


Sexual Harassment and Abusive Conduct Prevention Training

for Non-Supervisory Personnel

(Compliant with California AB1825 and SB1343)

Presented by
Heffernan Consulting





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- National Certification through the HR Certification Institute (HRCI) as a Senior Professional in Human Resources (SPHR) since 2002
- 25+ years in HR management
- Former President of National Human Resources Association (NHRA) – San Diego Chapter



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Content Disclaimer

The information provided in today's webinar is **not intended to be legal advice.**

We strongly encourage you to seek legal counsel prior to making any significant employment decisions.

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Reminders

- Legally, you must **actively participate** for the full session to receive credit for the training
 - ✓ Participation on polling questions is tracked
 - ✓ Active viewing is tracked
- A certificate of completion will follow
- Responses to unanswered questions will be emailed to you.
- Use the **Q&A box** for questions throughout the webinar.



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Today's Objectives

- Define, recognize and prevent
 - Sexual harassment,
 - Discrimination and
 - Retaliation
- Understand and explain aspects of harassment
 - Federal and state statutory provisions
 - Consequences of harassment and discrimination
 - Complaint process and confidentiality requirements
 - Available remedies to victims of harassment
 - Your role in preventing, handling, and investigating claims
- Provide practical examples!



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“Supervisor” Defined

A person qualifies as a supervisor for purposes of the California Fair Employment and Housing Act (FEHA) if they have the discretion and authority to

- Hire, transfer, promote, assign, reward, discipline, or discharge other employees, or effectively recommend any of these actions;
- Act on the grievances of other employees or to effectively recommend action on grievances; or
- Direct the claimant's daily work activities.



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Discrimination Defined

The act of denying rights, benefits, justice, equitable treatment, or access to facilities available to all others, to an individual or group of people because of their race, age, gender, handicap or other defining characteristic.



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True or False

If you feel comfortable doing so, you should tell the harasser to stop.

T



Laws Prohibiting Harassment

- Federal Title VII
 - Enforced by EEOC
 - Organizations with 15+ employees
 - Employer not automatically liable
 - Does not apply to contractors, volunteers, and unpaid interns
- California Fair Employment and Housing Act (DFEH)
 - Enforced by DFEH
 - All sizes of organizations
 - Employer automatically liable
 - Employer has no defense if harasser is a manager or supervisor
 - Includes contractors, volunteers, and unpaid interns



Harassment Defined



Unwelcome conduct that **denigrates or shows hostility or an aversion** toward another person on the basis of [a] characteristic protected by law.



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True or False

Inappropriate behavior of a sexual nature is only illegal if someone is offended by it.

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Sexual Harassment Defined


- DFEH regulations define sexual harassment as **unwelcome 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.



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True or False

An employer's obligation to conduct an investigation is different if the alleged harasser is a customer.

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Who Might be a Harasser?

- Co-workers
- Managers/Supervisors
- Owners
- Customers
- Vendors
- Independent Contractors
- Interns
- Volunteers
- Any person you come into contact with while performing your job duties



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Legally Protected Characteristics



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Protected by CA Law (DFEH)

- Race
- Color
- Ancestry
- Marital status
- Sex (including pregnancy and related conditions)
- Gender (including gender identity and gender expression)
- Religion (including religious dress and grooming practices)
- Medical condition (including cancer and genetic characteristics)
- Disability –mental and physical (or perceived)
- National origin (including language use restrictions)
- Age (40 and over)
- Citizenship status
- Military service
- Sexual orientation



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Sexual Definitions

- Sexual orientation
 - Who the person is attracted to
- Gender identification
 - Who they feel like they should be (woman/man)
- Gender expression
 - Appearance or behavior, regardless of assigned sex at birth
- Transgender
 - Gender identity is different than assigned sex at birth
 - May take steps to transition, physically and socially



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Types of Illegal Sexual Harassment

There are only 2 types:

- 1) Quid Pro Quo
- 2) Hostile Work Environment



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Quid Pro Quo

- Demanding sexual favors in exchange for employment benefits
 - This for that: "I will hire / promote / recommend you for the position you want... if you will..."
- Demanding sexual favors by threatening negative employment actions
 - When submission to or rejection of sexual conduct is used as the basis for making employment decisions such as promotions, pay increases, hiring, or firing



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True or False

The promise of reward or threat of punishment in exchange for sexual favors must be explicit in order to constitute quid pro quo sexual harassment.

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Hostile Work Environment

- Harassing behavior
 - directed toward the complainant
 - witnessed by the complainant
- Widespread sexual favoritism that infects the workplace, creating a hostile or abusive environment



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Hostile Work Environment

- Verbal
 - Foul or obscene language
 - Derogatory comments
 - Comments about someone's body
- Visual
 - Staring
 - Making sexual gestures
 - Sending graphic emails, texts, or jokes
- Physical
 - Kissing
 - Hugging
 - Impeding or blocking movement



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Hostile Work Environment

- Severe or pervasive
 - Pattern of conduct vs. single incident
- Unreasonably interferes with employee's job performance or creates a hostile working environment
- From a view point of a "reasonable person"
- **The impact matters, not the intention!**



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Harassment?

Adam lightly hugs everyone he meets, including his staff, rather than shakes hands.

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Harassment?

Tom's supervisor, Sofia, implies Tom won't get laid off if he comes over to her place to discuss the matter over a drink. Tom declines and is one of several people selected for the lay-off.



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Harassment?

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Employer Liability

- The company will be liable for harassment by a **non-supervisor** if the harassment:
 - Occurred because of the employee's protected characteristic;
 - Occurred regularly;
 - Affected the complaining employee;
 - Would have affected a reasonable person; and
 - Was known or should have been known by the company.



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Personal Liability


- Employees (supervisors and non-supervisors) can also be personally liable under CA's FEHA
- The harasser can be held personally liable for damages.



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Harassment?

Adrian is dating his manager Suzanna. They can't seem to get enough of each other. They flirt and take breaks & lunch together.

Nothing



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Workplace Bullying

is Abusive Conduct



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Bullying Defined

- “Abusive conduct” means 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 is usually repeated infliction of verbal or physical abuse.

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



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Examples of Abusive Conduct

- Humiliation
- Intimidation
- Hazing
- Teasing
- Name calling
- Snubbing
- Pushing/shoving
- Taunting
- Ridiculing
- Intentional sabotage



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True or False

It is required that employees follow the “chain of command” when making complaints of harassment.

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No Independent Cause of Action

Abusive conduct: “bullying” in and of itself is not a violation of the FEHA unless it can be shown to have been substantially motivated by a protected characteristic.



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Adverse Action NOT Required

- The complainant does not have to have a tangible economic loss or other adverse employment action.
- The crux of a harassment claim is the assault on the complainant's personal sense of dignity and well-being.



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True or False

If an employee requests to speak “off the record” to a supervisor about harassment, the supervisor is not required to report it.

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Cost of a Harassment Claim

- According to *Time* magazine:
“California is the most litigious state in one of the most lawsuit-crazy nations in the world.”
- 1.5+ million civil suits are filed in CA every year
 - Lawyers earn upwards of \$17 billion annually in legal fees
- Average jury verdict for sexual harassment claims is \$1 million



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Possible Remedies

- Lost wages and benefits (past and future)
- Compensatory damages for emotional distress
- Punitive damages to punish the wrongdoer(s)
- Reinstatement or promotion, if related
- Attorney's fees
- Court-ordered policy changes and training



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Anti-Harassment Policy

- Clear and easy to understand written policy
 - Translated if 10% speak another language at work
 - Complaint process
 - Prohibits retaliation
- Distributed and discussed on regular basis
- Prompt and fair remedial action
- Management as role models
- Training for all employees



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Training

- All companies with 5+ employees
 - Every employee must be trained within 2019
 - Within 6 months of hire or promotion into supervisory
 - Repeated every 2 years
- Supervisory staff
 - 2-Hours mandatory
- Non-supervisory employees
 - 1-Hour mandatory
- Temps and seasonal employees
 - Within 30 days or 100 hours of work



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True or False?

If a charge is denied, a claim for sexual harassment cannot be successful without a neutral witness or documentary evidence.

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Scenario

Carl has been a manager for the Company for 5 years. Carl approaches another manager, Terry, and tells him that she identifies as a transgender woman and is beginning the process of transitioning at work. From now on, Carl would like to be called Kay, will be wearing clothing consistent with an identity as a woman, and prefers the use of feminine pronouns.



As the weeks pass, Kay's coworkers become accustomed to her new name and appearance, but some of them inadvertently refer to Kay as "Carl" and use the masculine pronoun "he," especially when telling stories about things that happened before Kay's transition. Usually, the coworkers quickly correct themselves when this happens. Terry, however, pointedly says "good morning, Carl," when Kay passes by, and makes comments like "nice dress, dude."

Kay, embarrassed, says nothing to Terry or anyone else about these comments for months.



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Scenario Options

- A. Kay should keep her head down and try to focus on work. Not everyone is going to be comfortable with her gender transition and she should expect some negative comments and remarks.
- B. Kay has a claim for discrimination and harassment because of gender identity and gender expression against the Company because of Terry's treatment of her, as well as because of her coworkers' occasional use of the wrong name and pronoun.
- C. **Kay has a claim against Terry and the Company because of Terry's negative comments and purposeful, repeated use of the wrong name and pronouns. Her coworkers' occasional and accidental mistakes are not harassment.**

C



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True or False

If I joke around or tease someone using derogatory comments, but it's all in fun, it is not harassment.

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True or False

Sexual desire is a key element to any claim for sexual harassment.

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Harassment?

Amy claims Bill stops working and watches her each time she leaves or enters the workspace they share with others.

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Harassment?

Samuel, a gay sales rep is subjected to jokes about his sexual orientation while at a client dinner.

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True or False

The Company must investigate potential harassment based on hearsay and rumors.

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Your Questions?



Please email questions to: Training@HRjungle.com

