



Smart Workplaces: Sexual Harassment Prevention  
for Office Managers & Supervisors, California, AB  
1825

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## Course Description

Welcome to “Smart Workplaces: Sexual Harassment Prevention for Office Managers & Supervisors, California AB 1825”

In 2005, a California bill AB 1825 mandated that all California employers with 50 or more employees must provide two hours of sexual harassment prevention training to their supervisors and managers every two years, starting in 2005.

The California Fair Employment and Housing Commission, or FEHC, recently established new regulations interpreting AB 1825. These new regulations specify the requirements of the sexual harassment prevention training which employers with 50 or more employees must provide to their supervisors and managers

This course provides two hours of sexual harassment prevention training to supervisors and managers working for employers in California with 50 or more employees. This course meets the content requirements stipulated in FEHC Regulations, Section 7233.0. (c) including amended regulations.

The FEHC Training and Education Content Requirements Section 7233.0. (c) is located in the Resources section at the end of this course.

This course is designed to further your instruction in several ways.

**Written Material:** The course is divided into topical sections. The principles of each topic are described in straightforward, jargon-free text.

**Learning Activities:** Each section includes at least one learning activity with a practical slant. The activities will reinforce your new knowledge by putting it to use.

**Bibliography:** A list of resources available online and in print gives you the option of supplementary study beyond the scope of the course. You can turn to these resources for detailed information on topics that interest you.

**Testing:** Multiple-choice questions throughout the course encourage you to review and retain the material. At the end of the course, a test will assess your overall understanding. You must pass the test to receive credit for this course.

## Learning Objectives

At the conclusion of this course, you will be able to:

- Describe unlawful sexual harassment and sexual harassment conduct
- Illustrate statutory provisions and case laws regarding sexual harassment, employer liability, and remedies
- Explain the actions all employers must take against and in response to sexual harassment in the workplace
- Identify questions to ask parties and witnesses that were involved in an incident
- Outline measures to stop harassment and ensure it does not happen again

## Overview

### Sexual Harassment Statistics

In 2011, the Equal Employment Opportunity Commission (EEOC) awarded \$52.3 million in damages to individuals sexually harassed in the workplace; that is \$3.9 million more than the year before.

In the same year 11,364 sexual harassment charges were filed with the EEOC, a slight decrease from the 11,717 sexual harassment charges filed with the Commission in 2010.

Experts believe that one major factor in the decrease of charges filed over time has to do with increased workplace education.

It is important to note that women are not the only victims of sexual harassment. In 2011, 16.3% of the charges filed with the EEOC were filed by men. This number has increased 16% since 2001. Men report harassment by both male and female colleagues. Therefore, it is important to be aware that harassment can happen to any employee.

In California, sexual harassment charges represented 46% of the total employment claims filed with the California Department of Fair Employment and Housing (DFEH) in 2011.

However, the percentage of employers without affirmative defenses to sexual harassment claims rose from 50.1 percent in 2010 to 53 percent in 2011, indicating a nearly 3 percent increase in the number of employers unable to provide clear evidence that company employees had received sexual harassment training and understood the company's harassment policy.

Additionally, a 2010 Society for Human Resource Management (SHRM) poll of 467 randomly selected human resource professionals from SHRM's membership revealed that:

64% of employers reported sexual harassment claims were filed by an employee or employees within the last 24 months

25% of employers reported an increase in sexual harassment claims within the last 24 months

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78% of employers reported that the sexual harassment claims were filed mostly by female employees, while 19% reported that the sexual harassment claims were brought by both male and female employees equally

37% of employers provided sexual harassment training for their employees every year, 22% every other year, with 12% offering no training at all

50% of publicly owned for profit organizations provided employee sexual harassment training, compared to only 30% of privately owned for profit organizations

53% of large staff organizations provided training, while only 32% of small staff organizations offered training

82% of employers required all employees to attend sexual harassment training, 17% only required the training of executive and senior management, and 17% only required middle management to receive training

Plainly, sexual harassment continues to be a problem in the workplace, making sexual harassment training an absolute priority for all employers.

### Rise in Retaliation Claims

According to the EEOC report, claims by employees alleging they were retaliated against as result of filing a complaint or participating in an investigation have been rising steadily since 2008 making employer retaliation the most common EEOC charge two years in a row.

Retaliation can include, but is not limited to, demotions, failure to promote or termination in response to filing a harassment complaint.

In 2010, 36,258 retaliation complaints were filed with the Commission and 37,334 retaliation complaints were filed in 2011.

EEOC retaliation claims on all agency enforced statutes represented 37.4% of all charges filed in 2011, with the agency awarding \$147.3 million to employees retaliated against by their employers.

The California Department of Fair Employment and Housing (DFEH) reported 7,728 retaliation claims in 2011, representing approximately 43% of the total 18,012 employment cases reported to the agency.

In 2012 the EEOC reported 2,698 charges of Title VII retaliation in California alone representing 36.5% of the total charges filed in California and 8.6% of claims filed nationally.

Additionally, 62.7% percent of employers charged with employee retaliation were unable to provide an affirmative defense.

The term affirmative defense is known as the Ellerth/Faragher defense. It has to do with whether the employer took appropriate action to prevent and/or correct any harassing behavior.

These EEOC statistics demonstrate that employers are not only responsible for sexual harassment training of supervisors in order to prevent harassment claims, but they are also

responsible for educating them on the most effective methods of handling a claim once it has manifested in order to prevent a retaliation allegation as well.

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## What is Sexual Harassment?

### Introduction to Sexual Harassment Laws

By law employers have an obligation to provide employees with a safe work environment. A critical part of this is helping prevent harassment altogether. Employers must also take prompt and corrective action once the employer is aware that harassment may have occurred.

The first step in preventing sexual harassment in your workplace is to know how unlawful sexual harassment is defined under federal and California laws and the types of conduct that constitutes sexual harassment.

This information will be covered in this topic along with suggested strategies for rejecting unwelcome conduct. Definitions of other legal terms related to sexual harassment are provided as they will be used throughout this course. By the end of this topic, you will be able to describe unlawful sexual harassment and sexual harassment conduct.

In 1980 the Equal Employment Opportunity Commission (EEOC) produced a set of guidelines for defining and enforcing Title VII of the federal Civil Rights Act of 1964.

EEOC defines sexual harassment under section 1604.11 as follows:

(a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (EEOC Regulations, Sec. 1604.11).

Items (1) and (2) are called "quid pro quo" (Latin for "this for that" or "something for something"). Item (3) is called hostile work environment. Quid pro quo harassment and hostile environment sexual harassment have been established in employment law. Both types will be discussed in greater detail in this course.

The FEHA defines harassment because of sex as: including sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

The Fair Employment and Housing Commission (FEHC) develops regulations for defining and enforcing the FEHA.

Commission regulations define sexual harassment as unwanted sexual advances, or visual, verbal or physical conduct of a sexual nature. This definition includes many forms of offensive behavior and includes gender-based harassment of a person of the same sex as the harasser.

## **Types of Sexual Harassment**

There are two types of sexual harassment that will be discussed in this course: Quid Pro Quo and Hostile Work Environment.

An important point to remember at this point is that the sexual harassment law applies to equally to situations where - the victim of harassment may be male or female, the harasser also may be male or female. The law applies to both genders. The harasser and victim may be of the same gender or opposite gender.

The harasser may be a direct supervisor, a supervisor of another area, a fellow employee, an agent, or even a non-employee.

The victim can be anyone affected by the harassing conduct. It does not necessarily have to be the person directly harassed.

Quid Pro Quo harassment is the "you do something for me and I'll do something for you" type of exchange. This occurs when a job benefit is directly tied to an employee submitting to unwelcome sexual advances. For example, a supervisor promises an employee a raise if she will go out on a date with him, or tells an employee he will be fired if he doesn't sleep with her.

Quid pro quo harassment also occurs when a supervisor makes an evaluative decision, or provides or withholds professional opportunities based on another employee's submission to verbal, nonverbal or physical conduct of a sexual nature.

Quid pro quo harassment is equally unlawful whether the victim resists and suffers the threatened harm or submits and thus avoids the threatened harm.

A single sexual advance linked to granting or denying employment opportunities can be enough to trigger a quid pro quo claim.

The second category, known as hostile environment sexual harassment, occurs when a workplace is permeated with unwelcome discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Generally speaking, a single isolated incident will not be considered hostile environment harassment. To support a hostile environment claim, the law requires that the conduct must be so objectively offensive as to alter the conditions of the victim's employment. However, courts have held that if a single incident is particularly egregious, it can meet the "severe and pervasive" test. For instance, if a supervisor's words are coupled with an offensive physical act like forcing an open mouth kiss or intentional groping. (*Hostetler v. Quality Dining, Inc.*, 218 F.3d 798 (7th cir 2000).)

Supervisors, managers, co-workers and even customers can be responsible for creating a hostile environment.

## **Negative Effects & Costs of Sexual Harassment**

It is now widely accepted that sexual harassment is wrong. We know this morally and because of the laws in place. However, many people are unaware of the many types of harm that sexual

harassment can cause. The widespread acceptance that sexual harassment is wrong and the laws against it are rooted in the fact that sexual harassment can cause many different types of harm.

Beyond the moral and legal arguments against sexual harassment, harassing behavior can have significant negative effects and costs to both the employee and the employer.

This is especially worrisome because it is estimated that up to “70 percent of women and 45 percent of men have experienced some form of sexual harassment in the workplace.” Because there is an imbalance of power in the workplace (senior vs. junior positions) the potential for harassment exists.

Where there is harassment, the employee being victimized may risk losing their job, feel pressured to quit their job, become unable to properly perform their job and they may even suffer significant physical or emotional consequences.

The other effects of sexual harassment have been found to include, but are not limited to:

Psychological Reactions such as

- Depression, anxiety, shock, denial
- Anger, fear, frustration, irritability
- Post-Traumatic Stress Disorder (PTSD)
- Insecurity, embarrassment, feelings of betrayal
- Confusion, feelings of being powerless
- Shame, self-consciousness, low self-esteem
- Guilt, self-blame, isolation, Suicide

Physiological Reactions such as

- Headaches
- Lethargy
- Gastrointestinal distress
- Dermatological reactions
- Weight fluctuations
- Sleep disturbances, nightmares
- Phobias, panic reactions
- Sexual problems
- Elevated Blood Pressure

And Career-Related Effects such as

- Decreased job satisfaction
- Unfavorable performance evaluations
- Loss of job or promotion
- Drop in work performance due to stress
- Absenteeism
- Withdrawal from work
- Change in career goals

Emotional effects from harassment can be as debilitating to a victim as physical wounds. Even “less severe” harassment can have significant impacts if it is persistent and repeated. Many times the harassment is not one glaring violation but a series or pattern of behavior that exists and continues over time creating an environment that is hostile and stressful.

In the immediate workplace, friends and co-workers of the person being harassed may also show a decline in productivity as their morale is affected. The effects can also be cumulative. For example, women may feel discouraged from seeking promotions, supervisory positions or even employment when they see or hear about sexual harassment in the workplace. For some workers, just being in a hostile environment is enough to cause a decline in productivity.

The employer must contend with the possible creation of a hostile work environment which can lead to a decline in productivity, absenteeism, and high turnover in addition to the potential significant expense of penalties and fines. Should a case end up in court the harm to the company can also be substantial in terms of public perception, the loss of executive time to deal with the case and the direct cost of litigation which can be very high.

### **Examples of Awards against Companies**

Awards are not the norm, but juries have little patience for sexual harassment in the workplace and are willing to make employers pay for failing to enforce a comprehensive and effective anti-harassment policy.

What most cases highlight is that harassment must be prevented, when an employee complains action must be taken and company cannot retaliate against an employee for filing a complaint. Failure to act accordingly can end up costing a company a great deal of money.

The following cases highlight the magnitude of the cost companies can face by not working diligently to prevent sexual harassment in the workplace.

In the case of *Alford v. Aaron's Rents Inc.*, a jury in Illinois awarded Alford \$95 million for sexual harassment. Alford alleged a year of harassment by her supervisor and when she complained to the company, it did nothing. This culminated in a sexual assault on Alford by the supervisor.

Ingraham was awarded \$10.6 million by a jury in Missouri in the *Ingraham v. UBS Financial Services Inc.* case. Ingraham alleged her supervisor engaged in a pattern of harassment including commenting on her breast size, talking about his penis, asking her about her fantasies and even invited her to view offensive emails on his computer. Ingraham claims that after she complained about the harassment, she was fired. The jury found that UBS retaliated against Ingraham.

In the *Carmen Jean-Baptiste v. District of Columbia* case, a jury awarded \$3.5 million to a lifeguard who claimed her supervisor repeatedly asked her out, invited her on trips and sexually propositioned her. The alleged harassment started as soon as Jean-Baptiste began working at the D.C. pool. After notifying supervisors of the harassment, Jean-Baptiste claims her harassing supervisor retaliated against her. Also, after filing a written complaint, Jean-Baptiste was fired.

In the *Ani Chopourian v. Catholic Healthcare West* case, a cardiac surgery assistant was awarded \$168 million by a federal jury in Sacramento. Chopourian alleged two years of near daily and continuous sexual harassment. There was physical contact, and there were demeaning sexual comments and sexual advances. After enduring two years of harassment and filing written and verbal complaints, Chopourian was terminated. Following her termination, the hospital later terminated her physician assistant privileges rendering her unemployable for 2.5 years. The jury found that the hospital was responsible for allowing the existence of a hostile work environment, retaliating against Chopourian by terminating her and later revoking her surgery privileges and causing a series of mental and emotional harms.

## Legal Definitions

### Common Legal Terminology

Supervisors/Managers should understand the legal definitions of the common terminology used within the context of sexual harassment claims.

"Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment

Under federal law you are a supervisor if:

- You have authority to undertake or recommend tangible employment decisions affecting the employee; or
- You have authority to direct the employee's daily work activities.

The Title VII definition of "employer" is "a person engaged in an industry effecting commerce..." The definition of "employer" also includes "any agent" of an employer. Title VII has no definition of "agent," so a general definition based on common law applies. The common-law definition for agent of an employer is: "a person or entity (as an employee or independent contractor) authorized to act on behalf of and under the control of another in dealing with third parties"

Labor organizations and employment agencies are also bound by Title VII.

A "tangible employment action" means a significant change in employment status. Examples include hiring, firing, promotion, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.

It is important to note that jurisdiction differences between federal and California law. Before a complainant can file a claim under federal law, an employer must have at least 15 employees; however, state law might be different.

Liability is the accountability and responsibility to another enforceable by civil remedies or criminal sanctions. In these cases responsibility has to be proven.

Strict Liability is the liability that is imposed without a finding of fault. This means you are responsible automatically and simply because something happened. Your intention or the circumstances would not matter here.

Vicarious Liability is the liability that is imposed for another's acts.

Harassment can include "sexual harassment" unwelcome sexual advances, requests for sexual favors, verbal, non-verbal, or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's gender. For example, it is illegal to harass a woman by making offensive comments about women in general, such as "Women belong in the home."

Both the victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

### **Examples of Sexual Harassment Violations**

Here are some examples of Sexual Harassment Violations.

Unwanted sexual advances

Offering employment benefits in exchange for sexual favors

Making or threatening reprisals after a negative response to sexual advances

Verbal sexual advances or propositions

Sabotaging the victim's work

Granting job favors to those who participate in consensual sexual activity

Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual; suggestive or obscene letters, notes or invitations; discussing sexual activities

Physical conduct: touching, impeding or blocking movements, physical interference with normal work or movement, assault

Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes; making remarks about sexual orientation

Non-verbal conduct: sexually offensive emails, text messages, leering, making sexual gestures, displaying of suggestive objects or pictures, cartoons or posters

Conduct is unwelcome if the recipient did not initiate it and regards it as offensive. Some sexual advances ("Come here babe and give me some of that") are so crude and blatant that the advance itself shows its unwelcomeness. In a more typical case, however, the welcomeness of the conduct will depend on the recipient's reaction to it.

#### **Types of Rejection**

Let's take a look at the types of rejection. First, outright rejection.

The clearest case is when an employee tells a potential harasser that the conduct is unwelcome and makes the employee uncomfortable. It is very difficult for a harasser to explain away offensive conduct by saying, "She said no, but I know she really meant yes." A second-best approach is for the offended employee to consistently refuse to participate in the unwelcome

conduct. A woman who shakes her head "no" and walks away when asked for a date has made her response clear.

In case of ambiguous rejection, matters are more complicated when an offended employee fails to communicate clearly. All of us, for reasons of politeness, fear, or indecision, sometimes fail to make our true feelings known. A woman asked out for a "romantic" dinner by her boss may say, "Not tonight, I have a previous commitment" when what she really means is "No way, not ever." The invitation is not inherently offensive, and the response leaves open to question whether the conduct was truly unwelcome.

Finally, soured romance. Sexual relationships among employees often raise difficult issues as to whether continuing sexual advances are welcome. Employees have the right to end such relationships at any time without fear of retaliation on the job, so that the conduct that was once welcome is now unwelcome. However, because of the previous relationship, it is important that the unwelcomeness of further sexual advances be very clear.

### **Statutory Provisions and Case Law**

Let's take a look at some of the Supreme Court rulings regarding liability for hostile environment.

Meritor Savings Bank v. Vinson (1986) marked the United States Supreme Court's recognition of certain forms of sexual harassment as a violation of Civil Rights Act of 1964 Title VII:

"A sexually hostile work environment is one in which "discriminatory intimidation, ridicule, and insult . . . [is] sufficiently severe or pervasive as to alter the conditions of a victim's employment."

In Harris v. Forklift Sys., Inc (1993), the U.S. Supreme Court emphasized that whether a work environment is hostile or abusive can be determined only by looking at all the circumstances.

In another case of a Supreme Court ruling regarding liability for supervisors, Burlington Industries, Inc. v. Ellerth (1998) and Faragher v. City of Boca Raton (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors.

The standard of liability set forth in these decisions is premised on two principles. They are:

- 1) An employer is responsible for the acts of its supervisors, and
- 2) Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

In order to accommodate these principles, the Court held that an employer is strictly liable for a supervisor's harassment if it culminates in a tangible employment action (quid pro quo situation). However, the employer can be liable, if the supervisor establishes a hostile environment against an employee.

To avoid liability or limit damages, the employer must prove that:

- 1) The employer exercised reasonable care to prevent and correct promptly any harassing behavior.

2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

This two-tier test is known as the Ellerth/Faragher defense.

In determining whether allegedly harassing conduct is sufficiently hostile or unwelcome to alter the terms and conditions of employment, courts apply a "reasonable person" standard. In order to find the employer liable for the conduct in question, a court must find both that the conduct was in fact subjectively hostile or abusive to the plaintiff, and that it would have been objectively hostile or abusive to a reasonable person.

The "severe or pervasive" standard is intended to ensure that viable sexual harassment claims arise only as a result of extreme conduct. Under this standard, occasional or sporadic teasing, gender-based jokes, offhand comments and other such behavior do not amount to actionable sexual harassment.

These U. S. Supreme court decisions specify the liability of an employer for the conduct of its supervisors and clarify the circumstances that may establish whether a work environment is hostile.

Ellison vs. Brady (1991) was a landmark sexual harassment case that set the "Reasonable Woman" standard (later called the "Reasonable Worker" standard) in sexual harassment law. Sexual harassment is examined from the perspective of what a "reasonable woman," not a "reasonable person," would find offensive.

### **Employer Liability**

Under federal Title VII, supervisors and non-supervisory employees cannot be held personally liable for sexual harassment, only employers. However, they may be held liable under common law torts committed against the victim, such as assault and battery.

Compensatory and punitive damages are limited (capped) according to the number of employees. This means that employers cannot be made to pay amounts higher than the limit set by law.

If the harassment results in a significant change in employment status, such as hiring, firing, demoting, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, the employer is strictly liable for the conduct of its supervisor or agent.

The employer also can be liable if the harassment by a supervisor creates a hostile work environment. However, it has a possible defense if the employer can show that it took reasonable steps to prevent and promptly correct the problem, and the employee unreasonably failed to take advantage of the company's preventive or corrective measures.

The employer is liable if it knew, or should have known, about the harassment inflicted on an employee by a co-worker. However, the employer is not liable if immediate and appropriate corrective actions were taken to remedy the problem.

## California Law

### Fair Employment and Housing ACT (FEHA)

- The 1959 California Fair Employment and Housing Act (FEHA) prohibited harassment of employees, applicants, and independent contractors by any persons and requires employers to take all reasonable steps to prevent harassment. The FEHA has been amended over the years, most recently 4/1/2016 and has broadened classes to explicitly include – any and all of the following:
  - Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age for individuals over forty years of age, military and veteran status.
  - Employers can no longer rely on a “catch-all” statement that states that the employer will not discriminate based on any category protected by the law

### Revised Definitions Relating to Gender Discrimination

The FEHA regulations provide definitions for the protected categories of: “Gender Expression,” “Gender Identity,” “sexual orientation; and “Sex.” The 1/1/2018 Senate Bill 396 greatly expanded the scope of Harassment based upon gender discrimination. The new regulations provide definitions for the terms: “Transgender” and “Sex Stereotyping.” The definitions are as follows:

- **Sex:** has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breastfeeding; gender identity; and gender expression;
- **Sexual Orientation:** An individual's preference in terms of sexual relationship with others - whether homosexual or heterosexual;
- **Gender Expression:** a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth;
- **Gender Identity:** a person's identification as male, female, a gender different from the person's sex at birth, or transgender;
- **Transgender:** a general term that refers to a person whose gender identity differs from the person's sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as “transsexual;” and
- **Sex Stereotyping:** an assumption about a person's appearance or behavior or about an individual's ability or inability to perform certain kinds of work based on myth, social expectation, or generalization about the individual's sex.

Sex, gender, gender identity, and gender expression are considered independent of the others. For example, the same person may have (a) the sex of male, which was assigned at birth, (b) the gender identity of female, and (c) the gender expression of masculine with variations like butch, femme, transgender, genderqueer, or nonconforming queer. A transgender person “may or may not have a gender expression that is different from the social expectations of the sex assigned at birth.”

An additional, separate aspect of the same person is sexual orientation. Staying with our example, one can have the assigned sex at birth of male; the gender identity of female; a masculine gender expression; and an orientation of gay, lesbian, or heterosexual. In addition, one may change or transition one's gender, gender identity, gender expression, and sexual orientation throughout life.

**The law and company policies require that LGBT employees be treated with equal respect.**

The purpose of California's required harassment training is to ensure a respectful workplace. California law recognizes 17 different protected characteristics: race, color, national origin, sex, sexual orientation, gender, gender identity, gender expression, religious creed, marital status, genetic characteristics, ancestry, mental disability, physical disability, medical condition, military/veteran status, and age. Everyone has at least 12 of these characteristics. For example, everyone has a race, color, ancestry, gender, gender expression, gender identity, and sexual orientation. Since many characteristics apply to everyone, a single characteristic—or a select number of characteristics—cannot define a person. Promote a respectful working environment and do not reduce any person to one's characteristics.

**Performance should be the foremost criteria for evaluating employees.**

In a 1998 decision, the Supreme Court of California explained that harassment is "conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." A supervisors' focus should be the work performance of the employees in the organization and not an employee's gender identity, gender expression or sexual orientation (or any other protected characteristic), other than for the purpose of preventing harassment or discrimination.

**Supervisors' compliance with these policies is required.**

In a recent U.S. Equal Employment Opportunity Commission report on harassment in the workplace, the Commission emphasized that "[Compliance training] is not training to change your mind. It's training to keep your job." This statement recognizes the limits of anti-harassment training. If, for example, a supervisor simply refuses to call transgender employees by their preferred names or refuses to refer to them by their preferred pronouns, a two-hour mandatory training seminar is not likely to change that supervisor's mind about transgender people. The training goal is to ensure that supervisors are fully informed of the standards of conduct required in the workplace and the disciplinary consequences when those standards are not met.

In California and some other jurisdictions, laws protecting against gender discrimination require that employers honor requests from employees to identify them by a preferred gender, name or pronoun. Here are some key guidelines to keep in mind:

- If an employee requests a new name on a business card or to be called by a different pronoun, employers can easily honor those requests. However, in situations where it's necessary to meet a legal obligation, such as the issuing of paychecks, employers may use the employee's gender or legal name as it appears on a government-issued ID.
- Employers may be liable for failing to use a name or pronoun requested by an employee. If, for example, someone forgets to use the correct pronoun, the employer would not be automatically liable. However, organizations do need to have a plan for addressing name and pronoun change requests, and communicating to managers and employees their responsibility to use the individual's preferred name or pronoun.
- With regard to the pronouns themselves, there are a number of different ways individuals may request to be addressed. An employee may wish to change from using she/her/hers to he/him/his, or vice versa. An employee may request to be addressed by gender-neutral pronouns, such as the singular they/them/their or by ze/hir/hirs or by other pronouns. Some employees may request to be addressed by their name only, and by no pronouns at all.

### **Guidance on Promoting a Respectful Workplace**

Here is some practical guidance that supports a respectful work environment for LGBT employees:

1. Ensure that the company has updated policies that expressly prohibit harassment, discrimination, and retaliation on the bases of all protected characteristics, including gender identity, gender expression and sexual orientation. Employers may want to review those policy provisions in the training.
2. Instruct supervisors to refrain from gossip, rumors, or other discussions or speculations about employees' sexual orientations or gender identities.
3. Instruct supervisors that company policy prohibits employees from engaging in any discriminatory conduct directed at employees because they associate with organizations that advocate LGBT causes.
4. Emphasize that employees should be addressed by their preferred name. Explain that when an employee refers to a person, the employee should use the name and pronoun consistent with the person's gender identity and expression.
5. Display the required poster developed by the Department of Fair Employment and Housing regarding transgender rights in a prominent and accessible location at the workplace.
6. Designate human resources professionals to [assist transitioning employees](#) to ensure their legal access to facilities, accommodate dress code issues, and help ensure respectful and proper communications with other employees about the transition process.

### **National Origin Protection**

In 2015, FEHA was amended to make it unlawful for an employer to discriminate against an applicant or employee because he or she holds or presents a driver's license issued under section 12801.9 of the California Vehicle Code—licenses issued to undocumented individuals. This year, FEHA has been amended to state that employers may require an applicant or employee to hold or present any form of driver's license as part of employment only if:

- Possession of a driver's license is required by state or federal law; or
- Possession of a driver's license is uniformly required by the employer and is otherwise permitted by law. If this policy is not uniformly applied or is not justified by legitimate business reasons, however, it may be evidence of a violation of FEHA.

Under amended FEHA regulations (effective 4/1/2016, California employers must:

- 1) Take all reasonable steps to prevent discrimination and harassment from occurring. If harassment does occur, take effective measures to end any further harassment and to correct any effects of the harassment
- 2) Create and implement written harassment, discrimination, and retaliation prevention policies, in addition to distributing the Department of Fair Employment and Housing's (DFEH) Brochure 185 on Sexual Harassment
- 3) Have a written procedure for employees to make complaints and for the employer to investigate complaints

Policies must:

- List all of California's protected classes. Employers should make sure that their policies prohibit unlawful discrimination and harassment and include all protected classes.
- Expressly state that the employer prohibits unlawful discrimination, harassment, and retaliation by any supervisor, manager, coworker, and/or any other third party that comes into contact with an employee
- Include a complaint process in which it is expressly stated that an employee is free to complain either verbally or in writing. The policy must not direct employees to make complaints only to their supervisors or any specific personnel, because that individual may be the subject of the complaint.

Policies should include the following provisions to:

- Fully inform the employee of his/her rights and any obligations to secure those rights.
- Conduct a thorough, objective and effective investigation, interviewing anyone with information regarding the matter. A determination must be made and the results must be communicated to the complaining employee, to the alleged harasser and, as appropriate, to all others directly concerned.
  - Take immediate and effective corrective action if the harassment allegations are proven in order to stop the harassment and ensure it will not continue. The employer must also communicate to the complaining employee that action has been taken to end the

harassment and keep it from recurring. Lastly, appropriate steps must be taken to remedy the harassed employee's damages, if any.

- Post the Department of Fair Employment and Housing poster (DFEH - 162) in the workplace, which is made available through the DFEH publications line (916) 478-7201 or website at [www.dfeh.ca.gov](http://www.dfeh.ca.gov).

3) Distribute an information sheet on sexual harassment to all employees. This information sheet should not be used in place of a sexual harassment prevention policy, which all employers are required to have. An employer may either distribute the Department of Fair Employment and Housing pamphlet (DFEH 185), or develop an equivalent document that satisfies Government Code Section 12950(b) requiring:

- a statement that sexual harassment is illegal
- the definition of sexual harassment under state and federal laws
- examples of sexual harassment
- a description of the internal complaint process of the employer
- the available legal remedies and complaint process of the Department of Fair Employment and Housing Commission
- instructions for contacting the Department of Fair Employment and Housing Commission
- the retaliation protections available for opposing the practices prohibited by law or for filing a complaint with, or otherwise participating in investigative activities conducted by, the Department or the Commission
- the requirement that all employers with 50 or more employees must provide a minimum of two hours sexual harassment training once every two years to all supervisory employees within six months of assuming a supervisory position

4) All employees should be made aware of the seriousness of violations of the sexual harassment policy and must be cautioned against using peer pressure to discourage harassment victims from complaining.

5) Updated harassment, discrimination, and retaliation prevention policies need to be formally communicated and distribute to all employees.

### **Fair Employment and Housing Commission (FEHC)**

The Fair Employment and Housing Commission enforces California civil rights laws regarding discrimination in employment, housing, and public accommodations; pregnancy disability leave; family and medical leave; and hate violence.

The new FEAH regulations confirm that the leave entitlement for pregnancy disability leave is four months (which does not need to be taken in one continuous period of time) and that employees are eligible for up to four months of leave and continued benefits per pregnancy, not per year. Additionally, a transgender individual who is disabled by pregnancy is not excluded from the pregnancy, childbirth, or related medical conditions provisions. Under the new regulations, employers must modify their policies as necessary and post a new notice (either a compliant employer notice and/or the agency notice) regarding the right to take pregnancy disability leave.

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The Commission engages in five primary activities: administrative adjudication; mediations; regulations; legislation; and public information and training.

### **AB 1825**

In 2005, California bill AB 1825 mandated that all California employers with 50 or more employees must provide two hours of sexual harassment prevention training to their supervisors and managers every two years, starting in 2005.

The California Fair Employment and Housing Commission recently established new regulations interpreting AB 1825. These regulations went into effect August 17, 2007. These new regulations specify the requirements of the sexual harassment prevention training that employers with 50 or more employees must provide to their supervisors and managers.

### **Department of Fair Employment and Housing (DFEH)**

The DFEH accepts complaints of discrimination, investigates those complaints, issues accusations, and prosecutes those cases both before the Fair Employment and Housing Commission and in court (FEHA Government Code Section 12930.)

As part of its routine investigation of any complaints filed, the DFEH now asks every employer subject to AB 1825 in every employment discrimination case whether it has provided its supervisors sexual harassment training.

In her presentation, FEHA 50th Anniversary: Civil Rights Past, Present and Future, in April 2009, the Director of DFEH, Phyllis W. Cheng, stated that one of the recent innovations of DFEH is “vigorous enforcement of the law.” She continued her presentation with law cases substantiating the department’s commitment to the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.

## California Law Cases

Let's take a look at a few law cases under the California Law. The first case deals with sexual harassment.

Adult comedy writers' use of sexually explicit language and gesturing in the presence of their female assistant did not constitute harassment within the meaning of the FEHA in the context of the creative workspace.

The outcome of a case of hostile work environment was that an employee may establish sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.

Employers are strictly liable under the FEHA for sexual harassment by their supervisory employees. The Ellerth/Faragher defense to liability applicable in Title VII harassment cases does not apply to FEHA, although the defense may be used to limit damages.

A case of liability for discrimination established that individual supervisors may be liable for harassment but not discrimination.

## Employer Liability

When there is a difference between state and federal law, employers are required to follow the law which provides more protection to the employee. California law provides more protected classes of employees, no limits on employer liability, and more stringent employer defenses than federal law.

All employers, regardless of the number of employees, are covered by the harassment section of the FEHA.

Harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassing an employee or co-worker or for aiding and abetting harassment, regardless of whether an employer "knew or should have known" about the harassment. Accordingly, a company should clarify that its antidiscrimination, harassment and retaliation policy applies to all persons involved in or related to the company's business or operation and prohibits unlawful discrimination or harassment on the part of any employee, supervisor, manager, third party, or visitor (including, by way of example, any contractor, agency temporary employee, vendor, candidate, etc.).

No proof of tangible employer action is required for liability. In other words, if an employee can prove that the harassment occurred, the employer is automatically liable for damages awarded against the supervisor, without the employee having to prove the company was negligent or even did something wrong.

There are no limits to the compensatory and punitive damages awarded.

It is unlawful to retaliate against anyone who has opposed sexual harassment practices or has filed a complaint, testified or assisted in any proceeding under FEHA. Employees are protected from retaliation if they complain about harassment or discrimination. This is the FEHC Regulations (CA Code of Regulations, Section 7287.8).

Employers are required to take “all reasonable steps to prevent harassment from occurring.” If an employer has failed to take such preventive measures, that employer can be held liable for the harassment. In this case, an employee may be entitled to damages, even though there was no significant change in employment status, such as hiring, firing, demoting, etc.

When quid pro quo or hostile environment harassment occurs by a supervisor/agent, the employer is held strictly liable even if it did not know, or have reason to know, of the harassment. That is, if an employee can prove that the harassment occurred, the employer is automatically liable for damages awarded against the supervisor.

The employer also is strictly liable when a supervisor takes a specific job action against an employee who rejects the supervisor’s sexual advances.

In case harassment from co-workers occurs, the employer is liable for harassment by a co-worker only if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

The employee must prove that the employer knew that the perpetrator had harassed the employee and took inadequate steps to prevent it or the employer should have known of the harassment.

If an employer knows or should have known that a non-employee (for example, client, customer or contractor) has sexually harassed an employee, applicant, or person providing services for the employer and fails to take immediate and appropriate corrective action, the employer may be held liable for the actions of the non-employee.

Many people do not realize that you do not have to be the direct target of harassing behavior to be a victim of harassment under the law. This is known as “bystander” or “third party” harassment. Let’s look at a couple of examples:

A supervisor is having an affair with Employee 1. The supervisor gives Employee 1 extra time off, bonuses, etc. that are not available to the other employees. The other employees realize that to get that time off and those bonuses they would have to have an affair with the supervisor. This is what is known as quid pro quo third party harassment.

The other type is hostile work environment. Here the other employees would have to prove that because of the situation created by the supervisor’s actions they lost motivation and/or their work performance suffered. While this is a difficult case to prove it is nonetheless a possibility and should be avoided.

Another issue to watch for occurs when a third party witnesses and reports harassing behavior. The key concern here is retaliation. This can come from supervisors or fellow employees. It is important that no one who reports harassing behavior suffers retaliation and it is up to the supervisor to ensure that this does not occur.

Employer liability may be reduced for supervisory harassment using avoidable consequences defense.

In the State Dept. of Health Services v. Superior Court of Sacramento County noted earlier, the Court made it clear that the defense for supervisory harassment at most serves to reduce the damages recoverable.

As explained by the Court, the defense has three elements:

- 1) the employer took reasonable steps to prevent and correct workplace sexual harassment
- 2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided
- 3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered (avoidable consequences).

Evidence potentially relevant to the avoidable consequences defense includes anything tending to show that the employer took effective steps "to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to the complaints."

If an employee wins his or her sexual harassment case, the law provides for administrative fines and remedies for individuals, including the following:

- Hiring
- Promotion
- Reinstatement
- Front pay/back pay
- Reasonable attorney's fees and costs
- Expert witness fees
- Changes in the employer policies or practices
- Cease-and-desist order
- Punitive damages
- Damages for emotional distress from each employer or person found to have violated the law

### **CA – AB 2053: Abusive Conduct**

Bullying is a hot button issue that continues to emerge in the national dialogue. While it initially focused on children and schools, advocates sought to expand the conversation to include bullying in the workplace. They argued that bullying in the workplace comes at a high price and employers should do more to prevent it.

Section 12950.1 of the Government Code provides for mandatory sexual harassment training. In September of 2014, the governor of California signed Assembly Bill 2053 expanding Section 12950.1 of the Government Code to also require training on the prevention of "abusive conduct". Abusive conduct can also be referred to as workplace bullying. The addition is effective as of January 1, 2015.

"Abusive conduct" 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. Abusive 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. A single act shall not constitute abusive conduct, unless especially severe and egregious.

CAL Gov. Code §12950.1(g)(2)

In its report, the Senate Committee on Labor and Industrial Relations cited research conducted by the Workplace Bullying Institute. Their research found that "27% of Americans have suffered abusive conduct at work, another 21% have witnessed it and 72% are aware that workplace bullying happens (2014 WBI: U.S. Workplace Bullying Survey)." -Senate Labor and Industrial Relations Analysis, June 24, 2014.

Those in favor of this law see bullying as a national problem that is increasing. They claim the cost of bullying in the workplace includes a reduction in productivity, low morale, increased absenteeism and turnover and also higher medical and workers' compensation claims. In its third reading, the Office of Senate Floor Analyses references estimates by supporters of the law that the cost of abusive conduct in the workplace is as high as \$200 billion annually.

The Assembly Committee on Labor and Employment listed the following effects of abusive work environments:

- feelings of shame and humiliation
- stress
- loss of sleep
- severe anxiety
- depression
- many other stress-related disorders and diseases

The goal of the addition of abusive conduct is not to punish employers but to prevent bullying through education. This law does not provide a legal remedy for those who suffer from bullying.

While bullying in the workplace in California is not technically illegal, it is in the employer's interest to adopt an explicit policy against it. Employers and employees should have clear expectations regarding what is and is not considered acceptable behavior and what the consequences are on the bully. As with sexual harassment, a mechanism for reporting and investigating bullying should be in place and used when required. It is important to note that while abusive conduct has yet to be criminalized, sexual harassment is still illegal.

As stated in the definition, the elements to look for in bullying are:  
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.

In the absence of specific guidance from the state regarding what specific actions would constitute abusive conduct, it is up to employers and employees to self-monitor and ensure that no one in the workplace is suffering at the hands of a bully and that appropriate and adequate action is always taken.

Workplace bullying takes many forms. Here are a few examples:

Molly works in sales. Her job requires her to meet particular sales goals. In group sales meetings Molly's boss, John, insults her when she fails to meet her goals. Over the course of the next month, John continues to berate her in front of her colleagues and encourages them to join in on jokes that refer to her as stupid, incompetent or ugly. When Molly speaks to John about his behavior, he states that it is simply humor and she should get a thicker skin. Molly feels humiliated and has trouble sleeping.

Michael works in an office. For weeks, his co-worker Thomas has made it clear he does not like Michael. When it is necessary for them to speak, Thomas stands over Michael or invades his personal space. In group meetings Thomas talks over Michael or interrupts him whenever Michael attempts to speak. On their lunch break Thomas encourages his co-workers not to sit with or speak to Michael. Thomas consistently and loudly gossips about Michael in front of co-workers. Michael now suffers from severe anxiety every time he walks into work.

Joseph is an accountant at a large accounting firm and he is experiencing difficulties with his supervisor, Patricia. She has written him up several times for non-existent performance issues and consistently insulted the quality of his work even though colleagues insist his work is of high quality. Patricia has also assigned Joseph tasks with impossible deadlines and then berated Joseph loudly in front of his colleagues when the task is not completed. She has also repeatedly denied his requests for both training and leave. This has been going on for months. Joseph is stressed and has slipped into a depression.

Stephanie is a nurse in a large medical office. For over a year, she has been having trouble with a co-worker named Dawn. Dawn has reported Stephanie numerous times to management falsely claiming that Stephanie made mistakes in her work. The claims were all dismissed. Stephanie has repeatedly found her tools and equipment either missing or moved around making it difficult for her to do her job. Stephanie regularly overhears Dawn talking with co-workers about how pathetic and stupid Stephanie is. Stephanie feels sick with anxiety and shame and has begun missing work.

Abusive conduct comes in many forms and it is up to management and staff to self-monitor and ensure that all employees are treated with respect and dignity. Too often the bully is rewarded for being "assertive" or "aggressive". This new law changes the conversation and seeks to create a workplace where all employees have a safe and secure environment in which to work.

## Retaliation

### Retaliation Definitions and Examples

Retaliation is a term that describes adverse action taken in response to an employee's complaint of discrimination, participation in a discrimination proceeding, or opposition to discrimination.

This can include, but is not limited to, firing, demoting or harassing someone for filing a complaint of sexual harassment. Retaliation can also include:

- docking hours
- entering an unfounded negative evaluation
- passing someone up for a promotion they otherwise would have received
- providing a false negative reference

- increased monitoring of the employee

Note: these are examples and are not an exhaustive or conclusive list of what constitutes retaliation.

In the alternative, this does not mean that as supervisor you cannot reprimand an employee who has performed their job poorly simply because they have filed a sexual harassment complaint. The goal here is to act as professionally as you would have had the employee not filed a complaint.

Unfortunately many employers get caught in retaliation actions. Oftentimes there is no basis for the original harassment allegation, but because management retaliated, the employer is liable. As we saw in the previous example cases, companies found liable for retaliation have had to pay substantial sums of money.

### Federal Retaliation Cases

There has been a steady increase in retaliation claims against employers since the Supreme Court case *Burlington Northern v. White* (2006) lowered the standard of proof, making retaliation claims easier to prove than discrimination claims. The Court in *Burlington* expanded the scope of unlawful retaliatory adverse employment actions to include actions viewed by a reasonable person in the employee's position as materially adverse, though they may not necessarily be ultimate employment actions.

Some examples of what federal courts have determined to be retaliatory adverse employment actions include:

- Undesirable job reassignments and demotions
- Discipline notices
- Negative performance evaluations
- Suspensions
- Threats of losing pay, benefits or job
- Investigations that focus on complainant's character
- Denial of opportunities for advancement
- Denial of use of accrued sick leave

A federal district court in Michigan held that a job transfer involving a small pay increase and one-time bonus was still an adverse employment action because it was less prestigious to the employee and resulted in less opportunity for advancement.

However, not every employment action that makes an employee unhappy will be considered an adverse employment action by the courts. For example, courts have found that performance improvement plans are not, by themselves, materially adverse employment actions.

Additionally, the U.S. Supreme Court's decision in *Clark County School District v. Breeden* gives insight into how employers can deal with an employee who files a discrimination or harassment claim as a way of avoiding discipline. According to the Court, employers do not have to abandon previously planned employment actions once a discrimination suit has been filed. Of course, it will be necessary for the employer to be able to demonstrate that the action was "previously contemplated" with well-documented prior performance problems and/or warnings being key.

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California, AB 1825

Federal courts in different parts of the country do not always make the same decisions, so employers need to be aware of the judicial rulings in their jurisdiction.

## Requirements for Proving Retaliation

Let's take a look at the requirements for proving retaliation.

Currently, the standard for proving a Title VII retaliation claim only requires the employee alleging employer retaliation to demonstrate that the employer took an adverse action against him/her that might have discouraged a reasonable worker from making or supporting a claim of discrimination.

To make a prima facie retaliation claim under Title VII, an employee must establish the following three criteria:

- 1) He/she engaged in a protected activity.
- 2) The employer took some adverse employment action against him/her.
- 3) The protected activity was the cause of the adverse employment action.

A protected activity could include:

- filing a sexual harassment claim
- testifying, assisting or participating in a sexual harassment investigation, proceeding or hearing
- making complaints to a supervisor/manager
- expressing support of co-workers who have filed a sexual harassment complaint
- protesting against harassment in general

## California Law and Retaliation

Like Title VII, FEHA also offers retaliation protections to employees, by making it unlawful for an employer to discharge, expel, or otherwise discriminate against any employee because the person has opposed any practices forbidden under California law or because the person has filed a complaint, testified, or assisted in any complaint proceeding.

To make a prima facie retaliation claim under FEHA, an employee must establish the following three criteria:

The activity causing retaliation must be protected activity.

The retaliatory job action must be adverse, such as:

- Refusing to hire or employ
- Refusing to select for training programs leading to employment
- Barring or terminating from employment or a training program leading to employment
- Discrimination in compensation or in terms, conditions or privileges of employment

There must be a causal link between the protected activity and the adverse job action demonstrated by evidence that:

- The employer was aware of the protected activity.
- The adverse action followed within a relatively short period of time.

An employee's opposition to discrimination or harassment does not need to be a formal charge to qualify as a protected activity, but needs to be sufficient to put an employer on notice as to what conduct should be investigated. Additionally, an employee must reasonably believe the activity he/she opposes is unlawful, but it need not actually be later found unlawful by a court.

Only employers, not individual employees, can be held liable for retaliation under California's Fair Employment and Housing Act (FEHA). This court ruling ensured that employees receive the same immunity from retaliation claims as they have received from discrimination claims under FEHA.

An employer must have either actual or constructive knowledge of improper conduct and must take appropriate action in response to the retaliation claim.

An employee retaliation claim can be justified by the "temporal proximity" between the complaint and the retaliatory discharge.

FEHA supports liability when a partner asserts a claim for retaliation against her partnership based on reports of sexual harassment of an employee.

Employees must present substantial evidence that their termination was motivated by retaliatory intent on the part of employer as a necessary element of their claim.

Supervisors/managers can take the following steps to avoid a retaliation claim.

- Be aware of what actions constitute retaliation.
- Have a clear policy against retaliation resulting from sexual harassment claims, and include it in all harassment training to make sure all employees are aware of it.
- Make employees aware that their harassment complaint is being taken seriously and let them know you want to hear if they experience any retaliation.
- Keep sexual harassment complaints confidential.
- Document all actions taken to prevent retaliation.

## Preventing Sexual Harassment

### Employer Responsibility

An employer is responsible for creating a safe workplace for all its employees. This means the employer must prevent sexual harassment.

Once an employer is on notice that there is harassment either through observation by a supervisor of the conduct or a complaint by a victim of harassment or a witness to it, the company **MUST** take action.

It is far easier to prevent harassment than it is to conduct an investigation.

The supervisor is a critical component in preventing harassment.

The key questions in any investigation are:

- What did the company do to prevent harassment?
- Once the company was aware of harassment did it do anything to prevent further harassment and was prompt and corrective action taken?

As a supervisor you may be called to testify about anything from company policy to what you knew and what you did about the alleged harassment.

### Workplace Policy

It is the legal obligation of the employer to make sure that the workplace is free of sexual harassment.

That means an employer's obligation arises even before harassment occurs. The employer must take reasonable steps to prevent harassment.

To this end an effective workplace policy must be put into place. Beyond creating an anti-harassment policy, the employer should ensure that all supervisors and employees are aware of it.

This helps establish that the employer took reasonable steps to prevent harassment and that a system was in place to adequately address any harassment should it have occurred.

At a minimum the policy should:

- Contain a statement of policy banning sexual harassment in the workplace and expressing to all supervisors and employees that such conduct will not be tolerated.
- Define "harassment" in a broad sense. This should include:
  - unwelcome advances
  - requests for sexual favors, and
  - any other verbal, visual, or physical conduct of a sexual nature.

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- Ban any behavior that has the purpose or effect of unreasonably affecting the work performance of an employee, or creating an intimidating, hostile, or offensive work environment.
- Identify the person complaints are to be reported to
- Establish the reporting procedure
- Establish the investigation procedure
- Contain a non-retaliation provision

You should familiarize yourself with the details of your company's harassment policy. It is important that you know how your company expects you to handle complaints or suspect behavior. These policies are designed to protect employees and the company and maintain a positive and healthy work environment.

You should be able to answer questions your employees may have about the harassment policy or direct them to the appropriate person who would know the answer to their question.

As with most things, advanced preparation is key. In this way, you will be ready to appropriately handle any situation that might come your way.

Encourage your employees to also learn about the company's harassment policy.

Informed employees feel empowered and can help reduce incidences of harassment. They are also more likely to inform you early on of any suspect behavior.

When employees know there is a system in place to protect them, they are more likely to take advantage of it which can only benefit the company. Employees who know there is a system in place to address their concerns in a respectful and efficient manner are less likely to resort to lawsuits and other legal options.

Treat all instances of suspected harassment seriously and report them. The policy is in place for your use and it is better to take a small matter seriously than to let something slip through the cracks. The earlier you can address a case of suspected harassment, the better.

Also, as a supervisor you are responsible for letting the company know of what is going on. As a legal definition, once you are aware of a situation, the company is considered to be aware.

In sum, it is important for you as a supervisor to:

- Know your company's harassment policy
  - How do you handle a case of suspected harassment?
  - What steps do you take?
- Be prepared to answer employee questions
- Encourage your employees to familiarize themselves with the harassment policy
  - Let them know their rights
  - Ensure they are familiar with the complaint procedure
  - Treat all suspected harassment seriously

## **How to Recognize and Stop Prohibited Behavior**

As a manager or supervisor it is your duty to be aware of what is occurring in the workplace. You are the eyes and ears of the company and must be vigilant for any inappropriate behavior or language. You must also lead by example.

Another important step to identifying prohibited behavior is to speak with your employees. Encourage a policy of open communication. Since you cannot be everywhere at all times it is in your best interest to know that your employees would likely tell you if they saw something suspect. This open communication does not replace your duty to stay vigilant but can be a great additional mechanism.

Also, let your employees know that it is ok for them to express any discomfort they feel. Let them know it is ok to say no. Too often victims of harassment feel awkward or uncomfortable saying no. When the harasser fails to hear a “no,” they assume the harassing behavior is ok and it will likely continue.

The most important thing to do whenever you see prohibited behavior is to take action.

Taking action early and quickly can help restore a positive work environment, eliminate the need for any further or serious action and even prevent a lawsuit. The keyword here is “action.” This is where your familiarity with your company’s policies is critical. It’s not just taking action, but taking the appropriate action that counts.

Any report of possible harassment should be taken seriously, regardless of the circumstances.

## **Harassment Investigation**

“The investigation should be designed to obtain a prompt and thorough collection of the facts, an appropriate responsive action, and an expeditious report to the complainant that the investigation has been concluded, and, to the full extent appropriate, the action taken.”

According to the California Department of Fair Employment and Housing: the three most common types of sexual harassment complaints filed with the Department are:

- An employee is fired or denied a job or an employment benefit because he/she refused to grant sexual favors or because he/she complained about harassment. Retaliation for complaining about harassment is illegal, even if it cannot be demonstrated that the harassment actually occurred.
- An employee quits because he/she can no longer tolerate an offensive work environment, referred to as a "constructive discharge" harassment case. If it is proven that a reasonable person, under like conditions, would resign to escape the harassment, the employer may be held responsible for the resignation as if the employee had been discharged.
- An employee is exposed to an offensive work environment. Exposure to various kinds of behavior or to unwanted sexual advances alone may constitute harassment.

As per FEHA, a program to eliminate sexual harassment from the workplace is not only required by law, but is the most practical way for an employer to avoid or limit liability if harassment should occur despite preventive efforts.

### **Complaint Process and Confidentiality**

Complaint Process and Confidentiality are two actions all employers should take against harassment.

Employer Complaint Process states that employees subjected to sexual harassment should follow the sexual harassment prevention policy provided by the employer. This policy should include procedures for employees to make complaints and the procedures the employer will use to investigate complaints.

Employer Confidentiality emphasizes that an employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible.

An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.

A conflict between an employee's desire for confidentiality and the employer's responsibility to investigate may occur if an employee tells a supervisor about alleged harassment, but asks the supervisor to keep the matter confidential and take no action.

Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.

### **Proving Sexual Harassment**

Harassment can be proven even where there is no third party witness. The victim can provide the information regarding the harassment and any other discrimination. They can describe what happened, how they reacted to it and any harm they suffered. Without a third party witness to corroborate claims, it comes down to an issue of credibility.

Third party witness can be critical as they can corroborate the victim's claims and bolster their credibility. The third party witness can be anyone: a fellow employee, a supervisor, a customer or client, etc.

These witnesses can speak about:

- changes in the victim's behavior;
- how s/he looked before and after the assault;
- whether other workers have been assaulted or otherwise harassed in the workplace;
- the response of the employer to prior reports of harassment;
- acts of retaliation against persons who complain about harassment or testify on behalf of victims; or
- other important evidence that supports the victim's case.

## **DFEH Complaint Process**

### *Filing the Complaint*

Employees or job applicants who believe that they have been sexually harassed may file a complaint of discrimination with DFEH within one year of the harassment. In addition to filing with the DFEH, employees also have the option of filing with the EEOC; assuming jurisdiction requirements are met (e.g., employer has at least 15 employees and complaint filed with one year of discriminatory act).

When a complaint is filed with the DFEH, the interviewing representative drafts a formal complaint which is, if accepted for investigation, also filed with the EEOC. The DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes.

If the complaint is substantiated, a formal conciliation conference will be scheduled to settle the complaint. The terms of any settlement will be formalized in a written agreement.

Note: Even after an employer has conducted their internal investigation, the complainant can file with the DFEH or EEOC. It is also important to know that a complainant has one year from the time of the last discriminatory act to file a complaint with DFEH or the EEOC.

### *The Investigation Process*

If the complaint is not resolved during the preliminary stages, it will be fully investigated by the DFEH. Throughout the investigation process, both employees and employers are given the opportunity to ask questions, provide information, and suggest witnesses. As the investigation proceeds, the DFEH may:

- Interview the respondent, as well as any other relevant witnesses
- Access pertinent records and documents for review
- Make an on-site inspection of facilities and operations
- Initiate formal discovery (subpoenas, interrogatories, or the depositions of witnesses).

Employee's responsibilities during the investigation

Employees filing the complaint with the DFEH must fully cooperate in the investigation by:

- Providing accurate information, such as names, addresses, telephone numbers, dates, and places
- Identifying any witnesses and supply documents to support the charges listed in the complaint
- Notifying the DFEH in writing if they decide to withdraw their complaint, decide to file a lawsuit on their own behalf, and/or change their address, telephone number, or contact information.

If the employee fails to cooperate with the DFEH in any way, the case may be closed.

Individuals who allege that they have been illegally fired are required to continue to look for work and keep records of each contact with a potential employer, including the employer's name and address, the position sought and date of application, and the name of the company representative

### *Employer's Responsibilities During the Investigation*

Employers must refrain from unlawful retaliation against an employee who has filed a complaint. Employers must also fully cooperate with the DFEH during the investigation by:

- Retaining any written materials relevant to the complaint until a determination has been reached and all appeals and proceedings have been terminated
- Providing the DFEH with requested data and any additional relevant information regarding the complaint
- Filing their current address with the DFEH and notifying the agency of any change of address that occurs while the complaint is pending

Note: Employers are required by law to maintain all applications, personnel, membership, or employment referral records for a minimum of two years. After a complaint is filed, all such records shall be retained until a determination has been made.

### *Prosecution*

If the DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a formal accusation. The accusation must be issued within a year of the date a complaint is filed, or two years if hate violence is alleged.

After the DFEH issues an accusation, it may litigate the case in a public hearing before the FEHC. If the respondent elects to have the matter heard by the Commission, the Commission will hear testimony under oath, take evidence, render a decision, and issue a legally enforceable order.

However, if damages for emotional distress or administrative fines are sought, the employee can have the case moved to a civil court. If the case is moved to court, the DFEH prosecutes, but the employee complainant is the party in interest.

### *Remedies and Damages*

If the DFEH finds a violation, it has the authority to:

- Issue cease-and-desist orders
- Order reinstatement
- Order hiring
- Order promotion
- Order policy changes
- Award back pay
- Award front pay
- Award emotional damages
- Award out-of-pocket losses
- Award an administrative fine

The amount awarded for emotional distress may not exceed \$150,000 per employee, though an additional amount of \$150,000 may be awarded for intimidation. Additionally, an award of up to \$25,000 may be ordered for violations of Civil Code section 51.7 (Hate Violence).

When ordering an administrative fine, the FEHC will look at factors such as:

- Willful, intentional or purposeful conduct
- Refusal to prevent or eliminate discrimination
- Conscious disregard for the rights of employees
- Commission of unlawful conduct
- Intimidation or harassment
- Conduct without just cause or excuse
- Multiple violations of FEHA

At its discretion, the FEHC may also award to the prevailing party reasonable attorney fees, including expert witness fees.

### *Moving the Case to Superior Court*

If the matter is removed to Superior Court, the same remedies are available, with the following exceptions:

- There is no limit on emotional distress damages.
- Instead of administrative fines, unlimited punitive damages may be awarded.

FEHA Government Code section 12965, subdivision (b), requires that individuals must exhaust their administrative remedies with the DFEH by filing a complaint and obtaining a "right-to-sue notice" from the Department before filing a lawsuit under the FEHA.

The DFEH will accept requests for an immediate "right-to-sue notice" from individuals who wish to proceed to the Superior Court. The DFEH complaint must be filed within one year from the last act of discrimination or the right to file suit under FEHA is lost. If an individual requests a "right-to-sue notice" immediately the Department will not investigate the complaint.

Offers and counteroffers made in an effort to settle a case, as well as any information disclosed during formal conciliation efforts by DFEH, will be held confidential. All other information gathered in the course of an investigation is subject to disclosure unless otherwise protected by the individual's right to privacy (e.g., medical records).

### **EEOC Complaint Process**

In addition to filing with the DFEH, victims of sexual harassment may file a complaint with the EEOC. While the DFEH enforces California law, the EEOC enforces federal law against sexual harassment. The federal law applies to all employees of employers in the United States or its territories with 15 or more employees. Before a lawsuit for sexual harassment can be filed in federal court, an employee must file a complaint first with the EEOC or a state or local fair employment agency.

### *Non-U.S. Citizens & Overseas U.S. Citizens*

Non-U.S. citizens and undocumented workers are covered by federal law. There is no requirement that a victim of sexual harassment must be a U.S. citizen in order to file a complaint (aka charge) with the EEOC. Also, a U.S. citizen working for a U.S. company overseas is covered by the law. However, a foreign citizen working for a U.S. company overseas is NOT covered.

### *Third Parties*

A third party can file a charge on behalf of a victim of sexual harassment. This third party can, in theory, be anyone. It can be a friend, relative, co-worker, attorney, shelter worker, healthcare provider and the list goes on.

Also an EEOC Commissioner (there are 5) can launch an investigation on their own based on information their office receives.

### *Deadline*

A charge must be filed within 180 days of the harassing event. Where we talk about a pattern of harassment, one of those actions must have taken place within the last 180 days. Where the victim is terminated, the clock runs from the date of termination.

### *Procedure*

Within ten days of the filing of a charge, the EEOC will serve the employer with a copy of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. The employer then has an opportunity to respond. This process and the investigation are confidential. If the matter is brought to court, then it becomes a public matter.

## **Investigation**

Once a charge has been filed with the EEOC and the employer has been timely notified, an investigation will commence. At any point in the investigative process, the EEOC may seek a settlement if both the employer and the person who filed the charge express an interest in doing so. If a settlement is not reached, the investigation continues. According to the EEOC, the average time to complete an investigation is 182 days.

In pursuit of its investigation the EEOC may accept any statement or evidence from the alleged victim, a third party filing on behalf of the alleged victim or the employer. The EEOC may also request that the alleged victim provide the following:

- 1) A statement showing each specific harm that the person has suffered and the date on which each harm occurred.
- 2) For each harm, a statement showing the act, policy or practice which was unlawful.
- 3) A statement showing why the alleged victim believes the above act, policy or practice is discriminatory.

The EEOC may ask the employer to provide:

- 1) A statement of position. This is the company's chance to tell its side of the story.
- 2) Request for Information. Here the EEOC may ask for copies of the company's policies, the charging party's personnel file, the personnel files of other parties involved and other materials.
- 3) An on-site visit. The EEOC may ask for this to help move the fact-finding process forward. While it can be disruptive to the operations of the company it can save time in lieu of generating documents.

4) Witness information. This is to help the EEOC conduct interviews. The employer is allowed to be present for interviews of management level employees. However, if the interview is with a non-management level employee, the interview can occur without the employer's presence or permission.

During the investigation, the EEOC asks employers to:

- Help identify the easiest ways to gather the information.
- Submit requested documents in a timely manner. This can greatly speed up the conclusion of the investigative process.
- Respond truthfully and accurately to all EEOC requests.
- Let the investigator know if you think the request for information is too broad
- Retain relevant documents.

The EEOC may also call for a fact-finding conference. The goal here is to:

- define the issues
- determine which elements are undisputed
- resolve those issues that can be resolved and
- ascertain whether there is a basis for negotiated settlement of the charge

Employers, parties filing charges and witnesses are required to comply with the EEOC's requests for information. In the event there is not compliance, the EEOC has the authority to issue subpoenas requiring the testimony of witnesses, the production of evidence and access to evidence. If an employer does not comply with the subpoena, the EEOC can then file a federal court complaint requiring cooperation. Note, once the complaint is filed in court, the existence of a federal EEOC sexual harassment investigation becomes public.

When the investigation is completed the EEOC will discuss its findings with either or both parties.

## **Resolution**

There are 3 things that may happen to a charge. It may be dismissed, the EEOC may issue a Cause Determination or there can be Conciliation.

### *Dismissal*

At any point in the investigation the EEOC may dismiss a charge. This occurs where the EEOC does not feel it will find a violation of the law even if it were to continue its investigation. Some cases are even dismissed upon receipt of the charge by the EEOC. If the evidence collected does not show a violation of the law, the EEOC will communicate this to the charging party. After this a notice stating that the case is closed is issued. The charging party has 90 days from the receipt of that notice to file a lawsuit in federal court if they wish to pursue the matter further.

### *Cause Determination*

Where a case has not been settled or dismissed, the EEOC shall issue a determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is

occurring. A letter of determination is then sent to the alleged victim, the employer and a third party if a third party filed the charge.

### *Conciliation*

Once a cause determination has been made the EEOC will encourage the parties to reach a confidential settlement. Remember, the process thus far is confidential as it has not gone before a federal court. Here, the parties know what the evidence is and can hopefully reach a mutually agreeable settlement. If this is unsuccessful, the EEOC will bring the matter before federal court.

### **EEOC Litigation**

Litigation is a last resort. It occurs where the charge was not dismissed, the parties could not reach an agreement and the investigation concluded that there was reasonable cause to believe that an unlawful employment practice occurred or is occurring.

A complaint is then filed with the federal court. The lawsuit is between the EEOC as the U.S. Government acting for the charging party and the employer. The EEOC will seek to prove to the court that the employer violated federal law. The EEOC can represent the individual who made the initial charge or it can also represent an entire class of similarly situated employees even if they did not file. This latter type is called a class action. Once the case is filed in federal court the EEOC will issue a press release. This puts possible witnesses and possible members of the class action on notice that a case is pending in federal court. It also puts the public on notice that the employer is being sued for sexual harassment.

If for any reason the EEOC decides not to sue, the charging party can request a Notice of Right to Sue. This allows the charging party to pursue the case in federal court on their own. They have 90 days from the date they receive this notice to file their case in federal court.

### *Employee Lawsuit*

Simply because the EEOC did not find a violation of law or did not pursue a federal court case does not prevent the employee (or a third party filing on their behalf) from doing so. The only requirement is that a charge must be filed with the EEOC prior to pursuing legal action in federal court.

Once the charging party files suit in federal court, the case becomes public. In the courtroom, the charging party must prove that a violation of federal law did occur. The court is not bound by any previous determinations made by the EEOC and essentially reviews all the information as if it were new. Note, even if the EEOC decided not to pursue a federal case, it may still intervene in a case brought by the charging party.

### **Remedies Available**

When a victim sues in federal court for sexual harassment, they may receive the following:

### *Back Pay or Front Pay*

Back Pay is what the victim would have earned starting from the date they were fired. Front pay is what the victim would have earned if they were reinstated at their job but cannot be reinstated due to the circumstances

### *Compensatory Damages*

This covers compensation for the harms we discussed. It includes money lost, pain and suffering, money you will lose out on, mental distress, etc.

### *Punitive Damages*

These are damages designed solely to punish the employer if the court finds the employer acted with reckless indifference or malice. Under federal law a victim cannot get punitive damages against a federal, state or local government agency.

### *Costs & Fees*

This covers things like court costs and attorney's fees. They are only awarded to the prevailing party, if awarded at all. Therefore, if an alleged victim loses their case, they may potentially have to pay the attorney's fees and court costs of the company. It works both ways.

### *Injunctive Relief*

This type of remedy requires a party to the litigation to either do something or not do something. In the context of a sexual harassment case, the court may order an employer to rehire, promote or transfer an employee. The court may order the employer to conduct sexual harassment education classes for all employees, etc. These are examples and not an exhaustive list.

## **The Division of Labor Standards Enforcement (DLSE)**

Though less well known than DFEH, the DLSE is another agency which also handles complaints for retaliation and discrimination. A complaint must be filed within six months of the adverse action such as unlawful discharge, demotion, suspension, reduction in pay or hours, refusal to hire or promote, or any other action. There are some exceptions to the 6-month deadline, but it is best to file a complaint as soon as possible to ensure that it is timely.

## **Supervisor as the Accused**

If you, as a supervisor, are the person accused of sexual harassment, you must remember that you have a duty to cooperate in the investigation, regardless of whether you believe the allegations to be true or false. You will be expected to answer questions completely and honestly.

You may be asked not to communicate with certain individuals during the course of the investigation. You must remember that you are not to retaliate against the person who made the complaint or against anyone who participates in any way in the investigation. You must treat them in the same fair and even-handed manner you would if no complaint had ever been raised.

Failure to abide by these rules may result in discipline against you, even if the investigation shows that no sexual harassment occurred. Indeed, retaliation against a complainant may violate the law even if the underlying complaint of harassment cannot be substantiated.

You should expect to be asked to confirm or deny each of the specific allegations against you. It is possible that the allegations are gross exaggerations or downright lies, but it is important to remain calm and keep your responses factual. You may be asked to provide any facts that might explain why the complainant would be motivated to exaggerate or fabricate the charges. The investigator might need to talk to you several times while other employees are questioned and information is gathered.

### **Conducting an Effective Investigation**

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action. The investigative process is not an easy one. If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

In the event the person accused of harassment is the supervisor of the person making the claim of harassment, it is paramount that the supervisor be instructed that there can be no retaliation against the claimant.

#### *Questions to Ask Complainant*

When interviewing a person alleging harassment, it is important to handle the situation carefully. For one, you should not speak to the complainant in an accusatory tone. Nor should you act too familiar with them. The interview should be respectful, professional but thorough. It is essential you get all the facts.

At the beginning, start with open ended questions and then proceed to more specific ones. This allows the complainant to communicate a complete version of the facts as they recall them and allows you to ask follow up questions based on what they've told you.

Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?

If the allegation is ongoing harassment, start with the most recent event or occurrence and work backwards.

- Did the alleged harasser threaten you in any way? Physically, professionally, legally, etc.
- Did anyone else in the company retaliate against you? Demotion, firing, threat of firing, etc. Did anyone in the company try to convince you not to pursue the matter?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)? How would you like to see the situation resolved? Do you know of any other relevant information?

#### *Questions to Ask Third Parties*

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

#### *Questions to Ask Alleged Harasser*

It is important not to presume the guilt of the alleged harasser. The interview process is most effective when the person being interviewed senses no bias against them. And you should not have a bias because at this point you do not have all the facts. Here again, ask open ended questions and let the alleged harasser convey their version of the story.

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physicals evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

If the alleged harasser denies allegations...

- Is there a reason why the “complainant” would say this?
- What was your working relationship like?

### *Credibility Assessments*

Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility.

Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party’s testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the factors previously listed are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment does not defeat the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

### *Reaching a Determination*

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. The parties should be informed of the determination.

When a determination is made, it must be reached based on a “preponderance of the evidence.” This is the standard that the EEOC and DFEH will use. Preponderance of the evidence simply means that a majority of the evidence (51% or more) must support the conclusion.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

## **Corrective Action**

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures. A record of these measures should also be entered in the employee's personnel file.

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

### *Examples of Measures to Stop Harassment and Prevent Reoccurrence*

- Oral or written warning or reprimand
- Transfer or reassignment
- Demotion
- Reduction of wages
- Suspension
- Discharge
- Training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and monitoring of harasser to ensure that harassment stops

### *Examples of Measures to Correct the Effects of Harassment*

- Restoration of leave taken because of the harassment
- Deletion of negative evaluation(s) in employee's personnel file that arose from the harassment
- Reinstatement
- Apology by the harasser

- Monitoring treatment of employee to ensure that she/he is not subjected to retaliation by the harasser or others in the work place because of the complaint correction of any other harm caused by the harassment (e.g., compensation for losses)

## Conclusion

### Summary

In this course we defined unlawful sexual harassment along with other terms used throughout this course. Sexual harassment conduct was described and the situations under which that conduct are classified by law – quid pro quo and hostile environment. Strategies for rejecting unwelcomed conduct were presented with outright rejection being the clearest way of saying, “no.”

We took a look at Federal and CA statutory provisions and case law that describe unlawful sexual harassment conduct and the liability that employers have for that conduct. Knowing both federal and CA laws and the employer’s liability and potential remedies under them should encourage employers to take every action possible to prevent sexual harassment in the workplace.

Additionally, both federal as well as CA statutory law and cases relating to employee retaliation complaints were examined and suggestions were offered to help supervisors/managers avoid an allegation of employer retaliation. The course outlined the DFEH complaint process and procedure was explained in detail including information on filing the complaint, the investigation process, what DFEH expects from both the employee and the employer during the investigation, the prosecution process and the remedies and damages available if a violation is found. The course also outlined the specific FEHA actions that employers must take to prevent sexual harassment. How to respond to sexual harassment complaints also was presented including creating a sexual harassment prevention policy that includes the procedures for employees to make complaints and the procedures the employer will use to investigate complaints, fully and effectively investigating and taking prompt and effective corrective action if the harassment allegations are proven.

### Implications

Regardless of your position, from entry-level associate to senior manager, everyone needs to be aware of Sexual Harassment in the workplace. Employees must be able to face their daily responsibilities free of sexual harassment - be it quid pro quo or hostile environment. They should be assured that if they are victimized, they have company policies and procedures to protect and aid them in making a complaint.

There can be hefty costs resulting from absent or inadequate company policies to prevent and address sexual harassment. Your team can suffer loss of productivity, absenteeism, or employee turnover. Members of your department may show signs of frustration, anger, or depression. You could find that your employees are experiencing negative physical results as well including panic attacks, sleeping problems, or nervousness.

Smart Workplaces: Sexual Harassment Prevention for Office Managers & Supervisors,  
California, AB 1825

Employers can avoid these negative outcomes by developing a sexual harassment policy, by developing and implementing a formal complaint process, and by conducting employee and management education in identification, prevention, and resolution of sexual harassment.

## Resources

### Supplemental Documents

[Checklist for Your Policies and Procedures](#)

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