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LAW CALLS FOR ANTI-'ABUSIVE CONDUCT' WORKPLACE TRAINING

BULLY PULPIT

THOSE WHO THINK THEY ARE BULLIED AT WORK DON'T HAVE AN AVENUE TO SUE.

One of the recent additions to California workplace laws requires addition of the prevention training for "abusive conduct" – bullying – to mandatory sexual harassment avoidance training.

The law, AB2053, defines abusive conduct as that which "a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."

Acts can include "repeated infliction of verbal abuse ... 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."

That behavior can be displayed from a supervisor to an employee, or the other way around. It also can occur between employees, or even come from a third party who visits the workplace.

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But AB2053, which took effect Jan. 1, is a bit like a road that ends at a ravine, with no bridge to take it to the other side.

It is not linked to any already-protected category for illegal discrimination or harassment – such as age, gender, ancestry, race, religion or disability – and does not include its own cause of action that would allow a person to file a bullying claim lawsuit.

The legislation did not take on the difficult task of separating perceived harassment from accepted business practices such as performance improvement programs, where management contact is intense and requirements are strict. Trying to define malice in those situations would be sticky, at best.

In other words, the bullying outlined by the law is bad

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AB2053 ABUSIVE CONDUCT PREVENTION

- **Before AB2053** became law Jan. 1, companies with 50 or more workers were required to provide a minimum two hours of sexual harassment prevention training to supervisors every two years, or within six months of an employee becoming a supervisor.
- **AB2053 requires** affected employers to include training in the prevention of abusive conduct alongside the sexual harassment prevention training.
- **The law is unclear** on whether supervisors who recently received scheduled sexual harassment prevention training, but before AB2053 took effect, now must be retrained, said Anthony Zaller, author of California Employment Law Report. He advised "employers should approach this issue with caution."

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behavior toward another person at work that is not linked to discrimination. If you think you have an issue, your resolution is likely with human resources, not the courts.

That has not stopped attorneys from writing complaint letters "saying they are going to sue, and then figure out why during the course of litigation," said Todd R. Wulffson, a business and labor expert with the Irvine office of Carothers, DiSante and Freudenberger.

Wulffson, who is critical of the law, said he has seen "dozens" of such letters recently, even though there is no legal cause to cite bullying.

He said the legal strategy appears to be, "If I can get in front of 12 licensed drivers and show you are dropping F-bombs and swearing, I don't need to prove (bullying) to a jury, because they will decide you are being mean," he said.

"It's just a paternalistic piece of legislation that has no explanation and no real teeth," Wulffson said of AB2053. "It's another piece of legislation that makes the rest of the country make fun of California."

And there are no benchmarks in the law for the prevention training it requires, meaning attorneys and human resource experts who provide advice to businesses have been left to look at the law's definitions of bullying to cipher their advice for best practices.

Despite the missing pieces, AB2053 has "made employers more aware of this issue," said Alison Alpert , a partner for Best Best & Krieger law firm and chair of its labor and employee practice group.

"I have been talking to businesses about bullying," she said. "It's a big problem in the workplace."

She said one area of advice to clients has been to review company rules regarding office conduct.

While those rules may not be as explicit as the law's description of bullying, "they have some conduct guidelines about disrespectful treatment of coworkers or threatening or abusive conduct."

And even if those actions are not actionable in court, Alpert said, their existence in company policy means workers and supervisors can be subject to discipline for violations.

There also are concerns that the law can be used to cite bullying in cases of progressive discipline or performance improvement programs.

"What one person may perceive as bullying is actually a legitimate employee disciplinary action," Alpert said. "It should not stop employers from taking reasonable action in the workplace."

Wulffson said he warns clients to be more detailed when outlining company discipline or performance improvement programs.

Such notices should not only describe the disciplinary issue, and recount previous warnings, but also make it clear that the issue is being addressed because the employee is the only one behaving that way and there has been no deference to others acting similarly, he said.

The letter needs to memorialize the action in anticipation of a third party seeing it, Wulffson said. "It needs to say, 'I am not picking on you.' You need to bake that into the warning," he said.

He said the law could give some workers "a false sense of security that they can do something about a supervisor who is rigid or strict.

"Being strict is not being abusive, but some employees see it that way," he said.

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