

# Taking A Crack At Calif.'s Workplace Anti-Bullying Law

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Law360, New York (February 19, 2015, 12:05 PM EST) -- No longer confined to the schoolyard or classroom, bullying is now recognized as an issue that employers should address in the workplace. In the past few years, a number of states have sought to prevent "abusive conduct" in the workplace by requiring mandatory training on the topic, introducing anti-bullying legislation and creating advisory committees to address the issue. Even with such additional measures, however, workplace bullying can lead to employer liability when merged with an employee's protected status. In June 2014, for example, a federal jury awarded \$4.7 million to Osama Saleh, a Yemeni-born employee of a New York clothing store who was repeatedly "bullied" by a co-worker.



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Countries outside the U.S. already have laws that prohibit workplace bullying and have held employers liable for such conduct. In 2006, Helen Green, a woman in the U.K., was awarded \$1.5 million in damages against her employer, [Deutsche Bank AG](#), on the grounds that her co-workers subjected her to crude comments, excluded her and interfered with her work. The alleged behavior was not tied to any protected status (e.g., race, gender, sexual orientation, etc.). Rather, it was based on the finding that Green's co-workers mocked her hygiene and physical appearance, among other acts, in a deliberate and concerted campaign of bullying.

In California, workplace bullying is not yet by itself illegal, provided the behavior does not otherwise qualify as unlawful discrimination, harassment or retaliation. The California Legislature has, however, taken the first step to prevent such conduct by requiring certain California companies to include "abusive conduct" training as part of the mandatory anti-harassment and discrimination training for supervisors and managers.

## **New California Supervisor Training Requirement to Prevent “Abusive Conduct” at Work**

Effective Jan. 1, 2015, California's A.B. 2053 specifically requires covered employers to include anti-bullying as part of their mandatory two-hour sexual harassment training programs for managers and supervisors under California Government Code Section 12950.1. The training obligation under Section 12950.1 requires California employers with at least 50 employees to provide interactive and practical training to supervisory employees within six months of an employee's start date, and once every two years thereafter. The training requirement has been in place for over a decade. Prior to Jan. 1, 2015, however, the training requirement focused exclusively on prohibiting and preventing sexual harassment, discrimination, retaliation and other types of unlawful harassment, but was silent on workplace bullying.

The new training requirement under A.B. 2053 amends Section 12950.1, and expands the training to include the prevention of “abusive conduct,” which is defined as “conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests.” Such conduct may include “repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of a person's work performance.” Under the new law, “a single act shall not constitute abusive conduct, unless especially severe and egregious.”

Failure to conduct such training can undercut an employer's affirmative defense that it should not be held liable for a manager or supervisor's inappropriate conduct, among other consequences. For example, if the bullying is related to an employee's protected status (e.g., gender, disability, sexual orientation or national origin), then the underlying conduct could presumably draw a claim for unlawful harassment or discrimination. Unlike the other training areas under Section 12950.1, such as sexual harassment and discrimination, however, bullying is not an explicitly prohibited form of workplace conduct under the California Fair Employment and Housing Act, and A.B. 2053 does not change that.

Proponents of the law, which was sponsored by the California Teamsters Public Affairs Council, have stated that abusive conduct not only impacts the health and wellbeing of the targeted employee, but also carries consequences for the employer, since it leads to reduced productivity and morale causing more absences, frequent turnover and even increases in medical and workers compensation claims. Legislative commentary to A.B. 2053 indicates the workplace bullying prevention effort was combined with the existing sexual harassment training requirement because the two problems often “go hand in hand.” Neither the law nor its commentary, however, dictates what content must be covered in the abusive conduct component of the training or how much training time should focus on this new requirement.

## **Workplace Bullying as Prohibited Conduct in California?**

Given the growing awareness of bullying generally and the legislative intent behind A.B. 2053, we might reasonably expect A.B. 2053 to be the first step toward legislation preventing and prohibiting “abusive conduct” in the workplace. As such, there is a possibility that FEHA could be expanded to prohibit abusive conduct, or any conduct that is “threatening, intimidating or humiliating,” independent of otherwise protected categories. Section 12950.1 explains that the required training “is intended to establish a minimum threshold and should 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.”

## **Recommendations and Considerations for California Employers**

California employers should have updated training materials to comply with the updated Section 12950.1, and consider updating their policies to prohibit bullying in the workplace. Although A.B. 2053 does not specifically prohibit bullying in the workplace, proper and expanded training and updated policies may assist in an employer’s affirmative defense that it took reasonable steps to prevent unlawful discrimination or harassment caused by alleged bullying. This can put employers ahead of the curve if and when abusive conduct becomes unlawful. If the drafters of the new law are correct, such training may also improve the health and wellbeing of the employees and lead to better employee morale and increased productivity.