

Question of the month *I have heard that companies with over 50 employees must train all supervisory personnel in sexual harassment. Does this include construction. How can this be?*

Sexual harassment lawsuits are on the rise and, to stem the tide, there is a new labor law requirement that all managers be trained in sexual harassment in the workplace issues when they are first hired and every two years thereafter. Good thing too as judgments are usually automatic when supervisors are involved in the harassment. Read on to learn what this new requirement is all about and what you can do.

But first

Employer Convicted in Worker's Death

At the risk of being labeled Dr. Doom once again I'm posting this article from the Cal/OSHA Reporter, a private newsletter that tracks California's Department of Occupational Health (DOSH). I have written many times about the potentially high penalties for violations of the Title 8 workplace safety standards and here is another example....

A worker doing sheeting work on the 5th floor of an apartment building fell through a floor opening (leading edge?) to his death. The employer, his boss, was convicted of charges that carry up to 3 years in jail and a fine of up to \$1.5 million. Another employee, a supervisor, and the GC's Superintendent plead no contest to similar charges. Both Companies were also fined, amount to be determined, but could be as high as \$1.5 million also. Sentencing will be in a few months.

The lesson to be learned here is that fall protection must be taken seriously. There are provisions for doing certain decking and framing operations where tying off is not possible and the rules must be religiously applied and enforced. If your employees are doing decking, rolling joists, sheeting, etc., where the fall to the next level exceeds 7-1/2 feet you must develop and use a written fall protection plan to Cal/OSHA Standards and provide fall protection – harness and lanyards, nets, guardrails, or, Controlled Access Zones, etc., no exceptions. The old “blue line” or caution tape definitely will not do! Read the first two paragraphs again.

We have developed written plans for cast in place concrete leading edge decking operations, pre-cast concrete construction operations, framing and roofing operations. If you have an interest in this material or training at the supervisor and worker level let me know buy email – info@qrmonline.com.

Standards Board to Vote on Emergency Heat Illness Regulation Aug. 12

Acting in the wake of a rash of heat-related deaths in recent days, the Cal/OSHA Standards Board will hold an extraordinary session Friday, Aug. 12 in Sacramento to vote on a proposed emergency regulation to prevent heat illness in outdoor workers.

The emergency standard focuses on access to adequate water, providing cool shade and specific training requirements.

It requires that workers have access to specific quantities of potable drinking water, and stresses the importance of frequent water consumption. It also directs employers to provide sufficient shade for workers suffering from heat illness or who need it to prevent becoming ill. The emergency regulation also requires the Standards Board to review by Jan. 1, 2006, the feasibility of requiring shade for rest periods at outdoor places of employment.

The standard also requires employers to educate employees and supervisors likely to be exposed to high heat on ways to prevent becoming ill and steps to take if heat illness should occur.

How the new regulations will be communicated to all construction companies in the state, let alone all affected businesses, remains to be seen. You are forewarned (and forearmed)!

Jobsite Heat Illness tailgate training material on various heat stress/stroke/sunburn topics in English and Spanish is available by email request to info@qrmonline.com.

Do this training now. As you know, working conditions are currently not good due to the heat.

Sexual Harassment in the Workplace – The New rules

Sexual harassment is a legal concept developed originally to address a particular type of sexual discrimination. Briefly, sexual harassment is unwelcome behavior of a sexual nature that makes someone feel uncomfortable or unwelcome in the workplace by focusing attention on their gender instead of on their professional qualifications. The concept applies now to both women and men, to adults, to children and, same sex issues.

Sexual harassment is usually defined as behavior by someone higher in status or power toward someone lower in status or power – usually “quid pro quo” or something for something, although harassment by peers or customers is also recognized as a problem – the “hostile workplace.” The unequal balance of power is an intrinsic element of the legal definition of sexual harassment and often leads to automatic employer liability.

The Supreme Court has stated that the employer is responsible for the actions of the harasser, even when the employer is unaware of the harasser’s behavior. An employer can no longer claim that they did not know about the sexual harassment because the employee did not inform them, nor can they claim that they were unaware of the harasser’s behavior.

Employers must be proactive in order to avoid sexual harassment lawsuits.

Steps Employers Can Take to Avoid Sexual Harassment Lawsuits

- If your company does not have a sexual harassment/discrimination policy, get one fast! The policy should communicate that the company is taking a "zero tolerance" approach toward sexual harassment. Have an attorney review it, and make sure it gets out to all your employees either through the employee handbook or in memo form. Have the employees sign it to acknowledge that they received and read the policy. The policy should be verbally communicated to all new employees, and can even be posted in the workplace. If you have employees whose primary language is not English, have your sexual harassment policy translated or communicate to them in their primary language. Provide different routes that employees can take to file complaints; i.e., calling a hotline, contacting the human resource department, or by contacting their supervisor. In addition, the employee should have the option of talking with a male or female company representative to report a complaint.
- Conduct sexual harassment training for employees, even if it is only composed of reading material or watching a video; something is better than no training at all.
- For companies with more than 50 employees 2-hour sexual harassment training is mandatory for all supervisors as of Jan 1, 2006 and every 2 years thereafter. Failure to conduct this training may result in automatic liability.
- Conduct yearly meetings with supervisors to review the sexual harassment policy, and to make sure that they understand that an employee does not need to suffer negative consequences in order to make a claim of sexual harassment. Inform the supervisors that even mild to moderate sexual jokes or statements can create an atmosphere of hostility that will make some employees uncomfortable, and could lead to the creation of an environment where sexual discrimination could develop. The supervisor should also be directed to always

inform upper management of any sexual harassment complaints he or she receives from employees. Supervisors should never promise confidentiality with an employee when the information relates to sexual harassment.

- Conduct a yearly sexual harassment survey among your employees. The survey can be done anonymously and should be distributed with a copy of the company's sexual harassment policy and other labor policies. The survey can simply ask the employees (male and female) if they have experienced any form of sexual harassment during the past year. Why do a survey? The results of the survey will tell a court that your company is actively engaged in preventing and correcting sexual harassment. Remember, that the Supreme Court has just determined that an employer can be held liable for incidents of sexual harassment that they are unaware of occurring. So, one method of defense will be to demonstrate to the court or a jury that your company conducts yearly meetings with supervisors and also conducts a yearly sexual harassment survey, and bi-annual supervisor training to state standards to attempt to uncover sexual harassment violations before they cause problems for your employees.
- Conduct investigations promptly and thoroughly. After the dispute is resolved, a follow up should be done with the employee to ensure that no one has suffered retaliation. Make sure your sexual harassment policy spells out clearly that retaliation against an employee filing a sexual harassment complaint is illegal and will not be tolerated.
- Treat same-sex harassment, and men reporting harassment, the same as you would for a woman reporting her male supervisor being sexually inappropriate.
- Always document the results of any sexual harassment complaint or investigation. Not only document the results, but also document any corrective action that you asked the employee or supervisor to take. Follow up on any corrective action so you can document if the employee fails to take advantage of your company's policies/procedures or any corrective action that your company takes to prevent the sexual harassment from occurring again in the future.
- Inform all employees that it is their obligation to report sexual harassment that they either experience or witness.

The Supreme Court also stated that the court will no longer heavily rely on the two different forms of sexual harassment, "quid pro quo" and "hostile environment." The Court called these two forms of sexual harassment of "limited utility" in assessing employer liability.

As a result, an employee that refuses the unwelcome sexual harassment of a supervisor, and who suffers no adverse job consequences, can still bring a sexual harassment lawsuit against her employer if the employee can show they were discriminated by the sexual content. The employee will not necessarily be required to show a loss of advancement, retaliation, loss of income, or stress as they once did under "quid pro quo" and "hostile-environment." They will need to show that the nature of the sexual content they experienced caused them to experience discrimination.

Give It To Me Straight

Even though the employer has a policy against sexual harassment and even when sexual harassment training is provided to their supervisors, they still can be held vicariously liable in cases where a supervisor uses sexual content to discriminate against an employee. The courts are now looking at what a "reasonable person" would determine to be sexual content that could cause discrimination versus the old standards of quid pro quo and hostile-environment. The Supreme Court did not throw out these standards, but will not rely on them as courts have in the past.

The Employer Liability Test

The Supreme Court created a two-part test to be used by employers in defending themselves against a sexual harassment lawsuit.

- The employer needs to show that they took reasonable care to prevent and correct any sexual harassment behavior within their workplace.
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

If you are an employer, it is time to change how you deal with sexual harassment in your company. Currently at least 40% of all women report being sexually harassed at some point in their career, and men currently account for 11.6 % of all sexual harassment cases filed with the EEOC. So, the chances of your company needing to respond to a sexual harassment concern is great. Be prepared and you will likely deal with it successfully for all parties involved.

Sexual Harassment in Construction Training is available. Call for details.