

#MeToo2.0: A Guide to Help Navigate New Workplace Harassment Laws

League of California Cities Annual Conference | October 17, 2019

Presented by: J. Scott Tiedemann

LCW LIEBERT CASSIDY WHITMORE



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Agenda

- #MeToo Movement
- California Legislative Changes in Response to #MeToo
- Navigating the Workplace in Response to #MeToo and the FEHA Amendments
- “Rebooting” Workplace Culture

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#MeToo Movement

- 2006: Tarana Burke coins the phrase “Me Too”
- Fall 2017
 - Ashley Judd accuses Harvey Weinstein in The New York Times
 - Alyssa Milano reignites “Me Too” with a tweet
 - Accusations of sexual misconduct against other famous individuals are reported
 - Time magazine names the “Silence Breakers” its 2017 Person of the Year

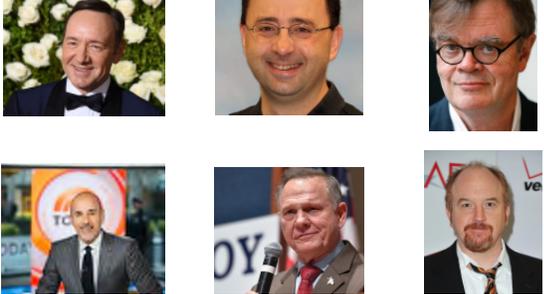
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#MeToo Movement



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#MeToo Movement

- 2018
 - January: Over one million nationwide took to the streets in Women’s March
 - February: Weinstein is sued by several women
 - March: #MeToo and Times Up dominate the Oscars
 - May : Weinstein is criminally charged
 - September: Sexual misconduct claims against U.S. Supreme Court nominee Brett Kavanaugh
 - *Many more high-profile individuals are accused*

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Why Now? Why Never Before?



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California Legislature Responds

"Introduced in response to the #MeToo movement, Senator Hannah-Beth Jackson's (D-Santa Barbara) legislation to fight sexual harassment in the workplace passed off the Senate floor today and now heads to the Governor. Senate Bill 1300 closes loopholes in the law that discourage or prevent victims from speaking out, allow employers to avoid sexual harassment and discrimination laws, and leave employees vulnerable to sexual harassment at work."

Sen. Jackson Press Release
August 31, 2018

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California Legislature Responds

"Secret settlements in sexual assault and related cases can jeopardize the public — including other potential victims — and allow perpetrators to escape justice just because they have the money to pay the cost of the settlements... This bill will ensure that sexual predators can be held accountable for their actions and ideally prevent them from victimizing others."

Sen. Connie Leyva (D-Chino) as quoted
in the LA Times, 10/19/2017

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New California Laws

- Effective January 1, 2019
 - SB 1300 – Amends and adds to FEHA
 - Government Code §12950.1 (SB 1343) – Training
 - Cal. Code Civ. Pro. §1001 (SB 820) – Settlement Agreements
 - Cal. Civil Code §1670.11 (AB 3109) – Settlement Agreements/Contracts
 - Civil Code §51.9 (SB 224) – Unruh Act
 - Cal. Code Civ. Pro. §340.16 (AB 1619) – Sexual Assault
 - Labor Code §1031 (AB 1976) – Lactation Accommodation

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Gov't Code Section 12923

- Sets forth Legislature's "declaration of intent" regarding harassment laws in California
- Broadens scope of harassment claims that will violate the FEHA

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Gov't Code Section 12923 – Case Study

Richard made an off-hand, offensive comment to a gay employee twice over the course of a calendar year. The employee sued for sexual orientation harassment.

Sufficient basis for a harassment lawsuit?

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Gov't Code Section 12923

- Pre-2019
 - Harassing conduct must be severe or pervasive
 - "Severe or pervasive" = conduct that alters the conditions of employment considering:
 - The nature of the conduct;
 - **How often, and over what period of time, the conduct occurred**
 - **The circumstances under which the conduct occurred**
 - Whether the conduct was physically threatening or humiliating; and
 - The extent to which the conduct unreasonably interfered with an employee's work performance.

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Gov't Code Section 12923

- Post-2019
 - Legislature declares that harassment creates a hostile work environment
 - A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment
 - Courts should not consider what type of conduct is sufficiently severe or pervasive to constitute violation of FEHA
 - Rejecting *Brooks v. City of San Mateo* (2000) 229 F.3d 917 (9th Cir.)

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Gov't Code Section 12923

A co-worker tells Sheila, who is 50 years old, that she is "obsolete". A supervisor from a different department overhears the comment, and says that Sheila probably has an 8-track in her car. Sheila is terminated months later, sues and points to the comments as evidence of age discrimination. The City argues the comments are not admissible at trial because they were made by non-decision makers and not related to the termination.

Are the statements admissible?

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Gov't Code Section 12923

- Pre-2019
 - Some California courts held that "an isolated remark by a person not involved in the adverse employment action" is not sufficient to withstand summary judgment
 - *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147;
 - *Horn v. Chushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798
- Post-2019
 - A discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non decisionmaker, may be relevant, circumstantial evidence of discrimination
 - The "stray remark" doctrine is officially rejected

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Gov't Code Section 12923

A police detective assigned to sex crimes complained of harassment after overhearing co-workers frequently making sexist jokes and discussing their sexual experiences while working on cases. The City argues that detectives in that assignment deal with sexually explicit materials and engage in sexual talk in connection with their cases and to relieve stress.

Good argument?

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Gov't Code Section 12923

- Pre-2019
 - Circumstances pertaining to the type of work and job duties of the victim are properly considered in a harassment case
 - *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264
- Post-2019
 - The legal standard for sexual harassment should not vary by type of workplace
 - Irrelevant that a particular occupation exposed the victim to greater frequency of sexual comments or conduct
 - Courts should only consider nature of workplace if prurient comments/conduct are "integral" to the performance of the job duties

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Gov't Code Section 12923

Sarah claims that she was sexually harassed in the workplace. The employer has evidence that despite her complaints, there was no evidence that Sarah missed work, no evidence that her productivity declined and no evidence that her performance suffered in any way.

Does this matter?

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Gov't Code Section 12923

- Pre-2019
 - A victim alleging harassment must show he/she was "harmed"
 - "Harm" not well defined, but some courts would look for evidence of tangible harm
- Post-2019
 - Employee need not prove tangible productivity has declined
 - Only need to show a reasonable person would find harassment made it more difficult to do the job
 - "Harm" can constitute disrupting the victim's emotional tranquility or interfere with and undermine victim's sense of well-being

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Gov't Code Section 12923

LCW files a summary judgment to dispose of a harassment claim on the grounds that the harassment only occurred twice over a two-year period, that the victim was not offended by the conduct and that the alleged harassing comments did not impact Plaintiff's workplace.

What are the odds?

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Settlement Agreements

An employees sues for harassment and the City settles the claim. The settlement states that the employee will not disparage the City or disclose information about the harassment. The settlement also requires the claimant to release all claims against the City.

Is this valid?

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Settlement Agreements

- Pre-2019
 - Valid and common
- Post-2019
 - The same as long as the provisions are contained in a “negotiated” settlement agreement to resolve an underlying complaint filed in court, before an administrative agency, or through the employer’s internal complaint process
 - “Negotiated” means voluntary, deliberate, informed, provides consideration and claimant advised of notice of right to consult an attorney

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Settlement Agreements

After an employee files a lawsuit for sexual harassment, the City settles the lawsuit. Concerned about bad publicity and embarrassment, the City places a confidentiality clause in the agreement.

Is this valid?

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Settlement Agreements

Cal. Code of Civ. Pro. §1001 (SB 820)

- Pre-2019
 - The confidentiality clause would not be impermissible, but of limited value, due to Public Records Act request, or other legal process

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Settlement Agreements

Cal. Code of Civ. Pro. §1001 (SB 820)

- Post-2019
 - A provision within a settlement agreement that prevents disclosure of factual information prohibited regarding the following types of claims or actions:
 - Sexual assault
 - Workplace harassment or discrimination based on sex
 - Failure to prevent workplace harassment or discrimination based on sex
 - Retaliation for reporting harassment/discrimination based on sex

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Cal. Civil Code §51.9

Employees accuse an elected Councilmember of harassment. The employee sues the City and the City contends that it cannot be liable because the Councilmember is not an employee of the City.

Will this defense be successful?

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Training: True or False

- Your agency only employs 45 full-time staff members. The agency provided its supervisors with training on sexual harassment in December 2018.
 - True or False: *Because your agency employs less than 50 people, it has no legally-required training obligations for non-supervisory employees.*
 - True or False: *Because your agency provided supervisory employees with training in December 2018, it does not need to provide the next training until December 2020.*

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Sexual Harassment Training - Gov't Code §12950.1

Changes to sexual harassment training requirements:

- Applies to employers with 5 or more employees (including temporary or seasonal employees)
- At least 2 hours of sexual harassment training (same content as before) to all supervisory employees
 - All supervisory employees must receive training within 6 months of hire
- At least one hour of sexual harassment training (mostly same content) to all nonsupervisory employees by January 1, 2021, and once every 2 years thereafter
- DFEH to develop online courses
- If compliant training provided in 2019, refresher training not needed until 2021

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Sexual Harassment Training - Gov't Code §12950.1

- Beginning January 1, 2020
 - Training must be given to seasonal and temporary employees, or any employee that is hired to work for less than six months
 - Training must be provided within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first.
 - If temporary employee came from a temporary services employer, the training shall be provided by the temporary services employer

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Optional Training - Gov't Code §12950.2

- Optional training
 - Employer may now provide "bystander" intervention training
 - Includes information/guidance on
 - How to enable bystanders to recognize potential problematic behavior
 - Motivate bystanders to take action
 - Advise of resources that can support intervention

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What Can Agencies Expect?

- Potential impact for agencies
 - Increased amount of harassment lawsuits
 - Increased training and need to track training
 - Need to audit and revise applicable policies
 - Training/education of elected officials
 - New litigation strategies
 - More cases may go to trial
 - More focus on early settlement

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Navigating the Workplace in Response to #MeToo

Culture of Intolerance Toward Harassment

- Take a hard look inside your agency
- Encourage transparency and open dialogues
 - Understand workplace culture and any communication gaps
 - Do not foster a culture of harassment
- Encourage employees not to turn a blind eye with they observe harassment
- Management employees should speak out when they hear inappropriate remarks or witness harassing conduct

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Internal Changes: Policies

- Ensure anti-harassment and discrimination policies are up to date
 - Policies should already prohibit *any* offensive conduct, even one instance
 - Increasing discipline for violations of policy?
 - Mandatory letter of counseling for violations?
 - May want to review the wording of legislative intent and incorporate into policy

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Internal Changes: Training

- Train employees on the policies in accordance with the FEHA amendments.
 - Smaller agencies now likely covered (5 employees)
 - Non-supervisory training required
 - Increased record keeping and tracking
 - Further emphasis on proof of attendance
 - Seasonal/temporary training must happen quickly
 - If temporary service agency, make sure they are complying with training laws

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Internal Changes: Investigation & Supervision

- Supervision
 - Must take all complaints seriously, even if one instance reported
 - Must ensure internal complaint process works efficiently
 - Exercise vigilance in preventing stray remarks
 - Emphasize supervisor reporting requirements, even if conduct is not within chain of command
 - Remember definition of "supervisor" more expansive under FEHA

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“Rebooting” Workplace Culture

- Heightened awareness of their interactions with colleagues
 - Fear accusation of harassment
- Explore positive reinforcement to help create a healthy, stress-free workplace
 - Encourage open communications and open door policies
 - Build trust among employees and management
 - Foster an inclusive and collegial culture.
- Be open to having conversation with employees that may be uncomfortable at times but that allows employees to share honestly and enables employers to address concerns in the post #MeToo workplace.

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The Ultimate Goal is to Establish a Workplace Defined By Courtesy, Sensitivity, and Respect

Thank You!

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