

DEPARTMENT OF INDUSTRIAL RELATIONS

Office of the Director

1515 Clay Street, 17th Floor Oakland, CA 94612

Telephone: 510-286-7100

[AB 547 Email Address: AB547@dir.ca.gov](mailto:AB547@dir.ca.gov)[Director's Office Website: https://www.dir.ca.gov/directors_office.html](https://www.dir.ca.gov/directors_office.html)

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AB 547 Advisory Committee

Amended Proposal to Continue the Temporary Substitution of “In-Person” Janitorial Sexual Violence and Harassment Prevention Training with Sexual Harassment Training and Education Permissible Under FEHA (Government Code Section 12950.1) During the COVID-19 Pandemic

AB 1978 and AB 547

Legislation enacted in 2016 (AB 1978), the Property Services Workers Protection Act, (Labor Code sections 1420 – 1434) established a registration program for janitorial services employers and biennial “in-person” sexual violence and harassment prevention training requirements. Legislation enacted in 2019 (AB 547) further clarified the sexual violence and harassment prevention training requirements under AB 1978 (Labor Code sections 1422 and 1429.5).

Pursuant to Labor Code sections 1422 and 1429.5, the Labor Commissioner promulgated regulations. These new regulations at sections 13820 through 13822 of Title 8 of the California Code of Regulations (“CCR”) took effect on July 15, 2020, and specify trainer qualifications and establish the frequency, duration, language, literacy level, modes, techniques, content, and documentation of the sexual violence and harassment prevention training requirement for the janitorial services industry. Under Labor Code section 1429.5 and the regulations, by January 1, 2021, employers shall use a qualified peer trainer to provide “in-person” training to nonsupervisory workers.

- Labor Code section 1429.5, subsections (a)-(e), state in pertinent part:
 - (a), the training requirements of section 1429.5 shall be in lieu of and not in addition to the requirements for training under section 12950.1 of the Government Code;
 - (b), the training advisory committee shall consider the requirements of section 12950.1 of the Government Code when developing the recommended standard;
 - (c), by January 1, 2021, the CA Department of Industrial Relations (DIR), through the Labor Commissioner’s Office (LCO), shall post on its website a list of qualified organizations that employers shall use to comply with the in-person, peer training requirements of section 1429.5;
 - (d), the LCO shall require covered employers to use the training content developed by the Labor and Occupational Health Program (LOHP);

- (e) and (k)(1), covered employers must use a qualified organization, if available, from the LCO's list to provide the required in-person training to non-supervisory covered workers, and;
- Per Labor Code section 1429(a)(10), effective January 1, 2022, all applications for new or renewal registrations to do business in California as a janitorial service provider must demonstrate completion of the in-person sexual violence and harassment prevention trainings pursuant to section 1429.5 by attesting whether training was provided by a peer trainer and, if not, why not.

COVID-19 and Proposal to Temporarily Substitute In-Person Training with Requirements for Training Permissible under FEHA (Government Code Section 12950.1)

The known health risks of in-person gatherings together with public health restrictions during the COVID-19 pandemic present insurmountable conflicts with the in-person and peer training requirements of AB 1978, AB 547, and the LCO regulations. As a result, on October 15th, November 10th, December 17th, 2020, and September 29, 2021, the CA Department of Industrial Relations called virtual meetings of the Advisory Committee established under Section 1429.5. The Advisory Committee last convened on September 29th, 2021, and discussed the possibility of extending the timeline due to ongoing concerns about in-person trainings. In response to the feedback and concerns, DIR and LCO provide the following set of recommendations to the Janitorial Advisory Committee for their consideration:

- Suspend until July 1, 2022, enforcement of section 1429.5, subsections (a), (c), (d), (e) and (k) and the applicable DLSE regulations and instead require all covered janitorial employers as defined by Labor Code section 1420(e) to comply with the requirements of Government Code section 12950.1 by providing the online trainings made available through the CA Department of Fair Employment and Housing (DFEH) website or other effective interactive training and education regarding sexual harassment as defined at 2 CCR section 11024 (one hour for non-supervisory employees and two hours for supervisors). Pursuant to Government Code section 12950.1(e), the training and education requirements are 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, and;
- In lieu of the LCO posting the LOHP training on the LCO's website, post guidance on the temporary substitution of the section 12950.1 training requirements and a link to DFEH's online trainings, and;
- Suspend until July 1, 2022, enforcement of section 1429(a)(10)'s January 1, 2020, requirement to demonstrate completion of the Section 1429.5 in-person training; and suspend enforcement of the January 1, 2022, attestation requiring employers to demonstrate whether the training was provided by a peer trainer and, if not, why not until January 1, 2023.
- Continue to reconvene the Advisory Committee during 2022 to continue development of the list of qualified organizations and review how developing conditions in the pandemic impact further recommendations regarding implementation and enforcement of AB 547.

The Proposal to Adjust Janitorial Training In Light of Pandemic Conditions Is Sound Because the Content of the Janitorial Training and the FEHA Sexual Harassment Training Requirements Are Aligned

Labor Code section 1429.5 and 8 CCR section 13822(a) and (b) specify the subject and content matter requirements for both worker and supervisor training and require coverage of appropriate topics to ensure the Legislature's mandate is implemented effectively and in a manner true to its intent: to use training to reduce significantly or eliminate sexual harassment of and violence against janitorial workers. The regulation aligns with the content-based training requirements under FEHA and promotes uniform, non-duplicative standards.

While the training requirements under FEHA do not require the training to be conducted in-person, it does require it to be an "effective interactive training". [Government Code section 12950.1(a)(1) and 2 CCR section 11024(a)(2).] The Legislature intended for these programs to be harmonized in order to be most effective, particularly as FEHA is the primary state law governing sexual harassment training. Therefore, although we continue to recognize the importance of the in-person training requirement and the peer training requirements that apply specifically to the janitorial industry, we believe that temporarily substituting the FEHA training requirements which includes the use of online DFEH trainings, for the in-person training requirements during the pandemic will provide a safe manner in which to cover the basic components of sexual violence and harassment prevention training. This is in the best interest of janitorial workers, employers, and of the state in order to mitigate the spread of the virus.

Conclusion

DIR and LCO believe this proposal is necessary and practical as it addresses the concerns raised by the stakeholders, and provides appropriate time for adoption of the proposal. The Labor Commissioner possesses inherent prosecutorial discretion **to suspend enforcement of the in-person training requirement on a temporary basis**, particularly where exercise of such discretion is founded upon a well-reasoned justification and in response to a deadly pandemic.