

Sexual Harassment and Abusive Conduct Prevention Training

for Supervisory Personnel

(Compliant with California AB1825 and SB1343)

Presented by

Heffernan Consulting



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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.

The written and verbal contents of the presentation are not intended to constitute consulting and/or advice and no client relationship is established between the presenter and attendees.



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Agenda

During this training we will:

1. Introduce the history that brings this issue to the forefront of employment laws.
2. Review the elements of sexual harassment and the remedies available to victims of sexual harassment under both California and federal laws.
3. Discuss other forms of unlawful harassment.
4. Address concerns regarding abusive conduct in the workplace.
5. Consider strategies for preventing and responding to unlawful harassment.



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- | | |
|--|-------|
| 1. Individuals can be personally liable for sexual harassment. | TRUE |
| 2. Volunteers and unpaid Interns are not protected against sexual harassment in California. | FALSE |
| 3. Sexual Harassment only occurs if a female is harassed by a male boss. | FALSE |
| 4. Sexual desire is a key element to any claim for sexual harassment. | FALSE |
| 5. An employee can file a claim for sexual harassment even if the supervisor took no adverse employment action (e.g., termination, failure to hire, demotion), against the employee. | TRUE |
| 6. An employee can only file a harassment claim if they experienced economic loss or other adverse employment action. | FALSE |
| 7. In California, if the employee does not take advantage of the established internal complaint process, the employer has a complete defense to a sexual harassment lawsuit. | FALSE |
| 8. California mirrors federal laws regarding harassment in the workplace. | FALSE |

True/False Quiz – Polling Questions 1-8



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Why do we have to do this training?

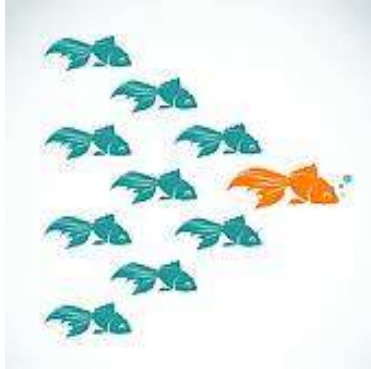
- Department of Fair Employment & Housing - www.dfeh.ca.gov
- Equal Employment Opportunity Commission – www.eeoc.gov
- Penalties for non-compliance
- Advantages of Compliance



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Supervisors



- Anita Hill testifies against US Supreme Court nominee Clarence Thomas • 1964
- #MeToo movement exposes sexual harassment practices prevalent in the entertainment industry • 1975
- Sexual discrimination is made illegal • 1986
- “Sexual Harassment” is recognized by the supreme court as a form of sexual discrimination? • 1991
- Supreme Court declares that same-sex harassment is unlawful at work • 1998
- The first sexual harassment case came to court • 2018

History Quiz: Match the year to the event using your Chat box



Two Forms of Sexual Harassment

Sexual harassment is defined by case law in two ways:

1. **Quid Pro Quo**
 - A. Demanding sexual favors in exchange for employment benefits
 - B. Demanding sexual favors by threatening negative employment actions;
OR
2. **Hostile Work Environment**
 - A. Harassing behavior directed toward the complainant
 - B. Harassing behavior witnessed by the complainant
 - C. Widespread sexual favoritism that infects the workplace creating a hostile or abusive environment



1. 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.
2. An employee who gives in to the demand for sex in order to avoid negative consequences forfeits his or her claim for quid pro quo sexual harassment.
3. If the alleged harasser denies the charge, a claim for sexual harassment cannot be successful without a neutral witness or documentary evidence supporting the complainant's accusations.

FALSE
FALSE
FALSE

Quid Pro Quo Quiz – Polling Questions 9-11



Quid Pro Quo Scenario Exercise – Poll #12

Blanche is new on the job and is in training on product knowledge. She is having some challenges grasping the concepts behind which components of the products are interchangeable and which are not. She asks her supervisor, Daniel, for some help and he suggests that they go out to dinner where he can take his time to teach her what she needs to know. Blanche is uncomfortable with this suggestion but agrees anyway. During dinner Daniel takes Blanche by the hand and tells her not to worry about her product knowledge as she will eventually learn it and if she hooks up with him he will cover for her at work.

IS Quid Pro Quo



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Quid Pro Quo Scenario Exercise – Poll #13

Kim and Nicholas are co-workers in the same department. Their boss, Anna, has an unpredictable nature and Kim and Nicholas frequently have lunch out together to talk about Anna's "mood of the day". After several months of these lunches, Nicholas admits to Kim that he is interested in a more romantic relationship with her. Kim declines Nicholas' request and as a result Nicholas stops having lunch with Kim, although they still work well together on the job.

IS NOT Quid Pro Quo



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Hostile Work Environment Quiz – Polls #14-15

1. To prove hostile work environment sexual harassment, the complaining party does not need to show that they suffered an adverse employment action.
2. To prove hostile work environment sexual harassment, the complaining party must show that they were subjected to unwanted sexual attention that was both severe and pervasive.

TRUE
FALSE



Verbal Hostile Work Environment

- Foul or obscene language
- Derogatory comments
- Explicit discussions about sexual activities
- Comments about other people's physical attributes



Visual Hostile Work Environment

- Leering
- Staring
- Making sexual gestures
- Displaying sexually explicit objects, pictures, cartoons, graffiti, or posters
- Sending graphic emails, text messages, or jokes



Physical Hostile Work Environment

- Kissing
- Hugging
- Grabbing
- Impeding or blocking movement
- Assault



Hostile Work Environment Scenario Exercises:

Verbal? – Visual? – Physical? – None? – Use your Chat Box

- Jackson starts a new job and notices that he is the only non-white person in the company. He is excluded from friendly discussions and when he tries to join, co-workers speak slower to him as if he doesn't understand English and ask him what "his people" think about things. **VERBAL**
- Mazie alleges that while working as a lifeguard, male supervisors groped her and other female lifeguards, and entered their locker room without knocking. **PHYSICAL**
- Regina's co-worker, Aaron, often poured out his relationship woes to her. During these conversations, he would touch her elbow. Sometimes, he called her at home to complain about his failed romantic relationships. **NONE**
- Every time Chris walks past Pat's desk, she makes gestures that suggest oral sex. **VISUAL**



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Abusive Conduct

Conduct in the workplace that a reasonable person would find

- Hostile
- offensive
- unrelated to an employer's legitimate business interests

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



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Employer Defenses

- Denial
- Welcomeness
- Reasonable Person
- Failure to Mitigate Damages
- Avoidable Consequences



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Avoidable Consequences Example

Christina alleged that she was sexually harassed by her Supervisor, Robert, over the course of a year. After a year, Christina told a co-worker, Max, about her supervisor's behavior but she did not formally report it to management until a year after telling Max. When Christina finally did complain her employer investigated Christina's allegations and determined that Robert had, in fact, violated the employer's sexual harassment policy. Robert was disciplined and eventually retired as a result of the findings. Christina subsequently sued Robert and her employer for, among other things, sexual harassment in violation anti-discrimination law, the Fair Employment and Housing Act ("FEHA"). Her employer asserted various affirmative defenses, including the argument that Christina's failure to promptly invoke the employer's anti-harassment policies and procedures provided it with a complete defense to her claim.



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Federal TITLE VII California FEHA

- Negligence theory only [Employer not automatically liable].
 - Employer not liable if:
 - Employer exercised reasonable care; and
 - Employee unreasonably failed to take advantage of opportunities to avoid harm.
 - 15 employees or more.
 - No application to independent contractors, volunteers and unpaid interns.
- Strict liability [Employer automatically liable for harassment by managers and supervisors].
 - Employer has no defense if manager or supervisor is harasser.
 - All employers, even those employing one person or sole proprietors.
 - Includes independent contractors, volunteers and unpaid interns.



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California

1. Race
2. Color
3. National Origin
 - Ancestry
4. Citizenship
5. Gender
 - Gender Expression
 - Gender Identity
 - Sexual Orientation
 - Genetic Characteristics
6. Religious Creed
7. Physical Disability
 - Mental Disability
 - Medical Condition
8. Age (over 40)
 - Military/Veteran Status
 - Familial Status
 - Natural Hair

Use your Chat Box to name the 18 protected bases for employment discrimination, harassment and retaliation



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SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND TRANSGENDER

- Sexual Orientation ¹
 - Heterosexuality, homosexuality, and bisexuality
- Gender identity ²
 - A person's internal understanding of their gender, or the perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender.
- Gender expression ²
 - A person's gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person's sex assigned at birth.
- Transgender ²
 - A person whose gender identity differs from the person's sex assigned 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."

¹ https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/03/Attach-K_WorkDraftGovCodeSec11135setseq.pdf

² <https://www.dfeh.ca.gov/legalrecords/?content=law#law>



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Best-Practices for Employers and Supervisors

- Know the Codes
- Leadership/Culture
- Policies
- Training
- Investigations
- Protocol for when a supervisor is accused
- Recordkeeping
- Why Now?



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Mini-Quiz – Polls #16-17

1. The DFEH can seek injunctive relief to compel employers to take all reasonable steps to prevent unlawful discrimination without proving an underlying violation of the FEHA.
2. The employer's duty to take immediate, effective action in response to a claim of sexual harassment only applies where there is a credible report or threat of unwanted physical contact.

FALSE TRUE



Know the Codes

- California Government Code 12940(j)(1)
- California Government Code 12940(j)(4)(A)
- California Government Code 12940(j)(4)(C)
- California Government Code 12940(k)
- California Code of Regulations 2 CCR 11203



California Government Code 12940 (j)(1) quiz

- Which of the following are not protected under the code:
 - A. Outsourced Bookkeeper
 - B. Someone that walks in unannounced looking for a job
 - C. Paid Interns
 - D. IRS Auditor conducting an audit
 - E. All of the above are protected under the code



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California Government Code 12940 (j)(4)(A) quiz – Poll #18

If you are a sole proprietor with no employees, you are not considered an employer

FALSE



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California Government Code 12940 (j)(4)(C) quiz

- Which of the following is not a type of harassment under the code:
 - A. Gender harassment
 - B. Performance based harassment
 - C. Medical condition harassment
 - D. Sexual harassment
 - E. All of the above are types of harassment under the code



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Leadership/Culture



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Policies

- (1) defines sexual harassment and discrimination
- (2) prohibits such conduct
- (3) provides a complaint and investigation procedure



Training

- Implicit bias training
- Interaction with certain groups
- Bystander intervention



Implicit Bias Training

- Why is it that so few people (only about 30 percent, [according to the EEOC](#)) report sexual harassment when it happens?
- Why is it that an unequal power dynamic so often exists between a harasser and victim?
- Why might we let certain people off the hook for harassment, but not others?



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Types of Implicit Bias

- **Affinity bias**
- **Confirmation bias**
- **Halo effect**
- **Perception bias**
- **Bandwagon bias**



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Interaction with certain groups



Bystander Intervention



TRAINING OPPORTUNITY Exercise – Poll #19

Josh is the HR Manager in charge of hiring at his organization. The last three people Josh has hired into executive positions have been people he has known through his Synagogue. Because he is friends with these people, he often socializes with them at lunch and after work. Ian, who has worked with the company for a number of years, lodges a complaint that he is being deliberately excluded from social functions because he is not Jewish. Which type of training may be good for this organization?

Implicit Bias Training



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TRAINING OPPORTUNITY Exercise – Poll #20

Kelly has an office next door to the lunch room and often overhears her co-workers conversations. She often hears her boss, Margarita, teasing a particular co-worker, Adam, about sexual things she would like to do with him if she was ten years younger. Adam walks away and rolls his eyes at Kelly as he passes her office. Kelly returns the eye roll and goes back to work. This behavior persists for a number of months until Adam quits working for the company and files a sexual harassment claim. Which type of training may be good for this organization?

Bystander Intervention Training



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Investigations

- Conduct a thorough interview with the complaining party.
- Give the accused party a chance to share their perspective of the events.
- Interview relevant witnesses.
- Obtain all relevant documents.
- Investigate all relevant avenues applicable to the allegations.
- Reach a reasonable and fair conclusion based on the facts.



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- | | |
|--|-------|
| 1. Be prompt and thorough | DO |
| 2. Use a Licensed investigator | DO |
| 3. Hire an outsourced HR professional | DON'T |
| 4. Punish the complaining party | DON'T |
| 5. Follow your policies | DO |
| 6. Delay responding to a complaint | DON'T |
| 7. Interview witnesses identified by the accused | DO |
| 8. Document every step of the investigation | DO |

Investigation do's and don'ts Quiz – Use your Chat Box



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Protocol for when a Supervisor is accused



Recordkeeping

1. Keep training records.
2. Keep materials readily available in multiple formats



Why Now?



EEOC Report Findings

- Forty-five percent of the EEOC's harassment claims were sex-based
- At least twenty-five percent of women experience sexual harassment in the workplace.
- Seventy-five percent of harassment victims experienced retaliation when they reported it.
- At least eighty-seven percent of employees experiencing harassment do not file a formal complaint.
- Sexual harassment costs companies millions.



- Homogenous workforce
- Workplaces where some employees do not conform to workplace norms
- Cultural and language differences in the workplace
- Coarsened Social Discourse Outside the workplace
- Young workforces
- Workplaces with “high value” employees
- Workplaces with significant power disparities
- Workplaces that rely on customer service or client satisfaction
- Workplaces where work is monotonous or tasks are low-intensity
- Isolated workplaces
- Workplaces that tolerate or encourage alcohol consumption
- Decentralized workplaces

EEOC risk factors



Lessons Learned from Harvey Weinstein

- Victims of h
 - Fear of ta
 - Fear of be
 - Profession
 - Fear of no
 - Fear that
 - Believing
 - with the h
- The Solution
 - Creating a
 - harasme



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EEOC Report Recommendations

Leadership and Accountability are Critical



In the News



True/False REPEAT

1. Individuals can be personally liable for sexual harassment. **TRUE**
2. Volunteers and unpaid Interns are not protected against sexual harassment in California. **FALSE**
3. Sexual Harassment only occurs if a female is harassed by a male boss. **FALSE**
4. Sexual desire is a key element to any claim for sexual harassment. **FALSE**
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