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PROPOSED REGULATIONS FOR SEXUAL HARASSMENT TRAINING

For the past two years, our firm has been providing you information and updates on the requirements of AB 1825 (Required Sexual Harassment Avoidance Training) and how it impacts your business. We also have been giving you updates on how the definition of sexual harassment has been expanded to create additional basis for liability for supervisors and organizations alike. Our office has had representatives involved in the development of the regulations interpreting AB.

On November 14, 2006, the Fair Employment & Housing Commission (FEHC) adopted the final proposed Sexual Harassment Training and Education Regulations. It was anticipated that the regulations would be implemented by the end of February. On January 30, 2007, the Office of Administrative Law (OAL) advised the FEHC that there proposed regulations were rejected because the explanation of who may provide the training was unclear. We believe that the ambiguities will be corrected shortly and that the final regulations will be implemented officially in the coming months. Here are a few of the key provisions from the draft regulations:

X The definition of employee is rather broad and includes, full, part time and temporary workers. The "employee count should also include any independent contractors that are providing services to the covered employer. Thus you may have only ten direct hires, but if you contract with someone with forty or more employees, you now meet the threshold required for mandatory training. There is no requirement that the fifty employees or contractors work at the same location or all work or reside in California.

X As touched upon briefly above, there has been a new development regarding the issue of the trainer's qualifications. This issue was raised when the FEHC submitted its proposed regulations to the OAL. The OAL is the state office that oversees the implementation of interpretative regulations for over 200 state agencies. The OAL believes that the proposed regulations are unclear concerning who should be considered a qualified trainer. The FEHC has been directed to clarify the issue and reissue new regulations. The bottom line is that in order to ensure compliance at this date, the individual or individuals leading the training seminar must be a trainer or educator who has legal education coupled with practical experience with harassment, discrimination and retaliation prevention. ***It is likely that after the regulations are clarified, most HR personnel, HR consultants, or general counsel or corporate attorneys will not fit the definition of a subject matter expert under AB 1825.*** The regulations set forth that it is the employer's burden to establish that the training material as well

as the individual instructor meets the criteria of the regulations. If the individual does not meet the regulations requirements, then the training is ineffective and meaningless. In addition, it has been our experience that plaintiff's counsel will use the instructor's lack of knowledge in sexual harassment training in its prosecution of sexual harassment cases. In other words the failure to use a qualified trainer will be a focus of the prosecution of plaintiff's attempt to hold that the employer does not treat its obligation to train its employees in sexual harassment avoidance seriously.

X Over the past year or so, companies and law firms have been developing training programs involving PowerPoint presentations, DVD presentations, or internet or e-learning situations. The regulations do address the type of training that is appropriate and although e-learning and "webinars" are permissible under the regulations, the documentation and burden of establishing that these training methods are adequate, will be borne by the employer.

X The regulations required that training is to be conducted every two years for supervisors. New supervisors must be trained within six months of hire or promotion. The last deadline for training occurred on December 31, 2005. Most of you were proactive in your training and completed this training prior to December 31, 2005. Accordingly, the regulations now require that you conduct a second session of training for these supervisors in this coming year.

X One question that was answered by the regulations concerned supervisors who transferred organizations in between the training year and whether that individual can transfer their old certificate to the new employer. The regulations hold that the supervisor who had training at a prior organization can transfer their certificate. However, the burden of establishing that the prior training complied with the regulations shall be on the current employer.

X New changes to the training requirements under AB 1825 specify that an employer does not have to train a supervisor that work outside the State of California even if they are responsible for the supervision of employees working in California.

A copy of the proposed FEHC regulations and the OAL rejection are attached for your reference.