, 527 U.S. 1003 (1999).
27 55 F.3d 269 (7th Cir. 1995).
28 *Blue Cross*, 67 Cal. App. 4th at 63-64.

speaks to the issue with language designed to prevent class claims from being litigated in the arbitral - or any - forum).

After all, arbitration agreements inherently take what could be a court-litigated matter out of court and into a less formal setting. And, in this setting, typical court-created procedures, evidentiary rules, and even rights to a jury trial may have been assumed to be different, relaxed or waived. Furthermore, the class action has been viewed as merely a procedural instrument created by the Federal Rules of Civil Procedure,[29] or by state procedural law. Indeed, a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[30]

For these reasons, in many existing arbitration agreements or ADR policies, the matter of class actions was not addressed. When the question arose whether a class action is permitted by a "silent" agreement, it presented peculiar problems for courts used to enforcing such agreements only in single-plaintiff cases.

Courts around the country have not been uniform in determining whether an arbitration agreement silent on the class action issue permits or forbids class arbitrations. While some courts have held that an agreement silent on the issue could not be construed to permit a class procedure,[31] others ruled that class arbitrations were permitted even where agreements did not expressly forbid or permit them.[32]

In 2003, the Supreme Court clarified how these "silent" arbitration agreements should be addressed and whether they should be enforced to preclude class actions.[33] *Green Tree Financial Corp. v. Bazzle* began as two cases brought in South Carolina state court challenging allegedly unlawful financing and notification practices by Green Tree Financial Corporation (Green Tree). The plaintiffs in the cases wanted to proceed as a class, and if permitted to do so, be awarded potential statutory penalties that could yield a multimillion dollar award. Each individual's claim, on the other hand, arguably would have been too small to litigate one-on-one. Green Tree had contracts with the plaintiffs that required the parties to arbitrate their claims. The arbitration agreement, however, was silent as to whether class actions were allowed or precluded.

In both matters, Green Tree moved to compel arbitration. In one case the trial court certified a class and then granted Green Tree's motion to compel, thus sending an entire class to arbitration. The other trial court granted Green Tree's motion, but left the class action issue for the arbitrator to decide. Ultimately, the U.S. Supreme Court agreed to consider Green Tree's claim that class arbitration was impermissible under the arbitration agreements at issue. The principal issue became, however, who should decide whether class actions are permitted by an agreement silent on the issue - the arbitrator or the court?

The Supreme Court in *Green Tree* concluded that the question should be determined by an arbitrator. Because the arbitration agreements were silent as to class actions, the Court held, any dispute over the meaning of the agreements required their interpretation, a question for the arbitrator and not a court.[34] The Court's decision is consistent with the position it took in another decision issued just two weeks before *Green Tree* was argued. In *PacifiCare Health Systems, Inc. v. Book*, the Court found an agreement ambiguous as to whether the contracts precluded treble damages.[35] The Court refused to "take upon itself the authority to decide the antecedent question of how the ambiguity is to be resolved."

In *Green Tree*, the Court had instructed that when considering a motion to compel arbitration, a court ordinarily may address only two "gateway issues:" (1) was there a valid agreement to arbitrate; and (2) does the agreement cover the alleged disputes.[36] If a court affirmatively answers those questions, it should grant the motion to compel arbitration and allow the arbitrator to decide other issues involving interpretation and application of the agreement. The Supreme Court, in so ruling, held that the question whether an arbitration agreement permits or prohibits class actions is not one of the "gateway issues" that courts are permitted to address.

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29 Fed. R. Civ. P. 23.

30 *General Tele. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

31 *See, e.g., Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (collecting cases); *Howard v. KPMG*, 977 F. Supp 654, 665 n.7 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 844 (2d Cir. 1999); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1033-34 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001); *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001).

32 *See, e.g., New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 3 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); *Keating v. Superior Court*, 31 Cal. 3d 584, 613-614 (1982), *overruled on other grounds Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross of Cal. v. Superior Court*, 67 Cal. App. 4th 42, 60, 65 (1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 862 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992).

33 *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)

34 *Green Tree*, 539 U.S. at 452-53.

35 538 U.S. 401, 407 (2003).

36 *E.g., Green Tree*, 539 U.S. at 452-53; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

This language should be encouraging to employers who wish to draft agreements that expressly forbid class arbitration. If the question whether an agreement forbids class arbitration does not concern its "validity," then a court should not be permitted to invalidate an agreement on the basis that it might be construed to forbid class arbitral proceedings. The Supreme Court observed instead that the question whether an arbitration agreement forbids class actions "concerns contract interpretation and arbitration procedures."[37]

In any event, an agreement silent on the issue will be interpreted first by an arbitrator to determine the intent of the parties. Thus, if an agreement does not address the class issue directly, an arbitrator will construe the agreement to determine whether it permits or forbids class arbitrations.[38]

— Employers Whose Arbitration Agreements Specifically Ban Class Action Lawsuits

As noted above, one may argue that the question whether a class action waiver clause is enforceable is not an issue for the courts. The Supreme Court in *Green Tree* stated that the question whether an agreement forbids class actions does not fall within the two "gateway issues" that courts are permitted to decide. Nonetheless, both before and after *Green Tree*, federal and state courts have addressed whether clauses banning class arbitrations are enforceable or, instead, unconscionable.

In view of the current uncertainty regarding the proper role of courts in addressing class action waivers, a party wishing to enforce a class action ban provision in an arbitration agreement should first attempt to convince the court that the question whether the class action provision is enforceable or unenforceable is not a "gateway issue" that the court may address.

One would argue, as *Green Tree* stated, the question whether an arbitration agreement permits or forbids class actions does not concern the "validity" of the agreement, but rather "what kind of arbitration proceeding the parties agreed to."[39] Assuming the arbitration agreement is otherwise valid and covers the dispute, the court simply should enforce the agreement as written.[40]

Opposing parties, and courts for that matter, may argue or believe that analysis of the class action ban is required because such a provision may be unconscionable under state law, and thus unenforceable. In such a situation, the party asserting the defense to contract enforcement bears the burden of proof.[41]

Typically, unconscionability has two elements, a procedural element and a substantive element. "Procedural unconscionability" usually focuses on the manner in which the contract was negotiated and the relative circumstances of the parties at that time. It focuses on whether there is "oppression" arising from an inequality of bargaining power or "surprise" arising from buried terms in a complex printed form. "Substantive unconscionability" focuses on whether the terms are "one-sided" or "overly harsh." The typical test for substantive unconscionability is whether the contract terms are "so extreme" or "unfair" as to "shock the conscience."[42]

Several federal circuit and state courts have enforced arbitration agreements that precluded class actions, and in so doing, rejected arguments of unconscionability. For example, the Fourth Circuit Court of Appeals rejected an unconscionability defense and held that an arbitration provision precluding the arbitration of class claims was enforceable and reversed the trial court's denial of a defendant's motion to compel individual arbitration.[43] The agreement at issue provided that "there shall be no authority for any claims to be arbitrated on a class action basis[.]"[44]

Similarly, in a Third Circuit case, the court concluded that the right to proceed as a class is "merely a procedural one, arising under [Rule 23], that may be waived by agreeing to an arbitration clause."[45]

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37 *Green Tree*, 539 U.S. at 453.

38 Arbitration agreements may specify that a particular organization administer the claims. An organization may promulgate rules and procedures for determining whether an arbitration agreement permits or forbids class actions and how class arbitrations will be conducted. Employers and their counsel need to be familiar with the particular rules adopted by these organizations, ideally *before* an arbitration agreement is drafted and an organization is designated to administer cases. For example, the American Arbitration Association (AAA) has developed specific "clause construction" procedures that its arbitrators use in determining whether an arbitration agreement "permits the arbitration to proceed on behalf of or against a class . . .." AAA *Supplementary Rules for Class Arbitrations*, Rule 3. JAMS has adopted a similar rule in its Class Action Procedures, Rule 2.

39 *Green Tree*, 539 U.S. at 451-52.

40 *Volt Info. Sciences v. Leland Stanford Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

41 *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (referring to unconscionability as one of several "generally applicable contract defenses").

42 *See, e.g., Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160 (2005); *State v. Berger*, 567 S.E.2d 265, 278 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002); *Leonard v. Terminix Int'l Co. L.P.*, 854 So. 2d 529, 538 (Ala. 2002), *reh'g denied*, 854 So. 2d 529 (Ala. 2003); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000).

43 *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th. Cir. 2002), *cert. denied*, 537 U.S. 1087 (2002).

44 *Id.* at 634.

45 *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

46 *E.g., Caley v. Gulfstream Aerospace Corp.* 428 F.3d 1359, 1378 (11th Cir. 2005); *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 877-78 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1457 (2006); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden*, 290 F.3d at 638-39; *Johnson*, 225 F.3d at 369.

Additional federal circuit courts of appeals have found that class actions can be banned directly or that agreements silent on the issue may be construed to prevent class actions from being maintained without running afoul of state contract law.[46] Numerous states courts have also held the same.[47]

Courts that have addressed this issue and enforced the agreements have been guided by the strong federal policy of enforcing arbitration agreements and the specific terms in those agreements. Under the Federal Arbitration Act (FAA), just as parties to an arbitration agreement may designate the procedures they want, they may agree to exclude procedures they do not want.[48] This would seem necessarily to include provisions either permitting or banning class actions, as the Supreme Court has held that the issue of arbitral class actions involves only "arbitration procedures" and "what kind of arbitration proceeding the parties agreed to."[49] Indeed, recently the Eleventh Circuit upheld a class action ban and stated that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition, . . .'"[50]

Moreover, there is an additional consideration central to the arbitral process: the right of each party in the arbitration to choose who will decide the dispute. Congress mandated in the FAA that if an agreement provision mandates the method for choosing an arbitrator "such method shall be followed."[51] Thus, courts must respect the parties' chosen method for selecting an arbitrator.[52] Accordingly, it may be argued, if named plaintiffs in a class action were permitted to proceed with their representative action, they would select the forum and the adjudicator for all parties, thus depriving the defendant and each unnamed class member of their right to choose an arbitrator to hear and decide their individual disputes.[53]

Not all courts, however, have upheld class action waiver clauses. These courts have found express class action bans to be unconscionable or that a ban of class actions pursuant to an arbitration agreement silent on the issue would be unconscionable.[54] It is essential to note that most of this case law is older and is often being superseded by new decisions.

Recently, the California Supreme Court addressed the enforceability of a class action ban contained in a consumer credit card agreement.[55] Although in the particular context of that case the court found the agreement unenforceable, the case must be closely analyzed, because within its holding are some promising signs that in the employment context, such clauses may be upheld.

In *Discover Bank v. Superior Court*, a credit card holder filed a class action in California alleging that the bank breached its credit cardholder agreement by imposing a late fee of $29 on payments that were received on the payment due date, but after the bank's undisclosed 1:00 p.m. "cut off" time. Discover Bank moved to compel arbitration on an individual basis and to dismiss the class action, arguing that the arbitration provision in the cardholder agreement expressly prohibited class arbitration and class actions. In response, the plaintiff argued that the class action/arbitration waiver clause, as stated in the cardholder agreement, was unconscionable and, therefore, unenforceable under California law.

In striking down the class action/arbitration waiver clause, the California Supreme Court relied heavily on the fact that the potential dollar recovery for an individual plaintiff in that case was so small that it was impractical for an individual plaintiff to file suit, leaving the unlawful conduct unremedied and uncorrected.[56] The court explained that through class action or class arbitration, numerous small individual recoveries could be aggre-

47 *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019 (Fla. App. 2005); *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918 (N.D. 2005); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003), *appeal denied*, 807 N.E.2d 982 (Ill. 2004); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 199 (Tex. Ct. App. 2003); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003), *appeal denied*, 807 N.E.2d 290 (N.Y. 2003); *Stein v. Geonerco, Inc.*, 17 P.3d 1266 (Wash. App. Div. 1 2001); *Rains v. Foundation Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. App. 2001); *Gras v. Associates First Capital Corp.*, 786 A.2d 886, 891 (N.J. Super. Ct. 2001), *cert. denied*, 794 A.2d 184 (N.J. 2002); *Edelist v. MBNA Am. Bank.*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, *reconsideration denied*, 922 P.2d 973 (Haw. 1996).

48 *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995).

49 *Green Tree*, 539 U.S. at 453.

50 *Caley*, 428 F.3d at 1378 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

51 9 U.S.C. § 5.

52 *See Universal Reinsurance Corp v. Allstate Ins. Co.*, 16 F.3d 125, 129 (7th Cir. 1994); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324 (9th Cir. 1987); *ATSA of Cal., Inc. v. Continental Ins. Co.*, 754 F.2d 1394, 1395 (9th Cir. 1985). *See also Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 821-22 (1981) (California Arbitration Act envisions the parties having complete autonomy as to the method chosen for the selection of an arbitrator).

53 *Cf. Green Tree*, 539 U.S. at 459 ("But petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well.") (Rehnquist, J., dissenting op.).

54 *See, e.g., Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002), *rehearing denied*, 854 So. 2d 529 (2003); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va 2002.), *cert. denied*, *Friedman's, Inc. v. West Virginia ex rel. Dunlap*, 537 U.S. 1087 (2002).

55 *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

56 *Id.* at 160-61.

gated to create an economically viable claim against the wrongdoer.[57] In the words of the court, a defendant should not be permitted to craft an adhesion contract that would "operate to insulate a party from liability."[58]

Although the *Discover Bank* decision limits the permissible scope of class waiver clauses in the context of certain consumer agreements, the language of the California Supreme Court's decision provides opportunity for employers seeking to use and enforce class action/arbitration waiver clauses. The court curtailed the reach of its holding by stating that "[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses."[59] In doing so, the court confirmed that some class action arbitration waivers are, indeed, enforceable.[60]

The court strongly suggested that the types of cases in which class action/arbitration waiver clauses may be enforceable are those cases where the individual claim at issue is valuable enough to warrant investment by an individual plaintiff and plaintiff's attorney. The court went so far as to address class action/arbitration waiver clauses in the context of employment discrimination cases. Focusing on age discrimination lawsuits, the court pointed out that "large individual awards are commonplace" for such claims and that "[u]nder California law, classwide arbitration is only justified when 'gross unfairness would result from the denial of opportunity to proceed on a classwide basis.'"[61] As such, the court strongly suggested that discrimination claims of significant dollar value may be subject to a class action/class arbitration waiver clause.

In fact, a typical employment discrimination lawsuit is often significant enough to attract the attention and efforts of an individual plaintiff and plaintiff's attorney and, as such, is arguably subject to a class action/arbitration waiver clause. Thus in California, and any other jurisdiction following the logic of *Discover Bank*, an arbitral class action waiver clause may be enforceable in a case in which, for example, a plaintiff purporting to represent a protected class underrepresented in management ranks seeks class action status. Under California and federal employment discrimination laws that single plaintiff may have a claim for back pay, front pay, emotional distress, punitive damages and attorneys' fees and costs. Arguably, it would not be "grossly unfair" to require the plaintiff to arbitrate his or her case on an individual basis only, as the arbitral process would provide the plaintiff with a full opportunity to vindicate his or her claim of discrimination.

There have been *thousands* of such individual cases filed under federal and state antidiscrimination laws over the past several decades, and thus there is no demonstrable disincentive for individual plaintiffs to combat employment discrimination through individual, non-class actions. Certainly, the arbitration agreement does not serve to insulate the employer from any alleged wrong in that circumstance.

Although not addressed in the decision, the court's logic may also support the enforceability of a class action/arbitration waiver clause in the context of wage and hour claims. In many cases, an individual wage and hour claim may be of lesser dollar value than a typical discrimination claim, but wage and hour actions are normally well above the $29 claim at issue in *Discover Bank*, particularly given the significance of waiting time penalties, interest and attorneys' fees. As such, employers may argue that a class action/class arbitration waiver clause is enforceable with respect to such claims, as the absence of class action arbitration would not be license to engage in wage and hour violations "with impunity," as the court feared in the context of the $29 fee addressed in *Discover Bank*.

Discover Bank *Decision Applied to an Employment Class Action Case - Class Action Waiver Held Not Unconscionable in California*

Indeed, echoing some of this analysis, the first opinion in a California employment class action case following *Discover Bank* was issued on January 19, 2006, by California's Second District Court of Appeal in *Gentry v. Superior Court*.[62] In *Gentry*, the court found a class action waiver clause in an employment-related arbitration agreement was not substantially unconscionable. *Gentry* involved a plaintiff who claimed his employer had misclassified salaried customer service managers as exempt when they should have been classified as nonexempt employees entitled to overtime. The court held that the case before it was not the type that predictably involved small amounts of damages (as in the case of the $29.00 late fee challenged in *Discover Bank*). The court stated: "Here, Gentry has alleged statutory violations that could result in substantial damages and penalties should he

57 *Id.* at 161.
58 Id.
59 *Id.*
60 *Id.* at 160 (". . . at least some class action waivers are unconscionable . . .").
61 *Id.* at 168.
62 *Gentry v. Superior Court*, 135 Cal. App. 4th 944 (2006), *reh'g denied*, 2006 Cal. App. LEXIS 260 (Feb. 9, 2006).

prevail on his individual claims. In fact, the Supreme Court acknowledged in *Discover Bank* that in some employment cases, large individual awards are commonplace."

While employers can be encouraged by *Gentry*, there are some caveats. The case applies only to arbitration agreements containing express class action waivers. Furthermore, it is expected that the plaintiff in *Gentry* will seek California Supreme Court review, or at least, request the case be depublished. Nonetheless, as of this writing, *Gentry* is the first and only post-*Discover Bank* appellate authority that expressly addresses the enforceability of class action waiver clauses in employment wage/hour class action litigation.

5. Strategic Initiative: What Employers Can Do to Maximize Enforcement of Arbitration Agreements and Prevent a Class Action Lawsuits

Despite the unsettled state of the law, and until the conflict in opinions among the federal and state courts is resolved, there are a few steps employers can take to enhance a court's likelihood of enforcing an arbitration agreement and prohibiting a class action.

— Specifically provide that the Federal Arbitration Act governs the agreement. Though many states have their own arbitration act, it is unlikely that any state has advanced the arbitration cause as far as Congress and courts interpreting the FAA. Thus, to take full advantage of the right to proceed to arbitration, and to receive the full protection of favorable U.S. Supreme Court decisions, employers should consider inserting language in the arbitration agreement specifically stating that the agreement is governed by the FAA, rather than any state act or law.

Insert a specific provision banning class actions. As discussed above, without a specific ban on class actions, the decision whether class arbitration is to proceed is one left for the arbitrator. Arbitral interpretations of arbitration agreements are difficult to overturn. Likewise, many employers my not want to have class claims decided by arbitrators. Thus, employers with agreements silent on the issue leave themselves open to arbitrators finding those agreements to permit class arbitrations.

Therefore, if an employer wants both arbitration and no class actions, the employer should have its agreement drafted to include a clause that will preclude class claims entirely. Such a clause might read:

> Neither party to this agreement will have the right to participate in a class, representative or collective action, as a class representative, class member or an opt-in party, act as a private attorney general, or join or consolidate claims with claims of any other person or entity.

— Make all the other terms of the arbitration agreement as fair as possible. When a court considers whether to enforce an arbitration agreement or clauses within the agreement, the more seemingly unfair the provisions are, the less likely the agreement will be enforced. Thus, for example, avoid provisions mandating employees to pay all of the arbitration fees or waiving individual remedies that would be available in court. Remove from the agreement any excuses for not enforcing it.

6. In Summary, the Balance of Advantages & Disadvantages Associated with Mandatory Arbitration Has Shifted in Favor of the Advantages

Each employer faces a different set of variables that answers the question of whether mandatory arbitration with a class action exclusion is appropriate. Culture, jurisdiction, litigation history, and past experience all weigh into making this decision. Once this decision is made it is then subject to periodic review and updating. For employers who have not considered a class action waiver in the last year, it is time to "redo the math." Imagine the difference between meeting with the CEO and Board of Directors to explain a multimillion dollar reserve for wage and hour class action litigation as opposed to reporting that such a claim was dismissed due to language in individual employment agreements precluding such claims.

It should also be recognized that technology has changed the balance regarding the workability of individual employment agreements. Currently software allows for such agreements to be drafted when an employee is hired and updated as needed. This can be handled by a clerk and is no longer a complicated administrative problem.

For further information on the advantages and disadvantages of ADR, a current report on the law, and sample forms see THE NATIONAL EMPLOYER®, Chapter 10. The decision is yours, but consideration of the option is a mandatory responsibility. The decision is too important to be decided by default.

B. Employment Law Compliance Metrics: Integrating Employment Law Issues, Including Mandatory Training, into General Corporate Compliance Initiatives

1. The Culture and Demand for an Ethical and Compliant Workplace is Increasingly Being Recognized and Centralized Within Organizations

In 2006, nearly every employer in the United States has mandatory employment law training obligations. Businesses face a vast array of compliance requirements, no matter their size or location. Training is required on broad ranging topics such as harassment, business ethics, whistleblower protection and safety. The mandate goes beyond merely providing training. Under the law, quality standards are also obligatory. Such intensive training on such wide ranging topics will affect nearly every interaction an organization has with its employees. Hence, the idea that employment law training is a "nice to have" is outdated, because employment law training is a legal imperative. In order to avoid repeating the mistakes of the past, employers must find a way to leverage existing Human Resources (HR) expertise to satisfy mandatory ethics and compliance training requirements. Further, the increase in employment law class actions necessitates the need to make sure that managers and HR (especially) are trained in not only what is legally required but also in employment law basics (*i.e.*, ADA, FMLA, wage and hour laws, privacy issues, etc.).

It is all too easy to lose sight of the larger compliance picture when focusing on individual compliance challenges. Yet, wise employers were conducting employment law training years before the mandates were passed. These employers realize that investing in employment law training pays for itself through lower litigation costs and less time spent dealing with vexing complaints.

As legal compliance gains increasing prominence in the workplace, HR will be called on to play a critical role. HR functions are often fragmented and undervalued within the company. This is not a new problem - traditionally, the human resources function has been an area where businesses sought to keep costs at a minimum with lean staffing. As a result, many HR departments are reactive, rather than proactive.

Further confusing the issue, many of the recent compliance initiatives are based on accounting or governance requirements. While corporate compliance continues to be a vitally important consideration for all companies, many of those initiatives are put into place without properly including or valuing the HR compliance needs. HR needs to be a full partner in the corporate compliance endgame.

It is essential that employers recognize that HR plays a vital role in actively shaping and tracking training requirements and compliance. If HR fails to engage in the ethics and compliance training, businesses are more likely to experience increased likelihood of repeating past corporate compliance mistakes. HR must become a full partner in the corporate compliance endgame.

2. The Challenge Has Been the Creation of a Common Structure for Compliance and the Development of Measurable Practices that Can Be Identified and Verified

Most employers are doing only piecemeal training. HR compliance issues are addressed by the HR department, and general governance issues are addressed by a corporate compliance officer, or even the individual business unit managers. And yet, the fragmented nature of such an arrangement is likely to lead to noncompliance. Which department is responsible for addressing the Federal Sentencing Guidelines that apply to all employees? Which department will undertake compliance with Sarbanes-Oxley? And, perhaps worst of all, which training requirements are being overlooked altogether?

Employers are also faced with the possibility of de facto training standards. For example, consider harassment training. As of this writing, only California, Connecticut, and Maine have statutes mandating workplace harassment training. Do the laws of these three states create a national standard? Only time will tell, but private employers with any operations in either California or Connecticut would be wise to act as if the answer is a solid "yes."

These mandatory harassment training laws will apply to many more organizations than employers first anticipated. The

regulatory bodies of California and Connecticut have taken the position that the laws apply to organizations with any in-state operations and at least 50 employees anywhere. The laws also have an extra-territorial effect. Both require training of out of state supervisors who manage in-state employees.

Employers may also unnecessarily expose themselves in other states where they have employees if they choose to offer a lesser standard of training because the particular state does not mandate particular training requirements. Employers must also consider the message sent to employees, judges and juries in other states if training is limited to one state. A skilled plaintiff's counsel could introduce the fact that a company trains in several states that require it, but only in those states, as some evidence that the company views the issue as a narrow compliance matter only, and not as a subject that deserves proactive attention and broad-based training.

It is difficult to believe that other states are far behind California, Connecticut and Maine in making harassment training "mandatory," especially when some of those states already have statutes that "encourage" such training.[63] The California law is not an aberration; it is part of a long developing trend. It is highly likely that other states will follow.

— Required Training

Required training takes on many forms. While there are broad national requirements that provide a minimum level of training, employers must also comply with training required by state laws and regulations. However, not all training requirements will apply to every employer, and is part of the frustration that HR often has a role in solving.

— Federal Sentencing Guidelines and Required Ethics & Compliance Training

The Federal Sentencing Guidelines (FSGs) are often overlooked when companies consider compliance and training programs. The FSGs apply to "all organizations, whether publicly or privately held, and of whatever nature, such as corporations, partnerships, labor unions, pension funds, trusts, nonprofit entities, and government units."

Under the FSGs, the potential range of fines for a criminal conviction can be significantly reduced - in some cases up to 95% - if an organization can demonstrate that it had put in place an effective compliance and ethics program and that the criminal violation represented an aberration within an otherwise law-abiding business.

The opposite side of this equation is that an absence of effective ethics and compliance programs can be used to increase fines and punishment. Failure to implement ethics and compliance programs that cover multiple subject areas can significantly increase employer liability.

The FSGs make clear that employers can be held liable for their employees' illegal conduct. If employers take proactive steps to prevent unethical and illegal conduct through an effective ethics and compliance program (which includes training), employers can substantially mitigate potential fines and punishment for criminal violations.

Training must occur periodically. While "periodic" is not defined officially by the FSGs, employers can be guided by how that term has been interpreted in the employment law arena. The U.S. Supreme Court and the Equal Employment Opportunity Commission (EEOC) do require "periodic" harassment and discrimination prevention training for all employees and managers. A thorough review of employment law training case law shows that "periodic" is generally interpreted as every 12 to 24 months.

Simple, quick-fix solutions will not satisfy the FSGs. Distributing a Code of Conduct does not satisfy training requirements. The FSGs specifically reference the need to proactively communicate the organization's ethics and compliance program by "conducting effective training programs." Clearly, distributing a Code of Conduct, whether electronically or in hard copy, does not amount to an effective education program.

Once again, given the relative infancy of the FSG requirements, employers can be informed and guided by the historical data and information regarding employment law training requirements to assist in interpreting the FSG standards.

— Sarbanes-Oxley and Similar State Statutes

The Sarbanes-Oxley Act of 2002, one of the most far-reach-

63 3 COLO. CODE REGS. § 708-1m, Rule 80.11(c); MASS. GEN. LAWS ch. 151B, § 3A(e); R.I. GEN. LAWS ch. 118, §§ 28-51-2(c), 28-51-3; VT STAT. Ann. tit. 21, § 495h(f); *Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

ing pieces of corporate reform legislation in recent memory, is one of the most important laws in this area of corporate compliance. The Act contains provisions that have received little or no public attention but that have potentially significant implications for employers. While the Sarbanes-Oxley Act applies to publicly traded companies, the rules and guidelines that it establishes are being widely adopted by privately held companies for two reasons: (1) Sarbanes-Oxley standards make for good business practice, adding value beyond simple "check the box" compliance; and (2) Sarbanes-Oxley type legislation is expected in the near future for privately held organizations. Many of the Sarbanes-Oxley requirements, like training, can help to substantially mitigate risk and liability for privately held organizations. Leading employers are recognizing the opportunity to stay ahead of the compliance curve.

Perhaps the most significant employment law change arising from the Act is the creation of a new federal cause of action entitled "Whistleblower Protection for Employees of Publicly Traded Companies." Under this section of the statute, an employee of a publicly traded company who provides information about actions that he or she reasonably believes to be a violation of federal securities law, the rules of the Securities and Exchange commission (SEC), or "any provision of Federal law relating to fraud against shareholders" is given federal statutory protection. To warrant this protection, the employee must provide information, or cause the information to be provided, or assist in an investigation into conduct that the employee reasonably believes violates securities law or the law barring fraud against shareholders.

The protected disclosures include information made available to a federal regulatory or law enforcement agency, a member of Congress, a congressional committee or, more broadly, any person with supervisory authority over the company or any person at the employer with the power to "investigate, discover or terminate misconduct." The Act also protects an employee who assists in any proceeding actually filed or "about to be filed" relating to securities fraud or fraud against shareholders. The protected assistance includes filings, testimony, participation, and assistance in such proceedings. The employee who engages in this protected activity is entitled to be exempt from discharge, demotion, suspension, harassment, or any other type of discrimination.

The far-reaching scope of the Act is emphasized by the fact that it covers not only publicly traded companies, but also their officers, employees, contractors, subcontractors, and agents. This language would appear to leave officers and employees open to liability in their individual capacities. In addition, the Act appears to create a claim against companies or organizations that do business with publicly traded companies.

— Specialized Industry Requirements

Companies also face specialized requirements based on industry standards. For example, hospitals have special training requirements on workplace violence prevention. Financial firms must meet various requirements set forth by the Federal Accounting Standards Board (FASB), the SEC, and other regulatory bodies. Noncompliance often results not only in a violation of the specialized requirement, but in an employment and labor law issue as well.

— California's Mandatory Harassment Training Law

California's mandatory harassment training law, known as A.B. 1825, showcases the importance and breadth of HR compliance and provides HR and in house counsel with an excellent model for compliance initiatives in general. A.B. 1825 requires employers who do business in California, and who have 50 or more employees, to provide harassment prevention training to all supervisors. The first round of training was to have been completed by January 1, 2006. Refresher training must occur every two years thereafter. Newly hired or promoted supervisors must be trained within six months of the assumption of a supervisory position. While failure to comply with A.B. 1825 does not render an employer automatically liable, plaintiffs will likely argue that not meeting the new training mandates is evidence of an employer's failure to take all reasonable steps to prevent harassment and supports a punitive damages award.

The regulations associated with A.B. 1825 promise to provide employers with a detailed blueprint of what is now legally mandated. While this is California specific its national implications are omnipresent. First, many larger multistate and global

organizations have adopted the A.B. 1825 requirements as their method of standardizing national training with a high assurance that they are meeting compliance requirements in all 50 states. Many training organizations like ELT and Littler's Legal Learning Group (LLG) are standardizing their A.B. 1825 programs to meet requirements both federally and in each of the 50 states. Second, providing a national training standard avoids the potential for plaintiffs in states other than California to claim that harassment and discrimination deterence are being shortchanged in comparison with the California efforts of the same employer. Third, many states are now considering the California example and it is expected that other jurisdictions will adopt similar statutes. As of this writing, approximately 14 states have commenced the legislative and/or regulatory process of specifying antiharassment training requirements. Fourth, making the training national overcomes the challenge of dealing with manager mobility in and out of California and the issue of covering managers who supervise California employees. Fifth, while detailed studies are yet to be conducted, substantial evidence exists that the uniform application of A.B. 1825 training requirements actually increases compliance and reduces workplace harassment litigation.

The implementing regulations will not be available until late in 2006. However, another draft of the regulations should become public on or about May 16, 2006 and will be posted on the FEHC website.[64] A detailed review of the draft regulations will be immediately available from both Littler and ELT and can be found at www.littler.com and www.elt-inc.com. Regardless of the specific wording of the final regulations, the following guidelines provide an excellent basis for conducting current training. **(SEE APPENDIX A)**

— Safety-Related Training

Training is a required component of compliance with virtually all Federal Occupational Safety and Health Administration (Fed OSHA) standards. However, there are two key compliance areas common to all employment situations that present excellent starting points for implementing safety and health training programs. These are hazard communication and accident prevention plans (*e.g.*, injury and illness prevention plans). Providing the required initial and refresher training in these areas can also meet minimum training requirements for a wide range of substance specific and industry specific OSHA standards.

Fed-OSHA requires periodic refresher training in hazard communication and accident prevention. The usual recommended frequency is at least annually. Employees seen violating safe work practices or procedures or behaving in an unsafe manner should also be candidates for additional refresher training. Training updates are required whenever the work area hazards change, the risk of exposure to those hazards increases, whenever new processes, chemicals, or procedures are implemented, and whenever new hazard controls are implemented.

Employers should be well aware of additional training obligations under state versions of OSHA. For example, the California Division of Occupational Safety and Health adopted an emergency regulation in September 2005, which was readopted in December 2005, covering heat illness prevention in all outdoor places of employment. The emergency regulation expires on April 20, 2006, but is expected either to be readopted or finalized.

3. The Challenge is Being Addressed By the Open Compliance and Ethics Group (OCEG)

One of the challenges facing employers seeking to implement compliance functions, or expanding such measures, is the present need for a common language with regard to the world of compliance measures. The Open Compliance and Ethics Group (OCEG) provides employers with a structured approach, common language, and objective good practice models that are usually applicable to organizations of all shapes and sizes. OCEG is a not-for-profit organization formed by business leaders from a wide range of industries for the purpose of creating compliance and ethics guidelines for employers to use in building compliance and ethics programs. In furtherance of its mission, OCEG put together guidelines for employers that incorporate existing standards under the Federal Sentencing Guidelines (FSGs), the Committee of Sponsoring Organizations (COSO) framework, and at least a dozen other frameworks that address internal control, risk management, and quality management.

64 *See* http://www.fehc.ca.gov/pub/regulation.asp.

OCEG's guidelines are designed to address the full lifecycle of planning, implementing, managing, evaluating, and improving integrated compliance and ethics programs. In short, the OCEG framework focuses on four processes: (1) developing an ethical culture; (2) setting objectives and a business strategy through governance; (3) performing risk management by identifying and addressing obstacles to voluntary and mandated boundaries; and (4) encouraging and requiring compliance, detecting noncompliance, and responding accordingly. These principles are put into practice with the objective of driving and supporting organizational performance.

With the adoption of this initial framework, the stage has been set for the full development of twelve subject-matter specific domains governing the entirety of corporate compliance. One of these domains is Employment and Labor Law, which is in turn being divided into as many as fifteen subtopics. The initial roll out of the Employment Law Domain took place in Phoenix in late September 2005 with over one hundred organizations participating. The presentation of the full Domains is now scheduled for a public worldwide webinar to be held May 11, 2006. This program is sponsored by OCEG and available without charge allowing an organization's entire compliance team to participate. The primary function of the program will be to explain and make available tens of thousands of detailed practices that have been developed. These will be easily accessed through OCEG-created software that follows the structure of the Foundation but allows a broad range of searches and topical reports. For example, the 50 State Wage and Hour Supplement provides detailed guidance on legal requirements. It then lists OCEG core practices. These are not legally compelled, but offer such value in reducing compliance risk that they are recommended and followed by most well structured organizations. Beyond these many advanced practices are listed and should be considered depending upon the nature of the organization and its industry.

OCEG guidelines can be of great use. For example, corporate counsel and HR may rely on the guidelines as a checklist to compare with the company's actual policies and practices. Corporate counsel and HR can also use the guidelines as a roadmap for improving the company's employment law compliance program. Thus, OCEG provides a great opportunity for employers to institute effective and comprehensive compliance programs. Much more detailed information is available directly from OCEG regarding their mission, their resources, and their technology.[65]

— OCEG Element of the Solution: Ability to Track Training Requirements Across the Enterprise

HR professionals tracking compliance and training will find the information provided by the Open Compliance and Ethics Group (OCEG) to be a particularly valuable tool. OCEG is a not-for-profit organization formed by a group of business leaders from a wide range of industries for the purpose of creating compliance and ethics guidelines for employers to use in building compliance and ethics programs. In furtherance of its mission, OCEG has put together guidelines for employers in developing, operating, evaluating, and improving an effective compliance and ethics program.[66]

The OCEG guidelines provide an objective method for companies to measure the organization's success in meeting and maintaining compliance and training requirements. The guidelines allow HR and compliance officers to track the training requirements across all compliance topics, and also allows focus on a particular subject of training. The guidelines may also be sued to educate managers on the types of compliance questions and expectations they may face in directing their respective departments.

4. Strategic Initiative: Adopting Compliance Metrics that Includes Mandatory Training Integrating Employment Law Issues into General Corporate Compliance

The importance of ethics and compliance in the workplace is extensive and ever-expanding. Employers, especially corporate compliance officers and HR, are tasked with greater responsibilities to train employees on a broad range of topics. Companies will need to reassess whether training actually meets the requirements, or whether the company is noncompliant in some way. Companies should undertake the following initiatives to ensure that compliance requirements, both HR and general, are united in a common system.

Identify what training is required for your organization. As a result of the compliance requirements stemming from the FSGs, Sarbanes-Oxley, and other governing statutes, employers must institute effective compliance and ethics policies and pro-

65 *See* http://www.oceg.org.
66 *Id.*

cedures. Employers first need to recognize the overall training needs of the organization. This requires that the Chief Compliance Officer (CCO) or HR identify the relevant legal foundation that designates training. Often, the required training will closely overlap with labor and employment topics, or so closely parallel labor and employment issues that HR is a necessary partner for successful implementation.

HR should be tasked with identifying and coordinating with affected employees, maintaining current record keeping on training, and ongoing compliance. For example, training requirements under Sarbanes-Oxley mandate topics such as governance and accounting. However, when it comes time to administer training and track compliance, individual departments or business units cannot be expected to efficiently track and maintain records. It is the role of HR to track compliance across the company and ensure that the company remains compliant as time goes on.

HR must also identify the required record keeping that is attendant to any required training program. The record keeping role is often overlooked. Arguably the least-glamorous function of any HR department, this expertise is crucial to any successful entity-wide compliance plan. Good record keeping has its reward - should litigation arise, it is often good record keeping habits which save countless hours in court.

Coordinate compliance and training efforts under the HR compliance banner. After identifying relevant training requirements, companies must coordinate their compliance efforts. HR departments are ideally situated to manage and monitor corporate training compliance. Tasks such as identifying employees who must be trained, maintaining training records after the training session, and then tracking compliance on an individual or training year calendar will be the cornerstone of successful compliance programs.

Coordinating the ethics and compliance requirements under the HR banner provides several values to the employer. First, it allows employers to quantify the training requirements for Sarbanes-Oxley, the FSGs and state laws. These requirements are often amorphous, and do not come with detailed requirements for carrying out the training. This lack of guidance can be especially frustrating when such statutes are compared with regulations such as those for California's A.B. 1825 that seek to provide employers with clear guidance on the breadth and depth that the training should cover. HR can provide the necessary assistance in this regard as they expand their expertise into selection and development of applicable training modules.

Second, unifying compliance within the HR function allows employers to charge one department with a quantifiable standard. Metrics for measuring successful performance are more clearly defined within the company, allowing company officials to expend less energy trying to monitor corporate compliance.

Third, and perhaps most importantly, unifying compliance efforts under HR will provide a picture of how HR and employee compliance issues significantly impact the company. Between 60% and 80% of all calls placed to corporate hotlines are HR-related. While the Sarbanes-Oxley mandate of corporate compliance drove the development of the phone hotlines, the overwhelming majority of the issues raised by employees calling into the lines involves some aspect of HR, be it retaliation, harassment, safety, or ethics. HR already possesses expertise to deal with all of these issues.

Don't make the mistake of sacrificing quality in favor of "check the box" training. Locating the training and compliance function within HR, regardless of subject matter, is also necessary to maintain quality and ensure high-impact training. As the quantity of required training increases over time, the demand for quality increases coextensively.

In order to use the affirmative defense of adequate training, employers must provide quality training. Typically, claims of negligent training arise when a coworker or a third party is injured as a result of the actions of an employee; with the injured person claiming that the employee who caused the injury was not trained or was trained insufficiently. The "hidden" requirement, therefore, is not only that training must be provided, but also that the training must be adequate, an adequacy defined with the benefit of hindsight.

Not only is quality important from a liability/legal standpoint, it is important from a business standpoint as well. Employee resistance to training and ongoing compliance will be greatly lessened if the value of training is readily apparent to employees. Poor quality presentations with little perceived value lead to employees who will be more resistant to training in the future. Reliance on "check-the-box" training may lead to employees who see training as a burden to be borne bi-annually, rather than an important component of the standards that make up everyday workplace behavior. Effective, high-quality training is a must for employers.

Integrate the training into the overall compliance initiative. HR must welcome the expansion of their traditional jurisdiction, as they will be filling a critically important role in the function of the business. Although training and corporate compliance may not necessarily be a traditional function of HR, the time has come to expand the HR expertise. Failure to have HR engage in ethics and compliance training will lead to a repetition of issues seen in American business over the last few years.[67]

67 For the latest developments on the law of training, a survey of required training and suggested training curriculum, *see* Chapter 15 of THE NATIONAL EMPLOYER®.

Appendix A

1. What do I do with training done in 2005 and continuing in 2006 since the regulations will likely not become final until the fall of 2006?

The regulations are not retroactive, and therefore, will not be used by the Commission to invalidate prior training initiatives. The Fair Employment and Housing Commission (FEHC) recognizes that conscientious employers will have completed the required training before the regulations were released or become final. In fact, the draft regulations provide a "safe haven" for employers who have made a "substantial, good faith" training effort to comply with A.B. 1825. The employers "shall be deemed to be in compliance with section 12950.[1] regarding harassment training as though it had been done under these regulations."

This provision was unchallenged during the hearing process by either employer or employee advocates. Instead, the provision has been welcomed by employers and all the major consistencies dealing with A.B. 1825. The intention is to recognize that minor inconsistencies between training efforts and the final regulations are likely and should not be used to show a lack of compliance with A.B. 1825.

2. Are employers with fewer than 50 employees in California (but 50 or more nationally) covered by A.B. 1825?

Probably. This is the position taken in the draft regulations and appears consistent with certain other California statutes. As the draft regulations now state: "There is no requirement that the 50 employees work at the same location or all reside in California." However, this position was not the bill's intent according to its author, the Honorable Sarah Reyes. During the hearing on the draft regulations, Ms. Reyes commented that law was meant to apply only to organizations with 50 or more employees within the state. She reasoned that the Legislature did not have the authority to dictate employment law requirements for those employers with fewer employees in the state. It must be noted that A.B. 1825 does not contain any specific language requiring the employees to be in-state.

Given this uncertainty, what should an organization with fewer than 50 employees in California (but 50 or more nationally) do? Prudent employers in this situation will strongly consider conducting training that would comply with A.B. 1825 for several legal and practical reasons.

All California employers, regardless of size, must recognize that the Fair Employment and Housing Act (FEHA) requires that the employer maintain a workplace without prohibited harassment and "take all reasonable steps necessary to prevent discrimination and harassment from occurring."1 Training will certainly help employers satisfy these duties. Since harassment and discrimination prevention training is effectively needed under federal law to take advantage of defenses and to limit punitive damages, providing such training is legally beneficial regardless of the coverage of A.B. 1825. The new regulations are expected to clarify how agents and contractors are to be included in determining the employer size requirements. Any employer nearing 50 employees will likely have agents and contractors in California sufficient to qualify for coverage under A.B. 1825. Finally, the improvements in the workplace from such training are increasingly being proven to include: increased job satisfaction, reduced turnover, promoted diversity and inclusion efforts, and increased productivity.

3. Is training required of supervisors of California employees who are themselves outside of California?

Yes. In the world of the Internet and instantaneous communications "distance is dead." Employers should include such supervisors in their training plans. It is not surprising, therefore, that the draft regulations state that "[s]upervisory employees need not be physically located in California so long as they supervise California employees." The directness of the reporting relationship is not specified by the draft regulations. As a practical manner, the more direct the supervision the greater the need to provide the training.

4. Can the two hours of training be provided through e-learning?

Yes. The statute provides that in addition to live instruction, "other inactive" learning is appropriate. Clearly e-learning will qualify; however, it must be interactive and the program needs to be designed to reasonably be completed in two hours or more. Interactivity can be achieved with frequent questions or actions directed to the learner. These should occur at least every 15 minutes, but more frequent interaction is highly recommended. Questions can be answered by resource guides or other help menu choices much like other computer-based learning.

[1] CAL. GOVT. CODE § 12940(k).

Additionally learners should be provided the option of sending e-mail questions to an HR professional. Responses should be returned within a reasonable period normally not longer than a week. It is expected that the final regulations will fine tune some of these requirements, but programs following the above guidelines should be fully compliant.

5. Can live webinars qualify as interactive training under A.B. 1825?

Yes. Webinars are a third form of training that can qualify as meeting the requirements of the statute in addition to live instruction and interactive e-learning. Many webinar programs may be questionable if they fail to take seriously the need for interactive learning. Turning on a live program and letting it run for two hours (or gathering several people around one computer and passively watching some one else take the course) is not consistent with the statute's author's vision of the required training or the "interactivity" language specifically stated by A.B. 1825. Such programs should periodically require learners to interact with the program by answering questions or otherwise demonstrating involvement. Based on the testimony provided to the FEHC, it is likely that required interactions will be part of the final regulations.

6. Can the two-hour program include other forms of harassment beyond sex harassment, as well as provide example of prohibited discrimination and retaliation?

Yes. While the focus of A.B. 1825 is prevention of sex harassment, the statute contemplates that other forms of unlawful harassment and actually requires that training include "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation."

It is inconceivable that an employer would limit the program to sexual harassment prevention without otherwise being assured that other forms of unlawful harassment, discrimination, and harassment are covered. It is very common for sex harassment claims to also cover other forms of prohibited harassment, and this is well understood and recognized both in the statute, the draft regulations, and by the FEHC and its staff. In fact, the draft regulations allow that training "may provide a definition of other forms of harassment covered by the FEHA, as specified at Government Code section 12940, subdivision (j), and discuss how harassment of an employee can cover more than one basis."

7. Regarding content will it be necessary to provide the text of the FEHA and describe by case name significant judicial rulings?

No. Clearly the meaning of California's statutory prohibitions and the teachings of significant cases needs to be designed into the course. However, citing case names, listing citations, and quoting statutory language is not expected to be required. The Honorable Sarah Reyes testified that the objective of the legislature was to provide practical learning that would be understandable and actually lead to a change in behavior. She recognizes that a barrier to effective learning could be created by making the material too technical. Expert guidance in the building of the courses for live presentation or e-learning will be needed to ensure that the proper themes, messages, and California law specifics are covered.

8. Are practical examples of harassment, discrimination, and retaliation required in the course?

Yes. A.B. 1825 requires that training include "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation." This clear mandate will undoubtedly be highlighted in the enabling regulations.

9. How much education and experience do presenters and course designers need?

The final details regarding such requirements and recommended qualifications will be addressed in the regulations. Clearly substantial expertise in law, human resources, and learning theory will be expected from the designers of e-learning programs. The same expectations would apply to the building of courses that are presented live. Additionally live instructors need sufficient experience and expertise to be able to answer questions (recognizing that some questions may need to be researched and responded to after the program). It is unlikely that trainers without significant HR experience will qualify as trainers even if they receive excellent training in how to the present the course in a so called "train-the-trainer" program. Until the final regulations are approved, a guideline for a presenter would be at least two years of intensive experience with related HR issues (including knowledge of relevant legal issues) as well as presenting

material that has been properly engineered and designed.

10. Will a California only program be required?
No. There are unique California requirements and procedures regarding harassment prevention, discrimination law, and to a lesser extent regarding retaliation, that must be addressed. Such provisions can certainly fit into a larger picture of what is required to build a workplace free from prohibited harassment, discrimination, and retaliation. When the course is constructed based on core values embedded with the statutes, it is possible to teach vital lessons that comply with federal and state law and are illustrated with practical examples. The program can then be supplemented to ensure that all the necessary California and federal learning points are covered. Between California and federal law based learning points, very few additional learning points are required to have a truly national program (and in many respects a global program). The enormous advantage of a fifty-state compliant program is that it qualifies supervisors regardless of their location or the location of the employees they manage. Course administration is simplified and values are underscored for the entire organization's workforce.

11. What penalties exist for noncompliance with A.B. 1825?
The statute is not intended to result in a fine or direct penalty, although the FEHC can mandate that compliance take place and hold an individual employer in violation of the statute for not having done the required training. The heavy enforcement threat comes from the ability of a plaintiff to cite noncompliance to a jury or the court in litigation involving alleged unlawful harassment, discrimination, or retaliation. A skilled plaintiff's counsel could introduce the fact that a company only trains in states that require it as some evidence that the company views the issue as a narrow compliance matter only, and not as a subject that deserves proactive attention and prophylactic measures. Such evidence could be highly relevant to a punitive damage award or even in convincing a judge or jury that the employer did not put a high value on compliance.

12. The obligation to retrain many supervisory employees starts in January 2007. How do we decide when employees need to be re-trained?

There are several extremely helpful provisions in the draft regulations that lessen the burden on employers managing their ongoing compliance obligations. Under the proposed regulations, employers can use either of two methods to meet A.B. 1825's periodic retraining requirement:
* Individual Tracking
* Training Year Tracking

Individual Tracking measures the 2-year time period from the date each individual supervisor completed his or her last training. Training Year Tracking allows employers to designate a "training year" in which to train supervisors. The employer must retrain supervisors by the end of the next training year. Practically speaking, this allows for more than 2 years to pass between some training sessions. New supervisors must be trained within six months of assuming their supervisory position, and every 2 years thereafter, measured either by the individual or training year tracking method. If an employer uses the Training Year method, some supervisors may need to be retrained sooner than once every two years.

Employers must carefully examine which method best meets their organization's needs. However, the Training Year will likely be infinitely easier to manage than the Individual Tracking method.

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CHAPTER 10

EVALUATING & USING EMPLOYER-INITIATED ARBITRATION POLICIES & AGREEMENTS

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CHAPTER 10

EVALUATING & USING EMPLOYER-INITIATED ARBITRATION POLICIES & AGREEMENTS

§ 10.1

I. RECENT TRENDS & DEVELOPMENTS

§ 10.1.1

A. INTRODUCTION

Today, a large percentage of the United States workforce is covered by some sort of alternative dispute resolution (ADR) or arbitration agreement. One study of Fortune 1000 corporations indicated that more than 23% of the respondents used ADR for nonunion employment dispute resolution.[1] Statistics from the American Arbitration Association (AAA) indicate that it has handled over 6,000,000 employment disputes through private ADR programs.[2] Thus, it appears clear that ADR is an increasingly important avenue for resolution of disputes between employers and employees in the United States. While there are many forms of ADR used in connection with nonunion workplace disputes (*e.g.*, mediation, neutral evaluation, internal review procedures, etc.) this Chapter focuses on mandatory arbitration.

This increase in use of alternative dispute resolution mechanisms, and particularly mandatory arbitration, is what Littler Mendelson predicted would occur back in 1992 when the first generation of mandatory arbitration program issues were addressed at the National Employer. Today, employers are able to take advantage of the increased acceptance by U.S. courts of alternative dispute resolution with employees. In 2001, the U.S. Supreme Court issued its

[1] Lipsky, David & Arcebor, *The Use of ADR in U.S. Corporations: Executive Summary* (1997) (survey conducted by Price Waterhouse & Cornell University's PERC Institute on Conflict Resolution).

[2] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 779-80 (2003).

decision in *Circuit City Stores, Inc. v. Adams*.[3] The Supreme Court's decision in *Circuit City* opened the door to uniform, nationwide application of mandatory arbitration agreements through the Federal Arbitration Act (FAA).[4] Before the *Circuit City* decision, the debate over whether the FAA would apply to contracts with employees, and the uncertainty created by the debate, caused some employers to shy away from mandatory arbitration as an ADR option. Now, with this uncertainty resolved by the Supreme Court's *Circuit City* decision, the next generation of arbitration agreement programs is set to emerge.

The Supreme Court has endorsed a national policy favoring enforcement of employer-employee arbitration which should significantly aid in the use of arbitration as an effective alternative dispute resolution mechanism. But, this is not the whole picture. Recent challenges to mandatory arbitration agreements based on procedural fairness and equity arguments have made it clear that arbitration programs need to be balanced and carefully constructed to be enforced under the FAA and applicable state law. It is critical for employers to understand these rapidly developing boundaries in order to have and maintain an enforceable arbitration program. Fortunately, as discussed below, recent case law has provided greater clarity regarding the enforceability of mandatory predispute arbitration policies and procedures.

What follows are significant case developments from some of the federal circuit courts of appeal in 2005 regarding mandatory arbitration agreements.

First Circuit

The First Circuit held that an employer's mass e-mail to its employees announcing a new ADR policy and providing an electronic link to the policy did not provide adequate notice under Massachusetts law to bind the employees to mandatory arbitration of workplace discrimination disputes.[5] In finding that there was inadequate notice, the court noted that the company had no history of communicating significant personnel matters to employees via e-mail, and the e-mail did not state expressly state that the new policy contained an arbitration agreement or indicate that the new dispute resolution policy was mandatory. In addition, although the e-mail alerted employees to the existence of a new employee handbook containing the ADR policy, the employer produced no evidence to suggest that the reissuance of the handbook would have contractual significance. However, the court stated that its holding should be limited to the facts of the case, and that it should not be read as a general denunciation of e-mail as a medium for contract formation in the workplace.

Fourth Circuit

In a case where the arbitration agreement was a take-it-or-leave-it contract of adhesion, the Fourth Circuit concluded that the agreement was nevertheless enforceable under West Virginia law because the employee could not identify any unfair terms in the agreement to establish its unconscionability.[6] The court expressly rejected the employee's argument that the arbitration agreement unconscionably abrogated his state constitutional right to a state judicial forum and a trial by jury of his state-law claims.

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[3] 532 U.S. 105 (2001).

[4] 9 U.S.C. §§ 1 *et seq.*

[5] *Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005).

[6] *American Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83 (4th Cir. 2005).

Sixth Circuit

The Sixth Circuit held that a former employee's claims under the Employment Retirement Income Security Act (ERISA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA) did not fall under the arbitration clause of his employer's severance plan.[7] While the court noted that a majority of courts have held that ERISA and COBRA claims are subject to arbitration under the FAA, the severance plan did not refer to ERISA or COBRA in its general arbitration provision, and thus the employees' claims under those statutes were not within the scope of the arbitration agreement.

In another case, the court refused to enforce an arbitration agreement that employees had to sign to be considered for employment at the employer's restaurant.[8] Applying Tennessee law, the court had several bases for its conclusion: (1) the prospective employees received nothing of value in return for giving up their right to a jury trial; (2) the prospective employees did not knowingly and voluntarily waive their right to a jury trial; (3) there was no mutual assent to arbitrate employment disputes; and (4) the agreement contained fundamentally unfair provisions regarding discovery and selection of arbitrators. Notably, the court found that the employer's promise to consider the applicants' for employment did not constitute sufficient consideration for the prospective employees' promise to arbitrate.[9]

Ninth Circuit

The Ninth Circuit refused to enforce an employer's posttermination modification of an arbitration agreement.[10] The court found that the arbitration agreement that was in effect during the employee's employment was unenforceable because the contract required the employee to forgo essential substantive and procedural rights and that clauses regarding coverage of claims, remedies, arbitration fees, cost-splitting, the statute of limitations, class actions, and modifications rendered the agreement excessively one-sided and unconscionable. The court concluded that the employer's posttermination modification of this agreement was not effective because: (1) the agreement's modification provision was substantively unconscionable due to its one-sidedness; and (2) even if the modification provision was enforceable, the modifications were ineffective against the employee because he lacked sufficient notice of the post-termination modifications.

Tenth Circuit

The Tenth Circuit held that an arbitration agreement between a shipping company and its delivery contractors did not cover the delivery contractors' claims against the shipping company relating to alleged misrepresentations made by the shipping company to the contractors regarding compensation for their services.[11] The court reached this determination because the arbitration agreement limited the scope of arbitrable disputes to claims arising out of the termination of the operating agreements between the contractors and the shipping company. Because the arbitration agreement was so narrowly drawn, the court found that the parties did not intend to arbitrate the claims asserted by the contractors.

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[7] *Simon v. Pfizer Inc.*, 398 F.3d 765 (6th Cir. 2005).

[8] *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005), *cert denied*, 126 S. Ct. 730 (2005).

[9] *Id*. at 380-81.

[10] *Al-Safin v. Circuit City Stores, Inc*., 394 F.3d 1254 (9th Cir. 2005).

[11] *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258 (10th Cir. 2005)

Eleventh Circuit

The Eleventh Circuit concluded that an arbitration agreement was enforceable against a class of employees asserting discrimination and wage claims against their employer.[12] In reaching this determination the court held that the FAA does not require an arbitration agreement to be signed by either party in order for it to be effective. The court also rejected the employees' claim that their continued employment was ineffective to waive their Seventh Amendment and statutory right to a jury trial. Analyzing the particular arbitration agreement under Georgia law, the court found that the contract was valid and enforceable under state law.

D.C. Circuit

While the D.C. Circuit held that a provision in an arbitration agreement precluding the recovery of punitive damages was unconscionable, the court held that the provision was severable in order to make the agreement enforceable.[13] The court found that severance was appropriate because the single unconscionable provision did not infect the arbitration agreement was a whole and the provision was generally understood as not being essential to the to the contract's consideration.

§ 10.2

II. OVERVIEW OF EMPLOYER INITIATED ARBITRATION POLICIES

§ 10.2.1

A. INTRODUCTION

The use of arbitration to resolve workplace disputes involving nonunion employees first gained momentum with the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*.[14] In *Gilmer*, the court held that an employee who signed an agreement requiring arbitration of any dispute arising out of his employment or his termination was not entitled to a jury trial of his federal age-discrimination claim. Since *Gilmer*, most courts have extended its holding to require arbitration of Title VII, Americans with Disabilities Act, Family Medical Leave Act, Employee Retirement Income Securities Act, and state law discrimination and tort claims. Similarly, in its most recent antidiscrimination statutes, Congress encouraged the use of alternative dispute resolution procedures, including arbitration.[15] Moreover, many states now have their own arbitration statutes.

Arbitration requires an agreement or contract between the affected parties to submit their dispute to arbitration. The use of arbitration clauses in employment contracts, and possibly in other forms such as offer letters, employment applications, and personnel policies, is a means of securing the employee's consent to binding arbitration to resolve disputes between the employer and employee in advance. It is especially valuable in disputes over termination of

[12] *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005).

[13] *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

[14] 500 U.S. 20 (1991).

[15] *See* Americans with Disabilities Act, 42 U.S.C. § 12212; Civil Rights Act of 1991, 42 U.S.C. § 118.

employment, which may trigger large claims for damages. However, there are some trade-offs involved for the employer. A discussion of the various advantages and disadvantages of mandatory arbitration is provided towards the end of this chapter and should be studied carefully before deciding to implement a mandatory arbitration program.

§ 10.2.2

B. THE *GILMER* DECISION – THE BIRTH OF THE FIRST GENERATION OF ARBITRATION AGREEMENTS

In *Gilmer v. Interstate/Johnson Lane Corp.*,[16] the U.S. Supreme Court held for the first time that an agreement to arbitrate an employment discrimination claim, specifically, an age discrimination claim under the federal Age Discrimination in Employment Act (ADEA) — is enforceable under the FAA,[17] and bars a legal action for discrimination by the employee. In essence, the Court held that the right to a judicial forum for trial of a federal age discrimination claim may be waived by the employee.

In *Gilmer*, the employee had been required, as a condition of his employment by Interstate, to register as a securities representative with the New York Stock Exchange (NYSE). The registration application provided that *Gilmer* agreed to arbitrate any dispute arising between him and Interstate that was required to be arbitrated under NYSE rules. Those rules provided for arbitration of any dispute between a registered representative and any member of the NYSE arising out of the registered representative's employment or the termination of that employment.

The central theme of the Court's decision in *Gilmer*, as evidenced by its careful review of the NYSE arbitration rules, is that the plaintiff, by agreeing to arbitrate his dispute, neither gave up a substantive right nor lost his opportunity to fully and fairly present his claim. The arbitration agreement did not negate or alter the plaintiff's claim; it merely changed the forum where the plaintiff's claim was heard. Arbitration therefore did not impede the antidiscrimination purpose of the ADEA. The Court specifically found: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[18]

In addition, the Court did not view the fact that the arbitration agreement was contained in a form application that Gilmer was required to sign as a condition of employment as an impediment to enforcement. Under the FAA, arbitration agreements are enforceable except where grounds for revocation, such as coercion or fraud, are shown.[19] The Court held that, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[20] The Supreme Court pointed out that Gilmer himself was an experienced businessman, and there was no evidence of coercion or fraud in his case. It did, however, note that claims of unequal bargaining power, like claims of procedural inadequacies in the arbitration agreement, should be left for review on a case-by-case basis.

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[16] 500 U.S. 20 (1991).

[17] 9 U.S.C. §§ 1 *et seq.*

[18] *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

[19] *See* 9 U.S.C. § 2.

[20] *Gilmer*, 500 U.S. at 33.

Gilmer stands for the proposition that, under the FAA, a person can agree to arbitrate claims under statutes in which the judicial forum is waivable. *Gilmer*, however, left a number of key questions unanswered. First and foremost, did the FAA even apply to contracts between employers and employees? Second, under what circumstances will a contract to arbitrate employment disputes be enforceable? And third, did Congress intend to allow employees to waive their right to a judicial forum under statutes other than the ADEA? The first generation of arbitration agreements struggled under the weight of these unresolved issues.

§ 10.2.3

C. THE SECOND GENERATION OF ARBITRATION AGREEMENTS & THE *CIRCUIT CITY* CASE

In 2001, much of the burden created by the unresolved issues in *Gilmer* was lifted. In a 5 to 4 decision, the Supreme Court determined conclusively that the FAA applies to most employment-related contracts in the much anticipated *Circuit City, Inc. v. Adams* decision.[21] This decision gave new life to the use of mandatory arbitration on a nationwide basis because the FAA preempts state law requirements for arbitration agreements that had previously created conflicts of law problems for national employers.[22] As a result, it is now clear that where the FAA applies and one party to the written arbitration agreement covered by the FAA fails or refuses to arbitrate, the other party may petition the court for an order compelling arbitration in lieu of court litigation with confidence that the FAA standards for enforcement will be applied.[23]

In *Circuit City*, the Supreme Court faced the issue of whether the FAA excludes all arbitration agreements with employees or whether the FAA's exclusion language only applies to a limited category of employment contracts. The Court held that the FAA applies to most employment contracts and only excludes those contracts involving transportation workers.[24]

In reaching its decision, the Court noted that all of the federal circuits but the Ninth found that the FAA applied to all employment contracts except those involving transportation workers.[25] To resolve the conflict between the Ninth Circuit and the other Circuits, the Supreme Court looked at both the statute's construction and legislative history arguments made by Adams and the Ninth Circuit Court of Appeals. The Supreme Court then agreed with the majority of the other courts and concluded that "Section 1 [the exclusion provision] exempts from the FAA only contracts of employment of transportation workers."[26] As a result of the holding in *Circuit City*, the vast majority of employment related contracts can be made subject to arbitration.

The Court indicated no willingness to accept the position of the EEOC and others who argued that mandatory arbitration was somehow contrary to the remedial purposes of antidiscrimination statutes. In one sentence, the Supreme Court rejected this argument stating "[t]he Court has been quite specific in holding that arbitration agreements can be enforced

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[21] 532 U.S.105 (2001).

[22] *See, e.g., Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984).

[23] 9 U.S.C. § 4.

[24] *Circuit City*, 532 U.S. at 109.

[25] *Id.*

[26] *Id.* at 119.

under the FAA without contravening the policies of congressional enactment giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, [b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[27] The Ninth Circuit's decision in *Duffield* which had held that for policy reasons Title VII claims could not be the subject of a predispute mandatory arbitration clause was not expressly addressed. However, it would certainly appear that the Supreme Court was sending a strong message that it did not agree with the reasoning used in *Duffield.* The Ninth Circuit got the message. In 2003, the Ninth Circuit expressly overruled *Duffield* in *EEOC v. Luce, Forward, Hamilton & Scripps*.[28]

This does not, however, mean that arbitration agreements will always be enforced. As discussed below, the basic equity-based exceptions to contract enforcement first noted in *Gilmer* are still present and are likely to become the primary focus of arbitration agreement challenges in the future.

In addition, arbitration agreements, like any other contracts, are subject to state law rules relating to the formation of contracts.[29] Therefore, in order to be enforceable, there must be consideration for entering into the contract. For example, some jurisdictions have held that continued at-will employment may be adequate consideration on the part of the employee in order to find a valid arbitration agreement.[30] Other courts have held that there must be a mutual agreement on the part of the employer and the employee to submit their respective claims in order to find sufficient consideration to enforce an arbitration agreement.[31] Questions regarding what can be valid consideration in a particular jurisdiction should be directed to experienced employment counsel.

§ 10.2.4

D. VALIDATING ARBITRATION AGREEMENTS: THE EVOLVING EQUITY TESTS

Section 2 of the FAA states, "A written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[32] Arbitration agreements are thus enforceable unless there are circumstances which render the agreement itself deficient. These circumstances generally are established by state contract law. It is this area of the law on

[27] *Id.* at 123 (quoting *Gilmer*, 500 U.S. at 26).

[28] 345 F.3d 742 (9th Cir. 2003).

[29] *See First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

[30] *See, e.g., Scaglione v. Kraftmaid Cabintry, Inc.*, 2002 Ohio 6917 (2002); *Tinder v. Pinkerton*, 303 F.3d 728, 736 (7th Cir. 2002); *Hightower v. GMRI, Inc.*, 272 F.3d 239, 243 (4th Cir. 2001); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1132 (7th Cir. 1997) ("an employer's specific promise to continue to employ an at-will employee may provide valid consideration for an employee's promise to forgo certain rights"); *Quigley v. KPMG Peat Marwick LLP*, 749 A.2d 405, 413 (N.J. Super. Ct. App. Div. 2000).

[31] *See Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637 (7th Cir. 1999); *Hardwick v. Sherwin-Williams Co.*, 91 Fair Empl. Prac. Cas. (BNA) 142 (Ohio App. Ct. 2003).

[32] 9 U.S.C. § 2 (emphasis added).

arbitration agreements that has seen the most significant volume of activity and change over the last few years.

§ 10.2.4(a)

Contract Interpretation Is Left to the Arbitrator

In *Howsam v. Dean Witter Reynolds, Inc.*,[33] the U.S. Supreme Court held that when presented with a motion to compel arbitration, under the FAA, a court's inquiry must be limited to two "gateway" issues: (1) whether there is a valid agreement to arbitrate; and (2) whether the agreement covers the dispute.[34] Specifically, the Court concluded that only an arbitrator could decide whether the claimant in that case timely filed her demand for arbitration because the time limit provision was not one of the two gateway issues related to arbitrability. The Court stated that all other remaining issues, including contract defenses to arbitrability, were to be first be decided by the arbitrator.

Therefore, under *Howsam*, only an arbitrator may make a determination on defenses against arbitration, such as unconscionability. The Supreme Court has since further explained and applied the rationale utilized in *Howsam*.[35]

§ 10.2.4(b)

Unequal Bargaining Power

In *Gilmer*, the Supreme Court stated that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[36] It then added a caveat, however, noting that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'''[37] The Court also indicated that the arbitration procedures at issue must be sufficient to preserve and enforce the substantive rights created by the statute.

Following remand by the U.S. Supreme Court, the Ninth Circuit in the *Circuit City* case, used California state law to employ a slightly different test. The Court divided the *Cole*-style factors (discussed below) into two groups. The first group of factors measures the comparative bargaining power of the parties to the arbitration agreement and whether the agreement is clear in its requirements. The factors require a court to consider:

1. the equilibrium of bargaining power between the parties;
2. whether the stronger party drafted the agreement;
3. whether the terms of the agreement are clearly disclosed;

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[33] 537 U.S. 79 (2002).

[34] *Id*. at 84.

[35] *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 4, 452 (2003) (holding that because the question of whether an arbitration agreement forbade class arbitration did not fall within the narrow inquiries a court could make, the question was one for the arbitrator to decide); *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003) (holding that a court may not decide the question of how an ambiguous, but arguably unenforceable arbitration agreement provision is to be resolved).

[36] *Gilmer*, 500 U.S. at 33.

[37] *Id*. (quoting *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

4. whether the arbitration agreement is a condition of employment; and
5. whether the employee had the ability or opportunity to negotiate the agreement.

With the exception of the disclosure factor, these invariably weigh against the employer. However, the court ruled that the arbitration agreement is unenforceable only if it fails to meet the requirements of both sets of factors. The second set of factors measures the degree to which the terms and obligations of the parties are similar and whether the agreement limits available relief or the time to bring a suit set by an applicable statue.[38] In this decision in the *Circuit City* saga, the court ruled that the arbitration agreement violated the first set of "procedural" factors because it was written by the employer, was a condition of the employee's hire and was not negotiable by the employee. The Court held that the agreement also violated the second set of factors because the employer reserved a right to sue the employee in court that was not justified by business necessity, the employer limited the amounts of recoverable pay and damages as well as the statute of limitations, and the agreement raised the possibility that an employee would have to split the arbitration fees.

§ 10.2.4(c)

Procedural Requirements

The procedural elements needed for an enforceable program have been the subject of significant litigation. The D.C. Circuit Court of Appeals indicated some of the procedural elements it would require for an enforceable arbitration agreement in *Cole v. Burns International Security Services*.[39] Specifically, the court referred to five factors that fulfilled *Gilmer*'s requirement that the employee not be required to give up any substantive rights provided by the statute at issue:

1. a neutral arbitrator appointed through the American Arbitration Association (AAA);
2. adequate discovery;
3. a written award;
4. all relief otherwise available in court; and
5. no requirement to pay unreasonable costs or arbitrator's fees or expenses.[40]

Arguably, the *Cole* decision represents the more conservative end of the spectrum but it is instructive. Courts applying a *Cole*-like analysis are more likely to strike down arbitration agreements that are one-sided in favor of the employer. For example, in *Hooters of America, Inc. v. Phillips,*[41] the court refused to enforce an arbitration agreement which contained the following provisions:

- a requirement that the employee provide the company notice of a claim, but no similar requirement on the employer's part to file any responsive pleadings or put the plaintiff on notice of its defenses;
- a provision that required the employee only to provide the company with a list of fact witnesses and a brief summary of their likely knowledge;

[38] *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002).

[39] 105 F.3d 1465 (D.C. Cir. 1997).

[40] *Id.* at 1482-84.

[41] 173 F.3d 933, 938-40 (4th Cir. 1999).

- an arbitrator selection process that gave the company control over the panel by requiring the employee to select an arbitrator from a company provided list;
- provisions allowing the company to move for summary judgment whereas the employee was not permitted to seek summary judgment;
- a provision allowing the company, but not the employee, to record the arbitration hearing;
- provisions permitting the company, but not the employee, to file suit in court to vacate or modify an arbitral award where the company could show the panel exceeded its authority;
- a rule providing that, upon 30 days' notice, the company, but not the employee, could cancel the agreement to arbitrate; and
- a provision reserving for the company the right to modify the rules in whole or in part, with or without notice to the employee.

While no one of these provisions was singled out by the court, the safest course is to avoid setting up an overall procedural framework that is heavily tilted in favor of the employer.

§ 10.2.4(d)

Fee-Sharing Provisions

Fee-sharing has generated substantial litigation and remains a subject of controversy.[42] Some courts have struck down arbitration agreements in their entirety where employers have attempted to shift some, or all, of the burden of the cost of arbitration to employees. For example, as mentioned above, the Ninth Circuit held that the arbitration provision in *Circuit City* was unenforceable, in part because it required employees to share equally the costs of arbitration with the employer.[43] The fact that the agreement gave the arbitrator discretion to order the employer to pay the fees for a prevailing employee did not change the Court's decision on this point.[44]

Other courts have held that the mere possibility that a plaintiff may be required to pay arbitration fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate civil rights or other employment-based claims.[45] As one court put it, "[a] fee-splitting arrangement is only contrary to the remedial and deterrent aims of Title VII if the fees are so great and the plaintiff's financial situation is such that the imposition of the fees would make the plaintiff unable to, or would substantially deter plaintiff from seeking to enforce his or her statutory rights."[46] It is generally up to the employee who is seeking to invalidate an agreement to offer evidence that shows that the fee-splitting provision would deter the employee from seeking to

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[42] *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (holding that a "risk" that arbitration costs would be prohibitively expensive is not enough and holding that the burden of proving that expenses would be too high to bear was on the party making this argument).

[43] *Circuit City*, 279 F.3d at 894.

[44] *Id.; see also Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).

[45] *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053-54 (8th Cir. 2004); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 764-65 (5th Cir. 1999); *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

[46] *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 355 (S.D.N.Y. 1999).

arbitrate his or her claims.[47] Where the applicable agreement contains a severability clause, other courts have adopted a middle approach and have "blue-penciled" agreements to sever a fee-splitting provision while still mandating arbitration.[48]

§ 10.2.4(e)

Common Law Challenges to Arbitration Provisions

Challenges to arbitration agreements based on state-law fraud in the inducement, equitable adhesion doctrine, or overwhelming economic power arguments have generally proven unsuccessful. The Supreme Court rejected the concept that mere inequality of bargaining power was enough to set aside the arbitration contract in *Gilmer*.[49] In addition, state laws that attempt to place stricter contract formation rules on arbitration agreements under the FAA than would normally apply to other contracts are preempted by the FAA and will not control.[50]

Importantly, many courts have held that the issue of unconscionably in the formation or terms of the contract are for the arbitrator, not the court, to decide.[51] However, there is a split amongst the courts on this issue.[52] Moreover, courts have become increasingly willing to examine the provisions of an arbitration agreement and determine, prior to arbitration, that the nature of the provisions are themselves unconscionable and therefore preclude the court's ability to allow the arbitration to commence.[53]

Arbitration agreements which bind only the employee, not the employer, are frequently found to be unenforceable. In *Gibson v. Neighborhood Health Clinics, Inc.*,[54] the Seventh Circuit found an arbitration clause in an employee handbook unenforceable because the employer was not required to submit its claims to arbitration. In 2002, the same court struck down another arbitration agreement, finding that there was insufficient mutuality of obligation between the employer and the employee where the agreement did not clearly require the employer to arbitrate its claims.[55] The court rejected the idea that the employer's promise to

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[47] *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001).

[48] *Jones v. Fujitsu Network Commc'ns*, Inc., 81 F. Supp. 2d 688 (N.D. Tex. 1999).

[49] 500 U.S. at 33.

[50] *See Doctor's Assoc., Inc. v. Cassarotto*, 517 U.S. 681, 686 (1996).

[51] *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) (claim of fraudulent inducement in contract as a whole is properly left to arbitrator); *Rojas v. TK Comm'cns*, 87 F.3d 745, 749 (5th Cir. 1996) (challenge to formation of contract as a whole for arbitrator to decide); *Freeman v. Minolta Bus. Sys., Inc.*, 699 So. 2d 1182 (La. Ct. App. 1997), *writ denied*, 706 So.2d 1977 (La. 1998); *Satarino v. A.G. Edwards & Sons, Inc.*, 941 F. Supp. 609, 613 (N.D. Tex. 1996); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1459-62 (D. Minn. 1996) (challenges to provisions of arbitration agreement regarding 180-day statute of limitations, limitation on damages, and costs of arbitration are for arbitrator to interpret in first instance, but indicating belief that provisions may be unconscionable).

[52] *See Garten v. Kurth*, 265 F.3d 136 (2d Cir. 2001) (question of fraud is a judicial one, which must be determined by a court); *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240 (N.D. Ala. 1997) (fraud issue decided by court because only arbitration agreement involved and arbitration clause not broad enough to cover a contract claim); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550, 555 (S.D.N.Y. 1997) (allegation of fraudulent inducement to enter arbitration agreement is for court to decide).

[53] *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280 (11th Cir. 2001).

[54] 121 F.3d 1126, 1131-32 (7th Cir. 1997).

[55] *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F. 3d 753 (7th Cir. 2001).

consider the applicant for employment was adequate consideration for the agreement. Other courts have held that continued employment or even possible employment is sufficient consideration to support an arbitration agreement.[56]

In *Johnson v. Circuit City Stores*,[57] the Fourth Circuit went one step farther. It held that even if the language of an arbitration agreement only requires employees to arbitrate their disputes, a court should infer that the employer's overall endorsement of the arbitration process means that it too is bound to arbitration. Accordingly, the court ordered enforcement of an arbitration provision in an employment application that was signed only by the employee and that, at least by its terms, purported to bind only the employee. Similarly, in *Michalski v. Circuit City Stores, Inc.*,[58] the Seventh Circuit distinguished its earlier decision in *Gibson* and upheld an arbitration agreement even though the document the employee signed did not expressly state that the employer would be bound by arbitration. As in the *Johnson* case, the court found that the agreement as a whole bound the employer to arbitration.[59]

Arbitration agreements have also been found unconscionable where they compel arbitration of claims typically brought by employees and exempt claims typically brought by employers (such as claims for intellectual property violations, unfair competition, and misuse of trade secrets or other confidential information).[60]

Arbitration agreements have also been subject to attack when they have sought to limit remedies available to employees.[61] It should be noted that some courts are willing to sever unenforceable limitations on remedies and will order arbitration subject to severance.[62]

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[56] *Butcher v. Bally Total Fitness Corp*, 2003 Ohio 1734 (2003) (offer of employment sufficient consideration to support arbitration agreement, even though agreement not read by employee); *Jenks v. Workman*, 83 Fair Empl. Prac. Cas. (BNA) 761 (2000) (arbitration agreement deemed as accepted and enforceable by the initial knowing signing of the form and later by continued employment); *Towles v. United Healthcare Corp.*, 524 S.E.2d 839 (S.C. Ct. App. 1999) (continued employment sufficient consideration to render arbitration agreement legally binding); *Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997) (arbitration agreement in employment application is enforceable because supported by promise to consider the application); *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567 (D.S.C. 1997) (arbitration agreement accepted by continued employment after receiving notice of arbitration policy); *Ball v. SFX Broad.*, 665 N.Y.S.2d 444 (N.Y. App. Div. 1997) (arbitration agreement accepted by continued employment after receiving notice of arbitration policy); *Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141 (W.D.N.Y. 1997) (consideration of application for membership sufficient to support arbitration agreement).

[57] 148 F.3d 373 (4th Cir. 1998).

[58] 177 F.3d 634, 636 (7th Cir. 1999).

[59] *See also Howard v. Oakwood Homes Corp.*, 15 I.E.R. Cas. (BNA) 678, 681 (N.C. App. 1999).

[60] *Mercuro v. Superior Ct.*, 96 Cal. App. 4th 167, 175-76 (2002); *see also O'Hare v. Municipal Res. Consultants*, 107 Cal. App. 4th 267, 275-76 (2003).

[61] *Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir. 2000); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054 (11th Cir. 1998); *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W. 2d 208 (Mich. Ct. App. 1999) (mandatory predispute arbitration agreements are enforceable even when statutory rights are at issue so long as no statutory rights or remedies are waived and the procedure is fair).

[62] *See, e.g., Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 109 (D.D.C. 2004) (arbitration agreement provision excluding punitive damages was severable in light of the strong public policy favoring enforcement of arbitration agreements); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001) (arbitration agreement provision limiting remedies can be severed, especially if the arbitration agreement provides specifically for severance of provisions found to be in conflict with

The lessons of these cases are severalfold. Mutually binding arbitration agreements, when properly drafted, are a valid condition of employment, and mutuality is often an essential prerequisite to an enforceable arbitration agreement. Further, courts will generally uphold unambiguous arbitration agreements that do not purport to waive an employee's substantive rights. Moreover, in most circumstances, claims that the plaintiff did not read the contract or understand its implications will be unsuccessful. Caution demands, however, that employers give employees every opportunity to read and understand an arbitration agreement before they sign it. The scope of the arbitration agreement should be clear and adequately communicated. Failure to provide employees with complete and accurate information about an arbitration policy may also result in a judicial finding of nonenforceability.[63]

§ 10.2.5

E. THE FORM OF THE ARBITRATION AGREEMENT

In addition to the terms and conditions of the arbitration agreement, the form of the agreement and its description of its coverage are important elements to consider. For example, some courts have found that an employee's statutory claims are not subject to arbitration because the agreement covers only disputes arising out of the contract or agreement.[64] Thus, it is important that the arbitration agreement broadly cover "all employment disputes," "all legal disputes with the employer," or something similar in scope in order to encompass both statutory and non statutory claims. The agreement should also specify that any dispute about whether a claim is arbitrable should be answered by the arbitrator.

In addition, it is generally advisable to have the arbitration agreement be a separate written contract signed by both parties. If the arbitration agreement is combined with another document, there is a risk that the arbitration agreement may be found unenforceable because the underlying document may not be an independently enforceable contract. For instance, where an arbitration agreement is contained in an employee handbook which can be revised by the employer with or without notice to the employee, then the arbitration agreement may be found illusory and therefore unenforceable. (See the next section regarding Arbitration Agreements in Employee Handbooks.) In addition, if the arbitration agreement is part of another contract which is found to be overbroad and unenforceable, such as an unduly prohibitive noncompetition agreement, the court may strike down the arbitration clause along with the rest of the agreement.

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applicable law); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279 (N.D. Ala. 2000); *but see Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280 (11th Cir. 2001) (refusing to sever an unenforceable fee-splitting provision, reasoning that such severance would provide incentive for employers to include unlawful provisions in arbitration agreements).

[63] *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 965 F. Supp. 190 (D. Mass. 1997) *vacated, opinion withdrawn, reh'g denied, in part*, 1999 U.S. App. LEXIS 7793 (1st Cir. Feb. 24, 1999), and *substituted opinion*, 170 F.3d 1 (1st Cir. 1999) (arbitration provision not enforced where employee was not provided with New York Stock Exchange rules for arbitration which were referenced in arbitration clause).

[64] *See, e.g., Alamo Rent-A-Car v. Galarza*, 75 Fair Empl. Prac. Cas. (BNA) 989 (N.J. Super. Ct. 1997); *Caldwell v. KFC Corp.*, 958 F. Supp. 962 (D.N.J. 1997) (employment application only referred to arbitration of claims concerning termination, not sexual harassment claims); *Van Weber v. Hall*, 929 S.W.2d 138 (Tex. App.–Houston [14th Dist.] 1996, no writ) (arbitration clause applied to disputes "as to all or any part of this Agreement" rather than to "any employment dispute").

§ 10.2.5(a)

Arbitration Agreements in Employee Handbooks

Depending on the jurisdiction and the applicable rules regarding contract formation, it may be possible to include the arbitration agreement in such forms as employee handbooks, employment applications, or offer letters. Several courts have upheld these forms of arbitration agreements.[65]

Extreme caution should be exercised, however, when providing an arbitration agreement only in an employee handbook. Several courts have declined to enforce arbitration policies in a handbook for this reason, or because of an employee's lack of notice of the policy.[66]

Employers who include their arbitration policies solely in their handbooks run the risk of not being able to enforce such arbitration policies. Where possible, the arbitration agreement should be a stand-alone document signed by the employee. If the arbitration agreement is included as part of another document, such as an offer letter, employment application, or handbook, the employee should be required to sign the document and agree to be bound by its

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[65] *See, e.g., Johnson v. Circuit City Stores*, 148 F.3d 373, 377-78 (4th Cir. 1998) (arbitration provision contained in employment application enforced); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837-38 (8th Cir. 1997) (arbitration acknowledgment found in an employee handbook found to be enforceable despite the usual disclaimers); *Kinnebrew v. Gulf Ins. Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. Nov. 28, 1994) (arbitration agreement in company handbook accepted by plaintiff continuing to work for company); *Lang v. Burlington N. R.R.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993) (mandatory arbitration clause became part of employment contract when employee continued to work after receiving amended employee handbook); *Continental Airlines, Inc. v. Mason*, 12 Indiv. Empl. Rts. Cas. (BNA) 140 (C.D. Cal. 1995), *aff'd without publ. op.*, 87 F.3d 1318 (9th Cir. 1995) *reported in full*, 1996 U.S. App. LEXIS 16558 (9th Cir. June 19, 1996) (arbitration policy in employee handbook enforced under California law because plaintiff signed acknowledgment that she received handbook and had actually used the arbitration procedure to grieve another issue); *KFC Nat'l Mgmt. Co. v. Beauregard*, 15 Indiv. Empl. Rts. Cas. (BNA) 467 (Fla. App. 1999) (arbitration agreement in employment application enforced); *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486 (Tex. App.–Fort Worth 1997, writ granted) (arbitration agreement in handbook enforceable because it had opt-out provision); *Ehresman v. Bultynck & Co.*, 511 N.W.2d 724 (Mich. Ct. App. 1994) (CPA required to sign arbitration contract as condition to becoming shareholder and although contract was never signed, CPA was bound by continuing to work under its terms).

[66] *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998) (agreement to arbitrate not enforced where acknowledgment form in employee handbook did not specifically reference arbitration provision); *Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89 (1st Cir.1997) (requiring waiver of judicial forum to be expressly stated); *Diaz v. Arapahoe (Burt) Ford, Inc.*, 68 F. Supp. 2d 1193 (D. Col. 1999) (disclaimer in employee handbook that nothing other than the arbitration provision is a legally enforceable contract fatal to defendant's efforts to enforce provision); *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683 (N.D. Ohio 1998) (arbitration clause in employee handbook unenforceable); *Vaccaro v. Insurance Co. of N. Am.*, No. 3:96CV1161 AHN, 1996 WL 762234 (D. Conn. Dec. 23, 1996) *unpublished op.* (dispute over plaintiff's receipt and knowledge of arbitration policy requires a jury trial); *Heurtebise v. Reliable Bus. Computers*, 550 N.W.2d 243 (Mich. 1996), *cert. denied*, 520 U.S. 1142 (1997) (clause in handbook reserving right of employer to modify policies at its sole discretion indicated that employer did not intend to be bound by handbook and therefore arbitration policy was not enforceable); *Stewart v. Fairlane Mental Health Ctr.*, 13 Indiv. Empl. Rts. Cas. (BNA) 1038 (Mich. Ct. App. 1997) (handbook stated it was not a contract of employment and allowed employer to amend policies at any time so there was no enforceable contract to arbitrate); *Reilly v. Stroehmann Bros. Co.*, 532 A.2d 1212 (Pa. Super. Ct. 1987) (for handbook to be construed as a contract it must contain unequivocal provisions that employer intends to be bound by it, and renounces the principle of at-will employment).

terms. Additionally, employees who are subject to arbitration agreements should have ready access to such agreements.[67] If the arbitration agreement is part of a handbook, the handbook should clearly state that the arbitration policy is contractual.

§ 10.2.6

F. EEOC ENFORCEMENT ACTIONS

§ 10.2.6(a)

EEOC v. Waffle House, Inc.

In 2002, the Supreme Court provided further guidance regarding matters pertaining to arbitration of employment disputes, particularly with respect to the role of the EEOC. In *EEOC v. Waffle House, Inc.*,[68] the Court ruled that a private predispute arbitration agreement between an individual and that individual's employer does not prevent the EEOC from filing a court action in its own name and recovering monetary damages for the individual. In *Waffle House*, an applicant signed an application containing an agreement to arbitrate all employment claims. After working 16 days, he suffered a seizure at work and soon thereafter was discharged. The former grill operator did not seek to arbitrate any dispute, but he did file a complaint with the EEOC alleging that his termination violated the Americans with Disabilities Act (ADA). The EEOC filed an enforcement action in federal court requesting injunctive relief, monetary damages for the grill operator and punitive damages against the restaurant. Waffle House insisted that the EEOC's claim should wait until the grill operator had pursued the claim on his own through arbitration, as agreed to in his application. The court of appeals rejected the restaurant's petition to stay the EEOC's lawsuit and allowed the EEOC to continue with the claim. However, the court of appeals reasoned that the public policy favoring arbitration of the grill operator's dispute under the FAA should limit the EEOC to pursuing injunctive relief and not "victim specific" monetary damages.

The Supreme Court disagreed. It ruled that the EEOC was not a party to the arbitration agreement made between the grill operator and the restaurant and that the arbitration agreement could not, therefore, limit the EEOC in its ability to bring the claim or in the type and amount of relief sought by the EEOC. Thus, if the EEOC chooses to litigate a discrimination claim, it is permitted to do so notwithstanding an inability on the employee's part to pursue civil litigation as a result of a valid arbitration agreement.

Some commentators have viewed this decision as a step back for arbitration of employment claims. Concerns have been raised that the decision creates the possibility that employers will have to defend themselves in two separate arenas simultaneously and thereby eliminates the finality and lower cost that drive employers to implement ADR plans. Realistically, this likely exaggerates the impact of the *Waffle House* decision. First, the Supreme Court made clear that established law would preclude an employer from having to pay any claim twice just because it was brought in two different forums. Second, findings and rulings made in one forum may have legal significance in the other forum with respect to related claims or

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[67] *See Owen v. MBPXL Corp. d/b/a Excel Specialty Prods.*, 173 F. Supp. 2d 905 (N.D. Iowa 2001) (employee who signed a form stating that he attended a meeting implementing and explaining a new arbitration policy was not required to arbitrate a claim because not enough evidence to show employee received a hard copy of the agreement or had sufficient access to read the agreement posted on the company website).

[68] 534 U.S. 279 (2002).

actions. Moreover, from a practical standpoint, and perhaps most importantly as the *Waffle House* Court noted, the EEOC intervenes in fewer than 1% of the charges filed each year.

§ 10.2.6(b)

The Public Policy Position of the EEOC: Is a Change on the Horizon?

Currently, the EEOC favors ADR generally, but is opposed to predispute binding arbitration agreements.[69] The EEOC has even gone so far as to pursue litigation against employers who implement mandatory arbitration programs using the argument that mandatory arbitration somehow takes away substantive rights granted by Title VII. Arbitration agreements that do not permit employees to file charges with the EEOC have been another concern to the EEOC, though this concern might be alleviated by allowing employees to file charges with the EEOC in arbitration agreements, but disallow the filing of lawsuits in court.

In *EEOC v. Luce, Forward, Hamilton & Scripps*,[70] the EEOC brought an action on behalf of an applicant who was denied employment after he refused to sign a mandatory arbitration agreement with the law firm of Luce Forward. In spite of the EEOC's aggressive prosecution of the *Luce* case, the Ninth Circuit removed all doubt that its prior decision in *Duffield v. Robertson Stephens & Co.*[71] was no longer valid law. *Duffield* held that mandatory arbitration agreements involving claims under Title VII of the Civil Rights Act of 1964 were unenforceable. Although *Duffield* was impliedly overruled by the Ninth Circuit in 2002,[72] in 2003 the court made it official: Title VII claims can be subject to mandatory arbitration agreements in the Ninth Circuit.

In light of circuit court decisions such as *Luce*, and the Supreme Court's decision in *Circuit City*, the EEOC's overall position against mandatory arbitration is growing increasingly unsustainable. This is particularly true given the Supreme Court's recent approval of EEOC litigation despite the existence of a valid arbitration agreement between the employer and employee. The EEOC's policy position is ripe for change.

Former EEOC chairwoman, Ida Castro, predicted in August 2001 that the EEOC would revoke its position that employers violate Title VII by mandating arbitration of employment disputes as a condition of employment. However, her successor, Cari Dominguez, has yet to indicate whether the commission's position will change under the new administration. The fact that in 2003 the EEOC continued to pursue its antimandatory arbitration case against Luce Forward,[73] suggests that the EEOC's position has not yet changed. Now that the Ninth Circuit has joined the rest of the circuit courts in finding that claims under Title VII can be subject to mandatory arbitration agreements, perhaps the agency will modify its stance.

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[69] *See* EEOC Policy Statement July 10, 1997, *EEOC Compliance Manual*, N:3101-3106 (BNA 1997).

[70] 345 F.3d 742 (9th Cir. 2003).

[71] 144 F.3d 1182 (9th Cir. 1998).

[72] *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002), *vacated, hearing en banc granted*, 319 F.3d 1091 (9th Cir. 2003), *different results reached on rehearing at* 345 F.3d 742 (9th Cir. 2003).

[73] *Luce, Forward*, 345 F.3d 742.

§ 10.2.7

G. THE UNION ENVIRONMENT

As discussed earlier, the Supreme Court in *Alexander v. Gardner-Denver Co.*, held that a union member did not agree to submit Title VII claims to arbitration through an arbitration clause in the collective bargaining agreement.[74] *Gilmer* distinguished this case and its progeny on three separate grounds:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims . . . . Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement . . . [a]n important concern . . . was the tension between collective representation and individual statutory rights . . . . Finally, those cases were not decided under the FAA, which . . . reflects a "liberal federal policy favoring arbitration agreements."[75]

The Court did not say, however, which ground was dispositive in distinguishing *Gardner-Denver*. As a result, some lower courts construing *Gardner-Denver* have cut away at the decision by holding, in effect, that all three grounds must be present in order for it to be controlling. For example, the Seventh Circuit in *Matthews v. Rollins Hudig Hall Co.*,[76] required arbitration of an employee's age discrimination claim when there was a question as to whether or not the employee was terminated "for cause" and the arbitration agreement applied to all claims "relating to a breach of this Agreement."[77]

In *Wright v. Universal Maritime Service Corp.*,[78] the Supreme Court addressed but did not resolve the issue. While confirming the continued vitality of *Gardner-Denver*, the Court left open the question as to whether a union in a collective bargaining agreement may prospectively waive a member's right to pursue federal statutory claims in court. The Court did hold that any such waiver must be "clear and unmistakable." Under the facts in *Wright*, the Court refused to require arbitration where the collective bargaining agreement provided that the agreement was "intended to cover all matters affecting wages, hours, and other terms and conditions of employment."[79] The Court held this to be a less than explicit union waiver and failed under the Court's "clear and unmistakable" standard.

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[74] 415 U.S. 36 (1974).

[75] *Gilmer*, 500 U.S. at 5 (citation omitted).

[76] 72 F.3d 50 (7th Cir. 1995).

[77] *See also Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996) (arbitration ordered where the clause at issue contained an express reference to statutory claims by the employee).

[78] 525 U.S. 70 (1998).

[79] *Id.* at 73.

The Fourth Circuit in *Carson v. Giant Food, Inc.*,[80] adopted a two-part test for applying *Wright*. The court held that the requirement of a "clear and unmistakable" waiver can be satisfied:

- through the drafting of an "explicit arbitration clause" pursuant to which the union agrees to submit all statutory employment discrimination claims to arbitration; or
- where the arbitration clause is "not so clear," employees might yet be bound to arbitrate their federal claims if "another provision, like a nondiscrimination clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement."

Courts applying *Wright* have uniformly held that, at a minimum, a statute must be specifically referenced in a collective bargaining agreement for it to approach *Wright's* "clear and unmistakable" standard.[81]

§ 10.2.8

H. PRACTICAL IMPLICATIONS OF THE FAA

Using the FAA to enforce arbitration agreements offers employers the following significant advantages among others:

- It provides a means to enforce arbitration agreements in jurisdictions where state arbitration law is absent or deficient.
- Where it applies, the FAA preempts contrary state laws limiting arbitration or barring it.[82]
- For multistate employers, the FAA provides a uniform basis for enforcing arbitration agreements. And, ultimately, FAA case-law will provide a more uniform and consistent body of law for both parties to rely on when making decisions.

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[80] 175 F.3d 325, 331 (4th Cir. 1999).

[81] *Fayer v. Town of Middlebury*, 258 F.3d 117, 123 (2d Cir. 2001) (terminated employee free to bring lawsuit based upon First Amendment where CBA covered only disputes arising under CBA); *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001) (antidiscrimination provision which states that union will abide by Title VII and that unresolved grievances under the provision are proper subjects of arbitration "indubitably provides" clear and unmistakable waiver); *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319 (4th Cir. 1999); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631 (6th Cir. 1999); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 9 (1st Cir. 1999) (agreement did not explicitly mention ADA or other federal antidiscrimination statutes); *Kelly v. Classic Rests. Corp.*, 92 Fair Empl. Prac. Cas. (BNA) 1222 (S.D.N.Y. Sept. 2, 2003) (arbitration clause in CBA not preclude employee from raising ADEA claims in federal court); *Giles v. City of New York*, 41 F. Supp. 2d 308, 311-12 (S.D.N.Y. 1999) ("list of covered grievances did not clearly include [Fair Labor Standard Act claims] or other statutory claims"); *Beason v. United Techs. Corp.*, 37 F. Supp. 2d 127, 130 (D. Conn. 1999) (agreement did not specifically refer to federal or state antidisability discrimination statutes).

[82] *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

- State-law contract-of-adhesion principles are not as easily applied to bar enforcement of an arbitration agreement to which the FAA applies or at least less liberally applied.
- If the employee's claims involve some issues that are subject to arbitration and some that are not, some state courts will hold that it is best to have all the factually intertwined claims resolved by litigation rather than arbitration.[83] This option can trigger efforts by a plaintiff to find any claim possible, regardless of how remote or meritless it may be, to throw into the asserted claims to defeat arbitration. By contrast, under the FAA, factually intertwined claims will not result in litigation of all disputes. Instead, all arbitrable claims must still go to arbitration in order to honor the parties' contract to arbitrate.[84] Thus, there is less motivation for the claimant to assert dubious claims and unnecessarily compound the cost and complexity of the dispute.

In sum, the broad application of the FAA makes most arbitration agreements and policies that meet the *Gilmer* standards readily enforceable and should provide a more uniform, nationwide set of standards for all concerned in the future. It is important to note that even where the FAA applies, the fact that a petition to compel arbitration was filed under the FAA, alone, will not confer jurisdiction on a federal court. Rather, there must be an independent basis for federal jurisdiction.[85] It is also important to recognize that there will still be instances where the FAA does not apply, particularly in cases involving transportation industry employees and unionized employers, and in such cases it is prudent to look to state law as an alternative vehicle for enforcing agreements to arbitrate employment disputes.

§ 10.2.9

I. STATE LAW OPTIONS FOR ARBITRATION AGREEMENTS

Most states have arbitration statutes. Assuming the FAA is inapplicable for some reason (*e.g.*, a transportation employee is involved), state laws must be carefully analyzed to determine the utility of an arbitration program in that state. Many state arbitration statutes place greater requirements on enforcing an agreement to arbitrate or may exclude employment disputes altogether. A detailed analysis of state law is beyond the scope of this chapter. However, it is safe to say that some states have enacted state statutes that are similar to the FAA.[86] Other states have clearly rejected the FAA approach and create special requirements for arbitration agreements or completely reject the concept of arbitration agreements for employment disputes.[87]

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[83] *See Atmel Corp. v. Vitesse Semiconductor Corp.*, Court App. No. 98CA0586 (Colo. Ct. App., Feb. 15, 2001).

[84] *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

[85] *See Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683 (5th Cir. 2001).

[86] *See, e.g.*, CAL. CODE CIV. PROC. § 1280; COLO. REV. STAT. § 13-22-203; DEL. CODE ANN. tit. 10, § 5701; D.C. CODE ANN. § 16-4301 (1981); 710 ILL. COMP. STAT. 5/1; IND. CODE. 34-4-2-1; 14 ME. REV. STAT. ANN. § 5927; MASS. GEN. LAWS ANN. ch. 150C, § 1; REV. MONT. CODE ANN. § 27-5-113; NEV. REV. STAT. § 38.035; 42 PA. CODE STAT. ANN. § 7302; S.D. CODIFIED LAWS § 21-25 A-1; TENN. CODE ANN. § 29-5-307; VA. CODE ANN. § 8.01-581.01; WYO. STAT. ANN. § 1-36-103.

[87] *See, e.g.*, ALASKA STAT. § 09.43.010; ARIZ. REV. STAT. § 12-1517; ARK. CODE. ANN. § 16-108-201(b); GA. CODE ANN. § 9-9-2; IDAHO CODE § 7-901; IOWA CODE § 679A; KAN. STAT. ANN. § 5-401; MD. CTS. & JUD. PRO. § 3-206; MICH. COMP. LAWS ANN. § 600.5001(3); N.H. REV.

§ 10.2.9(a)

California

Under section 1281 of the California Code of Civil Procedure, written agreements to submit to arbitration existing controversies or controversies thereafter arising are valid, enforceable, and irrevocable, except on grounds that exist at law or equity for the revocation of any contract. Thus, under California law an arbitration agreement may be invalidated if, for example, it is unconscionable or the employer has waived the right to arbitrate.[88]

Although there is strong public policy in favor of arbitration, there is no public policy in favor of forcing the arbitration of issues the parties have not agreed to arbitrate.

There are also guidelines for arbitration of disputes brought under the Fair Employment and Housing Act.[89] For example: (1) the arbitration agreement may not limit the damages normally available under the statute; (2) there must be discovery sufficient to adequately arbitrate the statutory claim; (3) there must be a written arbitration decision and judicial review sufficient to ensure the arbitrators comply with the requirements of the statute; (4) the employer must pay all costs unique to arbitration; and (5) the agreement must provide for the appointment of a neutral arbitrator.[90]

§ 10.2.9(b)

Colorado

Colorado has adopted the Uniform Arbitration Act of 1975, Colorado Revised Statutes sections 13-22-201 to 223. The legislative declaration in the statute provides that its purpose is to develop voluntary arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary. The statute adopts a policy to encourage settlement of disputes through the arbitration process and any doubts whether a dispute is subject to arbitration are now to be resolved in favor of, not against, arbitration.[91]

The Uniform Arbitration Act does not limit the classes of disputes or the parties who may invoke the procedure. The Act specifically applies to arbitration agreements between employers and employees or between their respective representatives, unless otherwise provided in the agreement. Colorado Revised Statutes section 13-22-203 provides an agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, subject to grounds existing at law or in equity for revocation of any other contract.

The Act contains mechanisms for applying to a state district court to enforce agreements to arbitrate. If the agreement does not provide a method for the appointment of arbitrators, the court may appoint one or more arbitrators. With regard to procedures, hearsay evidence may

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STAT. ANN. § 542:1; N.C. GEN. STAT. § 1-567.2; OKLA. STAT. ANN. tit. 15, § 818; OR. REV. STAT. §§ 243.650 *et seq.*; R.I. GEN. LAWS § 10-3-2; S.C. CODE ANN. § 15-48-10; TEX. CIV. PRAC. REV. CODE ANN. §§ 171.001-171.098; WASH. REV. CODE § 7.04.010; WIS. STAT. ANN. § 788.01.

[88] *Armendariz v Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000).

[89] CAL. GOV'T CODE §§ 12900 *et seq.*

[90] *Armendariz,* 24 Cal. 4th 83.

[91] *Hughley v. Rocky Mountain HMO, Inc.*, 910 P.2d 30 (Colo. App. 1995).

be admitted, but the Act provides the arbitrator "shall not give undue weight to hearsay or other improper or unsubstantiated evidence."[92] Arbitrators may issue subpoenas to compel the attendance of witnesses or the production of records. On the application of parties and for use as evidence, arbitrators may permit a deposition to be taken of a witness who cannot be subpoenaed or is unable to attend a hearing. Provisions of the law governing subpoenas in the state courts are equally applicable to arbitration.[93]

An award must be in writing and signed by the arbitrators joining in the award. Upon application of a party, the court shall confirm an award. A party may apply to vacate an arbitration award within 30 days after delivery of a copy of the award.[94] As will be discussed, the statute provides several grounds for vacating an award, but they are very narrowly construed.

Another source for ADR in Colorado is the Dispute Resolution Act.[95] This statute established a state office of dispute resolution to establish dispute resolution programs. Any court of record, at its discretion, may refer any case for mediation services or dispute resolution programs, or for any form of dispute resolution.

§ 10.2.9(c)

Georgia

The Georgia Arbitration Code (GAC) governs disputes in which the parties have agreed *in writing* to arbitrate. However, the GAC excludes certain types of agreements from its provisions, including:[96]

- agreements to arbitrate medical malpractice claims, which are subject to a separate set of guidelines under sections 9-9-60 *et seq.*;
- collective bargaining agreements between employers and labor unions;
- any contract of insurance, as defined by section 33-1-2(2);
- loan or consumer financing agreements in which the indebtedness is $25,000 or less at the time of execution;
- any contract involving consumer acts or practices as defined by the Fair Business Practice Act, sections 10-1-390 *et seq.*;
- any contract for purchase of consumer goods, as defined by the Uniform Commercial Code, sections 11-1-101 *et seq.*;
- agreements to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort; and
- any other subject matter currently covered by an arbitration statute.

[92] COLO. REV. STAT. § 13-22-207(1)(d).

[93] *Id.* § 13-22-209.

[94] *Id.* § 13-22-214.

[95] *Id.* §§ 13-22-301 to 313.

[96] GA. CODE ANN. § 9-9-2(c).

Employment contracts fall outside of the GAC's coverage unless the written arbitration clause is initialed by all signatories to the agreement at the time of the agreement's execution.[97]

The most significant provision contained in the GAC provides that all arbitration agreements, whether for an existing controversy or for any possible future dispute, are enforceable "without regard to the justiciable character of the controversy. . . ."[98] The provision also gives state courts jurisdiction to enforce arbitration agreements and to enter judgment on an arbitration award.

Parties may assert a statute of limitations defense in the arbitration proceeding itself. Like the courts, arbitrators have discretion on this matter. An arbitrator's decision relating to a statute of limitations defense is not subject to judicial review.[99]

§ 10.2.9(d)

Texas

For example, in 1997, the Texas Legislature revised the Texas Arbitration Act (TAA).[100] These revisions did not significantly alter the prior statute but rather clarified procedural issues related to arbitration. For example, the 1997 revisions provide for expanded discovery, including the taking of depositions. The subpoena power of the arbitration panel is clarified. The revisions contain more detailed provisions regarding the institution and venue of an arbitration proceeding, the method for vacating or correcting a panel's award, and appellate issues. The revisions continue to require a construction of the statute consistent with the laws of other states.[101]

The TAA has some important limitations. The TAA does not apply to claims for workers' compensation benefits or to collective bargaining agreements. And, if the arbitration agreement pertains to personal injuries or contracts of a certain monetary value, the agreement must be in writing and signed by both parties and their attorneys.[102] But if the FAA governs a dispute, these provisions of the TAA are preempted and will not prevent arbitration of such claims under the FAA.[103]

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[97] *Id.* § 9-9-2(c)(9). *See also Columbus Anesthesia Group, P.C. v. Kutzner*, 459 S.E.2d 422 (Ga. Ct. App. 1995).

[98] GA. CODE ANN. § 9-9-3.

[99] *Id.* § 9-9-5(b).

[100] *See* TEX. CIV. PRAC. & REM. CODE §§ 171.001–171.098 (Vernon 1997 & Supp. 2000).

[101] *See id.* at § 171.003.

[102] *See id.* at § 171.002.

[103] *See Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 219 (5th Cir. 1997); *Thomas James Assocs., Inc. v. Owens*, 1 S.W.3d 315 (Tex. App.–Dallas 1999, no pet.) (TAA); *Russ Berrie & Co., Inc. v. Gantt*, 998 S.W.2d 713 (Tex. App.–El Paso 1999, no pet.) (Texas General Arbitration Act); *In re Smith Barney, Inc.*, 1998 Tex. App. LEXIS 4273, at **4-5 (Tex. App.–Dallas, 1998, orig. proceeding); *Gomez v. Zardenetta*, 1998 Tex. App. LEXIS 553 (Tex. App.–San Antonio 1998, orig. proceeding); *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 721 (Tex. App.–Fort Worth 1997, orig. proceeding) (noting that an arbitration agreement under the FAA allowed for arbitration of work place injuries).

Under Texas law, an agreement to arbitrate is a contract subject to ordinary contract principles.[104] And a "party may revoke the agreement only on a ground that exists at law or equity for the revocation of a contract."[105]

A separate statute specifically addresses arbitration of disputes between an employer and an employee.[106] This statute has seen little enforcement because of the broader application of the FAA and the general Texas Arbitration Act. Moreover, this statute appears directed more toward traditional collective bargaining disputes. The statute does authorize arbitration in nonunion disputes, but it creates a difficult and burdensome arbitration board selection procedure for such cases.

§ 10.2.9(e)

Utah

The Utah Code Annotated (U.C.A.) section 78-31(a)-107 (effective May 15, 2003), provides that a written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or in equity for revocation of a contract. An enforceable agreement must be in writing and set forth the scope of the dispute to be arbitrated. *Pacific Development, L.C. v. Orton,*[107] section 78-31(a)-108 (effective May 15, 2003) provides that the court, upon a motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate unless it finds there is no enforceable agreement. The court shall determine the issue of the existence of the arbitration agreement or the scope of matters covered by the agreement. An order to submit an agreement to arbitration stays any action or proceeding involving an issue subject to arbitration under the agreement, unless the issue is severable from the other issues in the action, for which only the particular issue will be stayed. Refusal to issue an order to arbitrate may not be grounded on a claim that an issue subject to arbitration lacks merit, or that fault or grounds for the claim have not been shown. A party may seek review denying a motion to compel arbitration.[108]

U.C.A. section 78-31(a)-116(3) provides that the arbitrators shall appoint a time and place for the hearing, and notice shall be served not less than five days before the date of the hearing. This is a significant change from the 30-days' notice required under the former Arbitration Act. The hearing shall be recorded in a manner agreed upon by the parties. Costs of making a record shall be apportioned as directed by the arbitrators. If there is more than one arbitrator, the hearing shall be conducted by all arbitrators, but a simple majority may determine any questions and render a final award.[109] If, during the course of the hearing, an arbitrator for any reason ceases to act, a replacement arbitrator *must* be appointed to continue the proceeding.[110] This also is a departure from the previous Act allowing the remaining arbitrators to continue the proceeding. Unless otherwise provided by the agreement or by law, the powers of the arbitrators are exercised by majority vote.

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[104] *See Ysleta Indep. Sch. Dist. v. Godinez*, 998 S.W.2d 700,702 (Tex. App.–El Paso 1999, no pet.); *BDO Seidman v. Miller*, 949 S.W.2d 858, 860 (Tex. App.–Austin 1997, writ dism'd w.o.j.).

[105] TEX. CIV. PRAC. & REM. CODE § 171.001(b) (West 2000).

[106] TEX. LAB. CODE §§ 102.001-.075 (Vernon 1996).

[107] 23 P.3d 1035 (Utah 2001).

[108] *Pledger v. Gillespie*, 982 P.2d 572 (Utah 1999).

[109] UTAH CODE ANN. § 78-31(a)-114.

[110] *Id.* § 78-31(a)-116(5).

Arbitrators may administer oaths and issue subpoenas for attendance of witnesses or the production of records. Arbitrators may also order a party to provide any other party with information determined to be relevant and may order the use of requests for discovery as provided in the Utah Rules for Civil Procedure.[111]

§ 10.2.9(f)

Washington

Arbitration Under the Permissive Private Arbitration Statute

If an employment relationship does not affect interstate commerce, or involves transportation workers, it will not be governed by the Federal Arbitration Act. For those employment relationships, state law generally determines whether or not an agreement to arbitrate will be enforceable. Fortunately, Washington's private arbitration statute,[112] like the Federal Arbitration Act, evinces a strong policy in favor of arbitration and renders arbitration agreements generally enforceable.[113] With respect to employment and labor agreements, the statute provides that the parties "may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement."[114]

The specific procedures of the Washington arbitration statute will not apply to an employment or labor arbitration agreement, however, unless the agreement expressly incorporates them.[115] The statute essentially provides a structure, or template, for the procedures for conducting an arbitration hearing, challenging or appealing an arbitration award and staying litigation pending arbitration, so long as the parties to an employment agreement specifically incorporate the statute's provisions. Because these procedures can add a useful level of certainty to the enforcement of an arbitration agreement, it is advisable to include a provision in any employment or labor arbitration agreement expressly incorporating the Washington statute.

Agreements to arbitrate may be challenged on legal or equitable grounds, for example, procedural or substantive unconscionability. The doctrine of unconscionability might apply where the arbitration agreement heavily favors the employer, or where there is a gross inequality of bargaining positions between the employer and employee. The Washington Court of Appeals has rejected the argument that a standard form arbitration agreement that was required as a condition of employment was an unconscionable contract of adhesion.[116] But on the other hand, the Washington Court of Appeals has accepted the argument that if arbitration imposes costs on the claimant that are prohibitive in relation to the amount in controversy the agreement will be found unconscionable and unenforceable.[117]

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[111] *Id*. § 78-31(a)-118.

[112] WASH. REV. CODE § 7.04.

[113] *Tjart v. Smith Barney, Inc*., 107 Wn. App. 885, 901 n.31 (2001).

[114] WASH. REV. CODE § 7.04.010.

[115] *Id*.; *see also Department of Agric. v. State Pers. Bd*., 65 Wn. App. 508, 514, *review denied*, 120 Wn. 2d 1003 (1992).

[116] *Tjart*, 107 Wn. App. at 898-99.

[117] *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002).

Washington law regarding whether mandatory agreements to arbitrate statutory employment claims are enforceable is not yet well developed. There is currently a split of authority on this question among the Washington Courts of Appeals.[118]

Arbitration Under the Mandatory Arbitration Statute

The Washington Mandatory Arbitration Statute provides for mandatory arbitration of civil claims, including employment law claims, where the monetary damages alleged are less than $35,000.[119] Technically, the statute sets the limit at $15,000, but it also allows the judges of any county to vote to raise that limit to $35,000. The limit in all Washington counties is now $35,000. That amount excludes attorneys' fees, interest, and costs. For purposes of calculating the jurisdictional limit, each claim is calculated separately. If an employee asserts one claim for $25,000 and another claim for $33,000, the case is arbitrable because no party asserts a claim in excess of the limit.

The statute is implemented by the Superior Court Mandatory Arbitration Rules (MARs). Under the MARs, matters in excess of the jurisdictional amount may be arbitrated under the rules, but only by stipulation.[120] Note that arbitration under the MARs is different from other kinds of arbitration, such as arbitration conducted under the private arbitration statute.

Pursuant to MAR 1.3, the ordinary rules of civil procedure apply until a case is assigned to the arbitrator. Once a case is assigned to an arbitrator, the MARs govern, except where those rules incorporate a civil rule. For example, under MAR 4.2, Civil Rules 35 and 36 are incorporated, and under some local arbitration rules, civil rules authorizing discovery apply to the arbitration process.

Arbitrations conducted under the statute are both mandatory and binding. Following the arbitration hearing, the arbitrator files a decision and award with the clerk of the superior court. Parties have 20 days to file a notice of appeal of the decision and award. The appealing party has the right to demand a trial *de novo*, including a jury trial.[121] That means that no party is deprived of his or her day in court by the statute, and the arbitrator's decision is not entitled to any deference once it is appealed. But if the arbitrator's decision is not timely appealed, the decision becomes as final and authoritative as any decision by a judge or jury.

The fact that either party may appeal for any reason and be granted a wholly new trial at first appears to guarantee that trials will almost always follow arbitrations, since few litigants are wholly satisfied with the results of an arbitration. This impression is incorrect for two reasons. First, the additional step of a trial entails the risk that any advantage gained at arbitration will be erased at trial — even an advantage that did not completely satisfy the appealing party. Second, the statute provides that attorneys' fees can be assessed against a party who appeals an arbitration and fails to improve his position at trial.[122] Only those fees

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[118] *Compare Tjart*, 107 Wn. App. at 899-901 (Division One) (mandatory arbitration of claims under Washington Law Against Discrimination does not violate Washington public policy and is enforceable), *with Young v. Ferrellgas, L.P.*, 106 Wn. App. 524, 528-32, 21 P.3d 334 (Division Two 2001) (mandatory arbitration of statutory whistleblower and overtime claims violates Washington public policy and is unenforceable). *See also Mendez*, *supra* (statutory consumer protection act claims are subject to arbitration).

[119] WASH. REV. CODE § 7.06.020.

[120] MAR 8.1.

[121] WASH. REV. CODE § 7.06.050.

[122] *Id.* § 7.06.060.

incurred after the request for a trial *de novo* may be assessed.[123] Attorneys' fees can be considerable, and the risk that one may have to pay the attorneys' fees of one's opponent counsels caution in appealing an arbitration award.

§ 10.2.10

J. IMPACT OF ARBITRATION AGREEMENTS ON CLASS ACTIONS

As addressed in more detail in Chapter 9 of THE NATIONAL EMPLOYER® on class action litigation, there has been a noticeable rise in the volume of employment-related class action lawsuits in the United States. How individual mandatory arbitration agreements will impact class action claims is not yet clear.

In 2003, the U.S. Supreme Court in *Green Tree Financial Corp. v. Bazzle*[124] held that an arbitrator must decide whether class action arbitration in a consumer lawsuit is permitted under a mandatory arbitration agreement. The Court ruled that whether or not the contracts in question forbid class arbitration is a disputed issue of contract interpretation, and that such a dispute must be decided by an arbitrator. Although *Bazzle* related to a consumer litigation, the decision may have a substantial impact on the arbitration of statutory discrimination claims as well as other employment arbitrations. If *Bazzle* is applied to employment-related mandatory arbitration agreements, it could mean that the arbitrator has the power to decide whether or not the agreement to arbitrate employment-related claims precludes class actions.[125] State appellate courts in California[126] and New York[127] have since applied *Bazzle*'s rationale to employment arbitrations.

In 2005, the California Supreme Court held in *Discover Bank v. Superior Court*[128] that certain class action waivers in consumer contracts of adhesion are unenforceable under California law, and that the FAA does not preempt this conclusion. However, *Discover Bank*'s holding was expressly limited to the circumstances before the court, where the damages that could have been recouped by the plaintiff-consumers were so miniscule that the only effective method for the consumers to recover any damages was via class action.[129] This holding suggests a basis for distinguishing employment-related claims because, in contrast to the claims at issue in *Discover Bank*, employment-related lawsuits often result in high median awards and attorneys' fees.

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[123] MAR 7.3.

[124] 539 U.S. 444 (2003).

[125] Note that the result may be different under state law. For example, in California, the judge rather than the arbitrator must determine class action issues. *See, e.g., Blue Cross of Calif. v. Superior Court*, 67 Cal. App. 4th 42, 62-63 (1998).

[126] *Yuen v. Superior Court*, 121 Cal. App. 4th 1133, 1143-44 (2004) (the arbitrator should decide whether the parties' arbitration agreement, as part of an employment contract, permits consolidation of two individual's arbitration proceedings); *Garcia v. DIRECTV, Inc.*, 115 Cal. App. 4th 297, 302 (holding that the arbitrator should determine whether an arbitration provision forbids class arbitrations).

[127] *Flynn v. Labor Ready, Inc.*, 775 N.Y.S.2d 357,361 (N.Y. App. Div. 2004) (holding that the question of whether class action employment dispute may be submitted to arbitration under the parties' arbitration agreement is for the arbitrator to decide).

[128] 6 Cal. 4th 148 (2005).

[129] *d.* at 162-63.

The court, however, left undecided the issue of the enforceability of a provision in the agreement stating that Delaware law would apply to any controversy between the consumer and the bank. On remand, the California Court of Appeal held that the Delaware-law provision was valid and effective, and that under Delaware law, the class action waiver at issue was enforceable.[130]

Following the *Bazzle* decision, AAA announced that it will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if: (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules; and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.[131] In contrast, JAMS announced in November 2004 that it will not enforce class action waiver clauses in consumer arbitrations. JAMS's policy likely extends to employment cases as well.[132] In 2005, JAMS has reversed course and withdrew this policy in an effort to reaffirm its commitment to neutrality.[133]

In an earlier case, *Green Tree Financial Corp. v. Randolph*, the Supreme Court was presented, but declined to resolve, the argument that policies embodied in statutory class action lawsuits may trump the provisions of the FAA.[134] On remand from the Supreme Court, the Eleventh Circuit in *Green Tree* held that an arbitration agreement is enforceable and precludes the pursuit of statutory claims as a class action.[135] In coming to this conclusion, the Eleventh Circuit relied on the Third Circuit's resolution of a similar issue in *Johnson v. West Suburban Bank*[136] in which the court held that the right to pursue or participate in class action relief is merely a procedural one, conferred by Rule 23 of the Federal Rules of Civil Procedure, that may be waived by signing an individual arbitration agreement. The Third Circuit confirmed its position in *Lloyd v. MBNA America Bank N.A.*[137] Likewise, the Ninth Circuit has held in an unpublished memorandum that employees who knowingly sign an agreement to arbitrate statutory claims under the FLSA abandon their right to enforce those claims as part of a class action.[138] Under these decisions, the person with an individual, mandatory arbitration agreement may not be a proper class representative for purposes of pursuing a class action lawsuit or even a proper participant in the class. From a different perspective, some advocates have suggested that it may be possible to pursue classwide relief through arbitration procedures. Certainly it appears possible for parties to mutually agree to the handling of multiple-claimant disputes through a consolidated arbitration proceeding. In any event, there is clearly a continuing need for the courts to clarify these and many other issues related to class-type remedies and their relationship to arbitration in the near future.

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[130] *Discover Bank v. Superior Court*, 134 Cal. App. 4th 886 (2005).

[131] American Arbitration Association, *American Arbitration Association Policy on Class Arbitrations*, *available at* http://www.adr.org/Classarbitrationpolicy (last modified July 14, 2005).

[132] JAMS, *JAMS Takes Steps To Ensure Fairness In Consumer Arbitrations*, *available at* http://www.jamsadr.com/press/show_release.asp?id=187 (last modified Nov. 12, 2004).

[133] JAMS, *JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy*, *available at* http://www.jamsadr.com/press/show_release.asp?id=198 (last modified Mar. 10, 2005).

[134] 531 U.S. 79, 92 n.7 (2000).

[135] *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001).

[136] 225 F.3d 366, 368 (3d Cir. 2000).

[137] 2002 U.S. App. LEXIS 1027 (3d Cir. Jan. 7, 2002).

[138] *Horenstein v. Mortgage Mkt., Inc.*, 2001 U.S. App. LEXIS 9267 (9th Cir. May 10, 2001).

§ 10.3

III. PRACTICAL RECOMMENDATIONS FOR MANAGING ARBITRATION PROGRAMS

§ 10.3.1

A. LITTLER'S TIPS FOR PRESERVING THE BENEFITS OF ARBITRATION IN LITIGATION

Many of the benefits of arbitration are lost to the employer if the employer must first go to the expense of engaging in extensive litigation in order to enforce the arbitration agreement. In some cases the employer may even inadvertently waive its right to the benefits of arbitration by its conduct in the course of responding to an improperly filed lawsuit. In the event an employee pursues a lawsuit and refuses to honor his or her arbitration agreement, and the employer is forced into litigation, there are a number of key steps that employers should take in order to preserve and properly enforce the benefits of the arbitration agreement.

1. Employer should avoid initiating discovery or otherwise purposely availing itself of the benefits of litigating before a court when it does not have to do so. A number of cases have indicated that using the court to pursue affirmative relief, other than compelling arbitration or seeking dismissal of the litigation, can result in waiver of a claim that arbitration is the exclusive forum for relief.[139]
2. Employer should plead as an affirmative defense that the arbitration agreement's selection of arbitration is the exclusive forum for resolution of the dispute at issue.
3. Employer should consider the possibility that the employee may have repudiated the benefits of arbitration and thereby forfeited the right to pursue arbitration. As explained further below, this could result in the complete dismissal of the case.

As noted above, dispositive summary judgment arguments may be available where the employee has completely rejected arbitration as a means of resolving the dispute. Suppose an employer enters into a mandatory predispute arbitration agreement with one of its employees. The employee, despite the agreement, brings an employment discrimination or wrongful discharge case against the employer in court in breach of his obligations under the agreement to arbitrate. What can an employer do? Traditionally, employers have moved to compel arbitration under a state statute or the Federal Arbitration Act. However, employers are not necessarily limited to a remedy that simply shifts the forum of the dispute from court to an arbitration panel, particularly if the employee has repudiated the duty to arbitrate.

Arbitration is a creature of contract, and therefore contract law principles apply. Suppose a homeowner contracted with a painter to paint his house. The homeowner agrees to pay the painter $1,000 for the job. If the painter does not show up and refuses to paint the house, he is in breach. Does the painter thereafter have the right to demand that he paint your house? No.

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[139] *See Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988); *Christensen v. Dewor Devs.*, 33 Cal. 3d 778, 781-82 (1983); *Davis v. Blue Cross of N. Cal.*, 25 Cal. 3d 418, 425-26 (1979).

Once his duty to paint the house is repudiated, he cannot retract the repudiation and thereafter exercise the right to paint the house that the contract had conferred.

Similarly, if an employee refuses to arbitrate and brings an action in court, he evinces the intent not to arbitrate his dispute. An employer defendant has the right to assert the failure to arbitrate as an affirmative defense to the litigation. And, under appropriate circumstances, the employer may thereafter prevent the plaintiff from taking another bite at the apple and seeking arbitration as a second remedy once the court case is dismissed. This approach has been successful in California in several cases handled by Littler Mendelson.[140] In each case: (1) an employee sued a former employer; (2) the employee had signed a mandatory predispute arbitration agreement but refused to arbitrate the case; (3) the employer demanded in writing that the lawsuits be dismissed because the plaintiffs had brought them in a forum forbidden under the arbitration agreement; and (4) the plaintiffs refused, also taking actions that demonstrated they were refusing to arbitrate despite the employers' admonitions that they must do so.

The 24 Hour Fitness and *Scott Specialty Gases* courts held that the plaintiffs' refusal to arbitrate constituted a repudiation of the arbitration agreement. Because the employer was entitled to assert arbitration as an affirmative defense to the court action, the cases were dismissed. In light of the repudiation, the courts also held that the plaintiffs had nowhere else to go. Like the painter in the hypothetical example referred to above, the plaintiffs could not revive their right to arbitrate through a belated demand. The cases then were concluded. Littler Mendelson believes that the California approach may successfully be exported to other states. This approach is based on bedrock principles of contract law, widely, if not universally, recognized.

§ 10.3.2

B. COMPARING ADVANTAGES & DISADVANTAGES OF ARBITRATION

Employers are encouraged to consider both the advantages and disadvantages of mandatory arbitration carefully before implementing an arbitration program. Mandatory arbitration is not for every employer. Some employers will find that they prefer the traditional courtroom forum. To help employers make this decision, the most prevalent advantages and disadvantages are explained below.

Advantages

Reduced Litigation Costs

Arbitration is usually a less costly method of resolving problems in the workplace than traditional litigation. In a study on court-supervised arbitration, the Institute for Civil Justice of the Rand Corporation concluded that arbitration resulted in a 20% cost savings to the parties on average. It should be noted that the employer must typically pay the arbitrator, and that the arbitrator's fees may be several thousand dollars or more.

[140] *See 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199 (1998); *Martinez v. Scott Specialty Gases*, 83 Cal. App. 4th 1236 (2000).

Faster Resolutions

Traditional litigation is a time-consuming process. Litigation, including an appeal, can range from two to eight years before a final decision is rendered. Arbitration typically offers faster resolutions. The Institute for Civil Justice of the Rand Corporation concluded that the average processing time from the initial complaint until an arbitrator's decision is about 8.6 months.

Greater Privacy

Although there is an obligation for a certain degree of public distribution of an arbitration award, there is no question that arbitration offers a greater potential for privacy than the public courtroom. Traditional litigation can be highly publicized, depending upon the nature of the dispute and the parties involved. Court filings, unless filed under seal, are public records. In contrast, having a matter resolved by a neutral arbitrator is significantly more private and focused.

Arbitrator Replaces Jury

The jury is a prominent, but unpredictable, feature of wrongful discharge and civil rights litigation in the United States. Juries generally have a very good understanding of workplace issues. However, a jury often identifies very closely with the employee-plaintiff precisely because most jurors are employees. Moreover, juries in employment cases often base their decisions on how they would want to be treated by an employer, rather than the actual legal standard which is usually much more stringent. Likewise, jurors often feel that a large employer can afford to help a struggling employee or former employee whether the employer is really liable or not.

Increased Predictability

An arbitrator's previous decisions in prior similar disputes, when available, can provide insight into how he or she decides a case. There are many sources for arbitration decisions, including Labor Arbitration Reports, Labor Arbitration Awards, and the Labor Arbitration Index. Also, the California Code of Civil Procedure now requires the arbitrator to disclose the names of prior or pending cases in which the arbitrator served or is serving and the results of each case. Such disclosures are also part of the AAA rules or can be requested as part of the selection process according to the arbitration procedures provided for in the agreement. The ability to review and study previous arbitration decisions provides increased predictability in the decisionmaking process. On the other hand, there is very little predictability with a jury. It is impossible to predict with certainty how a jury, composed of a random group of six to twelve people, may view and resolve a dispute.

Enhanced Settlement Potential

Arbitration may encourage resolution without litigation. The system is more predictable with regard to time, cost, and likely result. Consequently, it is easier for both sides to put a value on the case and resolve the matter quickly.

Possible Insurance Discount

The insurance industry has been reviewing for quite some time coverage of workplace disputes such as wrongful termination and employment discrimination. In writing policies to cover such disputes, the industry has begun considering significant discounts to companies that adopt alternative dispute resolution techniques. Insurance companies are enthusiastic about this new technique because the processing time and litigation costs will be significantly reduced, and the predictability of resolutions will increase. Thus, an insurance company may

be more likely to provide coverage for such workplace disputes if a company has adopted alternative dispute resolution techniques.

Disadvantages

Increased Usage

If an arbitration policy is adopted, the company may very well be forced to defend against a greater number of claims. Employees may utilize arbitration more frequently because of reduced costs. The employer has to consider whether the time and cost of possibly handling more claims offsets the savings the company would achieve by avoiding judicial litigation of fewer claims.

Summary Judgment/Other Dispositive Motions

It is generally more difficult for an employer to have a case dismissed on a dispositive motion such as a motion for summary judgment or motion to dismiss in arbitration than it is in court. Because of this, it may be more difficult to settle cases which are brought before an arbitrator, because plaintiff's attorneys believe that they will have their case heard before a trier of fact. Motions filed can also be expensive as the employer typically must pay for the arbitrator's time.

Reduced Appellate Rights & Options

Judicial review of an arbitration award is very limited. Where an arbitrator makes a mistake or error of law, such an error normally is not grounds for a court to vacate the award. However, if a jury makes a mistake of law, this mistake can often be corrected in the appellate process. A large number of cases are overturned or remanded where there have been procedural improprieties in the trial process. In contrast, courts generally defer to an arbitrator's decision and will not overturn an arbitration award except in very limited circumstances. Thus, if the parties disagree with the outcome of the case or the arbitrator's legal analysis, there is a limited basis on which such award can be challenged. An arbitration award is more final and binding than a jury award. Obviously, this can be either an advantage or a disadvantage to arbitration depending on the arbitrator's decision.

Employee Resistance & Skepticism

Employees may resist the implementation of this new system and feel that their individual rights are being eroded by the introduction of arbitration into the workplace. Indeed, if employees perceive that the system erodes individual rights, it could have a negative effect on employee morale. To avoid this disadvantage, employers should explain the process and how the same individual statutory rights and remedies available in court are available in arbitration (in other words, only the forum has changed).

Potential for Unionization

If the company is nonunion and decides to implement an arbitration system, there is the potential that a union could seek to organize the employees, asserting that arbitration is a very complex process requiring employee representation. On the other hand, if the company is nonunion and one of the reasons the employees might consider joining a union is to gain access to arbitration, the employer can demonstrate unionization is unnecessary by voluntarily implementing an arbitration policy and system.

Legal Uncertainty

There are some legal uncertainties in the application of an alternative dispute resolution technique. The legality of the system will depend on the current state of the law, the state in which the company is located, and the particular procedures adopted. An arbitration agreement may be subject to attack by employees, the EEOC, or other groups or agencies. Employers are strongly advised to consult with legal counsel before implementing arbitration policies and procedures.

Presented above are the major advantages and disadvantages of compulsory arbitration. Each company can add to both lists based upon its particular circumstances. Both advantages and disadvantages should be carefully considered before implementing an arbitration procedure.

§ 10.3.3

C. CHECKLIST FOR DECIDING WHETHER TO ADOPT A MANDATORY ARBITRATION POLICY

A simple review of advantages and disadvantages of arbitration is only the first step in deciding upon whether to adopt an arbitration program. Before adopting a policy requiring arbitration of employment disputes, an employer should also carefully analyze whether adoption of such a policy for its nonunion employees makes sense economically and in terms of current employee relations. Many factors may be relevant to this analysis. Some of the factors that should be considered are the following:

- **What is the company's past history with respect to employment disputes?** If the company has had one or more large judgments against it in wrongful termination or discrimination actions, adopting an arbitration policy is more likely to be beneficial than for a company which has never had an employment-related lawsuit filed against it.
- **Has the company been involved in litigation?** Litigation typically requires the efforts of a wide range of employees and managers to collect documents, attend depositions, and otherwise assist in the litigation process. Although the same discovery techniques are available in arbitrations, discovery is often less extensive and contentious. Litigation is also typically more costly than arbitration.
- **Are there special factors, such as foreign ownership or management of the company, that may make the company especially leery of having an employment case with a local plaintiff go to the jury?** If management witnesses are not fluent in English or are not part of the community, their credibility may be undermined before the jury. Moreover, if the company has a bad reputation in the community, the jury may be biased. Arbitration could allow such an employer to avoid both community bias in the decisionmaking process and unwelcome publicity.
- **What is the company's exposure to punitive damages?** A large company, with substantial assets and income, is a target for punitive damages. Increased exposure to punitive damages is an argument in favor of arbitration. An arbitrator is more likely to recognize that while large companies may have substantial assets, they also have a significant number of employees, and, accordingly, an arbitrator is more likely to balance all of the relevant factors in deciding the amount of the award and whether to award punitive damages.

- **Is image important?** Many employers are very concerned about the impact adverse publicity has on their image. For example, a sexual harassment lawsuit that may be totally frivolous and ultimately dismissed may receive two or three days of publicity, giving the company an undeserved negative reputation. Arbitration promises to be faster, and quieter, and to entail less media exposure than traditional litigation.
- **Where is the company located?** If the company is located in an area where large jury awards are typical or the judges are known to favor the plaintiff, arbitration will typically be a more predictable and less costly forum.
- **Is the company expecting staffing changes?** If the company has had a very stable operation for over 20 years — rarely a termination, seldom a layoff, relatively few workplace complaints of a serious nature — the attractiveness of this system lessens. If, on the other hand, there is a lot of turmoil in the workplace or the company expects to lay off or terminate many employees in the future, then the company may be a candidate for adopting an arbitration system.
- **What else is going on in the employer's relations with its employees?** If the company is in the midst of a union organizing campaign, it would be foolish to try to implement an arbitration policy. Employees might perceive such a move as an effort to take away existing rights, which could backfire for the employer in a representation election or even lead to unfair labor practice charges. On the other hand, if the company is in the process of publishing a new employee handbook, if it is about to implement an improved benefits package, or if employee relations are generally good, the time may be opportune to implement an arbitration policy. Many companies adopt arbitration agreements only for new hires or on an ongoing basis.
- **Has the company had higher-than-average legal costs?** Legal costs include attorneys' fees, as well as management time lost during litigation. During litigation, management's time, energy, and resources are focused on the litigation and away from the business enterprise. As a result, there is an enormous hidden cost to the company. If the company is facing this problem, then it is a likely candidate for an arbitration system.
- **Will the time and cost of handling more claims offset the savings the company would achieve by avoiding judicial litigation of fewer claims?** If an arbitration policy is adopted, the company may very well have more claims filed, because it should be cheaper and faster to arbitrate a dispute than for an employee to find a lawyer and go to court.
- **Will the employer be disadvantaged by the relatively simpler arbitration proceedings?** While an arbitration procedure may provide for motions for summary judgment to get rid of meritless claims prior to the arbitration hearing, it is likely to be much harder to win such a motion before an arbitrator. Most arbitrators will be inclined to simply hear the evidence and rule after the hearing.
- **Is the company willing to litigate the propriety of the arbitration agreement?** At least initially, an employer may have to defend its arbitration agreement in court by filing motions to compel arbitration to prevent employees from pursuing claims in court.

§ 10.3.4

D. CONSIDERATIONS IN DRAFTING ARBITRATION AGREEMENTS

§ 10.3.4(a)

Drafting Issues

The next step is to design the arbitration program itself. The core of the program will be the arbitration agreement. In drafting the agreement, the employer should consider the following issues:

- **Which employees will be covered?**
  - Will only new employees hired after the arbitration policy is in place be subject to its provisions?
  - Will the policy cover only managers or supervisors, or only rank-and-file employees? Or will it apply to all employees?
  - If the employer's operations are multi-state, careful consideration should be given to the geographical application of the policy, as well as applicable substantive and procedural law (see below). Selection of a sample grouping of employees might also provide the employer with a first experience with arbitration before making it applicable to all employees. On the other hand, selective application may create a conflict among employees and the appearance of unfair treatment between groups of employees.
- **What types of claims or disputes will be subject to arbitration?**
  - Will only claims based on termination of employment, discrimination, or harassment be arbitrable, since such claims generally present the greatest monetary risk, or should all employment-related disputes be arbitrated?
- **Which waivers should be included?**
  - An express waiver of right to jury or court trial for both parties should normally be included.
  - Does the employer want to waive jury trial on all claims it could assert against the employee? Does it want to exclude certain types of disputes like trade secret injunctive actions from arbitration?
- **What law governs the enforceability of the arbitration agreement?**
  - If the Federal Arbitration Act cannot be used to enforce the agreement because it involves a transportation worker, is there an appropriate state law which governs enforceability?
- **What time limits should govern bringing any claim to arbitration?**
  - In general, the same limitations period applicable under state or federal law should apply in arbitration. Imposing shorter limitations periods can be risky and should not be implemented without consulting experienced employment counsel.

- **How does the employee or employer request arbitration?**
  - At a minimum, the request should be in writing and contain a short statement of the claim. Drafting a specific "request for arbitration form" is recommended; however, its use should be optional.
- **To whom should the request be made?**
  - Generally, the request should be made to the employer. The person making the request should identify his or her name, title, address of company. The request can be made by hand, fax, or mail.
- **Will the arbitration agreement require the parties to attempt to mediate their dispute informally with the assistance of an outside neutral party before proceeding to arbitration?**
  - If the parties are inclined to resolve the issue amicably, this can be a cost-effective way of resolving the dispute early on. Early evaluation or mediation of the claim can add to the overall costs, however, if the efforts at an early amicable resolution are unsuccessful.
- **What procedures will govern the conduct of the arbitration hearing, any prehearing discovery or motions, and the enforceability of the arbitrator's award?**
  - The more closely the employer's arbitration procedures follow or are modeled on the statutes providing the cause of action, or on arbitration rules which have been tested in litigation (such as the NYSE rules or the AAA rules), the more likely they are to be viewed as fair by a court. To assist in this analysis, the AAA rules are discussed at greater length below. Another good option is to conduct the arbitration in accordance with the Federal Rules of Civil Procedure.
- **Is the arbitrator expressly authorized to award injunctive relief?**
  - In some states express authorization may be required.
- **What restrictions, if any, are there on the arbitrator's authority to award remedies?**
  - The more restricted the remedy as compared with what the employee might obtain in court on the same claim (for example, limits on recoverable damages, no punitive damages), the more vulnerable the entire agreement may be to attack as unconscionable or contrary to public policy. Alternatively, the employer may want to limit the arbitration to only those remedies that could be awarded in court to take advantage of statutory caps and other guidelines. Generally, arbitration agreements should limit the arbitrator's authority to allow for the same remedies that would be available in court in order to avoid challenges to the agreement.
- **How will the costs of arbitration, including the arbitrator's fee, be allocated?**
  - An agreement to split arbitration fees can operate to nullify an otherwise enforceable agreement to arbitrate, particularly if the employee does not have sufficient resources to share the costs. Typically, the employer must pay the arbitration costs.

- **Should arbitration be mandatory, or only optional?**
  - Will the employee have the option to opt out of the arbitration? And, if so, what time-frame will be set for exercising the opt-out?
- **Should the arbitrator be empowered to rule on motions for summary judgment or motions to dismiss?**
  - If so, what rules should govern the decision of the motion (*e.g.*, the Federal Rules of Civil Procedure)?
- **How will the arbitrator be selected?**
  - This aspect is becoming increasingly important because of recent challenges to arbitration based on the premise that arbitration panels are biased in favor of employers. The allegations charge that the panels are unfair because they are stacked with lawyers who primarily represent employers in employment disputes; that they are more likely to side with the employer who will be a repeat player and likely to select the arbitrator again in future disputes; that a vast majority are white men; and that the panelists do not represent a cross-section of society. Generally, the favored approach is to provide a list of neutral arbitrators from an organization such as the American Arbitration Association and then allow each side to strike names in turn until an arbitrator is chosen.
- **How will the arbitration award be enforced?**
  - It is generally advisable to state that the award may be enforced by judgment of a court upon motion of either party. The FAA sets forth procedures and specific bases upon which a party can seek to confirm, modify and/or vacate an award.

§ 10.3.4(b)

Arbitration Rules and Procedure

Any agreement to arbitrate employment claims must, of course, comply with the procedural requirements of the FAA. In addition, employers may, and often do, adopt additional rules such as those promulgated by the AAA or JAMS/Endispute, a private organization.

Many courts have approved of the procedural rules provided by the AAA in its National Rules for the Resolution of Employment Disputes, the current version of which became effective January 1, 2004. If the employer does not incorporate AAA's rules, AAA will reserve the right to refuse to administer the arbitration unless it has approved the alternative rules and procedures in advance. Consequently, many employers have chosen to incorporate AAA's rules by reference into their arbitration provisions. The following list summarizes some of the more important rules of the AAA:

- Section 4 provides the manner in which an arbitration will be initiated and lists specific requirements of an initial Demand. The Demand must include the names, addresses, and telephone numbers of the parties, a brief statement of the dispute, the amount in controversy, the remedy sought and the hearing locale requested. The employer must respond to the Demand within ten days after the date of the letter from the AAA acknowledging receipt of the Demand.
- Section 12 describes how the arbitrator will be appointed and states that the parties will be given a list of names and will rank each name so that an arbitrator

may be selected. If the parties cannot agree on an arbitrator, the AAA will appoint one.

- Section 17 allows the arbitrator to exclude any witness, other than a party, from the hearing during testimony of other witnesses.
- Section 18 provides for confidentiality of the hearing.
- Section 24 states that the arbitrator may direct the order of proof and gives the arbitrator authority to subpoena witnesses or documents.
- Section 27 allows the arbitrator to take any necessary interim measures to preserve the property involved in the dispute.
- Sections 34 and 35 govern the arbitrator's award. These sections require the award to be in writing and submitted no later than thirty days from the close of the hearing, unless otherwise specified by law or agreed upon by the parties. These sections also allow the arbitrator to award any remedy available in court and to award or assess arbitrator fees, expenses, and compensation, as well as attorneys' fees as part of the remedy.

Substantially similar rules are provided by JAMS/Endispute. The JAMS rules require the parties to make every effort to conclude the document and information exchange process including witness names and experts within 14 calendar days after all pleadings or notices of claims have been received and not later than 14 calendar days before the arbitration hearing. The JAMS rules allow each party to take at least one deposition. The arbitrator has authority to order the production of any additional information. The JAMS rules also allow for a motion for summary disposition upon the agreement of the parties. JAMS also provides for an optional appeal process. Legal counsel should be consulted before implementation of any such substantive rules. JAMS has taken the position, however, that it will not administer arbitration agreements prohibiting class action arbitrations.

§ 10.3.4(c)

Practical Steps for Implementation of an Arbitration Program

Finally, the employer should use a pre-planned implementation process. This process will often differ depending upon the form of arbitration agreement at issue. For example, some programs will use individually executed agreements as part of a new benefit package. Other programs will distribute agreements in conjunction with new employee handbooks. Others may simply phase in arbitration by making it only applicable to new hires. Some basic steps to consider for implementation of a successful ADR arbitration program are as follows:

- Become knowledgeable about Alternative Dispute Resolution (ADR) options and procedures.
- Involve upper management in decisionmaking and implementation.
- Consider a pilot program.
- Develop an ADR policy.
- Develop implementation documentation.
- Consult experienced employment law legal counsel prior to implementation.
- Train management on the program.

- Educate employees about ADR and the company's arbitration procedures.
- Give employees sufficient information and time to make a decision before requiring acceptance of a mandatory arbitration agreement.
- Monitor, review, and keep current on alternative dispute resolution developments.
- Investigate the potential for insurance discounts.
- Ensure that there is valid consideration on the part of the employee for entering into the agreement. For instance, requiring an applicant to sign an arbitration agreement as a condition of employment is generally valid consideration, as is conditioning a salary increase or promotion on the signing of such an agreement. Questions regarding what can be considered valid consideration in a particular jurisdiction should be directed to experienced employment counsel.

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CHAPTER 15

TRAINING REALLY IS THE LAW: THE RISE OF MANDATORY TRAINING

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CHAPTER 15

TRAINING REALLY IS THE LAW: THE RISE OF MANDATORY TRAINING

§ 15.1

I. RECENT TRENDS & DEVELOPMENTS

§ 15.1.1

A. INTRODUCTION

In 2005, nearly every employer in the United States has mandatory employment law training obligations. Thus, the evolution of employment law training from a "nice idea" to legal imperative is now complete. Training is now required on topics such as harassment, business ethics, whistleblower protection and safety. The mandate goes beyond the mere provision of training as quality standards are also obligatory. Such intensive training on such wide ranging topics will affect nearly every interaction an organization has with its employees.

It would be easy to narrowly focus on these relatively new mandates. Yet, wise employers were conducting employment law training years before the mandates were passed. Why? These employers realized that the investment in employment law training is one that pays for itself through lower litigation costs and less time spent dealing with vexing complaints.

This section summarizes the more recent laws that make training obligatory and the business reasons that make training advisable.

§ 15.1.2

B. MANDATORY TRAINING

§ 15.1.2(a)

California's New Mandatory Harassment Training Requirement – A First Year Review

In 2004, California joined Connecticut and Maine in requiring that private employers train their managers on preventing workplace harassment, especially sexual harassment.[1] The California law, Assembly Bill 1825 ("A.B. 1825"), goes beyond the relatively straightforward requirements of these other states by significantly regulating the subject matter, quality, and delivery method of training.

Since A.B. 1825 became law in 2004, employers have busied themselves with meeting the December 31, 2005, deadline. These efforts have been taken in a vacuum of regulatory information about what the law requires, a particularly uncomfortable situation for employers trying to meet a legal mandate.

To provide clarity to employers on the specific requirements of the harassment training law, the Fair Employment and Housing Commission (FEHC) appointed a Blue Ribbon Advisory Committee ("Advisory Committee") to create regulations for A.B. 1825.

To draft the regulations, the FEHC recruited members for the Advisory Committee who could provide excellent guidance and expertise on harassment and discrimination prevention, as well as employment law training. As a recognized leader in both fields, Garry Mathiason, a Littler Mendelson shareholder and Chair of the firm's Corporate Compliance Practice Group, was appointed to the Advisory Committee.

The draft regulations prepared by the Advisory Committee and the FEHC were released on December 16, 2005, and are available online at http://www.fehc.ca.gov/pub/reg.asp.

California employers with 50 or more employees should keep tabs on the draft regulations now working their way through the administrative process, and make their concerns known within the comment period. The draft regulations specify 11 elements of required training — including two which do not appear directly in the applicable statute[2] — and address many more issues, questions and concerns.

The regulations are open for public comment until February 10, 2006, and such comments may be sent, faxed or e-mailed to the FEHC. Public hearings will be held in San Francisco on February 1, 2006, and in Los Angeles on February 10, 2006. Following the public comment period, the FEHC reviews the submissions and may make further modifications to the proposed regulations. Before becoming final, the FEHC will provide an additional 15 days for comments on the proposed modifications or new material. Depending on the amount of time the FEHC takes for internal review, California employers can expect the regulations to become effective in second or third quarter of 2006. Progress of the regulations can be tracked at www.fehc.ca.gov.

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[1] CAL. GOV'T CODE § 12950.1. The text of California's Assembly Bill (A.B.) 1825 is available at http://www.leginfo.ca.gov.

[2] *Id.*

Employers must realize that these draft regulations are just that — drafts. When completed, the final regulations will be codified at California Code of Regulations section 7288.0, under a new heading "Harassment Training and Education" (text available when posted at www.calregs.com). The final regulations are likely to change and provide even greater clarity for employers.

§ 15.1.2(b)

Do State Mandatory Training Laws Create a De Facto National Standard?

As of this writing, only California, Connecticut, and Maine have statutes mandating workplace harassment training. Do the laws of these three states create a national standard? The limits of prognostication demand the well worn answer "that only time will tell." However, proactive employers with any operations in either California or Connecticut would be wise to act as if the answer is a solid "yes."

These laws will apply to many more organizations than employers first anticipated. The regulatory bodies of California and Connecticut have taken the position that the laws apply to organizations with any in-state operations and at least 50 employees anywhere. The laws also have an extra-territorial effect. Both require training of out-of-state supervisors who manage in-state employees.

Does an employer expose itself to liability unnecessarily in other states where it has employees, by not training them as well, notwithstanding, the lack of state requirements? Employers must also consider the message sent to employees, judges and juries in other states if training is limited to employees only in one state. A skilled plaintiff's counsel could introduce the fact that a company only trains in states that require it, as some evidence that the company views the issue as a narrow compliance matter only, and not as a subject that deserves proactive attention and prophylactic measures. Imagine the following situation:

> An employer with multiple locations across the country implements a robust training program for its California and Connecticut supervisors. A serious harassment incident arises in the organization's Massachusetts location. The allegations reference harassing behavior that was directly addressed in the California training program, but Massachusetts supervisors did not receive the same training. Imagine now that you are the plaintiff's attorney in this case, criticizing the employer's lack of reasonable efforts to prevent and correct workplace harassment. In this instance, a narrowly focused, localized training approach actually creates problems for the employer. The problems are particularly severe in states, like Massachusetts, where there is no cap on punitive damages. A difficult case could be made worse by this sort of argument by plaintiff's counsel. "I thought I'd raise this issue for your consideration given the unlimited risks in Massachusetts, that the company could not provide the protection for your neighbors in Massachusetts that it offered its employees in California and Connecticut — the minimal amount of training required in those states." Accordingly, one national training policy is highly recommended.

It is difficult to believe that other states are far behind California, Connecticut and Maine in making training "mandatory," especially when some of those states already have statutes that "encourage" such training. In 2000, the authors of this chapter publicly predicted that by 2010, harassment and discrimination training would be statutorily required. The California

law is not an aberration; it is part of a long developing trend. It is highly likely that other states will follow, and that the California, Connecticut and Maine statutes will be amended to explicitly cover all forms of prohibited harassment and discrimination.

§ 15.1.2(c)

Training as a Mandatory Part of the "Faragher/Ellerth *Defense" to Workplace Harassment & the* "Kolstad *Defense" to Punitive Damages*

State Supreme Courts and Lower Federal Courts Take the Lead in Emphasizing Training

During 1998 and 1999, the U.S. Supreme Court's triptych of decisions in *Faragher, Ellerth,* and *Kolstad* put employment law training on the agenda of any human resources professionals looking to avoid litigation. While the U.S. Supreme Court has since been relatively quiet on the subject, other federal courts and state supreme courts have taken the lead. These courts show an emerging trend that training may be an essential part of establishing an affirmative defense in harassment litigation or punitive damages in discrimination litigation.

Example of Training Being a Necessary Part of an Affirmative Defense to Harassment Litigation

Federal and state courts in certain jurisdictions have held that training managers on preventing workplace harassment is an essential element in establishing the *Faragher/Ellerth* affirmative defense.[3] The line of cases from these courts hold that merely having an harassment policy is not enough to satisfy *Faragher/Ellerth*. In addition, employers must show the following:[4]

- training for the company's supervisors regarding harassment;
- an express antiretaliation provision; and
- multiple complaint channels for reporting the harassing conduct.

The decision in *Soto v John Morrell & Co.,* shows just how stringent courts have become in requiring the first prong (training) of the above stated test. In that case, the employer promulgated its harassment policy in a separate document in both English and Spanish. All employees received a copy of the policy at orientation, and annually thereafter, and were required to sign an acknowledgement. This acknowledgement stated that the employee had received the policy and gave the company's specific contact information for its Equal Employment Opportunity (EEO) officer. The personnel and training departments displayed large posters detailing the company's antiharassment policy. Finally, the employer's president sent a letter to all employees, including the plaintiff, reminding them that harassment was against company policy.

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[3] *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972 (8th Cir. 2005); *Montero v. Agco Corp.* 192 F.3d 856 (8th Cir. 1999); *Shaw v. Autozone, Inc.* 180 F.3d 806, 811-12 (7th Cir. 1999); *Hawkins v. Groot Indus., Inc.*, 2003 U.S. Dist. LEXIS 5051 (N.D. Ill. Mar. 31, 2003); *Soto v. John Morrell & Co.,* 285 F. Supp. 2d 1146 (N.D. Iowa 2003).

[4] *Soto,* 285 F. Supp. 2d at 1162. *See also Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1181 (9th Cir. 2001) (training part of a "a paradigm of the 'reasonable efforts'" taken by the employer).

This proactive, consistent approach to preventing workplace harassment was impressive. Yet, it failed to include one essential element — manager training. Managers were required to be trained yearly but that requirement apparently went unfulfilled. The Director of Human Resources did speak with managers yearly on the subject, claiming this was "training." His testimony fell apart upon examination by the plaintiff's attorney where the director admitted that he had given managers no tools or script on how to train employees.[5]

Based on this testimony, the employer could not verify that he had provided training to the plaintiff's manager. Thus, the court denied the employer's request for summary judgment on the affirmative defense and let the case proceed to trial.[6]

The New Jersey Supreme Court delivered possibly the most emphatic statement about the need for employment law training.[7] In that case, Maria Gaines, a Corrections Officer, alleged that her shift supervisor grabbed her face and kissed her against her will while the two were alone in the jail. Although Gaines reported this misconduct to one of her supervisors, the supervisor did not report this incident to his superiors because the county had not provided him with any antisexual harassment training. (In fact, several corrections officers testified that they had not received any training concerning the county's sexual harassment policy.) Gaines' allegations were ultimately brought to the attention of the county's Director of Personnel as a result of Gaines' deposition testimony in an unrelated case. Following an internal investigation of her claims, the county suspended the supervisor, who retired shortly thereafter.

The New Jersey Supreme Court held that, in the absence of managerial and supervisory training, triable issues existed as to the effectiveness of the county's antiharassment policy and as to whether that policy could shield the county from vicarious liability for the supervisor's misconduct.

In a previous decision, the New Jersey Supreme Court held that an employer may be held vicariously liable under New Jersey Law Against Discrimination for a supervisor's misconduct when the employer was negligent in preventing workplace sexual harassment by that individual. The *Gaines* court emphasized that numerous factors are relevant to this determination, including whether the employer provided "mandatory" antiharassment training for its supervisors and managers, and also made that training available to all employees in its organization.[8] The court also rejected the county's argument that Gaines' failure to file a formal complaint pursuant to the antiharassment policy barred her claims. The court stated that an employee's inaction must be viewed in the context of whether the employer provided meaningful assistance to the employee who sought to complain about a supervisor's harassment. Concluding that an antiharassment policy "must be more than the mere words encapsulated in the policy," the court stated that such a policy must demonstrate an employer's "unequivocal commitment from the top" to preventing workplace sexual harassment.[9] According to the court, the absence of "effective preventive mechanisms," such as training, will present strong evidence that an employer was negligent in monitoring and preventing workplace sexual harassment. Based upon the record facts, the court held that

[5] *Soto,* 285 F. Supp. 2d at 1165.

[6] *Id*.

[7] *Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

[8] *Id.* at 329-30.

[9] *Id.* at 332-33.

Gaines' complaint should not have been dismissed because factual issues existed concerning the effectiveness of the county's antiharassment policy.[10]

Following the *Gaines* decision, the U.S. District Court for New Jersey formalized New Jersey's defenses to negligence-based claims of harassment as follows:

> Effective preventative mechanisms, the New Jersey Supreme Court has observed, generally consist of four basic components: (1) formal policies which explicitly prohibit workplace harassment; (2) formal and informal complaint structures and procedures for promptly and thoroughly investigating and remediating claims; (3) training which is mandatory for supervisors and managers and made available to all other employees; and (4) some effective "sensing or monitoring mechanisms" to find out if the policies and complaint structures are trusted. Courts have also required that an employer demonstrate that it took affirmative steps to educate its employees about its policies and procedures.[11]

The *Faragher/Ellerth* defense spurred many employers to conduct harassment prevention training. Does the rejection of the defense by the California Supreme Court mean that such training is useless in California? No, it does not. In fact, employers should draw the opposite conclusion — that harassment training is more important than ever.

There is simply no margin for error when it comes to harassment by California managers. Put another way, the only way California employers can avoid liability for harassment by their managers is to ensure that the managers to do not commit harassment. This means that manager training must not only occur but that the training must be effective. "Check the box" training programs will no longer work (if they ever did) because there is no defense box left to check.

The lack of an affirmative defense, coupled with the new training obligation under California A.B. 1825 means that a prudent employer will focus on providing training that is effective and regular.

Avoiding Punitive Damages with Live, Interactive Training

In a recent case, the U.S. Court of Appeals for the Fourth Circuit so steadfastly adhered to the principle that punitive damages can be avoided that it actually overturned a jury's award of punitive damages because of the employer's good faith efforts (including live, interactive training) to proactively prevent workplace discrimination.[12]

In *Bryant v. Aiken Regional Medical Center Inc.*,[13] a jury found that the plaintiff had been denied promotions because of her race and because she had complained about discrimination (retaliation). The jury also decided that the employer should be castigated for the actions of its managers and awarded Bryant an extra $210,000 in punitive damages.

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[10] *Id.*

[11] *Hargrave v. County of Atlantic*, 262F. Supp. 2d 393, 431 (D.N.J. 2003) (citations omitted).

[12] *See, e.g., Ridley v. Costco Wholesale Corp.*, 2005 Dist. LEXIS 23276 (E.D. Pa. Oct. 12, 2005).

[13] 333 F.3d 536 (4th Cir. 2003), *cert. denied*, 540 U.S. 106 (2004). *See also Washington v. DeYoung*, 2004 U.S. Dist. LEXIS 14620 (N.D. Ill. July 29, 2004) (no genuine issue of fact as to the company's good-faith efforts, because training specifically covered discrimination by employees and customers).

The court agreed with the jury's decision regarding discrimination and retaliation. However, it disagreed with the jury's punitive damages decision. The court noted that employers are not subject to punitive damages when individual manager's unlawful decisions were made "contrary to the employer's good faith efforts" to comply with federal antidiscrimination law. The court emphasized that the employer's good faith efforts, included:

- Issuance and communication of an organization-wide equal employment opportunity policy.
- Training of employees in a "carefully developed," classroom program that included interactive group exercises.
- Voluntarily monitoring departmental demographics to help spot any issues of discrimination.

Contrasting these "extensive" actions with those of employers who never issued antidiscrimination policies or trained their managers, the court reversed the $210,000 punitive damages award.[14]

§ 15.1.2(d)

Mandatory Harassment Training on the Full Range of Protected Categories

Employers who focus their workplace harassment efforts exclusively on sexual harassment expose themselves to liability and damages on harassment based on other protected categories.[15] In recent cases, employers have attempted to use the fact of having conducted sexual harassment training to defend claims based on race or other protected categories. The courts have routinely rebuffed these efforts holding that training on sex does not accredit to the employer's efforts to prevent other types of unlawful harassment.[16]

Training for Those Conducting the Investigations

Training programs to prevent discrimination and harassment tend to focus on managers and employees. These programs often recommend that employees call the human resources or legal departments if serious issues arise for a more complete investigation. Thus, the skills of those conducting the investigations and making recommendations on appropriate remedial action must be up to date. The failure to do so can ruin any attempt to avoid litigation, as one employer learned in *Schnoop v. Rotary Corp.*[17] In reviewing the employer's efforts to prevent harassment, the court noted "most importantly, . . . trained professionals in place to address it

[14] *See also Young v. Daimler Chrysler Corp*, 2004 U.S. Dist. LEXIS 22813 (S.D. Ind. Oct. 25, 2004) (lack of details about training defeated *Kolstad* defense).

[15] *Freeman v. Spencer Gifts, Inc.* 333 F. Supp. 2d 1114, 1128 (D. Ka 2004) (sexual harassment training did not count towards avoiding punitive damages on racial harassment case); *Washington v. Walgreen Co.*, 2004 U.S. Dist. LEXIS 14620 (N.D. Ill. July 28, 2004) (no genuine issue of fact as to the company's good-faith efforts, because training specifically covered discrimination by employees and customers); *Hawkins v. Groot Indus., Inc.*¸ 2003 U.S. Dist. LEXIS 5051 (N.D. Ill. Mar. 31, 2003) (sexual harassment training does not help establish an affirmative defense to a racial harassment claim).

[16] *Id.*

[17] *Schnoop v. Rotary Corp.*, 2003 U.S. Dist. LEXIS 23225 (N.D.N.Y. Dec. 19, 2003).

[racial and sexual harassment] were nonexistent."[18] Thus, the employer's attempt to escape liability was denied.

Further, the individual must be able to actually enforce and or recommend discipline. If the individual conducting an investigation is trained, but remains compromised in his or her ability to practically enforce a harassment policy because they cannot act as a decisionmaker, the defense of good-faith compliance with Title VII may not be available. [19]

The "No Margin of Error" Philosophy Arises for Wage & Hour Compliance

Training managers on the basic requirements of wage-and-hour law has become crucial even though there is no direct requirement to do so. The wage-and-hour class action has become the "plaintiff's attorney's best friend." In California, the number of wage and hour class actions, now outnumber those filed for discrimination. These class actions can be devastating on employers. Not only do they often result in multimillion dollar verdicts or settlement, they tend to effect large portions of the workforce. For example, the parties recently settled for $210 million (including post judgment interest and other fees) the appeal of a $90 million verdict against a major insurance company who misclassified 2400 employees as overtime exempt.[20] Especially frustrating for employers is how quickly failing to pay for only tiny increments of hours worked can accumulate. Recently, a national chain of electronics stores agreed to pay $5.4 million to settle a dispute regarding its payment of overtime to employees. This huge dollar amount was generated from allegations that some 70,000 current and former employees were not paid for relatively small amounts of missed time including meal breaks, after employees punched out on the time clock, and while they waited for managers to unlock doors at the end of shifts. The problem was exacerbated by the fact that the retailer did not keep an accurate record of hours worked by employees as required by the Fair Labor Standards Act.[21]

This legal environment leaves no room for error for allowing even "minor" violations of wage-and-hour laws. Managers who know the basics about the employers' obligation are the first line of defense in preventing these minor infractions from occurring. In the case involving the national retailer, who would best know if the employees were taking their lunch breaks or if their time records were accurate? The answer is the local managers. However, very few companies train managers on the importance of keeping accurate time records or legal intricacies of what are "hours worked."

Management Skills Training & the Employment Law Connection

Several recent surveys and studies point to one conclusion — managers who fairly and professionally administer the performance and termination process are less likely to be sued

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[18] *Id.* at *53. *See also Ciesielski v. Hooters*, 2004 U.S Dist. LEXIS 25884 (N.D. Ill. 2004) (failure to investigate supported a jury's denial of the *Kolstad* defense, even though the company had a policy and did annual training).

[19] *Alaniz v. Zamora-Quezada*, 2005 U.S. Dist. LEXIS 32478 (S.D. Tex. Sept. 8, 2005) (since individual being investigated was the ultimate decisionmaker regarding complaints of sexual harassment, plaintiff not precluded from seeking punitive damages).

[20] *Justices Reject Review of Overtime Case, Leaving Intact $90 Million Award for Jury*, Daily Lab. Rep. (BNA), Nov. 27, 2001, at AA-5.

[21] *Best Buy Will Pay $5.4 Million To Settle Overtime Dispute, D.O.L. Says*, Daily Lab. Rep. (BNA), July 5, 2001, at A-1.

and, if sued, less likely to be subject to punitive damages.[22] For example, the American Bar Association recently conducted a mock disability discrimination trial, with evidence strongly favoring the employer. When the jurors retired to consider the case, the acting judge announced that, were this a real trial, he would have dismissed the case because no reasonable jury could find for the plaintiff. Yet, the jury disagreed, finding that the plaintiff was not treated "fairly." Although this consideration that was legally irrelevant, the jury recommended a multimillion-dollar damage award.[23]

Other surveys buttress the key finding of the mock trial. One study of the unemployed found that terminated employees found that only 4% of employees who felt their terminations were fair filed or considered litigation. Contrast that statistic with the statistics of those who felt that the termination process was insulting or felt that they had been given inaccurate information about the decision. A full 90% of that group either filed or considered litigation. The news is not much better for employers once they are before a jury. In another recent survey, most jurors disagreed with the statement "employees can be terminated without cause" even in states where employment at-will was the norm. Many jurors also disagreed that financial reasons were a legitimate reason for termination.[24]

The lessons from these surveys are clear. Management skills training and employment law basics training are connected. Yes, managers do need training on basic management skills. But this training must be linked with the legal obligations of the organization. Only by linking the two subjects (skills and compliance) can organizations best hope to avoid and defend wrongful termination litigation.

§ 15.1.2(e)

Ethics & Compliance Training Under Amended Federal Sentencing Guidelines

In response to the Sarbanes-Oxley Act of 2002, the U.S. Sentencing Commission amended their Sentencing Guidelines ("Guidelines") in 2004 to strengthen the requirements for corporate compliance. Several additional, unrelated amendments to the Guidelines went into effect on November 1, 2005. Under the Amended Guidelines, judges were required to consider whether a convicted corporation had established an "effective compliance program" prior to the violation taking place; in other words, whether the corporation had taken appropriate steps to prevent and detect violations of ethics laws. The 2004 amendment imposed the requirement that all employees, including high-level personnel, receive periodic training pertaining to their organization's ethics and compliance standards.

Consequently, comprehensive and periodic training on workplace ethics to prevent and detect criminal conduct has now become an ever greater imperative. If an organization undergoes scrutiny regarding its ethics and compliance practices under Sarbanes-Oxley or other federal statutes, evidence of an effective ethics and compliance program will significantly reduce liability exposure. Simply demonstrating that you have provided employees with an ethics policy or code of conduct is not legally sufficient; a formal training program is required under the Amended Guidelines.

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[22] Dr. Joni Johnston, *Why Jurors Fire Back During Wrongful Termination Lawsuits*, Nov. 24, 2003, *available at* http://www.hr.com.

[23] *Id.*

[24] *Id.*

In January 2005, the U.S. Supreme Court set aside part of the federal sentencing guidelines in a case concerning pronounced sentences for drug offenses.[25] While not addressing the Guidelines' corporate application in its opinion, the Court's decision has effectively left the "mandatory" nature of Sarbanes-Oxley sentencing Guidelines unclear. However, the Court did find that judges should continue to consult the guidelines in determining sentences on an advisory basis at least until Congress can reconsider the mandatory nature of the sentencing scheme. Thus, employers looking to keep their officers out of court would be well advised to consider ethics training as mandatory and carefully review chapter eight of the sentencing Guidelines.[26]

Until more specific guidance is issued, organizations will be well served to address the following as they implement ethics and compliance standards:

- Can your organization demonstrate a commitment to compliance with ethics law at the "highest levels" of management?
- Is compliance training universally provided to all employees, and is periodic evaluation of the effectiveness of compliance programs taking place?
- Among specific topics to address in the training, are the following areas covered?
  - confidential information;
  - insider trading;
  - conflicts of interest;
  - proper accounting practices;
  - Sarbanes-Oxley Act requirements – particularly, understanding antiretaliation and whistleblower protections of this and other laws;
  - proper financial reporting procedures and financial records maintenance;
  - use of organizational property;
  - handling gifts and favors; and
  - reporting ethical and compliance concerns under your organization's policies.

§ 15.1.2(f)

Diversity Training in the Age of Globalization & the Reign of Consent Decrees

Diversity training in the employment arena has resurged recently - required by consent decrees or settlement agreements; or voluntarily pursued in light of business needs, the current state of the workplace, or the ubiquitous concern of globalization. In fact, to render diversity training more effective and enduring, employers often have combined corporate diversity programs with other employee training initiatives.[27] Regardless of the motivation, one thing is certain: diversity training is becoming a staple in the workplace.

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[25] *United States v. Booker*, 543 U.S. 220 (2005).

[26] *See* 2005 FEDERAL SENTENCING GUIDELINE MANUAL (effective Nov. 1, 2005), *available at* http://www.ussc.gov/GUIDELIN.HTM.

[27] *Diversity Training Joins Corporate Development Mainstream,* HUMAN RESOURCES MGMT., 2005 at 192.

Emerging as a necessary component to a harmonious and cutting edge workplace, diversity training is being used to customize the workplace in preparation for the global frontier. According to current statistics, by the year 2050, almost 50% of Americans will be African American, Latino or Asian American.[28] However, unlike the themes emphasized in the past, current diversity training is not limited to race or gender relations. Instead, the range of diversity training has steadily progressed and expanded over the last 20 years, tackling the diversities of disabilities and abilities, sexual orientation and age. Currently, themes of diversity training include: religious differences, "microinequities" (small slights and unconscious behaviors that can result in exclusion), work-life balance and spirituality. Moreover, because workplace conflict and tension are expected to build as the age gap widens between Baby Boomers and younger employees (*e.g.*, Gen X and Y), diversity training also addresses differences in perspectives and values. [29]

Admittedly, with the advent of the Internet and other technological developments, the borders between countries have all but collapsed, resulting in a flatter world and yielding a more diverse workplace community. As a result, corporate America is more invested in diversity than ever. For example, companies such as IBM, Starbucks, Google have rigorously undertaken diversity efforts to further their endeavors, understanding it as a corporate strategy to penetrate new markets.[30] This dedication was strongly advocated in an amicus brief written by General Motors to the U.S. Supreme Court in support of the consideration of diversity in university admissions as follows:

> To succeed in this increasingly diverse environment, American businesses must select leaders who possess cross-cultural competence — the capacities to interact with and to understand the experiences of, and multiplicity of perspectives held by, persons of different races, ethnicities, and cultural histories.[31]

Clearly, diversity training is a key component in the acquisition of this "cross-cultural competence," a skill employers are realizing is critical for success in the global marketplace.

Moreover, it is obvious that diversity training, and by extension sensitivity training, endeavors are a natural counterpart to an employer's efforts to create and maintain a workplace free of harassment, discrimination and retaliation. In recognition of this, employers have begun to include diversity training in their employee development initiatives, often in tandem with harassment or discrimination training.

However, not only have employers recognized the essential function of diversity training in providing an equal employment opportunity workplace, but so have the courts. These days, it is commonplace for a consent decree or a settlement agreement issued in response to an

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[28] U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race & Hispanic Origin,* (Mar. 18, 2004) *available at* http://www.census.gov/ipc/www/ustinterimproj/; *see also Changing America: The United States Population in Transition*, 4 U.S. SOCIETY & VALUES 211 (June 1999), *available at* http://usinfo.state.gov/journals/itsv/0699/ijse/ijse0699.htm (the Electronic Journal of the U.S. Information Agency).

[29] *See generally The New Diversity*, WALL STREET J., Nov. 14, 2005.

[30] *Id*.

[31] Brief of General Motors as Amicus Curiae in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan's law school's use of race as an admission factor because it was a narrowly tailored use of race in admissions decisions which did further a compelling interest in obtaining the educational benefits that flow from a diverse student body.)

allegation of discrimination or harassment to include, along with EEO training, mandates for diversity training, diversity monitoring and assessments, diversity in hiring and/or the creation and establishment of a executive or board position dedicated to diversity.

For example, as mentioned in § 15.2.5(b) below, in 2005 Abercrombie & Fitch recently settled a class action discrimination claim for $40 million. Among other mandates, the consent decree — detailed by the settlement agreement — required: the hiring of at least ten full-time diversity recruiters; the utilization of diversity consultants; hiring benchmarks; and the creation of an Office of Diversity, led by a Vice President of Diversity who directly reports to the CEO or the COO. Among other things, this Vice President of Diversity must oversee the development and implementation of all EEO and diversity training and education programs.[32]

Additionally, in 2005 Sodexho Marriott Services, Inc. entered into a settlement agreement and consent decree in response to a class action alleging race discrimination in promotions and related employment practices. Settling for $80 million, Sodexho was also required to provide diversity and EEO training. Notably, the settlement agreement carefully articulated Sodexho's commitment to diversity and featured, among other things, a diversity and inclusion component to its annual bonus plan for bonus-eligible managers.[33]

It is important to note the rise of diversity training and increased employer sensitivity to diversity issues constitutes a big step in the ever evolving process of providing a harmonious and productive workplace. However, this recognition and sensitivity to diversity issues lays the foundation for what is the goal of such considerations: creating a work environment focused on inclusiveness. Organizations, such as IBM, JPMorganChase and Xerox, (long considered early pioneers regarding diversity issues in the workplace) have led the way, evolving their diversity agenda into this new endeavor. In short, by becoming more integrative, these organizations have focused on fostering an "inclusive environment."

Building an inclusive environment yields the next leaders of an organization. An inclusive environment is created and guided by broad recruitment and retention strategies, as well as the mentoring and cultivation of individuals through sponsorships, networking opportunities and even stretch assignments. Moreover, inclusiveness not only helps organization leaders expand their pool of talent, but also to get a return on investment and enhance shareholder value.[34] In other words, while sensitivity to diversity recognizes and celebrates differences, inclusion incorporates them into the framework and management of the organization.

In sum, diversity training provides the tools necessary to create and maintain a harmonious and productive workplace. It is among the first steps in creating an inclusive environment. Additionally, due to the realities of the global marketplace and the law's mandate that employees work in an environment free of harassment and discrimination, diversity training has become a workplace "must-have" as employers seek to remain competitive and legally compliant in the 21st century.

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[32] *See EEOC v. Abercrombie & Fitch Stores, Inc.*, Nos. 03-2817 SI, 04-4730 & 04-473 (N.D. Cal. 2004) (consent decree approved Apr. 14, 2005.)

[33] *Cynthia Carter McReynolds v. Sodexho Marriott Services, Inc.*, D D.C., No. 1:01-CV-00510 (ESH), (N.D. Cal. 2004) (consent decree approved Apr. 10, 2005).

[34] See Nancy DiDia, *Beyond Diversity: Building Cultures of Inclusion, available at* http://www.didiadiversity.com.

§ 15.1.3

C. THE BUSINESS OF WORKPLACE TRAINING

Employment Law Training Reduced Costs

The application of basic business principles in large degree has kept the interest in training strong. Even as the economy has recovered somewhat from the recession of the past few years, human resources professionals know that there "will be no money free for all" and that human resources will continue to have to "do more with less."[35] The simple fact remains that fewer resources will be available than in the past and that the organization's remaining "human resources" must be better trained to carry out the organization's objectives.[36] As one expert stated:

> I have consistently heard warnings that training budgets will be reduced due to a variety of circumstances. But I've never seen a business unit cut training that directly achieves business goals. . . . [Training that] advances business goals isn't an option; it's essential.[37]

Employment law training helps meet core business goals, and thus, must be viewed as "essential." In lean or good economic times, a core goal of any organization must be to reduce unnecessary costs and focus resources on building for the future. The average jury award for wrongful termination claims is $1,800,000 and one-fifth of jury awards now top the $1,000,000 mark.[38] Indeed the total amount that employers pay out as a result of harassment and discrimination claims has doubled in the last five years.[39]

Safety nets such as Employment Practices Liability insurance (EPLI) are costly themselves. Recent surveys show that premiums for this type of insurance have recently risen 50% and that employers can expect additional increases in premiums in the upcoming year.[40] With employment litigation insurance premiums dramatically increasing, employers who cannot effectively manage employment law obligations will find themselves paying a huge bill.[41] Even without litigation, the cost of employment law related disputes is high. One study found that large corporations spend $6.7 million per year dealing with harassment claims in addition to litigation costs.[42]

The extravagant costs of employment litigation and protective insurance must be reduced to meet the core business goals of reducing nonproductive costs. Employment law training

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[35] David Langdon, John McBride & Sharon Lucius, *What Top HR Leaders See for 2004!* Dec. 22, 2003, *available at* http://www.hr.com.

[36] Lois Webster, *A New View of Corporate Training*, ADVISOR: TECHNOLOGY KNOW-HOW, Jan. 9, 2002; Giovanni Marcelli, *Recession Proof: Managing Risk in an Economic Downturn*, CABLING BUSINESS MAGAZINE, *available at* http://www.cablingbusiness.com.

[37] *Id*.

[38] Reed Abelson, *Surge in Bias Cases Punishes Insurers & Premiums Rise*, N.Y. TIMES, Jan. 9, 2002, *available at* http://www.nytimes.com.

[39] Jonathan D. Glater, *New Guards to Lessen Liability*, N.Y. TIMES, Aug. 8, 2001, *available at* http://www.nytimes.com.

[40] Abelson, *supra* note 38.

[41] *Id.*

[42] Tim Hicks, *Mediation in Sexual Harassment Cases*, Apr. 4, 2001, *available at* http://www.hr.com.

programs, when done correctly, provide such a reduction. For example, after implementing a comprehensive employment law training program run by Littler Mendelson, the state of Washington realized a 37% decrease in employment law related claims. This saved the state an estimated $2 million per year. These facts comport with the experiences of human resources professionals nationwide. Eighty-two percent of those surveyed found employment law training to be effective or extremely effective in reducing litigation.[43] Indeed, with the average cost to settle a lawsuit hovering at $300,000, a training program that eliminates even one lawsuit presents an amazing return on investment.[44]

Employment Law Training Promotes Productivity

Employment law training can help reduce litigation costs and it can do more. Such training can improve productivity, a key goal for every employer regardless of the state of the economy. Productivity gains are especially noticeable for the "management lifecycle" programs such as lawful hiring, dealing with problem performance, and terminations. These programs teach managers the core skills needed to hire and retain their best employees and maximizing the performance of the entire workforce. Such efforts can also provide organizations with positive public relations. At the decade's start, the business headlines sensationalized Coca-Cola's $192.5 million settlement of discrimination class action. Last year, after introducing mandatory training for managers on equal employment issues, the company is earning public praise for its diversity efforts.[45]

Technological Advances

Training's continued strength was further promoted by advances in technology, allowing organizations to do more training with less resources. Early predictions that by the year 2000 the primary method of delivering training to employees would be on-line proved overly optimistic.[46] Yet, the future may have finally arrived.

Advancements in "live" on-line training, through virtual classrooms and webinars, have ameliorated some of the concerns with traditional, self-study e-learning. Live on-line learning allows organizations to combine the best features of classroom training (*e.g.*, use of engaging subject matter experts, participants having questions answered in real time, and team building) with many of the cost saving features that self-study e-learning allows. Indeed, one organization reported a $90,000 savings using live on-line learning to train over 500 employees on harassment prevention.[47] It is this combination of benefits that will likely make

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[43] Susan R. Hobbs, *Training Cures Managers' Ignorance; Helps Prevent Suits*, Daily Lab. Rep. (BNA), June 12, 2001, at C-1.

[44] John J. Donohue & Peter Siegelman, *The Changing Nation of Employment Insurance, is Harder to get, More Costly, Insurers Scared by Verdicts,* Jan. 22, 2002, at 711, *available at* http://www.diversity.com ("as layoffs mount nationwide, the number of employment-related lawsuits is expected to climb"). This study also reports that the average jury verdict for sexual harassment is $1 million and $1.8 million for wrongful termination.

[45] Barney Tumey, *Coca-Cola Gets Good Grades*, Daily Lab. Rep. (BNA), Sept. 27, 2002, at A-5.

[46] *Compare* MERRILL LYNCH & CO., THE BOOK OF KNOWLEDGE: INVESTING IN THE GROWING EDUCATION & TRAINING INDUSTRY 151 (Apr. 9, 1999) (a report predicting that on-line learning would account for 51% of employee training by the year 2002), *with* AMERICAN SOC'Y FOR TRAINING & DEV. (MARK E. VAN BUREN), STATE OF THE INDUSTRY REPORT (2001) (the actual figure was less than 10% in 2000).

[47] *Reducing Costs, Increasing Communication*, Jan. 1, 2002 (an ROI case study from Centra Software).

live on-line learning the "successor to traditional . . . classroom training."[48] Such remote instructor based learning accounts for a quarter of all technology-based training.[49]

§ 15.1.4

D. CONCLUSION

Harassment training is now required by the law of many states. Federal and state courts require harassment and discrimination training to avoid punitive damages. Sarbanes-Oxley requires ethics training as part of sentencing guidelines. These mandates further underscore what prudent employers have known for years, training, done correctly, can be a vital part of improving morale and productivity. Fortunately, technology trends have made conducting such training easier and more cost-effective than ever before. For employers looking to do the right thing by their organizations, employment law training serves both compliance and productivity goals

§ 15.2

II. OVERVIEW OF THE LAW OF TRAINING

§ 15.2.1

A. MANDATORY HARASSMENT PREVENTION TRAINING FOR PRIVATE EMPLOYERS

Legal authorities, whether the legislatures or courts, have traditionally been reluctant to require employers to provide training. That attitude has changed the last few years have brought a variety of new training mandates

§ 15.2.1(a)

Mandatory Sexual Harassment Training Under California Law

The wise course of action to conduct regular harassment training becomes a legal responsibility since Governor Arnold Schwarzenegger signed Assembly Bill 1825 ("A.B. 1825") on September 29, 2004.

A.B. 1825[50] requires that employers train supervisors on sexual harassment every two years. At first glance, the statute only seems to codify what many employers are already doing. A close reading of the statute, however, reveals very specific requirements that every employer must now follow.[51]

Since A.B. 1825 became law, employers spent much of 2005 attempting too meet the December 31, 2005 deadline. These efforts were taken without regulatory information about what the law requires, a particularly uncomfortable situation for employers trying to meet a legal mandate.

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[48] SOCIETY FOR TRAINING & DEV., *supra* note 46, at 17.

[49] AMERICAN SOC'Y OF TRAINING & DEV., STATE OF THE INDUSTRY REPORT (2004).

[50] New Government Code § 12950.1; text *available at* http:www.leginfo.ca.gov

[51] California's A.B. 1825 is also discussed in §15.1 above.

The draft regulations, prepared by the Fair Employment and Housing Commission (FEHC) and the FEHC's Advisory Committee, were released on December 16, 2005, and are available online at http://www.fehc.ca.gov/pub/reg.asp.

The regulations were open for public comment until February 10, 2006. Depending on the amount of time the FEHC takes for internal review, California employers can expect the regulations to become effective in the second or third quarter of 2006. Progress of the regulations can be tracked at www.fehc.ca.gov.

Employers must realize that these draft regulations are, as of the date of this publication, just that — drafts. When completed, the final regulations will be codified at California Code of Regulations section 7288.0, under a new heading "Harassment Training & Education" (text available when posted at www.calregs.com). The final regulations are likely to change and provide even greater clarity for employers. With this caveat in mind, we have incorporated important aspects of the current draft of the regulations into this chapter when such information was helpful.

In reviewing information about the draft regulations, employers should remember that they are *not* retroactive, and therefore, cannot be used to invalidate 2005 training initiatives. The FEHC recognizes that conscientious employers will have completed the first year of training before the regulations were released or become final. In fact, they provide a "safe haven" for employers who have made a "substantial, good faith" training effort to comply with A.B. 1825. Such employers "shall be deemed to be in compliance with section 12950.1 regarding harassment training as though it had been done under these regulations."

The Theory Behind A.B. 1825

A.B. 1825's legislative history provides some explanation of the law's rationale. The statute was sponsored by Assemblymember Sarah Reyes. Her basic argument was that current laws, while prohibiting sexual harassment, have not done enough to eliminate the problem. Reyes notes that during the 2002-03 fiscal year 4,231 sexual harassment cases were filed with the Department of Fair Employment and Housing (DFEH), totaling 22% of all cases filed. The impact of sexual harassment on businesses is significant, Reyes argued. Harassment costs the average Fortune 500 company $6.7 million per year in indirect costs alone. Training helps reduce those costs. According to the Hartford Business Journal, "Most legally sophisticated companies provide such training to all supervisory and nonsupervisory employees. That's the smart thing for small and large employers to do to minimize their legal exposure to [sexual harassment] claims."

Who Must Train, How Much Training & How Often

A.B. 1825 applies only to entities that regularly employ 50 or more employees or regularly receive the services of 50 or more persons pursuant to a contract. Presumably the "receiving services" language is an attempt to avoid deciding if a worker is an employee or independent contractor. Although not specified by the statute, courts have held that Fair Employment and Housing Act's (FEHA) other minimum employee requirements count only employees working in California. Remember that an "employer" has 50 or more employees if the entity "employ[s] fifty or more employees for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year." This is an important clarification for employers with seasonal workers, where the size of the workforce changes throughout the year.

Many larger organizations with less than 50 employees in California have wondered: "Does this law apply to me?" The Commission seriously debated whether the 50 employees had to reside in California. The bill's author, former Assemblymember Sarah Reyes, intended the law to apply only to organizations with 50 or more employees within the state. She reasoned that the Legislature did not have the authority to dictate employment law requirements for those employers with fewer employees in the state. However, it must be noted that A.B. 1825 does not contain any specific language requiring the employees to be in-state.

Given this statutory silence the FEHC defines *employers* as "any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contract workers or any person acting as an agent of an employer, directly or indirectly." As the draft regulations now state: "There is no requirement that the 50 employees work at the same location or all reside in California."

The law imposes an initial and continual training requirement on covered employers. By January 1, 2006, employers must have provided two hours of sexual harassment training and education to all supervisory employees who were employed as of July 1, 2005. Employers that already provided such training to a supervisory employee in or after 2003 would be exempt from this initial requirement as to any such supervisory employee. After January 1, 2006, covered employers must provide sexual harassment training and education to each supervisory employee once every two years, and to each new supervisory employee within that same timeframe.

A.B. 1825 does not define "supervisory employee," and that term is not defined in FEHA's other sections. FEHA does use the term *supervisor*, defining it as any individual having the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action . . . if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[52] Are the terms supervisor and supervisory employee synonyms? The draft regulations answer this question in the affirmative.

Specifics of the Training Requirement

What the Training Program Must Include

A.B. 1825 also sets specific quality standards for the required training. The training must be conducted via "classroom or other effective interactive training" and include the following topics:

- Information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention of sexual harassment.
- Information about the correction of sexual harassment and the remedies available to victims of sexual harassment in employment.
- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. Note that on its face, A.B. 1825 requires training beyond the narrow confines of sexual harassment.

[52] CAL. GOV'T CODE § 12926(r).

In dissecting these requirements, the Commission finds the following subject matter requirements:

1. A definition of unlawful harassment under the FEHA and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of other forms of harassment covered by the FEHA, as specified at California Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis.
2. Statutory provisions (FEHA and Title VII) and case law concerning the prohibition against and the prevention of unlawful harassment in employment.
3. Types of conduct that constitute harassment.
4. Remedies available for harassment.
5. Strategies to prevent harassment in the workplace.
6. "Practical examples" (including, but not limited to: role plays, case studies, group discussions, and examples with which the employees will be able to identify and apply in their employment setting).
7. Confidentiality of the complaint process.
8. Resources for victims of unlawful harassment (such as, to whom they should report any alleged harassment).
9. Training on how to conduct an effective investigation of a harassment complaint.
10. Training on what to do if the supervisor is personally accused of harassment.
11. Training on the contents of the employer's antiharassment policy and how to utilize it if a harassment complaint is filed.

Employers should note that items 9, 10 and 11 are not specifically mentioned in A.B. 1825.

Remember that the text of A.B. 1825 is not limited to sexual harassment, and the law requires that training include "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation."

Course Methodology

Classroom training is the one method of training specifically allowed by A.B. 1825. However, the statute does allow for "other effective interactive training" in addition to traditional classroom instruction. The regulations explicitly state that e-learning, both by live webinars and by self-study methods, is permissible. Such approval, however, is predicated on the training satisfying several requirements. Such nonclassroom training must:

- Be created by a qualified "instructional designer." Webinars must also be taught by a qualified trainer.
- Incorporate learner feedback or a participation component at least once every 15 minutes so that employees are "measurably engaged" in the training and acquisition of knowledge is tested.
- Provide an opportunity for feedback.
- Give the learner the opportunity to ask questions and have them answered.

Who Must Design and Facilitate the Training?

The quality mandate extends to those presenting the training. The training can only be presented by "trainers or educators with knowledge and expertise" in preventing harassment, discrimination and retaliation.

The FEHC's draft regulations contain significant detail about who should conduct the training. Trainers and educators, as well as developers of e-learning ("instructional designers") may include California licensed attorneys, human resource professionals, psychologists or others, provided the instructors have legal education or practical experience in harassment training and knowledge of California laws prohibiting unlawful harassment.

The draft regulations further state that trainers, educators or developers must be qualified to train on the following topics:

- What is unlawful harassment.
- How to intervene when harassing behavior occurs in the workplace.
- How to report harassment complaints.
- How to respond to a harassment complaint.
- How to investigate harassment complaints and the employer's obligation to do so.
- The illegality of retaliation for filing a harassment complaint and how to prevent retaliation from occurring when an employee has filed a harassment complaint.
- The employer's antiharassment policy.

Finally, desirable and undesirable qualities of a trainer are also listed in the proposed regulations. Desirable qualities for an effective trainer or educator include a person who: can use various training methodologies; can facilitate small and large group discussions; is an effective listener; has a credible, positive professional reputation, and continues to learn about gender and cultural issues and concerns. Undesirable qualities for an effective trainer or educator include a person who is or has a reputation of being in the workplace or the instructional environment: a "hugger," sexual, flirtatious, aggressive, arrogant, abusive, and demeaning to women or men, telling offensive jokes or using sexual, racial, religious, sexual orientation or other protected bases stereotypes or derogatory language.

Training Administration & Re-Training

The Training Calendar

There are several extremely helpful provisions in the draft regulations that lessen the burden on employers managing their ongoing compliance obligations. Under the regulations, employers can use either of two methods to meet A.B. 1825's periodic retraining requirement:

1. Individual Tracking.
2. Training Year Tracking.

Individual Tracking measures the two-year time period from the date each individual supervisor completed his or her last training.

- *For example*, Chris completes his first training program on October 26, 2005. Chris must be retrained no later than October 26, 2007.

Training Year Tracking allows employers to designate a "training year" in which to train supervisors. The employer must retrain supervisors by the end of the next training year. Practically speaking, this allows for more than two years to pass between some training sessions.

- *For example*, 2005 is designated as a "training year." Chris takes his first training program on January 5, 2005. Chris must be retrained no later than December 31, 2007.

New supervisors must be trained within six months of assuming their supervisory position, and every two years thereafter, measured either by the Individual or Training Year Tracking method. If an employer uses the Training Year method, some supervisors may need to be retrained sooner than once every two years.

- *For example*, an employer has created a training year schedule designated as 2005, 2007, 2009, etc. Chris is hired and receives harassment training in 2006. Chris needs to be trained again in 2007 along with the other supervisory employees, and thereafter follow the employer's two-year training schedule.

The Training Year method seems infinitely easier to manage than the Individual Tracking method. Assume an organization had 100 managers. In 2005, the organization held two classroom training sessions — one in June and the other in September. Fifty managers took one of these two courses. The remaining 50 lower-level supervisors took a self-study e-learning course at their own pace completing the course at different times. Using the Individual Tracking method, the organization would have to track the completion dates for the e-training taken for each e-learner. In this scenario, the employer could have as many as 50 Individual Tracking separate deadlines to monitor, in addition to the June and September 2005 training anniversaries. Those who took the July 2005 course would have to be retrained by July 2007. Those who took the September 2005 course would have to be trained by September 2007. Plus, the organization would have to manage a separate training deadline for each of the e-learners.

Under the Training Year method, all supervisory employees would be trained by the end of 2007. The training date is the same regardless of whether the employee took the July or September classroom training or the e-learning. The one drawback with the training year method is that new supervisors trained in the "off year" must be trained again during the next training year.

The Effects of Doing It Wrong & Getting It Right

The good news for employers is that, under A.B. 1825, a claim that training failed to reach a particular individual does not automatically result in the liability of an employer for subsequent harassment. It should be recognized that plaintiffs (or plaintiffs' attorneys) will almost certainly argue that the failure to meet the new training mandates is partial evidence of an employer's failure to take all reasonable steps to prevent harassment. The bad news is that an employer's compliance with the statute does not automatically insulate it from liability for

sexual harassment of any current or former employee or applicant. If an employer violates any of the statute's mandates, the DFEH must issue an order requiring compliance.

A.B. 1825 & Beyond

The statute provides a floor, not a ceiling, for an employer's harassment prevention efforts. The FEHA makes it an unlawful practice for an employer to fail to take "all reasonable steps" necessary to prevent harassment from occurring. Providing the required training will be one step, but only one step, in meeting this requirement. Indeed, A.B. 1825 does not "discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination."

The statute's invitation to go beyond its minimum requirements should be accepted by employers. In particular, employers should provide extra training (additional classes or training longer than two hours) that covers all the protected categories under both federal and state antidiscrimination laws. The Equal Employment Opportunity Commission (EEOC) in its 1999 guidance on preventing liability for workplace harassment made this point definitively:

> An employer should ensure that its supervisors and managers understand their responsibilities under the organization's antiharassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's antiharassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.[53]

Already courts have held that training which is limited exclusively to sexual harassment will be of no value in defense of a race, national origin, color, age or disability harassment case.[54] In fact, such limited training could backfire. For example, a plaintiff could argue that the employer was such a "minimalist" that only the statutory sexual harassment training was done. This minimalist approach, a plaintiff could then argue, shows a lack of respect or importance being placed on racial harassment, for example.

§ 15.2.1(b)

Mandatory Sexual Harassment Training Under Connecticut Law

The Connecticut Human Rights and Opportunities Act requires all mandatory sexual harassment training under Connecticut law, private and public employers with 50 or more employees to provide two hours of sexual harassment training and education to all supervisory employees, and to all new supervisory employees within six months of the assumption of a supervisory position.[55] This statute's regulations provide significant detail on how to meet this mandate.[56]

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[53] *See Enforcement Guidance*: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html.

[54] *Freeman v. Spencer Gifts, Inc.*, 333 F. Supp. 2d 1114 (D. Kan. 2004) (sexual harassment training was not helpful in defending a racial harassment claim).

[55] CONN. GEN. STAT. § 46a-54(15)(B).

[56] CONN. AGENCIES REGS. § 46a-54-204.

The training must be conducted in a classroom-like setting, using clear and understandable language and in a format that allows participants to ask questions and receive answers. Audio, video and other teaching aides may be utilized to increase comprehension or to otherwise enhance the training process. In 2003, Connecticut's Commission on Human Rights and Opportunities issued an opinion letter stating that online courses will comply if the course "provides an opportunity for students to ask questions and obtain answers in a reasonably prompt manner." Thus live, on-line webinars, for example, would satisfy the Commission's guidelines.

The content of the training must include the following:

1. A description of all federal and state statutory provisions prohibiting sexual harassment in the work place with which the employer is required to comply, including, but not limited to, the Connecticut discriminatory employment practices statute (section 46a-60 of the Connecticut General Statutes) and Title VII of the Civil Rights Act of 1964, as amended.[57]
2. Definition of sexual harassment as explicitly set forth under Connecticut statutes.
3. A discussion of the types of conduct that may constitute sexual harassment under the law, including the fact that the harasser or the victim of harassment may be either a man or a woman and that harassment can occur involving persons of the same or opposite sex.
4. A description of the remedies available in sexual harassment cases, including, but not limited to, cease and desist orders; hiring, promotion or reinstatement; compensatory damages and back pay.
5. A statement advising employees that individuals who commit acts of sexual harassment may be subject to both civil and criminal penalties.
6. A discussion of strategies to prevent sexual harassment in the workplace.

The regulations also encourage employers to discuss the following during the training:

1. Inform training participants that all complaints of sexual harassment must be taken seriously, and that once a complaint is made, supervisory employees should report it immediately to officials designated by the employer, and that the contents of the complaint are personal and confidential and are not to be disclosed except to those persons with a need to know.
2. Conduct experiential exercises such as role playing, co-ed group discussions and behavior modeling to facilitate understanding of what constitutes sexual harassment and how to prevent it.
3. Teach the importance of interpersonal skills such as listening and bringing participants to understand what a person who is sexually harassed may be experiencing.
4. Advise employees of the importance of preventive strategies to avoid the negative effects sexual harassment has upon both the victim and the overall productivity of the workplace due to interpersonal conflicts, poor performance, absenteeism, turnover and grievances.

[57] 42 U.S.C. §§ 2000e *et seq*.

5. Explain the benefits of learning about and eliminating sexual harassment, which include a more positive work environment with greater productivity and potentially lower exposure to liability, in that employers — and supervisors personally — have been held liable when it is shown that they knew or should have known of the harassment.
6. Explain the employer's policy against sexual harassment, including a description of the procedures available for reporting instances of sexual harassment and the types of disciplinary actions which can and will be taken against persons who have been found to have engaged in sexual harassment.
7. Discuss the perceptual and communication differences among all persons and, in this context, the concepts of "reasonable woman" and "reasonable man" developed in federal sexual harassment cases.

§ 15.2.1(c)

Mandatory Sexual Harassment Training in Maine

In workplaces with 15 or more employees, Maine employers must conduct a training program for all new employees within one year of commencement of employment that includes, at a minimum, the following information:

- the illegality of sexual harassment;
- the definition of sexual harassment under state and federal laws and federal regulations, including the Maine Human Rights Act and Title VII;
- a description of sexual harassment, utilizing examples;
- the internal complaint process available to the employee;
- the legal recourse and complaint process available through the commission;
- directions on how to contact the commission; and
- the protection against retaliation.

Employers must conduct additional training for supervisory and managerial employees within one year of commencement of employment. This training includes, at a minimum, the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.[58]

§ 15.2.1(d)

Ethics & Compliance Training Under Amended Federal Sentencing Guidelines

The Sarbanes-Oxley Act of 2002, one of the most far-reaching pieces of corporate reform legislation in recent memory, is the most important law in this area. The Act contains provisions that received little or no public attention but which have potentially significant implications for employers.

[58] ME. REV. STAT. ANN. tit. 26, § 807(3).

Perhaps the most significant employment law change arising from the Act is the creation of a new federal cause of action entitled "Whistleblower Protection for Employees of Publicly Traded Companies." Under this section of the statute, an employee of a publicly traded company who provides information about actions that he or she reasonably believes to be a violation of federal securities law, the rules of the SEC, or "any provision of Federal law relating to fraud against shareholders" is given federal statutory protection. To warrant this protection, the employee must provide information, or cause the information to be provided, or assist in an investigation into conduct that the employee reasonably believes violates securities law or the law barring fraud against shareholders.

The disclosures protected include information made available to a federal regulatory or law enforcement agency, a member of Congress, a congressional committee or, more broadly, any person with supervisory authority over the company or any person at the employer with the power to "investigate, discover or terminate misconduct." The Act also protects an employee who assists in any proceeding actually filed or "about to be filed" relating to securities fraud or fraud against shareholders. The protected assistance includes filings, testimony, participation, and assistance in such proceedings. The employee who engages in this protected activity is entitled to be exempt from discharge, demotion, suspension, harassment or any other type of discrimination.

The far-reaching scope of the Act is emphasized by the fact that it covers not only publicly traded companies, but also their officers, employees, contractors, subcontractors and agents. This language would appear to leave officers and employees open to liability in their individual capacities. In addition, the Act would appear to create a claim against companies or organizations which do business with publicly traded companies.

In response to the Sarbanes-Oxley Act of 2002, the U.S. Sentencing Commission amended their Sentencing Guidelines in 2004 to strengthen the requirements for corporate compliance. Under the amended guidelines, judges must consider whether a convicted corporation had established an "effective compliance program" prior to the violation taking place; in other words, whether the corporation had taken appropriate steps to prevent and detect violations of ethics laws. The 2004 amendment imposes the requirement that all employees, including high-level personnel, receive periodic training pertaining to their organization's ethics and compliance standards.

Comprehensive and periodic training on workplace ethics to prevent and detect criminal conduct has now become an imperative. If an organization undergoes scrutiny regarding its ethics and compliance practices under Sarbanes-Oxley or other federal statutes, evidence of an effective ethics and compliance program will significantly reduce liability exposure. Simply demonstrating that you have provided employees with an ethics policy or code of conduct is not legally sufficient; a formal training program is required under the amended guidelines.

In January 2005, the U.S. Supreme Court set aside part of the federal sentencing guidelines in a case concerning pronounced sentences for drug offenses.[59] While not addressing the guidelines' corporate application in its opinion, the Court's decision has effectively left the "mandatory" nature of the Sarbanes-Oxley sentencing guidelines unclear. However, the Court did find that judges should continue to consult the guidelines in determining sentences on an advisory basis at least until Congress can reconsider the mandatory nature of the sentencing

[59] *United States v. Booker*, 543 U.S. 220 (2005).

scheme. Thus, employers looking to keep their managers out of jail should consider ethics training as mandatory.

Until more specific guidance is issued, organizations will be well served to address the following as they implement ethics and compliance standards:

- Can your organization demonstrate a commitment to compliance with ethics law at the "highest levels" of management?
- Is compliance training universally provided to all employees, and is periodic evaluation of the effectiveness of compliance programs taking place?
- Among specific topics to address in the training, are the following areas covered?
  - confidential information;
  - insider trading;
  - conflicts of interest;
  - proper accounting practices;
  - Sarbanes-Oxley Act requirements – particularly, understanding antiretaliation and whistleblower protections of this and other laws;
  - proper financial reporting procedures and financial records maintenance;
  - use of organizational property;
  - handling gifts and favors; and
  - reporting ethical and compliance concerns under your organization's policies.

§ 15.2.2

B. *FARAGHER & ELLERTH*: THE AFFIRMATIVE DEFENSE & ITS IMPACT ON THE LAW OF TRAINING

Faragher and *Ellerth* — these two sexual harassment cases grabbed headlines in every daily newspaper across the country. The U.S. Supreme Court concluded that if a supervisor made remarks about a subordinate's breasts, told her he could make her life "very easy or very hard," and said she might not get a promotion because she was not "loose enough," that was sexual harassment even though she was never fired or demoted and in fact got a promotion. The Court also found that when supervisory male lifeguards touched the bodies of female subordinates without invitation, told lewd stories in their presence, and pantomimed oral sex in front of them, that was sexual harassment also. Those who read the newspaper accounts of these decisions and concluded that these rather obvious holdings merely refined the legal definition of sexual harassment missed several important points.

The real focus in these two cases, *Burlington Industries, Inc. v. Ellerth*,[60] and *Faragher v. City of Boca Raton*,[61] was not on what constituted sexual harassment, but on who was liable for it, under what circumstances, and why. The answers to these questions have had a definite effect on the emerging law of training during these last few years.

[60] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

[61] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

§ 15.2.2(a)

Failure to Adequately Train About Sexual Harassment

In *Ellerth*, the company argued that there could be no supervisory harassment absent a tangible job detriment. The Court rejected that argument. In *Faragher*, the City of Boca Raton argued that it could not be liable for what it did not know. The Court rejected that argument as well.

The Supreme Court held that an employer is *strictly liable* under Title VII for any gender-based harassment by a supervisor that results in a tangible job detriment. If the harassment does not result in a tangible job detriment, the employer is still strictly liable. Under those circumstances, however, the employer can raise an affirmative defense. It can show that: (1) it used "reasonable care" to prevent and correct any harassment, and (2) the employee "unreasonably" failed to complain.

Justice David Souter, writing for a seven-justice majority in one of the two cases, indicated that the root of the City of Boca Raton's liability was not only the intimidating authority its supervisors wielded, but also the fact that the City had failed in its duty to adequately train these supervisors:

> Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than of common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.[62]

The Supreme Court thus sent a clear message in these two linked decisions: The failure to adequately train supervisors regarding all appropriate aspects of sexual harassment creates Title VII liability and may deprive the employer of its best defense.

All Protected Categories Covered

Although these two suits focused exclusively on substantive issues related to sexual harassment, federal courts have applied these principles to harassment claims based on nearly all the protected categories.[63]

The Supreme Court implicitly endorsed that expansion when it explicitly drew a parallel between race and sex harassment in *Faragher*, stating that:

> Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense

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[62] *Faragher*, 524 U.S. at 803 (emphasis added).

[63] *See, e.g., Flowers v. Southern Reg. Physicians Servs.*, 247 F.3d 229 (5th Cir. 2001) (disability harassment under the ADA); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) (retaliatory harassment); *Wallin v. Minnesota Dep't of Corr.*, 153 F.3d 681 (8th Cir. 1998) (disability harassment); *Tomassi v. Insignia Fin. Group, Inc.*, 398 F. Supp. 2d 263 (S.D. N.Y. 2005) (age harassment under ADEA); *Keaton v. State of Ohio*, 2002 U.S. Dist. LEXIS 1993 (S.D. Ohio 2002) (racial harassment); *Gotfryd v. Book Covers, Inc.*, 1999 U.S. Dist. LEXIS 235 (D. Ill. Jan. 6, 1999) (national origin harassment); *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998) (national origin discrimination).

> in seeking generally to harmonize the standards of what amounts to actionable harassment.[64]

Indeed, the EEOC followed this line of thinking when it declared that the *Faragher* and *Ellerth* standards apply equally to all forms of harassment forbidden by federal antidiscrimination laws.[65]

The EEOC reported a dramatic rise since September 11th in harassment charges based on conduct targeted at Muslims or those with Arab, Afghani, Middle Eastern or South Asian national origins.[66] Thus, employers may have to rely on the affirmative defense more often in claims including a greater variety of categories. Thus, employers can expect to need to raise the affirmative defense in a wide variety of cases.

The EEOC's Mandate to Train

The requirement to train, implicit in these landmark Supreme Court cases, was further made explicit by the EEOC's 1999 guidelines on establishing an affirmative defense:

> If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities [under the laws prohibiting harassment]. . . . An employer should ensure that its supervisors and managers understand their responsibilities under the organization's antiharassment policy and complaint procedures. Periodic training can help achieve that result. . . . An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment . . . . The employer should ensure that the individual who conducts the investigation would objectively gather and consider the relevant facts. Whoever conducts the investigation should be well trained in the skills that are required for interviewing witnesses and evaluating creditability.[67]

The EEOC's position is clear: To have the best chance to avoid liability for workplace harassment, employers must train every employee and every manager on their responsibilities in preventing harassment at work.

§ 15.2.2(b)

Cases Discussing Harassment Training in the Wake of Supreme Court Decisions

Application of **Faragher/Ellerth** *Affirmative Defense*

In determining if an affirmative defense exists, courts have considered not only whether an employer has an antiharassment policy, but also whether the policy has been effectively communicated to supervisors and employees. The EEOC has taken the position that an employer has a duty to prevent harassment, which extends beyond merely implementing an

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[64] *Faragher*, 524 U.S. at 787 n.1.

[65] *Enforcement Guidance*: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html.

[66] *See Muslim/Arab Employment Discrimination Charges Since 9/11, available at* http://www.eeoc.gov.

[67] *Enforcement Guidance*: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html.

antiharassment policy.[68] Following this line of thought, courts have found that proof of sexual harassment training can be essential to an employer's ability to assert the affirmative defense. Indeed, some courts have held that training is an essential element in proving that the employer "exercised reasonable care to prevent and correct harassing behavior" under the first prong of the defense.

Training Managers – A Necessary Part of the Affirmative Defense

Federal and state courts in certain jurisdictions have held that training managers on preventing workplace harassment is an essential element in the establishing *Faragher/Ellerth's* affirmative defense.[69] The line of cases from these courts hold that merely having an harassment policy is not enough to satisfy *Faragher/Ellerth*. In addition, employers must show the following:

1. training for the company's supervisors regarding the harassment policy;
2. the policy permits both informal and formal complaints of harassment to be made; and
3. the policy provides a mechanism for bypassing a harassing supervisor when making a complaint.[70]

Soto v. John Morrell & Co., shows just how stringent courts have become in requiring the first prong (training) of the above stated test. In that case, the employer promulgated its harassment policy in a separate document in both English and Spanish. All employees received a copy of the policy at orientation and annually thereafter, and were required to sign an acknowledgement. This acknowledgement stated that the employee had received the policy and gave the company's specific contact information for its EEO officer. The personnel and training departments displayed large posters detailing the company's antiharassment policy. Finally, the employer's president sent a letter to all employees, including the plaintiff, reminding them that harassment was against company policy.

This proactive, consistent approach to preventing workplace harassment was impressive. Yet, it failed to include one essential element — manager training. Managers were required to be trained yearly but that requirement apparently when unfulfilled. The Director of Human Resources did speak with managers yearly on the subject, claiming this was "training." His testimony fell apart upon examination by the plaintiff's attorney:

> Q: What guidelines requirements does corporate have for you in terms of what you must do in training, is there any written policy or guideline saying this is what you must do, this is how you must do it?
>
> A: (Director of H): Not that I'm aware of.

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[68] "An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an antiharassment policy and complaint procedure." *Id.*

[69] *Clark v. United Parcel Serv., Inc.* 400 F.3d 341 (6th Cir. 2005); *Montero v. Agco Corp.* 192 F.3d 856 (8th Cir. 1999); *Shaw v. Autozone, Inc.* 180 F.3d 806, 811-12 (7th Cir. 1999); *Soto v. John Morrell & Co.,* 285 F. Supp. 2d 1146 (N.D. Iowa 2003); *Hawkins v. Groot Indus., Inc.*¸ 2003 U.S. Dist. LEXIS 5051 (N.D. Ill. Mar. 31, 2003).

[70] *Clark*, 400 F.3d at 349-50. *See also Soto*, 285 F. Supp. 2d at 1162 (in addition the employer must provide training for the company's supervisors regarding harassment, an express antiretaliation provision; and multiple complaint channels for reporting the harassing conduct).

> Q: Has corporate ever provided you like a script of what is to be told to employees regarding sexual harassment?
>
> A: No.
>
> Q: Have they ever provided you any policies that say you must do this training with its employees regarding sexual harassment and then provide the training material?
>
> A: No, other than the statements and placards and stuff that I have alluded to earlier.
>
> Q: So they don't have a program that they say this is the program you must teach?
>
> A: No.
>
> Q: So there's no uniform method of communicating the sexual harassment policy to the employees of John Morrell, is that correct?
>
> A: I believe that's correct.[71]

Based on this testimony, the employer could not verify that he had provided training to the plaintiff's manager. Thus, the court denied the employer's request for summary judgment on the affirmative defense and let the case proceed to trial.[72]

Training Employees- Evidence of Good Faith Compliance with Title VII

The need to provide antidiscrimination training to employees, as well managers, has been at issue in several recent cases. For example, in refusing to reverse a punitive damages award in a gender discrimination case, the Court of Appeals for the First Circuit considered the fact that the employer had not provided antidiscrimination training as evidence that the employer's efforts to comply with Title VII were "anemic."[73] And in another decision, a federal district court declined to allow the *Faragher/Ellerth* defense in part because the plaintiff, an hourly employee, never received any antiharassment training.

> [A]t this juncture, it is appropriate to mention that the value of sexual harassment training to all employees as evidence that an employer has taken prophylactic action should not be overlooked. At least two district courts have precluded an award of punitive damages where the employer's sexual harassment training program was deemed evidence of employer good faith.[74]

Successful Application of the Affirmative Defense

Compare how the employer faired in the *Soto* decision with those employers who combined proactive harassment prevention measures with training. Federal courts and the EEOC have

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[71] *Soto*, 285 F. Supp. 2d at 1165.

[72] *Id. See also Kolpien v. Family Dollar Stores of Wis., Inc.*, 2005 U.S. Dist. LEXIS 30060 (W.D. Wis. Nov. 28, 2005) (numerous efforts to communicate the policy, including a reference on a paystub, were insufficient to show the employer exercised reasonable care to make employee aware of the policy).

[73] *Rodriguez-Torres v. Carribean Forms Manufactirere, Inc*., 399 F. 3d 52, 65 (1st Cir. 2005).

[74] *Jackson v. Cintas Corp.*, 391 F. Supp. 1075, 1095 (M.D. Ala. 2005) (citations omitted); *see also Hull v. APCOA/Standard Parking Corp*., 2000 U.S. Dist. LEXIS 1658, at *15 (N.D. Ill. Feb. 14, 2000); *Woodward v. Ameritech Mobile Commc'ns, Inc*., 2000 U.S. Dist. LEXIS 7133, at *16 (S.D. Ind. Mar. 20, 2000)

determined that an employer which distributes an antiharassment policy and which trains its supervisors and employees on harassment prevention can establish the affirmative defense.[75] Indeed, employers who take regular and comprehensive measures to prevent harassment, as opposed to a one-time approach, will find themselves in a good position to have their motions for summary judgment granted.[76] Such a positive result can occur even when the employer's actions were not always perfect.

In *Wyatt v. Hunt Plywood*, Ms. Wyatt alleged that a supervisor committed harassment by referring to her in "vulgar terms" and by continually asking her to have sex.[77] The court found that the pattern of harassment fell into three specific time periods. Throughout the three periods, the company took a proactive approach to preventing harassment. It promulgated to all employees a harassment policy that included multiple ways to report harassment. The company also held regular training sessions with its managers on preventing harassment. Finally, after Ms. Wyatt's complaint of harassment, the company concluded a thorough investigation within three days resulting in the harasser being terminated. The court was impressed, holding that the company's approach was "more than adequate" to entitle it to summary judgment regarding the second and third periods of harassment.[78] Regarding the initial period of harassment, Ms. Hyatt had complained to her supervisor, who did nothing in response. The court found that the company had taken reasonable steps to prevent harassment. Because the plaintiff did complain, the company's motion for summary judgment could not be granted.

Continual efforts to prevent harassment, including training, can also help establish the second prong of the *Faragher/Ellerth* defense — the plaintiff's failure to reasonably complain about harassment to the employer. In *Frisk v. Postmaster General*, the plaintiff's failed relationship with a supervisor lead to years of sexually harassing conduct.[79] Yet, the plaintiff never availed herself of the several complaint procedures contained in the Post Office's policy. Was the plaintiff's failure to complain reasonable? The EEOC answered "no" based largely on employer's proactive steps to encourage complaints. These efforts included five separate posters relating to harassment being posted at the plaintiff's place of work, three publications were mailed to the plaintiff and other employees on EEO matters, including harassment, and the plaintiff received annual training.[80]

Continual efforts to prevent harassment also paid off for employers even when their remedial measures were not perfect. In *Fisher v. Electronic Data Systems*, the plaintiff alleged that she was subjected to sexual comments, touching, and implications that she would be fired if she refused her former supervisor's advances.[81] However, the plaintiff did not inform anyone about the conduct for over a year. In reviewing whether the employer established the affirmative defense, the court looked at two issues: (1) did the employer attempt to prevent

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[75] *See, e.g., Kopczyk v. Amphenol Corp.,* 2003 U.S. Dist. LEXIS 18885 (N.D. Ill. Oct. 22, 2003); *Reed v. MBNA Mktg. Sys*., 231 F. Supp. 2d 363 (D. Me. 2002), *vacated & remanded by* 333 F.3d 27 (1st Cir. 2003); *Seth v. Postmaster General,* 2002 EEOPUB LEXIS 6546 (Sept. 9, 2002).

[76] *See e.g., Harper v. City of Jackson Mun. Sch. Dist*., 149 Fed. Appx. 295 (5th Cir. 2005) (training with regular updates part of an affirmative defense).

[77] 297 F.2d 405, 407 (5th Cir. 2002).

[78] *Id*. at 413-14.

[79] 2003 EEOPUB LEXIS 4998 (Aug. 28, 2003).

[80] *Id.*

[81] 278 F. Supp. 2d 980 (S.D. Iowa 2003).

the harassment; and (2) once the harassment occurred did the employer take effective remedial action.

Regarding the first prong, the employer maintained an antiharassment policy and trained the plaintiff and her manager about the conduct. Even the plaintiff acknowledged that this was sufficient to show the employer's good faith efforts to prevent harassment.[82] The plaintiff did question the adequacy of the employer's investigation. However, the court deemed those flaws minor, especially in light of the employer's efforts to prevent harassment. Thus, the employer established the affirmative defense, and the plaintiff's complaint was dismissed.[83]

Conducting training before the harassment claim occurs gives an employer the best chance of showing that it took "reasonable steps" to prevent harassment. Many courts note the fact that training occurring well after the alleged harassment as a reason to deny the affirmative defense.[84] However, conducting training even in the post-complaint stage can help an employer avoid liability.[85] In *Ferencich v. Merritt,* the Board of County Commissioners was not liable for the sexually harassing behavior of a courthouse supervisor, because the evidence showed that the employer did not have a policy of allowing sexual harassment, and it acted quickly to discipline the offender, the Court of Appeals for the Tenth Circuit ruled. There, the plaintiff alleged that almost immediately after she started work at the County her supervisor began making sexual comments and sending her sexually explicit e-mails. The plaintiff finally complained after the supervisor twice placed her hand on his clothed genitals. The County's personnel director and assistant chief deputy took swift, authoritative action. After an investigation, they permanently demoted the supervisor and required him to undergo sexual harassment training. Unfortunately, the supervisor committed another incident of potential harassment, and the county terminated his employment. The court held that the combination of the policy, grievance procedure, and swift remedial action, which included training, were sufficient to insulate the County from liability.[86]

It is interesting that in many of the above cases the employers' actions, while admirable, were less than ideal. In *Wyatt*, the supervisor who fielded the initial complaint did nothing. Yet, this failure did not "poison the well" so that the company's regular training plus prompt reaction to the final complaint were enough to establish an affirmative defense to all but the

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[82] *Id.* at 990-91.

[83] *Id.* at 990-93. *See also Walton v. Johnson & Johnson Servs.,* 203 F. Supp. 2d 1312, 1324-25 (M.D. Fla. 2002) (training plus prompt remedial actions were sufficient to establish an affirmative defense although the policy did not fully describe to whom harassment should be reported).

[84] *Burford v. McDonald's Corp*., 321 F. Supp. 2d 358 (D. Conn. 2004).

[85] 2003 U.S. App. LEXIS 21951 (10th Cir. Oct. 27, 2003) (unpublished).

[86] *Id.*; *see also Bryant v. School Bd. of Miami Dade County* 142 Fed Appx. 382 (11th Cir. 2005) (extensive posting of the sexual harassment policy, an immediate investigation, and harassment training as part of remedial action help the employer establish an affirmative defense); *Jones v. Illinois Dep't of Transp*., 2001 U.S. Dist. LEXIS 20007 (N.D. Ill. Nov. 27, 2001) (the Department of Transportation's immediate action once it became aware of racial jokes, including training employees about the zero-tolerance policy for workplace discrimination and harassment prevented liability for the alleged harassment). Employers should not, however, rely on after-the-fact training as a magic bullet against liability. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), *cert. denied,* 535 U.S. 1018 (2002) (evidence of post-harassment training irrelevant to defense of harassment claims brought against a nonsupervisory employee); *Boggs v. Die Fliedemaus*, No. 99-Civ-2451 (S.D.N.Y. Oct. 7, 2003) (training as part of disciplinary action was not enough to establish an affirmative defense when the harassment was tolerated by several managers over a long time period).

first period of harassment.[87] In *Walton*, the company policy lacked a clear reporting chain, which was made up for by annual letters to employees and supervisory harassment training.[88] In *Fisher,* the employer's investigation, while quick, did not follow all of the most prudent procedures to ensure effectiveness.[89] The Board of Commissioners' quick response, including training, after harassment occurred was enough to establish a defense in *Ferencich v. Merritt*.[90] The message the courts are sending seems clear. While perfection is not required, employers' harassment efforts, including training, must be consistent and effective to establish an affirmative defense.[91]

Employer's Failure to Adequately Train Managers Defeats Application of the Affirmative Defense

Equally important to consider are those cases in which employers failed to establish the affirmative defense in part due to a perceived lack of or insufficient training about harassment. Often, employers with antiharassment policies have been unsuccessful in raising the affirmative defense because their policies were not effectively communicated to supervisors or employees. This problem could have been corrected by high quality training.

Training that does not adequately explain to employees how to prevent and report harassment may be insufficient to establish an affirmative defense.[92] In *Elmasry*, Jennifer Elmasry alleged sexual harassment by her supervisor. Elmasry claimed that the supervisor made numerous inappropriate sexual comments, propositioned her on several occasions, inappropriately touched her and fired her when she did not reciprocate. The company's motion for summary judgment regarding the harassment claim was denied. The court reasoned that the plaintiff raised genuine issues of fact as to whether the employer really had taken reasonable care to prevent harassment. Although Elmasry undisputedly received the company's antiharassment policy and complaint procedure, she was not "effectively made aware of that policy, because no one specifically pointed it out or explained it to her." Further, the company provided just "one training seminar, a portion of which dealt with sexual harassment."[93]

In *Kolpien v. Family Dollar Stores of Wisconsin, Inc.,* the employer proactively attempted to prevent harassment from occurring.[94] The handbook contained both an antiharassment policy and an open door policy, which were given to the employees during employment. The plaintiff herself signed an acknowledgment that she received such policies. Several posters about harassment prevention were placed around the workplace, including at the store where the plaintiff worked. While the employer did provide some training to upper level managers,

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[87] *Wyatt*, 297 F.2d at 413.

[88] *Walton*, 203 F. Supp. 2d at 1324-25.

[89] *Fisher*, 278 F. Supp. 2d at 980.

[90] *Ferencich*, 2003 U.S. App. LEXIS 21951.

[91] *See also Shaw v. Autozone*, 180 F.3d 806, 812 (7th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000) (affirmative defense established even though the plaintiff never received the policy when the employer trained employees); *Hare v. H&R Indus., Inc.*, 67 Fed. Appx. 114 (3d Cir. 2004) (failure to train was part of the reason that the court denied the affirmative defense); *Fuller v. Caterpillar, Inc.*, 124 F. Supp. 2d 610 (N.D. Ill. 2000) (employer conducted harassment prevention training two or three times a year for all employees).

[92] *Elmasry v. Veith*, 2000 U.S. Dist. LEXIS 340 (D.N.H. Jan. 7, 2000).

[93] *See also Miller v. Woodharbor*, 80 F. Supp. 2d 1026 (D. Iowa 2000) (employer did not exercise reasonable care to prevent the harassment since it had failed to train its supervisors and its policy lacked antiretaliation language and a detailed complaint procedure).

[94] *Kolpien*, 2005 U.S. Dist. LEXIS 30060, at **29-32 (W.D. Wis. Nov. 28, 2005).

"there [was] no evidence that anyone below the district manager received sexual harassment training." Instead, the employer simply delegated to store managers the duty to inform employees about harassment prevention. The failure to more aggressively train lower level managers and employees lead the court to deny the employer's request for summary judgment.

In *Williams v. Spartan Communications, Inc.*, the court reversed a grant of summary judgment to an employer, pointing out that although the employer had a policy, the accused harasser/supervisor had not been trained on sexual harassment or the policy, and there was other evidence of upper management harassment.[95] Thus, even though the plaintiff knew of the policy and the employer forced the alleged perpetrator to resign after the allegations, this employer had to continue the costly journey toward trial, in part, because it had not trained its supervisors. Having a sexual harassment policy but failing to disseminate it or train managers and employees on the subject prevented another employer from winning its summary judgment motion in the harassment portion of a lawsuit.[96]

Training Must Be Effective to Establish an Affirmative Defense

It should be recognized that while training is an important, possibly indispensable step, in avoiding liability for harassment, it is not a magic shield. In one case brought against Compaq, the company had an antiharassment policy that was posted in the workplace.[97] The plaintiff received training in sexual harassment prevention that included a discussion of ways that an employee could make a complaint. Yet, once she made an apparently valid complaint of sexual harassment against her supervisor, the computer maker did not monitor or limit the manager's authority. Thus, the court held that Compaq could not establish an affirmative defense to harassment liability and denied the company's motion for summary judgment.[98]

Courts are scrutinizing the details of the training before releasing organizations from liability under the affirmative defense. As explained above in *Soto,* the company's failure to provide any detail about what was presented during training barred the application of the affirmative defense.[99] In *Lapenta v. City of Philadelphia*, the court held that "one half day training seminar on sexual harassment, . . . almost ten years prior to the alleged harassment. . . [is] insufficient as a preventative measure."[100] General discrimination training or training focused on protected category will not be a general panacea against liability. In *Freeman v. Spencer*

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[95] 2000 U.S. App. LEXIS 5776, at *6 (4th Cir. Mar. 30, 2000).

[96] *See also Nuri v. PRC, Inc.*, 13 F. Supp. 2d 1296 (M.D. Ala. 1998) (employer fails to establish the affirmative defense even though it had a "comprehensive, vigorously enforced policy" against sexual harassment, because the plaintiff presented substantial evidence that the policy was not well known and, in fact, was not known at all to employees in her particular office); *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371 (10th Cir. 1998) (plaintiff had not been aware of the harassment policy prior to the alleged harassment); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812 (W.D.N.Y. 1998) (same).

[97] *Munroe v. Compaq Computer Corp.*, 2002 U.S. Dist. LEXIS 20821 (D.N.H. 2002).

[98] *See also Burford v. McDonald's Corp.,* 321 F. Supp. 2d 358 (D. Conn. 2004) (affirmative defense not available when plaintiff communicated her harassment concerns during a performance review, even though training had occurred); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 956-57 (N.D. Ill. 2001) (affirmative defense denied when the same managers who received training also failed to take action once the warning signs of sexual harassment occurred).

[99] *Soto,* 285 F. Supp. 2d at 1165.

[100] *Lapenta v. City of Phila.*, 2004 U.S. Dist. LEXIS 14308, at *7 (E.D. Pa. July 20, 2004).

Gifts, the company had conducted sexual harassment training, which the court found irrelevant in the attempt to establish an affirmative defense to a racial discrimination claim.[101]

The lesson from these cases is that training must be consistent and of such good quality that it helps employees change their behavior to comply with the law.

§ 15.2.3

C. STATES PROVIDING AN EVEN HIGHER STANDARD FOR AFFIRMATIVE DEFENSE

State courts have been even more emphatic in stating that employers who fail to train their employees on preventing harassment evidence negligence in monitoring their workforces, and therefore, will be without a defense to liability.[102] In *Gaines v. Bellino*, the plaintiff, a Corrections Officer, alleged that her shift supervisor grabbed her face and kissed her against her will while the two were alone in the jail. Although Gaines reported this misconduct to one of her supervisors, the supervisor did not report this incident to his superiors because the county had not provided him with any anti-sexual harassment training. (In fact, several corrections officers testified that they had not received any training concerning the county's sexual harassment policy.) Gaines' allegations were ultimately brought to the attention of the county's Director of Personnel as a result of Gaines' deposition testimony in an unrelated case. Following an internal investigation of her claims, the county suspended the supervisor, who retired shortly thereafter.

Gaines filed suit in 1998 against supervisor and the County Correctional Facility alleging violations of the New Jersey Law Against Discrimination (NJLAD). The county moved for a summary dismissal of Gaines' claims without a trial, relying on its antiharassment policy as an affirmative defense to Gaines' claims. Both the trial and appellate courts agreed with the county's position, concluding that the county was shielded, as a matter of law, from vicarious liability for supervisor's misconduct because: (1) it had promulgated a workplace antiharassment policy; (2) Gaines had failed to report the harassment incidents to higher level management in accordance with the terms of the policy, even though she knew of the policy's existence; and (3) the county took disciplinary action against the supervisor as soon as it learned of the alleged harassment. The New Jersey Supreme Court reversed both lower court rulings and remanded the case for further proceedings.

Training – Evidence of an "Unequivocal Commitment" to Prevent Workplace Harassment

The U.S. Supreme Court in *Faragher*, held that in the absence of managerial and supervisory training, triable issues existed as to the effectiveness of the county's antiharassment policy and as to whether that policy could shield the county from vicarious liability for the supervisor's conduct.

In its seminal 1993 decision in *Lehmann v. Toys 'R' Us*, the New Jersey Supreme Court held that an employer may be held vicariously liable under NJ LAD for a supervisor's misconduct when the employer was negligent in preventing workplace sexual harassment by that

[101] *Freeman v. Spencer Gifts*, 333 F. Supp. 2d 1114, 1127-28 (D. Kan. 2004).

[102] *See, e.g., Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

individual.[103] The court in *Lehmann* had explained that the presence of an antiharassment policy would not automatically shield the employer from claims of hostile environment workplace sexual harassment unless that policy was an effective one.

The court in *Gaines* emphasized that while *Lehmann* did not establish "a bright-line rule . . . for the standard of negligence required in sexual harassment claims," numerous factors are relevant to this determination, including whether the employer provided "mandatory" antiharassment training for its supervisors and managers, and also made that training available to all employees in its organization.[104] The court also rejected the county's argument that Gaines' failure to file a formal complaint pursuant to the antiharassment policy barred her claims. The court stated that an employee's inaction must be viewed in the context of whether the employer provided meaningful assistance to the employee who sought to complain about a supervisor's harassment. Concluding that an antiharassment policy "must be more than the mere words encapsulated in the policy," the court stated that such a policy must demonstrate an employer's "unequivocal commitment from the top" to preventing workplace sexual harassment.[105] According to the court, the absence of "effective preventive mechanisms," such as training, will present strong evidence that an employer was negligent in monitoring and preventing workplace sexual harassment. Based upon the record facts, the court held that Gaines' complaint should not have been dismissed because factual issues existed concerning the effectiveness of the county's antiharassment policy.

Eliminating the Affirmative Defense & the Greater Need to Train

The affirmative defense available to claims of harassment under federal antidiscrimination laws but may not apply to the parallel state laws. In a major decision regarding sexual harassment by supervisors, the California Supreme Court finally decided whether California's Fair Employment and Housing Act (FEHA) includes a special or "affirmative" defense to sexual harassment claims recognized by the U.S. Supreme Court in federal employment harassment claims. Ruling in *Department of Health Services v. Superior Court*, the California Supreme Court held that FEHA does not allow the federal *Faragher/Ellerth* defense.[106] The California Supreme Court emphasized that FEHA's provisions differ from Title VII. The *Faragher/Ellerth* defense was based on the law of agency. The FEHA imposes strict liability for all harassment by supervisors, and thus does not allow defenses based on agency.[107]

The *Faragher/Ellerth* defense spurred many employers to conduct harassment prevention training. Does the rejection of the defense by the California Supreme Court mean that such training is useless in California? No it does not. In fact, employers should draw the opposite conclusion — that harassment training is more important than ever.

There is simply no margin for error when it comes to harassment by California managers. Put another way, the only way California employers can avoid liability for harassment by their managers is to ensure that the managers to do not commit harassment. This means that manager training must not only occur but that the training must be effective. "Check the box" training programs will no longer work (if they ever did) because there is no defense box left to check.

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[103] 626 A.2d 445 (N.J. 1993).

[104] *Gaines*, 801 A.2d at 329-30.

[105] *Id.* at 332-33.

[106] *State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026 (2003).

[107] *Id.* (the court did allow employers to reduce damages if they could prove facts very similar to those needed to prove the *Faragher/Ellerth* defense).

Prudent employers will likely re-focus on live training for managers to best ensure the greatest impact. Regular follow-up training for managers will also likely become the norm under this regime of heightened scrutiny.

§ 15.2.4

D. THE "*KOLSTAD* DEFENSE" TO PUNITIVE DAMAGES

Training has also become an indispensable tool in the struggle to prevent the crippling costs of punitive damages. In 1999, the U.S. Supreme Court made EEO training more important than ever by making it a part of a defense against punitive damages in discrimination cases.[108] The Supreme Court's decision in *Kolstad v. American Dental Association* under Title VII of the Civil Rights Act of 1964 seems to have pleased both employees and employers. An employee is no longer required to show that an employer's discriminatory conduct was egregious or outrageous for an award of punitive damages. However, an employer will not be held liable for punitive damages if a manager's conduct is contrary to the employer's good-faith efforts to comply with Title VII.

Carole Kolstad was one of two employees competing for a promotion in the Washington, D.C. office of the American Dental Association. When the other employee, a male, was selected, she sued the Association in federal court, alleging that she had been passed over because of her gender in violation of Title VII. A jury ruled in her favor, awarding her $52,718 in back pay. Kolstad appealed, however, contending that the trial court should have instructed the jury that it could award her punitive damages as well. The appeals court agreed with Kolstad. The Supreme Court decided to hear the case to resolve a conflict among the federal appellate courts about the circumstances under which punitive damages (*i.e.*, extra money damages to punish the employer) may be awarded in Title VII cases.

The Supreme Court issued its decision in two equally important parts. The first part was good news for employees; the second part was a pleasant surprise for employers.

In the first part, the Court held that an individual who is successful in an employment discrimination suit might also collect punitive damages if he or she shows the following:

- *The discrimination was intentional*. This means simply that the employer intended to discriminate based on a protected category, not that it knew the discrimination was unlawful. (Remember: not all discrimination is unlawful; only discrimination on an improper basis, such as race, gender, etc., is forbidden. Disparate impact cases in which an employer does not intend to discriminate but where its action has a discriminatory effect, do not qualify for punitive damages.)
- *The employer acted with malice or reckless indifference to the employee's rights*. According to the Court, this does not mean that an employer's conduct must be egregious or outrageous before punitive damages may be awarded. Rather, the employee must only show that an employer discriminated "in the face of a perceived risk that [the employer's] actions [would] violate federal law." In other words, the employer knew that its actions might violate the law. The Court noted that there would be circumstances where intentional discrimination does not give rise to punitive damages, as where the employer is unaware of the relevant federal prohibition or discriminates with a distinct belief that its discrimination is

[108] *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

> lawful, where the underlying theory of discrimination is novel or otherwise poorly recognized, or where the employer reasonably believes that its discrimination satisfies the *bona fide occupational qualification* or other statutory exception to liability.

In part two of its decision, on a much more closely divided 5 to 4 decision, the Court ruled that even if an individual satisfies the criteria described above, he or she cannot collect punitive damages from the employer (as an entity) if the manager's actions "are contrary to the employer's good faith efforts to comply with Title VII." This means that even if the plaintiff shows that an employee, typically a manager or supervisor, engaged in unlawful discrimination with the knowledge that those actions might violate the laws, the plaintiff still may not receive punitive damages.

How does an employer show that it has made "good faith efforts" to comply with the discrimination law? Although the Court did not detail every action that might qualify under this standard, a "good faith" effort clearly includes: (1) adoption and implementation of antidiscrimination policies; and (2) training personnel about what is and is not permitted under applicable laws.[109] The Court's decision is to encourage "employers to adopt antidiscrimination policies and to educate their personnel."[110]

Post-*Kolstad* decisions point to training as a necessary part of the defense. The U.S. Court of Appeals for the Sixth Circuit recently reviewed the post-*Kolstad* analysis taken by federal courts. In general, the court found the analysis of punitive damages claims in Title VII cases begins with a review of whether "the supervisors involved in the (adverse employment) decision at issue had antidiscrimination training or even very general knowledge about antidiscrimination laws or an employer's antidiscrimination policies."[111]

In another recent case, the U.S. Court of Appeals for the Fourth Circuit so steadfastly adhered to the principles set forth in *Kolstad*, that it actually overturned a jury's award of punitive damages because of the employer's good faith efforts (including live, interactive training) to proactively prevent workplace discrimination. [112]

In sum, an employer need not be concerned quite as much about large punitive damages awards if the employer has adopted and implemented adequate antidiscrimination policies. But an employer cannot just sit back once a policy is in place or turn a blind eye to employee actions that might violate the law. The cases make it more important than ever for employers to train all employees, particularly supervisors and managers, about the do's and don'ts of federal discrimination law and to be ever vigilant in monitoring the workplace to insure that policies are regularly and consistently applied. To do otherwise is an open invitation to liability.

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[109] *Kolstad*, 527 U.S. at 544.

[110] *Id.* at 545.

[111] *Sackett v. ITC Deltacom, Inc.*, 374 F. Supp. 602, 612 (E.D. Tenn. 2005) (citations omitted).

[112] *Bryant v. Aiken Reg'l Med. Ctr. Inc.*, 333 F.3d 536 (4th Cir. 2003). For a more detailed discussion of *Bryant* see Recent Trends and Developments section above at §15.1.

§ 15.2.4(a)

Liability Limited Where Employer Provides Training

Courts have increasingly used the *Kolstad* decision to ensure that employers who train on harassment and discrimination prevention do not receive punitive damages.[113] In this case, the court refused to let the jury even consider awarding punitive damages against the defendant companies because they had shown good faith efforts to prevent harassment. Although two waitresses complained of vulgar comments and inappropriate touching by managers, the court found that the companies had "a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiff's complaints" which met the *Kolstad* standards.[114] In this case, although the companies were found liable for compensatory damages for harassment and emotional distress, they completely avoided punitive damages of much higher amounts.

Oddly, in this case, the same steps that earned the employer the *Kolstad* defense, failed to convince the jury that the company should have an affirmative defense under *Faragher* and *Ellerth*. The appellate court allowed this logical inconsistency by stating that it was reasonable for a jury to choose not to believe the company and therefore find the company liable for harassment. It was also reasonable for the judge not to give out a punitive damages jury instruction based on the company's efforts which satisfied the *Kolstad* good-faith test. Although the judge tried to "overrule" the jury and grant judgment as a matter of law on the harassment claims, the appellate court reversed that decision because a judge's opinion is not allowed to supplant the jury's.

The training needed to prevent punitive damages may have to be more extensive than training done to raise an affirmative defense. An employer was found to have insulated itself from punitive damages through its good-faith efforts to adhere to Title VII in a case where the following actions were considered in preventing the availability of punitive damages.

- Employer had a longstanding policy against sexual harassment.
- The policy was posted in glass display cases at the building entrances.
- Employer published several booklets for employees, providing guidance on how to recognize sexual harassment, how to report it, and an explanation of the consequences of harassment.
- Employer required all employees, both supervisory and nonsupervisory, to attend training regarding sexual harassment.
- Employer also required all salaried and management employees to attend an eight-hour diversity training course. [115]

Training of both managers and employees on preventing harassment, plus longer training for managers was key to the employer's defense. This type of training went well beyond the "check-the-box" approach used by many employers. In a recent race discrimination claim,

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[113] *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473 (5th Cir. 2002), *reh'g denied,* 2002 U.S. App. LEXIS 24504 (5th Cir. Nov. 5, 2002).

[114] *Id*. at 477.

[115] *Fuller v. Caterpillar Inc*., 124 F. Supp. 2d 610 (N.D. Ill. 2000); *see also Dobrich v. General Dynamics Corp., Elec. Boat Div*., 106 F. Supp. 2d 386 (D. Conn. 2000).

another federal court dismissed an employee's section 1981 claim for punitive damages with prejudice when it found undisputed evidence of the employer's good faith efforts to enforce and implement its antidiscrimination policy. These efforts included a well-established antidiscrimination policy and receipt of regular training by staff managers about reporting and handling discrimination issues. [116]

Courts have also applied the Kolstad defense where employers have held management training on harassment prevention and the employer was shown not to have had knowledge of the harassing situation.[117] In *Cooke v. Stefani Management Services, Inc.*, a male bartender alleged sexual harassment by his male manager. Although he complained to both the manager and assistant manager at the branch restaurant, he never reported the incidents to the corporate office. The appellate court held that the corporation had met the *Kolstad* good faith defense requirements by instituting antiharassment policies, holding management harassment prevention training which the alleged harasser had attended, and posting an antiharassment poster at the branch restaurant site. The court therefore reversed the award of punitive damages against the restaurant stating that the employer had done everything it could have done given that it never had knowledge of the alleged harassment.

§ 15.2.4(b)

Liability Enhanced Where Employer Fails to Train

One of the most remarkable legal developments have been decisions in which an employer's inaction regarding training showed willful disregard for the law and was the basis for the award of punitive damages in a harassment or discrimination law suit.[118] In *Phillips*, the job applicant claimed race and age discrimination during the application process. Although the employer never met the applicant, the plaintiff was able to show that the hiring managers had knowledge of his age and race through his resume. The managers admitted that they wanted to hire "bright, young, and aggressive" salespeople and actually hired seven young, Caucasian salespeople in place of the applicant.

Although the employer had an EEO statement on its application, the court found that the employer had discriminated against the plaintiff and that the company had failed to educate its managers about their legal duty not to discriminate. "Leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference" of antidiscrimination laws.[119] The employer here had to pay liquidated damages as a result of not educating its managers appropriately regarding their hiring duties.

Although *Phillips* applies only to the award of liquidated damages under the ADEA, courts routinely harmonize the standards applied under the various major federal EEO laws. Thus, failing to train managers could be used to prove a plaintiff is entitled to punitive damages. At

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[116] *Ridley v. Costco Wholesale Corp.*, 2005 Dist. LEXIS 23276, at *17 (E.D. Pa. Oct. 12, 2005). *See also Hull v. APCOA*, Fair Empl. Prac. Cas. (BNA) 247 (N.D. Ill. 2000) (holding that the employer's policy prohibiting discrimination and harassment, and its training of managers on that policy, indicated its good faith).

[117] *Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564, 568 (7th Cir. 2001).

[118] *See Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001).

[119] *Id.* at 777-78. *See also Young v. DaimlerChrysler Corp.*, 2004 U.S. Dist. LEXIS 22813 (S.D. Ind. Oct. 25, 2004) (lack of details about training defeated *Kolstad* defense).

the very least, proving that training has occurred will likely become a required element of showing that an employer implemented "good faith" efforts to prevent discrimination from occurring.

Even without *Phillips,* failing to train employees can result in the loss of the *Kolstad* defense.[120] Karen Romano sued U-Haul for sex discrimination after she was fired from her job as a customer service representative. Romano's manager told her that upper management did not want women working in the main office and that "the only problem you have is you sit when you pee." A jury verdict in favor of the plaintiff ($625,000 punitive damages; $15,000 compensatory damages) was affirmed on appeal. The court of appeals reviewed the *Kolstad* standard regarding whether to award punitive damages. Noting that a written antidiscrimination policy, without more, is insufficient to insulate an employer from punitive damages liability, the court held that a "defendant must also show that efforts have been made to implement its antidiscrimination policy through education of its employees and active enforcement of its mandate."[121]

Courts continue to enforce the message that employers who fail to train managers on how to prevent and properly respond to harassment complaints will be liable for punitive damages without recourse to *Kolstad*. In an action alleging that an employee discharge violated the Americans with Disabilities Act (ADA), the court denied an employer's summary judgment motion to set aside punitive damages.[122] In this case, plaintiff suffered from severe scoliosis of the lumbar spine and related medical conditions. After the employer ordered plaintiff to undergo a functional capacity evaluation (FCE), it placed her on short-term disability leave and ultimately discharged her on Total and Permanent disability. Little evidence of accommodation or interactive attempts was present. In justifying the upholding of the $300,000 punitive damages award, the court highlighted the employer's overall failure to engage in good-faith compliance with the ADA's requirements: "There was no evidence that DuPont had a written or publicized employee anti-discrimination policy. There was no evidence of employee training. There was no evidence of an employee discrimination grievance procedure."[123]

In another ADA case, a district court denied an employer's motion as a matter of law after the jury awarded punitive damages for disability discrimination.[124] In that case, the employer introduced evidence of an antidiscrimination policy, but failed to offer evidence that the policy was actively enforced. The employer also "failed to introduce any training evidence in existence at the time of [plaintiff's] discharge," prompting the court to state that, "(a) dearth of antidiscrimination training during the time period at issue in [the] lawsuit could actually lead a jury to infer that [the defendant] did not, in fact, make a good faith effort to enforce such policies." [125]

In *Swinton v. Potomac Corporation,* a section 1981 racial discrimination case, the court affirmed a $1,000,000 punitive damages award.[126] The employer had argued that it met the

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[120] *Romano v. U-HAUL Int'l*, 233 F.3d 655 (1st Cir. 2000).

[121] *Id.* at 670. *See also Koerber v. Journey's End, Inc.*, 2004 U.S. Dist. LEXIS 5424 (N.D. Ill. Mar 31, 2004).

[122] *EEOC v. E.I. DuPont De Nemours & Co*., 2005 Dist. LEXIS 11575 (E.D. La. June 6, 2005).

[123] *Id.* at **62-63.

[124] *Kuper v. Empire Blue Cross & Blue Shield*, 2003 U.S. Dist. LEXIS 2362 (S.D.N.Y. Feb. 13, 2003).

[125] *Id.* at *16.

[126] 270 F.3d 794 (9th Cir. 2001).

good faith *Kolstad* requirement because it had written policies forbidding harassment and had instituted antiharassment procedures. The court rejected this argument. The court stated that the company "could have impressed upon its supervisors . . . whom it tasked with accepting complaints of harassment . . . that repeatedly subjecting a black employee to "nigger" jokes is wholly unacceptable, and at odds with basic antidiscrimination principles. But it chose not to, and [the employer] cannot now be heard to protest . . . ."[127] The court clearly indicated that training and educational measures which further managerial awareness of discrimination and harassment are important components necessary before an employer can invoke the good-faith defense.

A similar decision was reached in *Marrero v. Goya of Puerto Rico, Inc*.[128] There, the court affirmed the punitive damages award against the company noting that defendant Goya's managers had failed to respond to complaints and "the jury was justified in finding that Goya did not have a sexual harassment policy in effect during the relevant events…[and even if it had] Goya did not present any evidence that it had implemented it, either through educating its employees or enforcing its mandate."[129]

In a particularly reprehensible case, a fuel-hauling company's East Indian employees filed a racial discrimination and breach of contract lawsuit against ARCO because its managers consistently called the Indian employees and owners derogatory names such as "rag-heads," "towel-heads" and the like.[130] The managers further demeaned the Indian employees by requesting that fuel be cleaned up with their turbans, making them wait longer to fill their trucks and forcing them to use slower pumps. The court found that ARCO did not present evidence "of the implementation of an effective antidiscrimination policy" and ARCO failed to respond to any complaints made internally and thus failed to assert or establish a *Kolstad* defense. The jury awarded only $1 in compensatory damages on the section 1981 race discrimination claim, but gave the fuel haulers $5 million in punitive damages. The court affirmed this award despite ARCO's protests of gross excessiveness.

The need to conduct effective harassment prevention training may now be more critical than ever in California, due to the recent decision by the California Supreme Court in *Department of Health Services v. Superior Court*.[131] The court held claims for sexual harassment filed under California's Fair Employment and Housing Act (FEHA) will not be subject to the federal *Faragher/Ellerth* defense. The court emphasized that the FEHA's provisions differ from Title VII in that the FEHA imposes strict liability for all harassment by supervisors, and thus does not allow defenses based on agency. The *Faragher/Ellerth* defense is based on the law of agency.

While limiting the application of the *Faragher/Ellerth* defense, this decision affords California employers a significant new defense to claims of harassment by supervisors under the FEHA: the doctrine of avoidable consequences. This defense allows an employer to plead and prove that it took appropriate steps to prevent and address harassment, but that the employee unreasonably failed to take advantage of those protections. It enables employers to

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[127] *Id.* at 811.

[128] 304 F.3d 7 (1st Cir. 2002).

[129] *Id*. at 30. *See also Thompson v. Altheimer & Gray*, 2001 U.S. Dist. LEXIS 20993, at *21 (N.D. Ill. Dec. 18, 2001) (rejecting the defendant's summary judgment motion stating: "[T]here is no evidence indicating that defendant conducted training or otherwise monitored enforcement of its antidiscrimination policy" and these are factors which "bear on the existence of good faith.").

[130] *Bains LLC dba Flying B v. ARCO Prods. Co.*, 220 F. Supp. 2d 1193 (W.D. Wa. 2002).

[131] 31 Cal. 4th at 1026.

limit damages, so that they will not be liable for damages an employee could have avoided by utilizing the employer's complaint procedures.

In addition to having adequate written policies and procedures, training should be conducted to establish that the company's policies and procedures have been clearly communicated to all employees. Thus, in the same manner that training helps establish an employer's "good faith" defense to punitive damages under Title VII, it will also remain a critical part of the avoidable consequences defense in cases of sexual harassment filed under California's FEHA.

§ 15.2.4(c)

Training Which Is Not Enough to Avoid Punitive Damages

Even in situations where an employer has trained its employees and can prove it, punitive damages may apply if the employer did not train the managers actually responsible for the inappropriate conduct.[132] In *Godinet,* the employer had to pay over $470,000 in damages and attorneys' fees, including $150,000 in punitive damages, even though it had an antidiscrimination policy and had trained some of its supervisors. In this case, a Samoan man was not promoted, and he claimed it was because the company had promoted African Americans instead. The plaintiff failed to receive two different positions with the company and ultimately filed a race discrimination lawsuit. Three employees testified that they had been directed by management to hire African American employees and both the positions the plaintiff wanted were given to African Americans.

Ultimately, although the employer had conducted training, it could not show that the four managers involved in the lawsuit had been trained in how to prevent discrimination. It had also failed to investigate the plaintiff's exit interview form where he checked "no" to a question regarding the company's provision of equal opportunity for all employees. The employer additionally failed to follow up on or investigate a phone call from plaintiff threatening to file a discrimination lawsuit.[133] For all of these reasons, the employer was found liable for $150,000 in punitive damages and the court stated that "in addition to adopting antidiscrimination policies, an employer 'must make a good faith effort to educate its employees about these policies.'"[134]

Training every other year is also not enough to prevent liability if the training did not occur during the years that the alleged harassment occurred.[135] In *Greene v. Coach, Inc.*, the employer, Coach, submitted attendee lists of seven antiharassment and antidiscrimination training workshops it conducted from 1996-2000. However, for the two years of the plaintiff's employment, 1997-98, no attendee lists were submitted. In addition, although Coach apparently had a policy, there was no evidence submitted that indicated the extent to which retail managers were informed of the policy. As a result, Coach's motion to dismiss the plaintiff's punitive damages claim was denied. In part, by not training on an annual basis, Coach lost the ability to claim a good faith defense at the summary judgment stage, and a jury will likely be allowed to decide whether the company is liable for punitive damages.

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[132] *Godinet v. Management Training Corp.,* 2003 U.S. App. LEXIS 184 (10th Cir. Jan. 7, 2003) (unpublished).

[133] *Id*. at *20.

[134] *Id*. at *19 (citing *Cadena v. Pacesetter, Corp*., 224 F.3d 1203, 1210 (10th Cir. 2000)).

[135] *Greene v. Coach, Inc.*, 218 F. Supp. 2d 404, 414 (S.D.N.Y. 2002).

Ensuring that the training is legally sound and covers the organizations own policies is also important to avoiding punitive damages.[136] In *Cadena*, the company had conducted antiharassment training. Yet, because of legally unsound advice given by the trainer (*e.g.*, the trainer's opinion that exposing genitalia to female employees would not be harassment if an apology ensued), the court held that the company had not taken "good faith" efforts to avoid harassment.[137]

Additionally, any delay in the implementation of training may impact the availability of *Kolstad*'s defense to a punitive damages claim. In *Johnson v. Spencer Press of Maine, Inc.*, the employer had launched a harassment prevention training program in early 2000, but the implementation of the program did not allow the employer to overcome a claim for harassment subsequently filed by an employee who had worked there since 1991. The accused supervisor alleged to have only realized that his behavior (making religious jokes, viewing Playboy magazines in the workplace and saving nude pictures on his computer) was inappropriate when he attended the training in April 2000. Due in part to the timing of the training, the court concluded that a triable issue of fact remained as to whether the employer had undertaken good faith efforts to comply with Title VII.[138]

In the same vein, employers which give "check-the-box" training will not always escape punitive damages awards either. In *Madison v. IBP, Inc.*, the employer had an antiharassment policy and an affirmative action plan.[139] Yet, it had squeezed "Legal Aspects of Supervision" into a two hour program which apparently included antiharassment training. The court held that these practices were not enough to avoid having the jury deliberate on punitive damages, given the evidence that the corporate policies were not carried out at the plant. Ultimately, managers were found to have ignored complaints of racial and sexual harassment and punitive damages were awarded.

§ 15.2.4(d)

Lessons on Avoiding Punitive Damages

As most employers already know, punitive damages can far exceed compensatory damage awards, sometimes raising much more serious financial issues for companies than the possibility of having to pay only compensatory damages. Punitive damage awards under Title VII are capped between $50,000 and $300,000, depending on the size of the employer. In light of the high stakes, an employer cannot afford to appear ignorant or unconcerned about its responsibilities to avoid discrimination complaints and to remedy the complaints it receives. Prevention through training can go a long way not only to limit an employer's liability under Title VII, but also to prevent discrimination claims from arising in the first place. Additional steps an employer can take include: instituting a policy forbidding harassment or discrimination, ensuring the policy is well-publicized, training new and existing employees on harassment/discrimination prevention, establishing a grievance procedure for harassment/discrimination complaints, and investigating internal complaints promptly.

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[136] *Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000).

[137] *See also EEOC v. Rite Aid Corp.*, 2004 U.S. Dist. LEXIS 12356 (E.D. La. June 30, 2004) (training that failed to review the company's own procedures failed to establish a *Kolstad* defense).

[138] *Johnson v. Spencer Press of Maine, Inc.,* 2003 US Dist. LEXIS 1058, at **71-72 (D. Me. Jan. 24, 2003).

[139] 257 F.3d 780 (8th Cir. 2001).

The high cost of litigation is often enough to encourage employers to train supervisors and employees about how to avoid acts of discrimination and harassment. However, the possibility of more frequent punitive damages liability in Title VII cases gives employers an additional incentive to timely and regularly train supervisors and employees on how to avoid discriminatory and harassing conduct. Employers cannot afford to shirk their antidiscrimination obligations under Title VII. Nor can they ignore the advantages of providing antidiscrimination training.

§ 15.2.5

E. UNLAWFUL WORKPLACE HARASSMENT TRAINING: STATE-BY-STATE SURVEY

§ 15.2.5(a)

Introduction

California, Connecticut, and Maine are the three states placing the most direct harassment prevention training requirements on private employers. The following summarizes the laws of other states regarding such training.

§ 15.2.5(a)(i)

California

In addition to the requirements discussed above, the California Fair Employment and Housing Act requires employers to distribute an "information sheet" or provide "equivalent information" to all employees regarding sexual harassment. The information sheet is available from the Department of Fair Employment and Housing.[140]

The California Penal Code also requires that all new law enforcement officers attend a "basic training" course that includes training on sexual harassment in the workplace. Current officers must also be trained on sexual harassment.[141] In 1998, the California Legislature authorized the state's Judicial Council to "provide by rule of court for racial, ethnic and gender bias, and sexual harassment training for judges, commissioners and referees."[142] The Judicial Council responded almost instantly, enacting a rule mandating "job-related training and continuing education programs for all [court] personnel concerning . . . sexual harassment awareness . . . [and] discrimination and bias."[143] The new rule took effect January 1, 1999.

§ 15.2.5(a)(ii)

Colorado

The Colorado Sex Discrimination Rules, as adopted by the Colorado Civil Rights Commission, "encourage" employers to "sensitize" employees regarding issues relating to sexual harassment.[144]

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[140] CAL. GOV'T CODE § 12950; FAIR EMPLOYMENT PRACTICE MANUAL (BNA) § 453:3441 (2002).

[141] CAL. PENAL CODE § 13519.7.

[142] CAL. GOV'T CODE § 68088.

[143] CAL. R. OF COURT, Rule 6.650.

[144] *See* 3 COLO. CODE REGS. § 708-1, Rule 80.11(C).

§ 15.2.5(a)(iii)

Connecticut

Along with the mandatory harassment training requirements outlined in § 15.2.1(b) above, Connecticut law requires state agencies to provide three hours of diversity training to all supervisory and non-supervisory employees and to all new supervisory employees within six months of the assumption of a position with a state agency. The diversity training must include information on state and federal discrimination laws as well as hate crimes directed at protected classes.[145]

§ 15.2.5(a)(iv)

Florida

The Public Personnel Rules of Florida's Administrative Code requires all supervisors within executive branch agencies to undergo training on the principles of equal opportunity and affirmative action.[146]

§ 15.2.5(a)(v)

Illinois

The Illinois Human Rights Act provides that every public employer shall maintain and carry out a sexual harassment program, including sexual harassment training, as a component of all new employee-training programs.[147] Illinois law also requires that public contractors and eligible bidders for public contracts have a written sexual harassment policy that includes information on the Illinois Department of Labor's complaint process and provide sexual harassment prevention training as a component of all ongoing or new employee training programs.

§ 15.2.5(a)(vi)

Maine

Maine's Sexual Harassment Training and Education in the Workplace Law requires all private and public employers to conduct a sexual harassment education and training program for all new employees in workplaces with 15 or more employees within one year of commencement of employment.[148]

§ 15.2.5(a)(vii)

Massachusetts

Massachusetts' Fair Employment Practice Act "encourages" employers to conduct an education and training program for new employees within one year of commencement of employment, and to provide additional training for supervisors.[149] In addition, "Labor organizations and appropriate state agencies are encouraged to cooperate in making such training available."

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[145] CONN. GEN. STAT. § 46a-54(16)(A).

[146] *See* FLA. ADMIN. CODE, tit. 60L, § 21.004.

[147] 775 ILL. COMP. STAT. § 5/2-105(B)(5).

[148] ME. REV. STAT. tit. 26, § 807(3).

[149] *See* MASS. GEN. LAWS ch. 151B, § 3A(e).

§ 15.2.5(a)(viii)

Michigan

Michigan's Disability Bias Law requires the department of civil rights to offer training programs to employers, labor organization and employment agencies to assist in understanding the requirements of the Act.[150]

§ 15.2.5(a)(ix)

New Jersey

As elaborated upon in § 15.1.2(c), the New Jersey Supreme Court held in 2002 that, in judging an employee's claim that its employer was negligent in preventing sexual harassment, New Jersey courts should consider whether the employer made sexual harassment training available to all employees in its organization. The court stated that providing sexual harassment training helps demonstrate an employer's "unequivocal commitment from the top" to preventing sexual harassment.[151]

§ 15.2.5(a)(x)

Oklahoma

Oklahoma's "Fair Employment Practices Act", through its Rules of Personnel Management and Administration, requires that all state personnel who investigate complaints of discrimination be trained in the areas of equal employment opportunity, discrimination and burdens of proof.[152]

§ 15.2.5(a)(xi)

Pennsylvania

Pennsylvania's Human Relations Act requires that all "Commonwealth employees will be educated in sexual harassment."[153]

§ 15.2.5(a)(xii)

Rhode Island

Rhode Island's Sexual Harassment, Education and Training Law "encourages" employers to conduct an education and training program for new employees within one year of commencement of employment, and to provide additional training for supervisors.[154] "Employers and appropriate state agencies are encouraged to cooperate in making such training available."

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[150] *See* MICH. COMP. LAWS ANN., § 37.1212.

[151] *Gaines v. Bellino*, 801 A.2d 322 (N.J. 2002).

[152] *See* OKLA. STAT. tit. 74, § 840.21(F.1); tit. 530, § 10-3-20.

[153] 4 PA. CODE § 7.595.

[154] *See* R.I. GEN. LAWS ch. 118, §§ 28-51-2(c), 28-51-3.

§ 15.2.5(a)(xiii)

Tennessee

The Tennessee State Employees' Sexual Harassment Law obligates the state department of personnel to conduct training workshops for all public employees.[155]

§ 15.2.5(a)(xiv)

Texas

Texas' Employment Discrimination Law mandates that each state agency provide its employees with employment discrimination training within 30 days after being hired and then on a supplemental basis every two years.[156]

§ 15.2.5(a)(xv)

Utah

The Utah Department of Human Resource Management Rules obligates all public employers to conduct sexual harassment prevention training consistent with standards established by the Department.[157]

§ 15.2.5(a)(xvi)

Vermont

The Vermont Fair Employment Practices Act "encourages" employers to conduct an education and training program for new employees within one year of commencement of employment, and to provide additional training for supervisors.[158]

§ 15.2.5(a)(xvii)

Federal Agencies

Under the Notification and Federal Employee Anti-Discrimination and Retaliation Act ("No FEAR Act"), federal agencies are required to: train all employees on discrimination, retaliation, and whistleblower laws by September 30, 2005; train new employees within 60 days of hire; and provide refresher training at least once every two years. Passed in 2002, the goal of the No FEAR Act is to make federal agencies more accountable for reducing the occurrence of discrimination and retaliation in their workplaces.[159]

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[155] *See* TENN. CODE § 4-3-1703.

[156] *See* TEX. LAB. CODE § 21.010.

[157] *See* UTAH ADMIN. CODE § 477-25-7.

[158] *See* VT. STAT. tit. 21, § 495h(f).

[159] *See* PUB. L. NO. 107-174; *See also No FEAR Act Training of Agency Employee Due by End of FY 2005 Under OPM Proposal,* Daily Lab. Rep. (BNA), Mar. 2, 2005, at A-10.

§ 15.2.6

F. OTHER SOURCES FOR REQUIRED TRAINING

§ 15.2.6(a)

Judicially-Imposed Settlements & Consent Decrees Requiring Training

Not all workplace training is mandated by legislatures or by executive branch regulators. Training may also be required by the judicial branch as part of the settlement of a lawsuit, or, if the state or federal government has brought suit against the employer, as part of a negotiated "consent decree." Indeed, requiring training as a part of litigation settlement is now standard operating procedure for the EEOC. For example, Morgan Stanley settled a long standing sexual discrimination class action on the eve of trial for $54 million.[160] In that case, the settlement contained detailed training requirements, including ongoing executive training, discrimination training, and diversity training.[161] Significantly, the decrees required that part of the training be done using live training (either in-person or live on-line) instead of self-study training.[162]

Additionally, in 2005 courts mandated via consent decrees comprehensive Equal Employment Opportunity (EEO)/antidiscrimination training for a myriad of employers, including: Rivera Vineyards in the Coachella Valley of California; Austrian Airlines; and the aerospace firm, Hamilton Sundstrand.[163] These employers settled claims of sexual harassment, age discrimination and national origin harassment, respectively. Specifically, Rivera Vineyards and Hamilton Sundstrand agreed to pay $1 million and $1.2 million to settle their particular class action suits, while the sole plaintiff in the Austrian Airlines suit, received $500,000. Along with the call for EEO training for management and employees, the consent decrees required each of these employers to adopt antidiscrimination and harassment policies as well as internal complaint procedures.

As a result of an effort to combat a discrimination suit, Abercrombie & Fitch received final court approval for a voluntarily-entered settlement agreement and consent decree which contained provisions related to the recruitment, hiring, job assignment, promotion, and training of Abercrombie & Fitch employees. Filed in late 2004, the triggering complaint featured a class action alleging Abercrombie & Fitch's failure and refusal to hire or promote women, African Americans, Latinos, and Asian Americans. Specifically, the consent decree requires the retail clothing giant to pay $40 million dollars to the class members and to

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[160] John Herzfeld, *Morgan Stanley to Pay $54 Million to Settle 2001 Bias Lawsuit by EEOC,* Daily Lab. Rep. (BNA), July 13, 2004, at AA-1. *See also UC Regents Approve $10 Million Settlement In Pay Discrimination Case at Livermore Lab*, Daily Lab. Rep. (BNA), Nov. 21, 2003, at A-7, (citing *Singleton v. Regents of the Univ. of Cal.,* No. 807233-1 (Alameda County Super. Ct.) — settlement approved by Regents Nov. 19, 2003).

[161] *EEOC v. Morgan Stanley & Co. Inc.,* No. 01-8421, (S.D.N.Y July 12, 2004) (consent decree approved).

[162] *Id.*

[163] *Rivera Vineyards in California Pays $1 Million Under Sex Bias Decree Reached with EEOC*, Daily Lab. Rep. (BNA), June 16, 2005, at A-12; *Austrian Airlines Manager to Get $500,000 Under Age Bias Consent Decree with EEOC,* Daily Lab. Rep. (BNA), Dec. 29, 2005, at A-16; *Aerospace Firm to Pay Hispanic Employees $1.25 Million to Settle Claims of Harassment,* Daily Lab. Rep. (BNA), May 24, 2005, at A-2.

institute a range of policies and programs to promote diversity among its workforce and to prevent discrimination based on race or gender. In particular, provisions include mandatory diversity and EEO training for all employees with hiring authority.[164]

OSHA also continued a long-standing practice of requiring safety training to settle disputes over employer fines. For example, Phillips Petroleum Co. agreed to pay $2,169,500 in penalties for safety and health violations discovered after an explosion in March 2000 that killed one worker and injured 69 others at a chemical plant. As part of the settlement agreement, Phillips Chemical Co. will conduct comprehensive reviews of the plant's training program and standard operating procedures.[165]

In an ergonomic-related settlement, the U.S. Labor Department settled a long-standing claim with Beverly Enterprises, the nation's largest nursing home chain. The agreement settled citations issued by OSHA to five Beverly nursing homes, and required the employer to agree to train workers on the proper use of lifting devices at 270 facilities operated across the United States.[166]

§ 15.2.6(b)

Other Legal Implications of Inadequate Training

The laws described above impose on an employer both a duty to train and a minimum standard of care. However, even when an employer provides all training that is required by law, a court may find that the employer should also have complied with higher training standards, if such higher standards are common in the employer's industry. Thus, if other companies in the industry provide training that exceeds the minimum required by law, the higher level will become the new threshold for training.

Training may also be deemed inadequate when a trainee fails to learn the material. For example, under the Federal Occupational Safety and Health Administration (Fed-OSHA), in order to comply fully with HazCom right-to-know regulations, employers must ensure not only that their employees receive the training but that they also understand the information and training that they were given.

An employer who fails to train as required by law or by industry standards may be subject to fines and penalties by the government agency involved, including forfeiture of government funding or exclusion from government contracts. Some statutes also specify criminal sanctions, including incarceration, against an employer or individual trainer when the failure to conduct training results in death or serious injury to an employee or someone else.[167] Of course, employees or third parties injured because of a lack of training (or inadequate training) may file civil lawsuits seeking compensatory and punitive damages from the employer, particularly if they can demonstrate that the employer failed to meet the industry standard for training.

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[164] *EEOC v. Abercrombie & Fitch Stores, Inc.*, Nos. 03-2817 SI, 04-4730 & 04-473 (consent decree approved Apr. 14, 2005.)

[165] *Phillips Petroleum to Pay $2.1 Million*, Daily Lab. Rep. (BNA), Jan. 4, 2002, at A-1.

[166] *Beverly Agreement Requires Training, Use of Lifting Aids*, Daily Lab. Rep. (BNA), Jul. 16, 2002, at AA-1.

[167] 29 U.S.C.A. § 666(e) (1995) (Fed-OSHA).

In these civil lawsuits, the plaintiff may try to prove that although the company met the minimum requirements of the statute, the particular circumstances of the workplace required additional training. For example, although Fed-OSHA does not require that training be conducted in more than one language, employers with diverse workplaces should ensure that the training is understood (*i.e.*, that it is conducted in the native language of the employees) not just in English. Similarly, although there is no requirement for employers to pair employees with supervisors who speak the same language, since training often occurs on the job, the employer's failure to pair the employee with a supervisor who speaks the worker's language may result in liability if the employee is injured or disciplined for failure to perform.

§ 15.2.6(c)

Occupational Safety & Health Training Requirements

Education and training are essential means for communicating practical understanding of the requirements of effective safety and health protection to all personnel. Without such understanding, managers, supervisors, and other employees will not perform their responsibilities for safety and health protection effectively. The U.S. Department of Labor's Bureau of Labor Statistics (BLS) reports that safety instruction is the field that currently provides the highest single percentage of training activity per employee in the nation. Employers are providing more on-the-job safety training than any other kind. According to data developed by the ASTD, 84% of employers with 50 or more employees responding to its 1997 Human Performance Practices Survey indicated they provided OSHA training the previous year.

On January 26, 1989, the Fed-OSHA issued Safety and Health Program Management Guidelines ("Fed-OSHA Guidelines") for use by employers to prevent occupational injuries and illnesses. These Guidelines consisted of program elements distilled by Fed-OSHA from safety and health management practices of employers who, in Fed-OSHA's view, successfully protected the safety and health of their employees.[168]

The Fed-OSHA Guidelines listed four elements for effective occupational safety and health programs: (1) management commitment and employee involvement; (2) worksite hazard evaluations; (3) hazard prevention and control measures; and (4) safety and health training. Employers must implement training programs to ensure that all employees understand the hazards to which they may be exposed and how to prevent harm to themselves and others from exposure to these hazards so that employees accept and follow established safety and health protections.

Supervisors must be trained to carry out their safety and health responsibilities effectively and to ensure that they understand those responsibilities and the reasons for them. This includes training supervisors to analyze the work under their supervision to identify potential hazards, maintain physical protections in their work areas, and reinforce employee compliance through performance feedback and enforcement of safe work practices.

Training is a required component of compliance with virtually all Fed-OSHA standards. However, there are two key compliance areas common to all employment situations that present excellent starting points for implementing safety and health training programs. These are hazard communication and accident prevention plans (injury and illness prevention plans). Providing the required initial and refresher training in these areas can also meet

[168] 54 Fed. Reg. 3904 -3916 (Fed OSHA Jan. 26, 1998).

minimum training requirements for a wide range of substance-specific and industry-specific OSHA standards. See "OSHA Training Requirements Highlights" at the end of this chapter for a detailed, but not all-inclusive, list of other safety and health topics that require employee training.

The minimum elements that must be covered in hazard communication and accident prevention training are as follows.

Employer Personnel Responsible for Safety & Health Program Administration

Initial and refresher training must clearly designate specific individuals with overall responsibility for implementing and updating hazard communication and accident prevention programs. Employees must be informed as to how to contact these personnel regarding safety and health questions or concerns including a provision for anonymous reporting of such concerns.

Task-Specific Hazards & Control Measures

Employees must be informed of all chemical, physical and biological hazards involved in their assigned work tasks, as well as additional hazards that may affect their work tasks. This training must include instruction in how employees can recognize such hazards and potential signs and symptoms of overexposure, and what measures the employer has implemented to protect employees from the hazards and to prevent overexposures. Hazard recognition training must include the employer's container labeling systems, warning signs and how employees can obtain and read Material Safety Data Sheets from chemical suppliers. Where protective measures include special tools or engineering controls, the employees must be taught how to use and maintain those devices. Where personal protective clothing and/or respirators are required, employees must similarly receive training in the proper selection, use, and maintenance of those devices. If employees may periodically be assigned to nonroutine tasks, the training program must include measures that the employer will use to identify and control potential hazards of such nonroutine work assignments and how those measures will be communicated to affected employees.

Most recently, OSHA has been formalizing a directive that will address workplace violence in the nursing home industry through training and outreach. The directive, CPL 2-2.69, requires all nursing home employees with occupational exposure to the hazards associated with blood and other infectious materials, to receive training at the time of initial employment and at least annually thereafter.

Employee Communication

Training for compliance with hazard communication and accident prevention plans must include a description of the means used to communicate with employees regarding safety and health matters. Communication methods may include workplace postings, written memos or newsletters, training handouts, safety meetings, and/or safety committees, as well as daily interactions between employees and their supervisors.

Minimum Safe Work Practices & Enforcement

Employers should develop and implement written, minimum safe work practices and standard operating procedures for each task assigned to employees. Compliance with these safe work practices and procedures should be a condition of employment. Noncompliance should result in disciplinary action in accordance with the employer's personnel policies and practices.

Both the minimum work practices and procedures and the employer's enforcement policy must be communicated to employees in training.

Refreshers & Training Updates

Employees require periodic refresher training in hazard communication and accident prevention. The usual recommended frequency is at least annually. Employees observed violating safe work practices or procedures or behaving in an unsafe manner should also be candidates for additional refresher training. Training updates are required whenever the work area hazards change, the risk of exposure to those hazards increases, whenever new processes, chemicals, or procedures are implemented, and whenever new hazard controls are implemented.

Training in safety-related subjects is already a fact of life in the American workplace. Today, however, the mere existence of a training program is not enough. The adequacy of employee safety training can become an issue in contested cases when the employer raises the affirmative defense of "unpreventable employee misconduct." This may require the use of tests and/or hands-on exercises as part of training programs to demonstrate employee understanding of the materials presented. Employers may also need to consider using translators or presenting training materials in a variety of verbal and written formats to ensure understanding by non-English speakers and employees with learning disabilities or physical disabilities.

Under already well-established case law developed by the Occupational Safety and Health Review Commission and the courts, an employer may successfully defend against an otherwise meritorious OSHA citation by showing that all feasible steps were taken to avoid the occurrence of the hazard. Proving the adequacy of employee training immediately becomes a hotly contested issue in most such cases. The content of training materials, the dates the trainings were presented, instructors, evidence of employee attendance, and evaluation of employee understanding should all be documented in writing and maintained in employee training records.

Employers should be well aware of additional training obligations under state versions of OSHA. For example, the California Division of Occupational Safety and Health adopted an emergency regulation in September 2005, which was readopted in December 2005, covering heat illness prevention in all outdoor places of employment. The emergency regulation expires on April 20, 2006, but is expected either to be readopted or finalized.

The regulation has a significant training obligation**.** All employees are to be trained on the following topics:

- Environmental and personal risk factors for heat illness.
- The employer's procedures for identifying, evaluating and controlling exposures to the environmental and personal risk factors for heat illness.
- The importance of frequent consumption of small quantities of water.
- The importance of acclimatization.
- Different types of heat illness and the common signs and symptoms of heat illness.
- The importance of reporting to the employer symptoms or signs of heat illness in themselves or in coworkers.

- The employer's procedures for responding to symptoms of possible heat illness.
- Procedures for contacting emergency medical services.
- How to provide clear and precise directions to the worksite.

In this training, employees are to be provided with basic information about risk factors that may affect their vulnerability to heat illness, such as degree of acclimatization, health, water consumption, alcohol consumption, caffeine consumption and use of prescription medications.

In addition, supervisors are to be trained in the procedures to follow implementing the emergency regulation and the procedures to follow when an employee exhibits symptoms consistent with possible heat illness, including emergency response procedures.

§ 15.2.6(d)

Federal Drug-Free Workplace Act Training Requirements

In response to a growing crisis, Congress enacted the federal Drug-Free Workplace Act (DFWA) nearly a decade ago. DFWA requires employers who receive grants from, or enter into contracts with, the federal government to inform their workers about the hazards of drug use and chemical dependency. These employers must establish programs informing their workers of the dangers of drug abuse in the workplace, must acquaint them with their company's drug-free policy and must point out available resources for drug counseling and rehabilitation. They also must inform employees of the penalties that may be imposed for transgressions. Employers covered by DFWA that fail to conduct such training may forfeit government grants or be excluded from future government contracts. Coworkers or third parties injured as a result of the conduct of inadequately trained, chemically-dependent employees can file a civil lawsuit under either DFWA or state law to obtain compensation for those injuries.

Ten years after DFWA was enacted, the nation's workplace drug problem remains enormous. The U.S. government has reported that 9.7 million Americans use marijuana each month and 1.9 million use cocaine at least monthly. The government also reports that 66% of those who use illicit drugs are employed. The arithmetic is astounding. It shows that 6.5 million of this country's workers are regular marijuana users and 1.25 million workers regularly use cocaine. The cost to business is astounding as well. Roger Smith, the former board chair at General Motors, once estimated that drug abuse was costing his company $1 billion per year. (Of course, the cost in terms of human lives and family tragedies dwarfs all other statistics.)

Government has responded to these disturbing statistics by imposing drug-free workplace regulations. Certain drug-free workplace requirements, set forth at 48 C.F.R. subparts 9.4, 23.5 and 52.2, apply generally to contractors with all federal agencies and departments. Violations can result in the debarment of a government contractor. Debarment not only results in the forfeiture of the current business relationship with the federal agency, but it also precludes an offending entity from securing any other federal grants or contracts.[169] While most debarments remain in effect for a maximum of three years (*e.g.*, for failure to perform, for fraud or other criminality), violations of DFWA may result in debarment for a period not to exceed five years.[170] Thus, a failure to train employees regarding the dangers of workplace

[169] 48 C.F.R. § 9.406-2(b)(2).

[170] *Id.* § 9.406-4(a)(i).

drug abuse in conformity with DFWA's requirements could have economically disastrous consequences for a company.

The Department of Energy (DOE) and the Nuclear Regulatory Commission have extended the reach of DFWA not only to prime contractors but also to subcontractors whose work costs the DOE $25,000 or more. DOE also requires that employers subject to its regulations submit a detailed written drug-free workplace program to it for review and approval. Each such program must include a plan for instructing supervisors and employees concerning problems of substance abuse, including illegal drugs, and educating employees regarding the availability of assistance through the employer's own employee assistance program and through referrals to other sources. DOE also requires that covered employers explain penalties that may be imposed for drug-related violations occurring on DOE owned or controlled sites.[171]

The U.S. Small Business Administration requires entities receiving grants to formally certify that they are in compliance with DFWA and that they have established ongoing drug-free awareness programs that inform employees about the dangers of drug abuse in the workplace. Covered employees also must be informed of each grantee's policy on maintaining a drug-free workplace. The availability of drug counseling also must be communicated. The existence of rehabilitation and employee assistance programs must be promulgated. In addition, employees must be informed of the penalties that may be imposed for drug abuse violations occurring in the workplace.[172]

The U.S. Department of Labor imposes similar agency-specific requirements for grant recipients.[173]

In addition to these government-wide and agency-specific federal drug-free training requirements for contractors and grant recipients, many states have imposed training requirements of their own. Many of the state requirements have a broader reach, affecting employers whether or not they contract with the state for goods or services.

§ 15.2.7

G. IMPLIED TRAINING REQUIREMENTS

An employer may comply with all mandatory training requirements and provide training that is consistent with industry standards, but still run afoul of a range of "indirect" training requirements that courts have gradually been developing. This section of the chapter identifies some of those "hidden" training requirements and describes how the failure to train, or to train inadequately, creates liability for an unwary employer.

§ 15.2.7(a)

Nondiscriminatory Selection of Employees for Training

The EEOC's Uniform Guidelines on Employee Selection Procedures state that the "selection for training" of an applicant or employee must be done without discrimination on the basis of

[171] 10 C.F.R. § 707.5(a)(2).

[172] 13 C.F.R. §§ 145.600 *et seq.* (see especially Appendix C to Part 145).

[173] 29 C.F.R. §§ 98.600 *et seq.*

age, race, national origin, disability, or any other protected category.[174] In addition, if training is used as a basis for employment decisions, those decisions must also be free of unlawful bias. Thus, employers must not discriminate when making decisions such as selecting applicants or employees to attend training, using an individual's performance during training to determine whether he or she will be retained or laid off, determining which job assignments an employee who has been trained will receive, or using the employee's performance during training as a component of his or her overall performance evaluation.

Although this nondiscrimination provision appears obvious, it contains a "hidden" training requirement. For example, individuals who are denied jobs, promotions or other job-related benefits on the basis that they were "unqualified" may claim that they were "unqualified" only because their employer denied them training opportunities on the basis of their national origin, disability or other protected status.[175]

In an interesting case of "reverse discrimination," several Caucasian male employees filed a lawsuit against a state university in Illinois, contending that the university restricted spaces in a janitorial training program to racial minorities and women. The U.S. Department of Justice filed the lawsuit on behalf of the employees.[176] By late 1996, the *Chicago Tribune* had reported not only that U.S. District Court Judge Richard Mills had issued a 19 page decision finding that the university had engaged in reverse discrimination, but also that at the root of the discriminatory activity was the university's affirmative action training program which (the court found) benefited women and minorities at the expense of Caucasian males. The court also specifically found in this instance that there had been no prior imbalance to rectify through an affirmative action training program.[177]

Nor can training opportunities be denied to a qualified person with a disability simply because of the need to make a reasonable accommodation for the disability. The EEOC's Technical Assistance Manual addresses this point. According to the manual, reasonable accommodations for the disabled with respect to training include: providing accessible training sites and facilities for persons with impaired mobility; providing training materials in alternate formats such as large print; providing interpreters and note takers for employees who are deaf; providing readers for individuals who have visual impairments or learning disabilities; adding captions to audio/visual materials for workers who are deaf; providing voice-overs for employees who are visually impaired; and offering individualized instruction for employees with mental retardation. Thus, making facilities and materials accessible for disabled individuals is another training requirement that is "implied" rather than explicit.

Training that Results in a Disparate Effect

Federal and state law explicitly prohibits training methods that, while neutral on their face, have the result or effect of adversely affecting individuals in a protected class. In a recent case before the EEOC, for example, the same "neutral" verbal and mathematics test was given to all employees as a prerequisite for advancement. A group of non-English-speaking employees who failed the verbal portion of the test filed suit, claiming that it was discriminatory to

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[174] 29 C.F.R § 1607.2 (1995).

[175] *See, e.g., Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2004) (lack of training was submitted as evidence of discrimination based on gender).

[176] *United States v. Illinois State Univ.*, No. 95-3067 (C.D. Ill. Mar. 2, 1995).

[177] *United States v. Board of Trustees of Ill. State Univ.*, 944 F. Supp. 714 (C.D. Ill. 1996); *Illinois State Training Plan Found Biased Against White Males*, CHICAGO TRIBUNE, Nov. 8, 1996, at 10.

require them to pass the verbal test when that test was not job-related (*i.e.*, not correlated to subsequent performance).

Another example of an unintended but adverse effect arises from testing or training materials in English that have the effect of discriminating against employees who are non-English speaking or who are culturally diverse. Thus, the "hidden" requirement is that employment materials be linguistically accessible.

§ 15.2.7(b)

Quality Training Required – Negligent Training Issues

Typically, claims of negligent training arise when a coworker or a third party is injured as a result of the actions of an employee; with the injured person claiming that the employee who caused the injury was not trained or was trained insufficiently. The "hidden" requirement, therefore, is not only that training must be provided, but also that the training must be *adequate*, an adequacy defined with the benefit of hindsight.

The leading case on negligent training remains *City of Canton, Ohio v. Harris*.[178] A woman who claimed police officers were inadequately trained and did not recognize that she needed medical attention while she was in custody sued the City of Canton, Ohio. The plaintiff argued that hers was a classic civil rights case. The city's facially constitutional policy (*i.e.*, that the city jailer shall have a prisoner needing medical care taken to a hospital), she contended, was unconstitutionally applied by a city employee. She also claimed that the city's employee was inadequately trained and the constitutional wrong she suffered was caused by that failure to train.

The court in *Canton* stated that plaintiff's contentions were not legally sufficient because she had sued under 42 U.S.C. section 1983. The court set a high threshold for plaintiffs bringing negligent training suits under this civil rights statute. Essentially, the court said that the need to train had to be so obvious to key decision makers that its absence evidenced a "deliberate indifference" to the rights of a plaintiff. The *Canton* decision indicated that it was not enough to show that one particular government employee was ill-trained. Moreover, a training program need not provide for every possible eventuality. Under the facts of the *Canton* case, the municipality was required to train officers to respond effectively only in "usual and recurring situations." Finally, the court indicated that training is not legally inadequate simply because harm occurred. It held that the diagnosis of the medical condition of a prisoner is not one of the "usual and recurring" situations with which a municipal police department must regularly deal. The absence of this skill did not establish a "deliberate indifference" to the constitutional rights of the townspeople. Hence, the plaintiff's negligent training suit was dismissed.

In another negligent training decision, the U.S. Supreme Court reemphasized that where deprivations of constitutional rights are at issue, the burden on the plaintiff is very heavy.[179] A section 1983 plaintiff must establish that the harm suffered at the hands of a government employee resulted from an established policy or custom. This rigorous test, the Court noted, ensures that municipal liability for civil rights violations in connection with negligent training suits will derive only from decisions of the city council or from acts of officials who may fairly be said to have acted on behalf of the government itself.

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[178] 489 U.S. 378 (1989), *limited by Farmer v. Brennan*, 511 U.S. 825 (1994).

[179] *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397 (1997).

The implications for private employers from these two section 1983 negligent training cases cannot yet be fully predicted. However, a post *Canton* section 1983 case decided at a lower level suggests that even private employers sued for negligent training may not be able to insulate themselves by contending that the need for training was unforeseeable. In *Thelma D. By and Through Delores A. v. Board of Education of City of St. Louis*, six young girls were molested by their public school teacher.[180] Among other things, the six sued the board of education for negligent training under section 1983, claiming that their civil rights were violated by the district's alleged failure to train school principals to recognize telltale signs of sexual abuse. The Eighth Circuit found that, under the *Canton* standard of "deliberate indifference" applicable to such civil rights cases, the school board could not be held liable. "To establish deliberate indifference in such a claim, appellant must show that the Board had either actual or constructive notice of the inadequacy of its training program and failed to take remedial steps."[181] The *Thelma D.* court stopped just short of such a finding of deliberate indifference; expressing frustration that the school board had apparently insulated itself from information which should have made it aware that employee training was, in fact, inadequate. "Appellants have submitted no evidence of impropriety or bad faith on the part of the Board in setting up its [information] system in such a manner, but this case clearly demonstrates the need for better lines of communication and an increased flow of information to the Board."[182] The court continued:

> The magnitude of the tragedy underlying this litigation compels us to sound a final cautionary note to the Board and other similarly situated public agencies. In the future, this court will closely scrutinize bureaucratic hierarchies which, in their operation, tend to insulate its [sic] policymaking officials from knowledge of events which may subject them to section 1983 liability. This case compels us to provide clear warning to the Board that in the future a defense of no liability due to lack of knowledge may no longer apply to a bureaucracy which continues to block notice to the Board of allegations of sexual abuse of students committed by teachers and others during school related activities.[183]

The Eighth Circuit carefully limited the above warning to public entities defending section 1983 cases. However, private employers should not ignore this case. The lesson for the private sector to be derived from *Thelma D.* is that top management cannot avoid exposure in failure to train cases merely by pleading ignorance. Private sector plaintiffs may just as credibly argue that a need for training would have been foreseeable had top management not (either negligently or intentionally) cut itself off from employee concerns.

Certainly, private employers will not be accorded the protection of *Canton*'s very high "deliberate indifference" standard if they are sued for negligent training. If section 1983 suits can be successfully brought under the rigorous *Canton* standard, it is clear that private employers will invite negligent training suits if they ignore reasonably foreseeable workplace training needs.

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[180] 934 F.2d 929 (8th Cir. 1991).

[181] *Id.* at 935.

[182] *Id.* at 935-36.

[183] *Id.* at 936.

§ 15.2.7(c)

Providing Inadequate Skills Training

Employees who are disciplined or discharged for poor performance often claim that the employer prevented them from performing, either by failing to train them in the necessary job skills or by providing training that was inadequate. Thus, even simple wrongful discharge lawsuits have the potential to result in a detailed dissection of the employer's entire training program.

§ 15.2.7(d)

Workplace Violence: Implied Training Requirements

With the increasing incidences of violence in the workplace, employers who do not provide training to their employees about the signs of incipient violence, or the steps to take to prevent or ameliorate violence, face potential liability from injured parties. Again, although there is no specific law requiring training in workplace violence, the "general duty" clause of Fed-OSHA, guidelines issued by some state safety and health agencies, as well as the common law, all suggest strongly that such training should occur.

Company workplace violence programs have received more attention on a national scale. The United Auto Workers has implemented a violence prevention program as part of its employee assistance program. Emphasizing the risks inherent in the service sector, the program addresses adequate staffing, physical protection and employee training. According to the U.S. Office of Personnel Management, such measures can be a first step in dealing with workplace violence. The office recommends developing a workplace violence prevention team that will be responsible for assessing all risks, developing procedures and training employees on how to deal with the risks.[184]

An important case on this point was decided in California. Unfortunately, the way the case was framed created a situation where the final holding was equivocal from a law of training perspective.

An armed robber entered a Kentucky Fried Chicken restaurant and took the wallet of Kathy Brown, a customer. While holding a gun to Brown's back, the robber then told the cashier to open the cash register and give him all the money. The cashier attempted to stall, stating that she did not have the key to the register and would have to get it from the back of the restaurant. The robber shoved the gun harder into Brown's back and told the cashier to open the register immediately or he would shoot Brown. The cashier complied; the robber grabbed the money and left. Brown filed suit against KFC for negligence, claiming that it had failed to properly train its employees on how to deal with robbers. The appellate court found that KFC had a legal duty to "require its personnel to behave reasonably during an armed robbery" in order to avoid increasing the risk to customers, and that KFC should have "foreseen" that if its cashier failed to cooperate with the robber, "the customer would be terrorized and potentially shot to death." A divided California Supreme Court reversed this decision on a 4 to 3 vote, holding that a shopkeeper has no duty to a patron to comply with an armed robber's demand for money in order to avoid increasing the risk of harm to patrons.[185] In doing so, the

[184] *Workplace Violence Company Programs Can Minimize Worker Violence, ABA Panelists Suggest*, Daily Lab. Rep. (BNA), Aug. 15, 2002, at C-3.

[185] *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814 (1997).

state's high court avoided the need to deal with the training issue that was an important component of the lower court's decision.

Legal ambiguities have not kept plaintiffs from suing employers when violence occurs at work. In one tragic and well-publicized case, a customer entered his local Wal-Mart, purchased bullets, chased down an employee of the store (the customer's ex-wife), and shot her before turning the gun on himself. The wife survived and sued Wal-Mart for negligently failing to take appropriate measures to provide her with a safe workplace. Since the store's managers allegedly knew about the husband's propensity toward violence, including the existence of a restraining order, its seems likely that Wal-Mart's apparent lack of a policy and training managers on their duties will be an important factor in determining liability.[186]

§ 15.2.7(e)

Wage & Hour Training for Managers in the Age of Class Actions

Training managers on the basic requirements of wage and hour law has become crucial even though there is no direct requirement to do so. The wage and hour class action has become the "plaintiff's attorney's best friend." In California, the number of wage and hour class actions now outnumber those filed for discrimination. These class actions can be devastating on employers. Not only do they often result in multimillion dollar verdicts or settlement, they tend to effect large portions of the workforce. For example, the courts approved a $90 million verdict against a major insurance company who misclassified 2400 employees as overtime exempt.[187] This case was eventually settled for $210 million. Especially frustrating for employers is how quickly failing to pay for only tiny increments of hours worked can accumulate. Recently, a national chain of electronics stores agreed to pay $5.4 million to settle a dispute regarding its payment of overtime to employees. This huge dollar amount was generated from allegations that some 70,000 current and former workers were not paid for relatively small amounts of missed time including meal breaks, after employees punched out on the time clock, and while they waited for managers to unlock doors at the end of shifts. The problem was exacerbated by the fact that the retailer did not keep an accurate record of hours worked by employees as required by the Fair Labor Standards Act.[188]

This legal environment leaves no room for error for allowing even "minor" violations of wage and hour laws. Managers who know the basics about the employers' obligation are the first line of defense in preventing these minor infractions from occurring. In the case involving the national retailer, who would best know if the employees were taking their lunch breaks or if their time records were accurate? The answer is the local managers. However, very few companies train managers on the importance of keeping accurate time records or legal intricacies of what are "hours worked." All indications suggest that the need to develop focused and effective wage and hour training will be critical to employers in coming years.

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[186] Shannon P. Duffy, *Employee Sues Wal-Mart Because Store Didn't Protect Her From Husband's Attack*, THE LEGAL INTELLIGENCER, Aug. 24, 2001, *available at* http://www.law.com.

[187] *Justices Reject Review of Overtime Case, Leaving Intact $90 Million Award for Jury*, Daily Lab. Rep. (BNA), Nov. 27, 2001, at AA-5.

[188] *Best Buy Will Pay $5.4 Million To Settle Overtime Dispute, D.O.L Says*, Daily Lab. Rep. (BNA), Jul. 5, 2001 at A-1.

§ 15.2.8

H. LEGAL IMPLICATIONS ARISING FROM TRAINING ITSELF

The very group whose responsibility it is to keep others in the organization out of legal trouble — the trainers — may itself cause substantial liability for the employer. Thus, even if the choice of who will receive training has been legitimate and nondiscriminatory, and even if the training is so thorough and comprehensive that it meets all mandatory and implied training requirements, defects in the content, method and delivery of training may result in liability.

§ 15.2.8(a)

Wage-and-Hour Issues for On-the-Job Training

On-the-job training of employees, including newly hired applicants, generally counts as compensable work time under the federal Fair Labor Standards Act. However, time spent by workers attending employer-sponsored training programs and instructional meetings does not have to be counted as hours worked, provided that:

- the meetings are held outside regular working hours;
- attendance is truly voluntary (the meeting time will count as hours worked if attendance is required by the employer — the hours must be counted if employees are led to believe that their working conditions or employment situation will be adversely affected if they do not attend);
- the training program or meeting is not directly related to the employee's job (training is considered job-related if it is designed to teach employees how to perform their current job more effectively, but not if it prepares them for a different job — for example, a typing course for a typist would be job-related training, but an electronics repair course would not); and
- the employee does not perform any productive work while attending the training session.[189]

§ 15.2.8(b)

Potential Liability Flowing from Material Collected During Training

Many training programs also evaluate how well participants have learned the material. This may include pre-training testing to determine the baseline level of the knowledge, post-training testing to determine short-term retention, on-the-job evaluations by supervisors to determine whether employees are applying the information, and follow-up training to correct deficiencies. However, an individual's performance on pre-training and post-training testing, including test answers, test scores, and evaluations of subsequent performance, may provide ammunition to plaintiffs in subsequent lawsuits. For example, in a sexual harassment lawsuit, the plaintiff may contend that the test results of the supervisor who allegedly harassed her show that he failed to understand what constitutes sexual harassment. Or, in a race discrimination lawsuit, the plaintiff may claim that a coworker continued to make racial comments at work, even after he had attended EEO training. Further the employer's

[189] 29 C.F.R. §§ 785.27-785.29 (1995).

post-training testing showed this, but the employer failed to provide immediate retraining. In both situations, test results will be used as evidence of the employer's indifference to the effectiveness of its training, thus leading to liability.

A highly publicized case on this point was *Stender v. Lucky Stores, Inc.*, a class action lawsuit by several female employees alleging systematic gender discrimination by a large grocery store chain.[190] Lucky had hired an outside consultant to conduct antidiscrimination training sessions for supervisors. The consultant assigned company officials to take notes during the sessions, particularly with regard to which supervisors expressed discriminatory views. The notes were preserved in Lucky's files. The plaintiffs wanted the notes to show that the supervisors held discriminatory beliefs and, therefore, were likely to have actually discriminated in the workplace. Lucky objected, stating that disclosure of the notes would discourage future participants from being honest and, therefore, not only undermine the value of EEO training as a whole, but subject the participants to individual liability for being honest enough to reveal their biases. The federal judge in charge of the case ordered Lucky to give the notes to the plaintiffs. Not surprisingly, the attorneys for the plaintiffs then referred to the notes as "the proverbial smoking gun."

The lawsuit resulted in a monetary settlement of approximately $75 million, with an additional $20 million allocated for affirmative action programs for female employees.

§ 15.2.8(c)

Inappropriate Comments Made During Training Session

Needless to say, trainers must not engage in discriminatory behavior during training. In one case before the EEOC, an air traffic controller who was training a female employee called her a "dumb broad" and stated that "women should stay at home," resulting in an administrative claim for gender discrimination.[191] In another EEOC case, a trainee alleged race discrimination after the trainer called her "stubborn" and "bullheaded" and told her to "shut up."[192]

In *Fitzgerald v. Mountain States Telephone & Telegraph Co.*, the misconduct was by a corporate instructor who had been retained to evaluate potential trainers in a course called "Train the Trainer."[193] The participants were asked to recount an experience that caused them to become interested in being trainers. The plaintiff, who was a Caucasian, told about her relationship with an African American and her belief that the relationship ended because the "black community" was intolerant of interracial relationships. The corporate trainer who was leading the discussion, an African American female, took offense and began belittling the plaintiff, saying to her: "You white bitches are always taking up the air time, and I'm sick of it." The plaintiff filed suit, alleging race discrimination on the part of the trainer and the employer.

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[190] 803 F. Supp. 259 (N.D. Cal. 1992).

[191] *Rosser v. Pena*, 1995 EEOPUB LEXIS 2915 (EEOC Oct. 19, 1995).

[192] *Wojno v. Shalala*, 1994 EEOPUB LEXIS 4317 (EEOC Sept. 16, 1994).

[193] 68 F.3d 1257 (10th Cir. 1995).

Inaction by a trainer can also lead to liability. In *Moller v. State Personnel Board*, the plaintiff alleged that she was treated unfairly during training because the trainer ignored racial remarks made by other participants.[194]

Much more troubling, however, are situations where the employer is sued even though the trainer did not intend to be discriminatory and, in fact, was just trying to do the job. For example, role-playing and question-and-answer sessions are common training techniques. Cases have arisen where comments by the trainer, made in the context of a role playing situation, became the subject of litigation. In one case, an employer's management training course included role playing sessions where participants were given scripts and asked to play certain roles, such as the overbearing boss and the employee who never takes responsibility. The script for a female employee, who was playing the part of a supervisor, called for her to be rude and intimidating. When the training instructor summarized her role as that of a "bitch," the employee complained and subsequently filed a lawsuit alleging that characterizing her as a "bitch" was evidence of gender bias.

In the *Lucky* case discussed above, the antidiscrimination training called for supervisors to discuss such stereotypes as "black females are aggressive" and "women cry more." The goal of the discussions was "critical self-analysis" (*i.e.*, for the supervisors to examine whether they possessed such opinions). The plaintiffs in *Lucky* used these discussions to suggest that both the company and the supervisors held subjective beliefs that were discriminatory.

These cases make the point that even well-intentioned training programs can form the basis for a lawsuit. Trainers must "sanitize" their hypotheticals and training materials to eliminate any suggestion of bias, or make sure to state that examples and discussion material are for training purposes only and not meant to suggest actual beliefs, or risk exposure. Written disclaimers are not at all inappropriate in a training session.[195]

§ 15.2.8(d)

Issues Related to Retaining Training Materials

Many employers routinely gather and retain documentation pertaining to training, such as the instructor's notes regarding the content of discussions during training and trainee performance on pre-training and post-training tests and evaluations. The benefits of retaining such records are obvious. They allow the employer to track who was trained, and whether they actually learned the material. An employer can also assess performance on the job and make determinations regarding promotions and future training. However, as the *Lucky* case demonstrates, such documentation may have to be disclosed in a lawsuit, with potentially unfavorable consequences.

To protect training documentation from being disclosed, two solutions are possible. The first is to have certain training sessions — such as those where participants are asked to voice biases, or where liability issues are discussed — conducted by an attorney and characterized as being confidential. Training sessions which are intended to be confidential, conducted by an attorney acting in the role of an attorney and not primarily as a trainer or consultant, are likely to be classified as attorney-client communications, which, under well-settled state and

[194] 1996 U.S. App. LEXIS 34005 (9th Cir. Dec. 3, 1996).

[195] At least two disclaimers should be considered. The first should advise participants that humor is used for learning purposes only and not to make light of the subject matter. The second should advise participants that the discussion of offensive topics during the program, such as harassment, is done only to facilitate learning.

federal law, would be protected from disclosure during litigation. However, the lower the level of the trainees' policy-making authority, the less likely that this protection would attach.

The second potential avenue for protecting training materials is the privilege for critical self-analysis. In the employment context, this privilege has been held to protect the subjective evaluative portions of employer affirmative action programs, provided that such evaluative information is required by the government.[196] Thus, to the extent training sessions are required by law, a valid argument can be made that personal beliefs and opinions expressed during such training are protected from disclosure by the critical self-analysis privilege, even where the training is not conducted by an attorney. At present, however, nonmandatory training sessions are not protected by the self-analysis privilege, although the possibility exists (because the courts created the privilege) that the courts may choose to expand the privilege to protect more training materials. Supporting such an expansion are the arguments that training participants should not be discouraged from speaking frankly for fear that their comments will be disclosed and become the basis for liability, and that employers should not be discouraged from conducting training or keeping good records.

In the face of the courts' apparent unwillingness to develop such a privilege, legislative bodies are beginning to step into the breach.

An example can be drawn from the Equal Credit Opportunity Act,[197] which was amended to include a provision that establishes a privilege for creditors' reports or results of self-tests, if the creditor is checking its own processes to determine the level of effectiveness of compliance with the Equal Credit Opportunity Act itself. The amendment establishes that reports or results of self-testing "may not be obtained or used by any applicant, department, or [government] agency in any proceeding or civil action in which one or more violations of [the Equal Credit Opportunity Act] are alleged."[198] The Equal Credit Opportunity Act self-analysis privilege, though not an employment-related privilege, certainly suggests that other legislative actions may extend the privilege to areas of employment law for similar policy-related reasons. However, in the absence of clearer and more sweeping pronouncements from the courts and in the absence of broader legislative limitations, it is not yet clear that any employer's efforts to analyze its own compliance with training requirements or to assess its employees' level of assimilation of training will be accorded a privileged evidentiary status, except perhaps on a case-by-case basis.

Until the laws are clarified, employers should assume that any retained training material is discoverable. Employers certainly should retain sign in sheets or other records showing that the employee took the course, and the core training material itself. However, employers are cautioned against keeping material created during the training session itself, such as test results and the results of interactive exercises. Such material will, by its nature, not have been reviewed carefully to determine if would help or hurt the employer at a later time. This approach should also be utilized in regards to programs done via e-learning tools.

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[196] *See, e.g.*, *Resnick v. American Dental Ass'n*, 1982 U.S. Dist. LEXIS 14603 (N.D. Ill. Aug. 18, 1982).

[197] 15 U.S.C. §§ 1691 *et seq.*

[198] 15 U.S.C. § 1691c-1(a)(2)(B).

§ 15.2.8(e)

Training & Religious Beliefs

In an effort to seek new ways to motivate employees, stimulate productivity and increase tolerance between workers, nontraditional training methods, including New Age and adventure based training, have been increasingly used. While these types of training can be effective they can also have negative consequences and have been subjected to increased legal scrutiny.

Sensitivity Training

Teaching coworkers to cooperate effectively with different types of employees, whether that difference is based on work styles or ethnic and religious backgrounds, can improve productivity and reduce discrimination and harassment lawsuits. Yet, such "sensitivity" or "diversity" training can cause litigation if not administered correctly. This is the lesson that the Minnesota Department of Corrections (a public employer) learned in the course of recent litigation.[199] The plaintiffs in *Altman v. Minnesota Department of Corrections*, Thomas Altman, Kristen Larson and Kenneth Yackly, were regularly required to attend training sessions.

One training session was to include a section on "Gays and Lesbians in the Workplace." When the agenda for the training session was published, Altman sent an e-mail to the warden protesting that the training session would "raise deviant sexual behavior for staff to a level of acceptance and respectability." In response to Altman's protest, the warden issued a memorandum to all staff stating that the gay and lesbian training was "part of the facility's strong commitment to create a work environment where people are treated respectfully, regardless of their individual differences." The training is not "designed to tell you what your personal attitudes or beliefs should be." The memorandum also stated that attendance at the training session was mandatory.

On the day of the training session, Altman, Larson and Yackly collectively decided they were going to read their Bibles during the program as a silent protest. They did just that. They read their Bibles, copied scripture and participated to a minimal extent. They were not disruptive, nor were they told by supervisors who were present to stop reading the Bible. Other employees also did not give their undivided attention during the training session. Several slept or read magazines.

Following the training session, an investigation was conducted when two of the trainers complained of the three employees' behavior. As a result, each of the three received a written reprimand making them ineligible for promotions for two years.

Altman, Larson and Yackly then filed suit alleging a violation of their First Amendment free speech and freedom of religion rights as well as for religious discrimination under Title VII.

The Department filed a successful motion to have the lawsuit dismissed. In its motion, the Department argued that the employees were not disciplined for reading the Bible, but rather, for insubordination (refusing to be trained). The employees appealed the dismissal and the Eighth Circuit Court of Appeals (which covers Missouri, Minnesota, Iowa, Nebraska, North Dakota and South Dakota) reversed the lower court and ordered the case to proceed to trial.

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[199] *Altman v. Minnesota Dep't of Corr.*, 251 F.3d 1199 (8th Cir. 2001).

The appeals court found that the Department's reason for issuing the written reprimands was suspect. The court stated that a jury needed to decide what the real reason for the discipline was: the employees' insubordination, their nondisruptive speech, their religion, or the fact that "they expressed their opposition through religious activity."

The key fact for the court of appeals was that there was evidence that other employees were also insubordinate during the training and were not disciplined. Evidence was presented that other employees slept, or read other materials such as secular magazines and miscellaneous paperwork. However, only the three employees who read the Bible were reprimanded. Because of the Department's inconsistent treatment of the insubordinate employees, the court found that there was evidence of religious discrimination and possible violations of the First Amendment right to free speech.

The court also found, however, that the Department did not "substantially burden" the employees' religious activities. The only burden placed on the employees was "the requirement they attend a 75 minute training program at which they were exposed to widely accepted views that they oppose on faith-based principles. This is not . . . a substantial burden on their free exercise of religion."[200] Therefore, the employees' free exercise claims under the First Amendment were dismissed.

New Age Training

New Age programs typically involve techniques such as visualization, self-hypnosis, biofeedback and meditation and are often designed to get employees to rethink how they work and the impact of personal beliefs and philosophies on their work habits. Critics of New Age training programs object to employers forcing employees to attend programs that attempt to change their view of reality or religious beliefs; others compare New Age training techniques to a form of brainwashing or portray it as an attempt to transplant cultism and mysticism into corporate America.[201]

Several cases have been filed in the last few years by employees who contend that New Age training programs infringe on various rights, including privacy and freedom of religion. In *Grant v. Joe Myers Toyota*, a would-be car saleswoman claimed religious discrimination when she was not hired because she refused to attend a sales training program.[202] The car dealership required new sales employees to attend training where they read, memorized, and recited passages from a motivational sales book. The book incorporated a biblical theme where Paul, Jesus Christ's apostle, becomes the greatest salesman on earth after receiving the ten main sales principles printed on scrolls. The plaintiff contended that the book conflicted with her Christian religious beliefs and complained to the employer. Toyota told her she had to take the class or she would not be hired. The court reversed summary judgment to the employer finding that under Title VII and state law, the plaintiff had stated a claim of religious discrimination. The court held that New Age trainings had been controversial for years and that Toyota had not offered a reasonable accommodation to applicants who could not attend the training for religious reasons.

Another highly publicized matter involved a public utility. Reportedly, the company spent $147 million to send its 67,000 employees to a training seminar called "Leadership

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[200] *Id*. at 1204.

[201] Jeremy Main, *Trying to Bend Managers' Minds*, FORTUNE, Nov. 23, 1987; *Gurus Hired to Motivate Workers Are Raising Fears of Mind-Control*, N.Y. TIMES, Apr. 17, 1987, at A10.

[202] 11 S.W.3d 419 (Tex. App. 2000).

Development," which was designed to teach people to "think about thinking." The seminar derived from the teachings of Russian philosopher George Gurdjieff, who created his own language and taught concepts that were later adopted by training consultants. As a result of employee complaints, the California Public Utilities Commission investigated the training program and concluded that it created fear, decreased productivity, wasted time and resulted in an intimidating environment.[203]

Adventure or Wilderness-Based Training

Also subject to potential scrutiny are so-called adventure and wilderness training programs. These programs are typically provided not by the in-house training department, but by outside vendors. Examples include fire walks, parachute jumps, rope climbing, white water rafting, and other physically and mentally challenging activities. The objectives of these programs include using physical and mental stress to develop teamwork and leadership skills and to encourage risk taking. There is very little legal precedent in this area. Obviously, physical and mental injuries to employees are covered by workers' compensation. However, there are many exceptions to the rule that workers' compensation is the exclusive remedy for injuries within the course and scope of employment, particularly where there is a claim that the employer intentionally inflicted emotional distress on the employee, or discriminated with respect to who could participate in the program. If an adventure program is mandatory and physically or mentally demanding, an employee could allege that he or she suffered severe emotional distress as a result of being forced to participate; an employee with physical limitations could allege that selection (or nonselection) for the training, or his or her performance during the training, was discriminatory in purpose or effect.

§ 15.2.9

I. CONCLUSION

The law of training has emerged as a body of law that can be described, analyzed and discussed. More importantly meeting the challenges posed by this body of law should be an essential component of meeting every organization's goals. In light of recent trends that equate failure to train with willful neglect, employers simply cannot afford to ignore the need for workplace training, especially in areas related to employment law. The question is no longer whether to train one's employees regarding the many facets of employment law described above. The question is how to train them effectively, in order to promote a harmonious workforce and prevent unnecessary litigation.

[203] CALIFORNIA PUBLIC UTILITIES COMMISSION, REPORT ON PACIFIC BELL'S LEADERSHIP DEVELOPMENT PROGRAM 5-7 (June 10, 1987).

§ 15.3

III. PRACTICAL RECOMMENDATIONS FOR HUMAN RESOURCES PROFESSIONALS ON THE LAW OF TRAINING

§ 15.3.1

A. COMPLYING WITH CALIFORNIA'S MANDATORY HARASSMENT TRAINING LAW

An Overall Approach to Compliance

The authors' overarching approach to A.B. 1825 is to make compliance as easy as possible. We use the term "easy" in two ways. First, it should be easy to show compliance. The law is technical and specific, containing many "hidden" requirements. When the Department of Fair Employment and Housing (DFEH) or a plaintiff's attorney is aggressively pursuing settlement, it is likely that the employer's training efforts will be closely examined. Thus, employers would be wise to ensure that their training programs obviously meet A.B. 1825's mandates without outsiders having to pick through materials to find the mandated learning points. Second, easy refers to the methods that can be used to deliver the training. As will be explained below, there are a variety of ways to deliver the required training. Employers should feel free to pick the method or methods that provide the best fit for their culture.

The new training law is probably more detailed than most employers would like. Even so, even the Chamber of Commerce, which initially opposed the bill, supports the idea that harassment training is generally a good idea and will work to benefit employers. Employers who follow the spirit of the law will have a better chance in showing compliance and reap the positive benefits that such training can sow.

There are several steps employers will need to take to ensure compliance with California's A.B. 1825. Consider the following approach:

> **Step One: Audit the organization's past harassment training efforts**. Do this to ensure that all covered supervisors were trained by the end of 2005.
>
> **Step Two: Decide who will do the training**. Regardless of whether the training is conducted with internal or external resources, live or on-line (or a combination thereof), employers must remember the quality standards mandated by the statute. Namely, that those who present the training must have "knowledge and expertise" regarding the prevention of harassment, discrimination, and retaliation. The two words in quotes, taken together, likely mean that trainers must know about harassment, discrimination, and retaliation in law and have practical experience dealing with such issues.
>
> **Step Three: Establish the training program – topics and timing.** The law requires a minimum two hours of sexual harassment training covering specific topics including California law and remedies available to victims of harassment. Because of these details, employers should be very careful when selecting programs designed

before A.B. 1825's passage. Such programs often do not include state law specific topics such as the additional categories protected under California law or the remedies available. Even if programs contain all the required topics, the coverage may not be readily apparent, giving the DFEH or plaintiff's counsel reason to investigate the program in greater detail. This level of scrutiny certainly "fails" the suggested "make compliance easy" standard.

Employers should also seriously consider conducting more than the bare minimum of two hours of training required by law. By lengthening the training program slightly (a half-hour, for example), employers can avoid a plaintiff's attorney accusation that "they have done nothing but the least amount required by law." Longer classes also allow the coverage of harassment prevention based on the other categories protected under federal and state law (such as race, age, and disability). Covering these extra topics will help limit workplace disputes and create a stronger defense against liability or damages if litigation arises. Finally, longer classes give employers a margin for error when compliance is questioned. For example, if a participant in a live on-line class logged in a few minutes late to a two and one half hour webinar that person will still receive the requisite two hours of training.

Step Four: Decide who needs to be trained. The statute requires training all supervisory employees. At a minimum, employers need to list all of those who meet the FEHA's definition of a supervisor regardless of job titles or where a person fits within an organization's structure. Also note that it is possible that term "supervisory employee" as used in A.B. 1825 is broader than the term "supervisor" defined in FEHA's general sections.

A.B. 1825 is silent on the issue of whether supervisors outside of California must be trained. Based on previous court decisions, the answer is likely that out of state supervisors probably do not have to be trained unless they actively manage California employees. However, multistate employers should consider providing the same training to all supervisors. Doing so will help enforce a consistent model of behavior that the organization desires. Organizations that train managers in California, but not elsewhere, also open themselves to attack. Assume there is a sexual harassment claim in Kentucky and only California supervisors were trained. Plaintiff's attorney in this hypothetical case would likely argue that such a dichotomy clearly showed that the employer, by just training where legally mandated, was not taking reasonable steps to avoid harassment.

Step Five: Decide training delivery methods. The only training method specifically sanctioned by A.B. 1825 is classroom training. However, the statute allows unspecified other delivery methods if such methods are "interactive and effective" as required by the statute. The following briefly recaps the delivery methods available and their benefits and problems under the statute.[204]

- *Classroom Training*: This method is specifically approved by A.B. 1825 on the theory that it remains the most powerful way to ensure compliance with an organization's antiharassment efforts. Employers using classroom training will, however, have the administrative burdens of scheduling and tracking compliance manually.

[204] Discussions on the delivery method assume that the training program contains the content required by AB 1825 and is delivered by those with the requisite knowledge and expertise.

- *Live Webinars*: Webinars combine a live instructor with voice and visuals being presented on the learner's computer. If done using technology that allows the instructor to pose questions to the audience and for the audience to pose their own questions to the instructor, such webinars will almost certainly meet A.B. 1825's requirements ether because it is considered "virtually" classroom training or because it is effective and interactive. Webinars also allow organizations to electronically monitory compliance efforts.

- *Self-Study Learning Without a Live Component*: Self-study learning is most typically done via the web, video tape, or workbook. Without any live component, this method has been the most questioned by organizations and lawyers. The draft regulations promulgated by California's Fair Employment and Housing Commission explicitly state that e-learning, both by live webinars and by self-study methods, is permissible. Such approval, however, is predicated on the training satisfying several requirements. Such non-classroom training must:
  - Be created by a qualified "instructional designer." Webinars must also be taught by a qualified trainer.
  - Incorporate learner feedback or a participation component at least once every 15 minutes, so that employees are "measurably engaged" in the training and acquisition of knowledge is tested.
  - Provide an opportunity for feedback.
  - Give the learner the opportunity to ask questions and have them answered.

- *Blend of Live & Self-Study*: Organizations could provide an hour of training through a self-study computer based program and an hour via live (in-person or webinar) program, for example. This approach allows for the many efficiencies that e-learning presents with the assurance that students receive information from and can ask questions of an expert. Therefore, it is very likely, that the unblended solution would comply with A.B. 1825's mandate as a "virtual classroom."

Many employers have used a combination of all three methods. For example, one nationally recognized health care provider is using the following methodologies:

- Divisional managers: A full day class on employment law basics, including two hours of harassment training.
- Managers: A 2.5 hour in-person training program.
- Line-supervisors: A 1.5 hour self-study e-learning program and a 1 hour webinar
- Employees: A self-study e-learning program

Step Six: Draw up a training schedule. Even mid-size companies will likely be challenged to ensure that all supervisors receive training by January 1, 2006 and every two years thereafter. Employers must also retain records that the supervisors took the course. Learning management systems or data tracking systems that come with some high quality e-learning products can help with this process.

Newly hired or promoted supervisors must be trained within six months of the assumption of a supervisory position. Thus, employers must develop a procedure to identify when a new supervisor is "activated."

Step Seven: Establish a procedure for the ongoing training requirement. There are several extremely helpful provisions in the draft regulations that lessen the burden on employers managing their ongoing compliance obligations. Under the regulations, employers can use either of two methods to meet A.B. 1825's periodic retraining requirement:

1. Individual Tracking.
2. Training Year Tracking.

Individual Tracking measures the two-year time period from the date each individual supervisor completed his or her last training. For example, Chris completes his first training program on October 26, 2005. Chris must be retrained no later than October 26, 2007.

Training Year Tracking allows employers to designate a "training year" in which to train supervisors. The employer must retrain supervisors by the end of the next training year. Practically speaking, this allows for more than two years to pass between some training sessions.

For example, 2005 is designated as a "training year." Chris takes his first training program on January 5, 2005. Chris must be retrained no later than December 31, 2007.

New supervisors must be trained within six months of assuming their supervisory position, and every two years thereafter, measured either by the individual or training year tracking method. If an employer uses the Training Year method, some supervisors may need to be retrained sooner than once every two years. For example, if an employer has created a training year schedule designated as 2005, 2007, 2009, etc. and the supervisor is hired and receives harassment training in 2006, then the supervisor needs to be trained again in 2007 - along with the other supervisory employees - and thereafter follow the employer's two-year training schedule.

The Training Year method seems infinitely easier to manage than the Individual Tracking method. Assume an organization had 100 managers. In 2005, the organization held two classroom training sessions — one in June and the other in September. Fifty managers took one of these two courses. The remaining 50 lower-level supervisors took a self-study e-learning course at their own pace, completing the course at different times. Using the Individual Tracking method, the organization would have to track the completion dates for the e-training taken for each e-learner. In this scenario, the employer could have as many as 50 separate Individual Tracking deadlines to monitor, in addition to the June and September 2005 training anniversaries. Those who took the July 2005 course would have to be retrained by July 2007. Those who took the September 2005 course would have to be trained by September 2007. Plus, the organization would have to manage a separate training deadline for each of the e-learners.

Under the Training Year method, all supervisory employees would be trained by the end of 2007. The training date would be the same regardless of whether the employee took the July or September classroom training or the e-learning. The one drawback with the training year method is that new supervisors trained in the "off year" must be trained again during the next training year

Step Eight: Establish record retention procedures. Keep track of which supervisors have taken and completed the training by creating and maintaining physical records, such as sign-in sheets. An employer that diligently trains all its supervisors with appropriate content in a timely manner, but cannot produce the physical evidence confirming it has done so, faces the possibility that it will be disbelieved by a jury, court, or administrative fact finder, and thus reap none of the benefits of its diligence. The certification forms should reference the specific requirements of A.B. 1825.

§ 15.3.2

B. ESSENTIAL STEPS TO AVOID TRAINING-RELATED LITIGATION

The points presented below suggest essential steps that should minimize an employer's exposure to litigation arising from its training program.

Step One: Identify Training Needs & Goals

Conduct a comprehensive labor-relations audit:

- Identify applicable laws that require training set forth in federal, state and local statutes, regulations and ordinances including laws that are specific to the particular industry and case law.
- Identify the level of training needed by executives, human resources professionals, managers, and nonsupervisory employees.
- Identify "hidden" training requirements, such as skills training, workplace-harassment training, workplace-violence training, and occupational safety and health training.
- Identify industry practices regarding the provision of additional training.
- Audit claims and litigation experience in the areas of workers' compensation, EEO, OSHA, sexual harassment, wrongful discipline, wrongful discharge, negligent hiring, training and supervision, and workplace violence.
- Survey supervisors and employees to determine the areas in which they believe training is needed.

Step Two: Select the Training Platform

The decision regarding when to conduct training using live instructors or e-learning training technologies will depend on factors such as the organization's goals, budget, and access to technology. For example, highly experienced managers or human resources professionals can be trained using live trainers, while web-based training can be used to quickly train large numbers of new managers, front line supervisors, and nonsupervisory employees. Another method is called blended learning. One type of blended learning utilizes live instructors working with students via the Internet or a satellite system. Technology advances have made blended learning much more practical. There are now several providers of on-line "virtual classrooms" that maximize student participation, including virtual "breakout" sessions. Blended solutions can also include using self-study web learning to quickly cover the basics and then follow-up with a live session to ensure that difficult concepts are adequately

explained. This solution will generally reduce the duration of the live program because participants already know the basic learning points. Listed below are advantages of each type of training.

Advantages: In-Person Training

- Allows employees from various parts of the organization to learn from each other in an interactive environment.
- Builds teamwork along organizational or departmental lines.
- Provides instant feedback from trainer to trainees especially when the trainer is a subject matter expert.
- Leverages employee's questions by allowing participants to learn from each other.
- Allows for "on the fly" changes whereby the trainer can adjust to the needs of a particular group during the presentation based on participant responses.
- May be easier and quicker to customize than technology-based training.
- May be more economical for small groups of employees.
- Currently there are more high quality programs available on a wider variety of issues, especially for higher-level programs geared towards experienced managers, executives, and human resources professionals.
- Trainers with significant authority or prestige can convey difficult concepts or convince participants about the importance of the subject matter (*e.g.*, attorneys can often speak with authority on employment law issues such as harassment prevention and convince even those who initially do not "buy into" concepts).
- Certain state regulations (*e.g.*, Connecticut) require live training to meet legal standards.
- Courts have favorably mentioned live training in reviewing an employers' defenses to litigation.

Advantages: Computer/Web-Based Training Self-Study or Asynchronous

- Allows large numbers of employees to be trained contemporaneously and quickly, even in remote locations.
- Can provide "just in time" training.
- More economical for training large groups of employees, especially when the expense of travel and time away from work are considered.
- Allows an individualized learning experience, at the learner's own pace.
- Because of the individualized learning experience, course length may be reduced while retention is increased.
- Requires that each learner perform tasks to complete training.
- Provides a consistent message without variation over the entire range of employees.
- Provides consistent evidence of training if training is an issue during litigation.

Advantages: Blended Solutions

Blended solutions, as the name implies, seek to combine the advantages of traditional classroom training and web-based training. Blended solutions allow expert trainers to communicate with learners on-line without either instructor or learner having to go farther than the nearest computer. Recent technological advancements have moved this type of training far beyond the traditional "webinars." Now learners can raise their "virtual hands" to ask real time questions, teachers can give learners tasks to perform, and learners can even work in virtual groups to solve problems together. The primary advantages of blended solutions are as follows:

- Allows employees from various parts of the organization to learn from each other in an interactive environment, without travel costs.
- Builds teamwork along organizational or departmental lines.
- Allows instant feedback from trainer to trainees especially when the trainer is a subject matter expert.
- Leverages employee's questions by allowing participants to learn from each other.
- May be easier to customize than asynchronous technology-based training.
- Allows employees in remote locations to join in with other employees.
- Trainers with significant authority or prestige can convey difficult concepts or convince participants about the importance of the subject matter.
- Allows large numbers of employees to be trained more quickly than live training, even in remote locations.
- More economical for training large groups of employees, especially when the expense of travel and time away from work are considered.

Step Three: Select Qualified Training Providers

Quality should be more than a buzzword when applied to the area of employment law training. As cases have frequently shown, improper training may be inadequate to provide the legal defenses allowed by the courts. (See section above "Failure to Adequately Train About Sexual Harassment")

- Carefully review each outside trainer's skills and experience in providing the specific training involved. This is especially important when the training involves legal issues. For live training, it is imperative the trainer have legal knowledge of the subject matter, experience assisting organizations solve the legal issues being addressed, and expertise in the area of training. For computer-based training, quality means that the program must be based on content provided by legal experts with outstanding reputations. Be cautioned that training programs that are not legally sound may result in the employer being unable to establish a legal defense.
- Ensure the training program is interactive and requires participants to engage in the learning process rather than being passive recipients of information. Passively receiving information simply means that participants will likely not retain key

learning points.[205] For example, using a story-based approach vastly improves retention, especially in computer based training.

- If the training is provided from inside the organization, ensure that the latest training methodologies are used. Internal trainers should have significant experience with the legal subject matter (in-house counsel or human resources managers) and have gone through a "train-the-trainer" program.
- Ensure the training focuses on the needed skills and is not a legal lecture. Detailed explanations of case law and statutes are more often confusing and counter-productive, especially when training employees and managers.
- Solicit the recommendations and views of other employers regarding the training provider.
- Review the experience the outside trainers might have in testifying or otherwise participating in the litigation process.
- Ensure that the topics covered in the training program are appropriate for the audience. For example, employees should receive training on preventing and reporting harassment, but they generally should not be made familiar with liability issues. Yet, these issues are important for managers.
- Use training providers whose material has been reviewed by attorneys experienced in labor and employment law issues.
- If using a mix of live and computer-based training, ensure that the message of both types of programs is consistent.
- Ensure that the training provider can track program completion.

Step Four: Decide on a Training Process

- For training provided internally, include the legal department in the design process.
- Match the curriculum to the goals of training.
- When applicable, preserve the attorney-client privilege and the confidentiality of business information.
- Offer training on a nondiscriminatory basis and reasonably accommodate trainees with disabilities.
- Be sensitive that the training itself does not create a higher standard of care than is necessary.
- Provide written course outlines.

Step Five: Monitor the Training

- Spot-check training sessions to ensure compliance with the curriculum, agency or company policies, and legal requirements.
- Keep accurate records regarding the location and physical facilities where training is provided.

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[205] THOMAS JUSTICE & DAVID W. JAMIESON, PH.D., THE FACILITATOR'S HANDBOOK 11 (1999) (learning occurs best when people's attention and energy stay engaged and focused).

- Keep accurate records of attendance, and ensure that those selected for training have been allowed to attend.
- Have trainees' complete written evaluations of the program and the instructors.

Step Six: Assess & Follow-Up

- Evaluate the effectiveness of training by using written and performance testing, as well as on-the-job observations of supervisors.
- Discourage the use of pre- and post-training tests. These results can be used in subsequent litigation against the employer.
- If material has not been learned, retrain immediately. Decide in advance how the assessment will be used.
- Document training to the extent required by specific laws (*e.g.*, OSHA) and consider the legal implications of retaining test scores and other evaluative data.

§ 15.3.3

C. FIVE CAUTIONS & FIVE RECOMMENDATIONS FOR EMPLOYERS CONDUCTING ANTIDISCRIMINATION & ANTIHARASSMENT TRAINING

Antidiscrimination and antiharassment training are vital for setting standards of appropriate behavior. However, as highlighted earlier in this chapter, unless a trainer is careful, the legal problems that result from the training itself can be worse than no training at all.

To be effective, training about discrimination and harassment can involve a level of personal disclosure about participants' attitudes and feelings about race, gender, disabilities, sexual orientation, age, and other such categories. This is especially true for employers that conduct training specifically to shift attitudes of managers that an employer suspects are not appropriate in today's workplace. Providing an opportunity for employees and managers to explore and change their attitudes about different groups, including their own groups, can go a long way toward ensuring a nondiscriminatory workplace, free of harassment.

To lessen the risk of litigation resulting from the training itself, an employer should carefully review the training curriculum beforehand. The employer may wish to let the trainers maintain overall control over the diversity or harassment training program, but the employer should provide guidelines, nonetheless. The following is a list of five cautions and five recommendations for employers regarding how to conduct — and not conduct — antidiscrimination and antiharassment training.

Five Cautions: What Not to Do When Conducting Training

1. Do Not Let Trainers Ask Managers About Their Own Stereotypes or Biases

Many antidiscrimination and antiharassment training programs ask managers to agree that they will be open and honest in discussing their "feelings" on diversity issues or expressing their "comfort level" with particular groups. In some situations, this kind of "self examination" can be effective in addressing prejudice and bias. However, courts recognize no "soul searching" privilege for comments made in training sessions. If managers are revealing their stereotypes and biases, even indirectly, these statements can be used later against the

company. Debunking stereotypes is important, but have the trainers volunteer these stereotypes — not the managers.

2. Do Not Rely on Participants' Promises of Confidentiality

Even if participants agree in training to keep confidential what is said, everything said or written can often be revealed in subsequent litigation. Employers should not be lulled into a false sense of security.

3. Do Not Let Trainers Draw Legal Conclusions

If a trainer says, "This conduct is sexual harassment," — he or she is drawing a legal conclusion that could compromise future legal defenses. It is better to describe the hypothetical conduct used in training as "inappropriate." Trainers should be wary of trainees who pose supposedly hypothetical situations and ask whether such conduct is unlawful. The conduct described may be that of the next plaintiff.

4. Do Not Forget that Training Materials Can Be Discoverable

Employers should draft and review training materials with an eye to their possible discoverability during litigation. If an employer later becomes involved in litigation, these materials may have to be provided to the plaintiff. For example, retaining test results in employment law training courses could be used by opposing counsel to "prove" that the employer kept a manager knowing of the manager's propensity to harass employees (*e.g.*, "Ladies and gentlemen of the jury this manager got every question wrong the first time around on a 'what is harassment test' immediately after taking a training class. The employer received those results but kept him on as a manager without doing anything!").

5. Do Not Just Rely on Training Alone—Audit

Effective training is crucial, but employers must not see it as a "magic pill." Employers should also undertake a comprehensive audit of the company's official policies and actual practices, and the almost inevitable gaps between the two. The audit should identify policies and practices that may be barriers to the recruitment, retention and promotion of a diverse workforce and begin to take the steps necessary to remove those barriers. Be sure to work closely with your attorneys so that an attorney-client privilege is maintained, if possible. (However, see the discussion earlier in this chapter regarding the probable nonavailability of a self-analysis privilege.) The more an organization honestly investigates its own policies and practices, the better its defense if it is later sued for discrimination or harassment.

Five Recommendations: What to Do When Conducting Training

1. Do Focus on Providing Tools to Change Conduct and Not Just Legal Obligations

Managers who understand the connection between good management practices and legal compliance can have an amazing impact on reducing litigation. A recent study of the unemployed found that terminated employees found that only 4% of employees who felt their terminations were fair filed or considered litigation. Contrast that statistic with the statistics of those who felt that the termination process was insulting or felt that they had been given inaccurate information about the decision. A full 90% of that group either filed or considered litigation. The news is not much better for employers once they are before a jury. In another recent survey, most jurors disagreed with the statement "employees can be terminated without

cause" even in states where employment at-will was the norm. Many jurors also disagreed that financial reasons were a legitimate reason for termination.[206]

Employers should teach managers what the law requires of them. Such training should include information about who is protected by the law and should give examples of conduct that is inappropriate. Training topics should be kept specific to the employer's work environment, such as issues that may arise around interviewing job candidates in protected classes, managing performance in a nondiscriminatory and consistent way, and avoiding retaliation. Again, while training is an opportunity to debunk common stereotypes, skilled trainers should volunteer these stereotypes—not the managers who are the trainees.

2. Do Train Managers Regarding How to Respond to Complaints

Managers need to know how to respond to complaints of discrimination and harassment under both the law and your policies. A prompt, effective response to a complaint can not only limit liability, but it can also "nip problems in the bud" by demonstrating to complainants that the company takes their concerns seriously. The perception that a company does not take complaints of its own employees seriously is part of a recipe for instant litigation.

3. Do Teach About the Company's Own Policies

Managers and employees need to know about the employer's own antiharassment and antidiscrimination policies and the consequences of failing to abide by them. In many cases where employers have been found liable for discrimination or harassment, the employer had a policy in place but did not insure that the company's managers and employees were aware of its existence. In other cases, employers were found liable because managers did not follow the procedures outlined in the policy. Employers should disseminate these policies widely and make sure that both managers and employees know how to invoke and use them.

4. Do Provide Tools for Continued Awareness

Training can lay important groundwork for attitudinal change, but attitudes do not change overnight. Thus, it is important to train employees how to challenge conduct that is inappropriate, discriminatory or harassing. Most employees do not want to condone discriminatory and harassing conduct, but they need to understand how to appropriately respond to it.

5. Do Keep Records of Who Is Trained

Employers should make sure they keep records regarding who has been trained, and what the curriculum was. Training can be an effective defense. If employees are trained to report harassment, are provided with a clear channel for reporting, and then fail to report offending conduct, the *Faragher/Ellerth* affirmative defense may well be available, in the absence of a tangible job benefit or detriment. Keeping inadequate training records could turn out to be substantially more expensive than the cost of good training.

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[206] Dr. Joni Johnston, *Why Jurors Fire Back During Wrongful Termination Lawsuits*, Dec. 2, 2003, *available at* http://www.hr.com.

§ 15.4

IV. ESSENTIAL TOOLS FOR IMPLEMENTING A TRAINING PROGRAM

§ 15.4.1

A. COMPLYING WITH A.B. 1825: FOUR LEGAL LANDMINES & HOW TO AVOID THEM

There is a common misconception that compliance simply means "follow the law." It is much more than that. Indeed, companies that structure their compliance programs to meet statutory requirements may inadvertently place themselves at greater risk. The following four "landmines" illustrate how an effective compliance program entails much more than a narrow focus on the mandates of A.B. 1825 (or similar such laws). Yet, laws such as A.B. 1825 provide a mandate and allocation of corporate resources that can be used wisely to create an effective compliance program. The challenge is to avoid the classic mistakes, and affirmatively use A.B. 1825 as additional motivation to build a workplace of mutual respect that keeps and attracts productive employees.

Landmine #1: Sex Only. Viewing A.B. 1825 as Only Requiring Training on Sexual Harassment & Limiting Programs to this Single Topic

A.B. 1825 is not just about sexual harassment! While the focus is on sex, the language of the bill affirmatively requires training on practical skills need to prevent "harassment, discrimination and retaliation." Moreover, it specifically leaves in place all existing requirements to train on other unlawful forms of harassment and discrimination (such as age, race, and religion). The draft regulations clarify this requirement. Training "may provide a definition of other forms of harassment covered by the FEHA, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis."

There is a serious danger that A.B. 1825's focus on "sexual harassment," if taken literally, may actually set employer training back ten years — to the early 1990's. During those years, employer training efforts focused on sexual harassment prevention as an outgrowth of the case law following the confirmation hearings involving Supreme Court Justice Clarence Thomas. Many managers wrongly perceived that the term "sexual harassment" had the same meaning as "unlawful harassment." The obsession with "sex" left uncovered the serious problems associated with other forms of unlawful harassment. Racial harassment, harassment based on age, national origin or disability, and harassment associated with one's religious beliefs were not only illegal, but very significant workplace challenges.

In 1999, the EEOC issued guidance reprimanding the employer community for its failure to broaden training to cover the full range of prohibited harassment: "[V]icarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability." Thus, employers should establish antiharassment policies and complaint procedures covering all forms of unlawful harassment.

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's antiharassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's antiharassment policy, the seriousness of the policy, the responsibilities of supervisors and managers when they learn of alleged harassment, and the prohibition against retaliation.[207]

Gradually, employers responded with increasingly effective training — educating employees and managers about how harassment could be associated with several prohibited categories, not just sex. However, California's "sexual harassment" training law has set back some employers' overall legal compliance efforts as they focus narrowly on the mandates of the statute to the exclusion of other forms of unlawful harassment, discrimination and retaliation. It is a serious mistake to interpret the California law so narrowly that an employer does not pay attention to broader forms of harassment and discrimination prevention.

Comprehensive unlawful harassment training is so important that an employer may actually face a greater risk of liability and damages, including punitive damages, having conducted only sexual harassment training as opposed to no training at all. Envision the conclusions that could be reached by a juror in a race, age, religion, national origin, disability, or sexual orientation harassment case, where the employer had conducted extensive sex harassment training but totally ignored these other protected categories. Plaintiff's counsel in such a case will remind the jury (again and again) that the employer must not have found these concerns "important" as it intentionally chose not to train in these areas. Moreover, even the sexual harassment training will be discounted, branding the employer as an uncaring "minimalist" that carries out only what is absolutely mandated by statute. This impression could be devastating. This is not a hypothetical argument, but rather one that we have encountered and anticipate in current litigation.

Clearly, adding 30 minutes to the two-hour training requirement, and integrating the full range of protected categories is the highly preferred way of complying with A.B. 1825, of reducing overall risk, and, perhaps most importantly, of making a statement to employees that the organization does not tolerate prohibited harassment and discrimination in any form.

Landmine #2: California Only. Providing Specialized Training Only to Supervisors in California Because A.B. 1825 Does Not Apply in Other States

California occasionally experiments with employment practices that are outside the national mainstream. Other times, California's practices are indicative of national trends. While A.B. 1825 is unfortunately focused on only one form of unlawful harassment, it is putting into law an employer practice that should have been well established. For responsible employers, such education for its managers has long been required. Nonetheless, A.B. 1825 (not unlike the seatbelt laws) makes a definitive statement specifying a deadline and a minimum requirement for compliance. To apply this statute solely to employees in California would be a major mistake for many multistate employers.

First, the California statute makes explicit what has been an EEOC requirement for several years under federal law. Indeed, as presented above, training needs to cover all prohibited forms of harassment and discrimination. Clearly this is a national concern, if not a core value that organizations may elect to apply internationally.

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[207] *Enforcement Guidance*: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html.

Second, the organization must consider the message sent to employees, judges and juries in other states if training is limited to California. Imagine the following situation:

> An employer with multiple locations across the country implements a robust training program for its California supervisors. A serious harassment incident arises in the organization's Dallas office. The allegations reference harassing behavior that was directly addressed in the California training program, but Dallas supervisors did not receive the same training. Imagine now that you are the plaintiff's attorney in this case, criticizing the employer's lack of reasonable efforts to prevent and correct workplace harassment. In this instance, a narrowly focused, localized training approach actually creates problems for the employer. Accordingly, one national training policy is highly recommended.

Finally, California now joins Connecticut and Maine with a mandatory training statute reaching the private sector. (Many states have mandatory training requirements for various categories of public employees.) It is difficult to believe that other states are far behind in making training "mandatory," especially when some of those states already have statutes that "encourage" such training.

Landmine #3: Supervisory Employees Only. Not Providing Training to Employees Because A.B. 1825 Only Covers Supervisors

Nonsupervisory employees in California and beyond benefit and need training for at least three critical reasons:

1. A review of federal case law post the landmark 1998 U.S. Supreme Court's *Faragher*[208] and *Ellerth*[209] decisions suggests that both managers and employees should be trained to better ensure the availability of an affirmative defense to harassment claims brought in federal court.

2. California Government Code section 12940(k) requires employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring." Basic harassment prevention training for *all* employees is part of a reasonable step necessary to prevent workplace harassment and discrimination.

3. In the 2003 *State Department of Health Services v. Superior Court* decision,[210] the California Supreme Court held that the Fair Employment and Housing Act (FEHA) does not allow the federal *Faragher/Ellerth* defense in harassment claims. Instead, for cases brought in state court, California employers may assert a different defense under the FEHA: the doctrine of avoidable consequences. This defense allows an employer to limit damages by proving that it took appropriate steps to prevent and address harassment.

According to *State Department of Health Services*, to establish the avoidable consequences defense, a California employer must:

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[208] 524 U.S. 775 (1998).

[209] 524 U.S. 742 (1998)

[210] 31 Cal. 4th 1026 (2003).

- Show that it adopted appropriate antiharassment policies and communicated essential information to employees.
- Ensure a strict prohibition against retaliation for reporting alleged policy violations.
- Ensure that reporting procedures protect employee confidentiality as much as is practical.
- "Consistently and firmly" enforce antiharassment policies.[211]

None of these factors identified by the court are limited in scope to supervisors. The court further stated that in establishing the avoidable consequences defense, potentially relevant evidence includes "anything tending to show that the employer took effective steps" to encourage individuals to report harassment and for the employer to respond effectively. Clearly, this broader directive, in addition to the specific requirements listed above, strongly supports training for *both* employees and supervisors

Landmine #4: Poor Quality. Thinking that Any Training Will Do.

A.B. 1825 mandates that the training be of high quality and presented by "trainers or educators with knowledge and expertise" in preventing harassment, discrimination, and retaliation. If classroom instruction is used, the qualifications of the trainers must be established. Train-the-trainer programs may be appropriate, but the actual instructors still need to meet the knowledge and expertise requirements. Accordingly, human resources professionals and California licensed attorneys are specifically mentioned by the FEHC's draft regulations as qualified trainers. These quality standards apply to both the trainers and those developing the training programs. If your organization is in doubt, it should consult qualified legal counsel to review the planned program. Articles on A.B. 1825 may be informative, but they are not a substitute for proper legal advice.

§ 15.4.2

B. MODEL CURRICULA FOR EMPLOYMENT LAW TRAINING

Over the years, Littler Mendelson has designed training curricula to meet the evolving needs of the American workplace. Several such employment law training curricula are presented below. Each is intended for a different constituency: employees, supervisors and managers, human resources professionals, corporate attorneys and human resources executives.

Several disclaimers and qualifications are necessary. First, the model curriculum outlines are designed to provide training in employment law. They are not a substitute for job-skill training or specific technical training required by law. Second, the outlines are based on the experiences of the attorneys at Littler Mendelson. They are not intended to establish a standard with which employers must comply. Each training program must be tailored to the industry, the specific company, and to governing law (including any collective bargaining agreements or consent decrees). Third, the outlines are designed primarily for private sector employers that are not unionized. Fourth, determining how much training is necessary can be done only on a workplace-by-workplace basis.

[211] *Id.*

Finally, the suggested times are the minimum length, assuming stand-alone, live-training modules are provided for each course. Employers should not cover too much material in one session or spend an inadequate time on important subjects. Doing so can reduce retention and jeopardize the training's effectiveness in providing a legal defense.[212]

All Employees

- ❑ Preventing Workplace Harassment (2 hours)
- ❑ Preventing Workplace Violence (2 hours)
- ❑ Diversity Training (4 hours)
- ❑ Workplace Safety (2 hours for general safety plus additional time for industry specific requirements)

Managers & Supervisors—Core Curriculum

Managers should receive the following training as soon as possible after becoming a manager:

- ❑ Employment Law Basics for Managers — This course should be a brief overview for new managers of the laws affecting the employment relationship, including EEO, wage-and-hour, OSHA, and wrongful termination. This course should not be used as a substitute for the more in-depth training detailed below. (3 hours)
- ❑ Preventing Workplace Harassment (3 hours)
- ❑ Ensuring Equal Employment Opportunity (3 hours)
- ❑ Legal Management of the Hiring Process (3 hours)
- ❑ Legal Management of Hours Worked Laws (2 hours)
- ❑ Legal Management of Employee Performance (3 hours)
- ❑ Lawful Termination (3 hours)
- ❑ Diversity Training (4 hours live)
- ❑ Privacy & Managing the Cyber-Workplace (3 hours)
- ❑ Preventing Workplace Violence (3 hours)
- ❑ Occupational Safety and Health (3 hours)
- ❑ Managing a Union-Free Workplace (4 hours)
- ❑ Managing the Union Workforce (for those managing employees represented by a union) (4 hours)
- ❑ Avoiding Litigation Landmines (2 hours)

[212] *See Elmasry v. Veith*, 2000 U.S. Dist. LEXIS 340 (D.N.H. Jan. 7, 2000) (harassment prevention training that was only minor part of an overall training program was inadequate to establish an affirmative defense); *Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000) (court rejected the employer's attempt to avoid punitive damages under *Kolstad*, in part, due to the conduct of the person who trained on discrimination).

Training for Experienced Managers—Advanced Curriculum

Assuming that the managers have completed the core curriculum, more experienced managers should receive training in the following areas:

- ❑ Managing Disabled Employees — Compliance with the Americans With Disabilities Act (4 hours)
- ❑ Managing the Web of Legal Leave Requirements (4 hours live)
- ❑ The Legal Aspects of Managing Substance Abuse (4 hours live)
- ❑ Wage-and-Hour Issues for Managers (2 hours)
- ❑ Occupational Safety and Health — Industry Specific (4 hours)
- ❑ The Art of Collective Bargaining (for those with bargaining obligations) (2 days)
- ❑ Understanding Workers' Compensation and Unemployment Compensation (2 hours)
- ❑ Sarbanes-Oxley Act/Corporate Ethics (4 hours)

Human Resources Professionals

Human resources professionals should receive training on all of the subjects listed in the core & advanced management curriculum. The courses for human resources professionals, however, should focus on their unique role in preventing and responding to employment law problems. Thus, the human resources level courses will be significantly longer than the managerial counterparts. In addition to the topics discussed above, human resources professionals should take the following courses:

- ❑ Human Resources' Role in Responding to Employment-Law Related Complaints (1 day)
- ❑ Conducting Lawful Investigation (This course should be considered for any employee with significant involvement in investigating employment law related matters.) (1-2 days)
- ❑ Employee Benefits (1 day)
- ❑ Alternative Dispute Resolution (4 hours)
- ❑ Immigration, Basics (4 hours)
- ❑ Ethics' Obligations for the human resources professional (4 hours)

Executives Including Human Resources Executives & the Legal Department

This version of the curriculum, targeting those with policy-making functions, takes at least seven to ten days to complete. Time has not been allocated for each topic because of the differences in professional responsibilities and levels of prior experience from company to company. *(i.e.*, the training for a corporate employment lawyer will differ significantly from the training for a corporate patent attorney.)

- ❑ Dispute Resolution
- ❑ EEO Law
- ❑ Diversity Policy Making & Training

- Audit of Employment Policies & Procedures
- New Legal Issues
- Unfair Competition
- Review of New and Pending Employment Law in Federal, State and Local Legislatures
- Wrongful Discharge/Demotion
- Review of Job Applications, Handbooks & Procedures Manuals
- Cyber-liability: Establishing and Enforcing Policies for the "net-worked" employer
- Privacy
- Leaves of Absence
- Workers' Compensation
- OSHA
- Immigration Issues
- Employee Benefits
- Compensation Law
- Workplace Violence
- Drugs and Alcohol
- Fundamental Organizational Changes: Mergers, Restructuring, Closures
- The Global Employer
- Insurance Coverage
- Sarbanes-Oxley Act/Corporate Ethics

§ 15.4.3

C. ASSESSING EMPLOYMENT-LAW TRAINING PROGRAMS "MUST HAVES" & COMMON PITFALLS

Choosing the Best Employment-Law Training

Given the need to use the best employment-law training program in your organization, the purpose of this section is: (1) to identify the essential components of an effective training program; and (2) to identify some of the most common pitfalls in employment law training programs.

The following "checklist" is an essential tool in evaluating both live and on-line employment-law training. Some of the issues pertain to on-line training only, as noted.

Is the Program Highly Interactive?

If the program does not require participants to interact, it is difficult to argue that learners were effectively trained and educated. A plaintiff's counsel and jury assessing the program

may wonder whether learners "tuned out," calling the degree of learner retention into question.

For live training, highly interactive programs using quizzes, case studies, or role-plays are highly recommended. These activities allow the process of self-discovery needed for participants to internalize the key learning points. Such activities also allow participants to learn from their colleagues, which builds teamwork and trust. The interactive sessions must be spaced appropriately throughout the program to ensure that the participants' attention never fades.

In e-learning, one of the greatest challenges is overcoming the phenomenon of low-completion rates. If the program is not engaging and interactive, users will not want to finish the course. E-employment law training is only effective if an organization can prove that learners actually finished the course.

For these reasons, an employment law training e-learning program should have the following:

- Screen functionality that ensures the user is constantly interacting with the program. The learner should be constantly clicking and/or scrolling, as opposed to passively listening to long audio clips and/or viewing long video clips.
- Mandatory questions that force the user to put the information on screen into practice.
- A detailed explanation of why wrong answers are incorrect.
- A detailed explanation as to why right answers are correct.
- The inability to move forward until questions are answered correctly.
- The ability to consult with onscreen resources to learn more about each topic presented (*e.g.*, a detailed content guide).
- A variety of media elements – text, audio, photos, animations, graphics. When programs are too text heavy, users are unlikely to read through all of the content and are unlikely to want to finish the course.

Is the Learner Asked to Make Legal Conclusions?

An effective employment law training program should ask questions, but those questions should not ask the learner to make a legal conclusion. An example would be when a program presents a scenario, and then asks the user "Is this harassment?"

Questions that ask for legal conclusions are problematic for two reasons. First, the legal conclusions can be used as evidence against the company in the event of a future lawsuit. Take the example above. A scenario is presented of "bad" manager behavior, and the user is asked whether that behavior "is" or "is not" harassment. The response from the teacher or e-learning program is that the behavior "is" indeed harassment. Keep in mind that this conclusion may be highly dubious given the myriad of complex and subtle factors that influence a court's decision in determining legal liability.

Second, suppose that the organization using the course is sued because one of its managers engages in behavior similar to that portrayed in the program. The company tries to defend the claim. Plaintiff's counsel points to the training program as an admission on behalf of the company that the type of conduct the manager engaged in "is harassment." Essentially, the

company's hands may be tied because of evidence it created against itself.[213] The learning points that such a question is trying to cover can be communicated just as effectively without making a legal conclusion.

Does the Program Increase the Organization's Employment Law Liability by "Setting the Bar Too High"?

In an attempt to be "politically correct" and to cleanse the organization of any behavior that could expose the company to complaints, many employment law training programs set the "bar" of acceptable behavior too high. In other words, the program deems almost any kind of potentially questionable behavior be unlawful.

For example, in workplace harassment training, a program may state that any discussions of personal relationships in the workplace are inappropriate. While this approach is well intended, it can actually be damaging to the organization for the following reasons:

- If the program "concludes" that such behavior is unlawful, then it has made a legal conclusion that could be used against the organization in the event of a future lawsuit.
- While an organization may want to set standards that are higher than those required by law (*e.g.*, indicating that while something may not be unlawful, it is still against company policy), it must do so extremely carefully. If the higher standard is communicated improperly, it may cause hypersensitivity to conduct and communications in the workplace. This hypersensitivity damages the concept of the "reasonable person" which is foundational in determining whether unlawful conduct has occurred, and which from a business perspective should still be included in company policy.
- An overly "sanitized" message may also spark an unwillingness on behalf of the learner to take the content in the program seriously. If the program presents an unrealistic and overly politically correct standard, its contents will likely be ignored.

If the Program Is About Workplace Harassment, Does It Only Address Sexual Harassment?

The Courts and the EEOC have made clear that a harassment prevention program should address all of the "protected categories." The heightened attention to religious, ethnic, and national origin harassment after September 11th only reinforces this point.

To be effective, a workplace harassment training program should:

- Address harassment related to race, national origin, color, disability, age, religion and other protected categories.
- Recognize that there may be additional "protected categories" under state law (*e.g.*, sexual orientation).

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[213] *See Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000) (legally unsound information giving during a training program contributed to the employer not being able to establish a defense to punitive damages).

- Provide the capacity to customize the program to highlight additional state protections.

If the Program Addresses Workplace Harassment, Does It Use the Outdated Term "Quid Pro Quo"?

"*Quid Pro Quo*" is an outdated term. The legal definition of *sexual harassment* has been evolving for a number of years. In the past, two types of harassment were recognized: "*quid pro quo*" and "hostile work environment." The Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* changed the terminology.[214] Sexual harassment is now defined by the harm caused to the victim rather than the nature of the offensive conduct. The court identified two categories of harassment: those involving a "tangible employment action" and those involving a "hostile work environment."

Tangible employment action harassment normally involves some type of monetary loss for an employee or significant changes in workload or work assignment. Therefore, it can more accurately be referred to as "economic harassment." Economic harassment is different from "*quid pro quo*" harassment because economic harassment focuses on the harm to the victim rather than the conduct of the harasser. It requires that the threat of job detriment or promise of job benefit actually result in some sort of employment action, such as a termination, promotion, demotion or reassignment to a considerably different job. Employers are strictly liable for conduct by managers that constitutes economic harassment.

A harassment training program that uses the outdated term "*quid pro quo*" and that implies or states harassment occurs even with the threat of tangible job action is incorrect and sets a standard for the organization that is actually higher than that set by federal law. In this respect, the program may actually expand liability, rather than reduce it.

Are There Separate Manager & Employee Versions of the Course That Ensure Employees Are Not Exposed to Potentially Volatile Information?

One of the greatest challenges in creating an employment law training program is ensuring that the content communicates the correct information, while not encouraging employees to bring lawsuits.

When a training program focuses on terms and concepts such as "lawsuits," "claimants," "suing," "litigation" and "damages," the content may focus the learner's attention on how to bring a claim against the company, rather than focusing his or her attention on the expected standard of conduct, and the duty to report. Furthermore, it is highly questionable whether the user gains any educational value from being exposed to such material.

An effective employment law training program should shield employees from this type of content. A thorough discussion of legal liability is really only appropriate for managers, who need to know more detailed information about the law, and the specific risks that misconduct poses to both them and the company.

A fear of exposing employees to any kind of information associated with employment law should not, however, prevent an organization from training their employees. Both the EEOC

[214] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

and state and federal courts require periodic training of both managers and employees on harassment and discrimination.

Does the Program Focus on Legalese?

Employment law training programs are designed to educate employees and managers – not create lawyers or human resources experts. Therefore, when discussing "the law," a training program should focus on the practical learning points associated with the content, rather than the details behind the statutory or case-based legal content. The program should be focused upon teaching learners how to prevent and correct misconduct – not upon the details of the legal language.

Can the Program Be Customized to Reflect Your Organization's Specific Workplace Policies?

An employment law training program should include customization options that allow for the incorporation of an organization's specific workplace policies. This capability is important for the following reasons:

- In addition to regular training, periodic dissemination and redissemination of workplace policies associated with legal obligations is an important part of an organization's compliance measures. If a training program can include company policy, then the program performs the dual function of training and policy dissemination.
- Inclusion of workplace policies allows the program to reflect and highlight specific mandates and procedures within the organization.

Does the Program Replicate a Realistic Working Environment?

Many employment law training programs use vignettes and case studies that seem very unrealistic and "hokey." This can be especially problematic when using videos or e-learning when participants are likely used to very high production used in Hollywood or major Web sites.

Such unrealistic scenarios cause two problems:

- A hokey program that causes chuckles from employees will not be very effective in showing the seriousness of the problem.
- A jury who has to review the program as part of an employer's defense will likely have the same reaction. Thus, the program's effectiveness as part of a legal defense is jeopardized.

If the Program Purports to Address "Discrimination," Does It Have Sufficient Content, or Is It Simply a Re-Named Harassment Program?

Harassment is one form of workplace discrimination. A "Workplace Discrimination" or "EEO" program for managers should address a wide range of content beyond economic and environmental harassment. This content would include all of the various forms of disparate impact and disparate treatment discrimination that can occur throughout the employment lifecycle — from hiring, to managing performance and to lawful terminations.

Proper training on discrimination can provide a company with a different type of defense from the "affirmative defense" associated with harassment training. In 1999, the U.S. Supreme Court issued a decision, *Kolstad v. American Dental Association*, in which it emphasized the importance of employers maintaining a written policy prohibiting harassment and discrimination as a defense to liability for punitive damages.[215] Under *Kolstad,* an employer will not be held liable for punitive damages if a manager's conduct is contrary to the employer's good faith efforts to comply with Title VII.[216]

A good faith effort clearly includes:

- adoption and implementation of antidiscrimination policies;
- training personnel about what is not permitted under applicable laws; and
- a commitment to "adopt antidiscrimination policies and to educate. . . personnel."[217]

Are Learners' Test Scores or Personal Information Through Questions or Assessments Retained?

Classroom learning always allowed employers to retain test results and student comments from tests and case studies. When an employment law course is delivered online, the capacity of the program to capture vast amounts of personally identifiable information is even greater. This information can be used to show proof of training and proof that the learner "got" the message.

The downside of retaining this information is significant because the information could be used against the organization at a later date to show evidence of workplace discrimination or harassment. How practically does this potentially damaging information capture occur? The most obvious way is when training programs "score" participants on test or quizzes. If a learner scores poorly on a test and then engages in misconduct, the poor score could be found to have put the company "on notice" that it had a problem employee on its hands, and that it should have taken greater efforts to prevent the misconduct from occurring.

In the same vein, the information captured during pre and post-course assessments could be extremely damaging. In diversity training, for example, precourse assessments will often ask a learner to identify any personal biases or stereotypes that he or she may have. While this introspective exercise can be extremely useful from a learning perspective, the information that is gathered can be like a litigation landmine waiting to explode. If evidence of self proclaimed bias gets into the wrong hands, a company could essentially be building an employment law case against itself.

Because of the damaging risks associated with assessments and scoring, organizations should not retain this type of information. This lack of scoring and assessments in no way detracts from the quality of the programs' content, or the effectiveness of the training.

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[215] 527 U.S. 526 (1999).

[216] *Id.* at 545.

[217] *Id*.

Can the Learner Skip Through the Course? (e-learning only)

The course should force the user to proactively engage the content on each screen. This means that:

- Foundational content should not be optional (*e.g.* case studies or exercises).
- From a course functionality perspective, the "next" button, arrow etc. should only become active after the user has been made to digest and interact with the content on each screen.

Does the Program Have a Certification & Tracking System? (e-learning only)

The course should be able to:

- Track individual users when they log onto the course, when they log off the course and when they complete the course.
- The course completion should capture a proactive agreement on behalf of the learner that:
  - He or she has understood and read all of the content in the program;
  - He or she agrees to abide by the principles set forth in the program; and
  - If applicable, that he or she acknowledges receipt and acceptance of any organization-specific workplace policies included in the program.

§ 15.4.4

D. OSHA TRAINING REQUIREMENTS HIGHLIGHTS

The following training requirements are by no means all inclusive. Employers should refer to the title 29 of the Code of Federal Regulations ("29 C.F.R.") for complete training requirements or to "Training Requirements in OSHA Standards and Training Guidelines," OSHA Publication 2254, available at www.osha.gov. In addition, employers should refer to individual state OSHA standards for additional state-specific training requirements.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.1030	Bloodborne Pathogens Program	Yes	Minimum elements: Methods used to perform hazard assessments/inspections Engineering & work practice controls used to reduce exposure Procedure to ensure use of "universal precautions" & good housekeeping Personal protective equipment selection, use & maintenance procedures Decontamination & waste disposal procedures Incident reporting & response procedures Post-exposure medical evaluation & follow-up Procedures for Hepatitis vaccinations Recordkeeping procedures Procedures for periodically evaluating program effectiveness

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.38	Emergency Action Plans	Yes	Minimum elements: Designated program administrator or other persons who can respond to questions Internal & external emergency phone lists Describe escape routes from each work area Emergency equipment locations & procedures for use Procedures for employees who remain behind to shut off critical equipment before evacuating Procedures for taking headcounts after evacuation Rescue & medical assignments Incident reporting procedures Alarm systems use, maintenance & testing Content & frequency of employee training/instruction Procedures for periodically evaluating program effectiveness
OSHA Guidelines	Ergonomics Program	Yes	Minimum elements: Methods used to perform hazard assessments/inspections Engineering & work practice controls used to reduce exposure Procedures/frequency of re-evaluating exposures Content & frequency of employee training/instruction Procedures for periodically evaluating program effectiveness

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.23 & 1910.132	Fall Protection Requirements for General Industry	Yes, in some cases	Employer must prove safety training for employees who work with this equipment, and must demonstrate proper selection based on task-specific hazard analyses.
Part 1910.38	Fire Prevention Plans	Yes	Minimum elements: Potential fire hazards & control measures Potential ignition sources Names of persons assigned to maintain fire prevention & fire fighting systems Names of persons assigned to control accumulation of flammable/ combustible materials Housekeeping procedures to prevent accumulation of flammables/combustibles Content & frequency of employee training/instruction Standard operating procedures for equipment & alarm testing Procedures for periodically evaluating program effectiveness
Part 1910.151	First Aid/ Medical Services	No	In absence of infirmary clinic or hospital in near proximity to workplace, a person or persons shall be adequately trained to render first aid.
Part 1910.1200	Hazard Communication	Yes	Educate employees about nature of hazards with which they work & train them in measures to protect their health.
Part 1910.120	Hazardous Waste Operations and Emergency Response	Yes	Employee training is required for all employees potentially affected by any release of any hazardous substance; as well as actual emergency responders & those involved in hazardous waste operations.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.95	Hearing Conservation Program (noise)	Yes	Minimum elements: Methods used to perform hazard assessments/inspections Methods used to measure employee exposures Engineering & work practice controls used to reduce exposure Procedures/frequency of remonitoring for exposures Procedures/frequency of hearing tests Procedures for responding to & notifying employees of documented hearing loss Procedures for selection, fitting & maintenance of hearing protection Content & frequency of employee training/instruction Procedures for periodically evaluating program effectiveness
Part 1910.178	Industrial Trucks, Forklifts and Tow Tractors	No, but recommended	Employer must train on operation and hazards of specific equipment and intended loads as well as anticipated work area conditions.
Part 1910.147	Lockout/Tagout (Control of Hazardous Energy)	Yes	Equipment-specific safe operating procedures are required. Employer must be able to prove equipment-specific employee training.
Part 1910.303	Low Voltage Electrical Safety Requirements (< 600 volts)	No	Employer must be able to document safety training for employees who work on or near this equipment.
Part 1910.212	Machine Guarding in General Industry, Including Slicers, Mixers, etc. Used in Kitchens.	No, but recommended	Employer must be able to document periodic inspections and maintenance are done and employees have equipment-specific safety training.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.146	Permit-Required Confined Space Entry	Yes	Written equipment-specific work practices, training certificates permits and documentation of air monitoring required.
Part 1910.130 through 1910.133	Personal Protective Equipment Standards (PPE), Including Gloves, Aprons, Safety Glasses, etc.	Yes	Minimum elements: Designated program administrator Methods used to perform task-specific hazard assessments & inspections Engineering & work practice controls used to reduce employee exposures Medical evaluation/examination procedures for employees Procedures for selecting, fitting, using & maintaining task-specific PPE Cleaning, storage and waste disposal procedures Content & frequency of employee training/instruction Procedures for periodically evaluating program effectiveness
Part 1910.119	Process Safety Management (PSM)	Yes	Equipment-specific work practices & emergency control required as well as employee training.
Part 1904	Recordkeeping	No	Inform employees of how they are to report injury or illness

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.134	Respiratory Protection Program	Yes	Minimum elements: Designated program administrator Methods used to perform task-specific hazard assessments & inspections Engineering & work practice controls used to reduce employee exposures Medical evaluation/examination & fit testing procedures for employees Procedures for selecting, fitting, using & maintaining respirators Cleaning, storage & maintenance procedures Content & frequency of employee training/instruction Procedures for periodically evaluating program effectiveness
Part 1910.107	Storage and Handling of Flammable and Combustible Liquids, including Cooking Oils and Cleaning Solvents	No	Employers must be able to document employee training and understanding of safe work practices. Advisable to have written safe work practices for these activities.

29 C.F.R.	Subject	Written Program Required	Comments/Other Written Records Required
Part 1910.252	Welding and Cutting Safety Requirements. General Requirements for Safe Use, Handling and Storage of Compressed Gas Cylinders, Including Welding Gases	No, but recommended	Written safe work practices advisable. Employer must be able to prove task-specific employee training.
OSHA Guidelines	Workplace Violence Prevention Program	Yes	This program is recommended by OSHA guidelines for Health Care and Social Service Workers, Late-Night Retail Establishments, and Taxicabs. Minimum elements: Designated program administrator Responsibilities for each job title Measures to ensure employee compliance Methods used to communicate with employees Content & frequency of employee training/instruction Method for anonymous hazard reporting Methods used to perform hazard assessments/inspections and to correct hazards Incident reporting & investigation Emergency response procedures Recordkeeping procedures Procedures for periodically evaluating program effectiveness