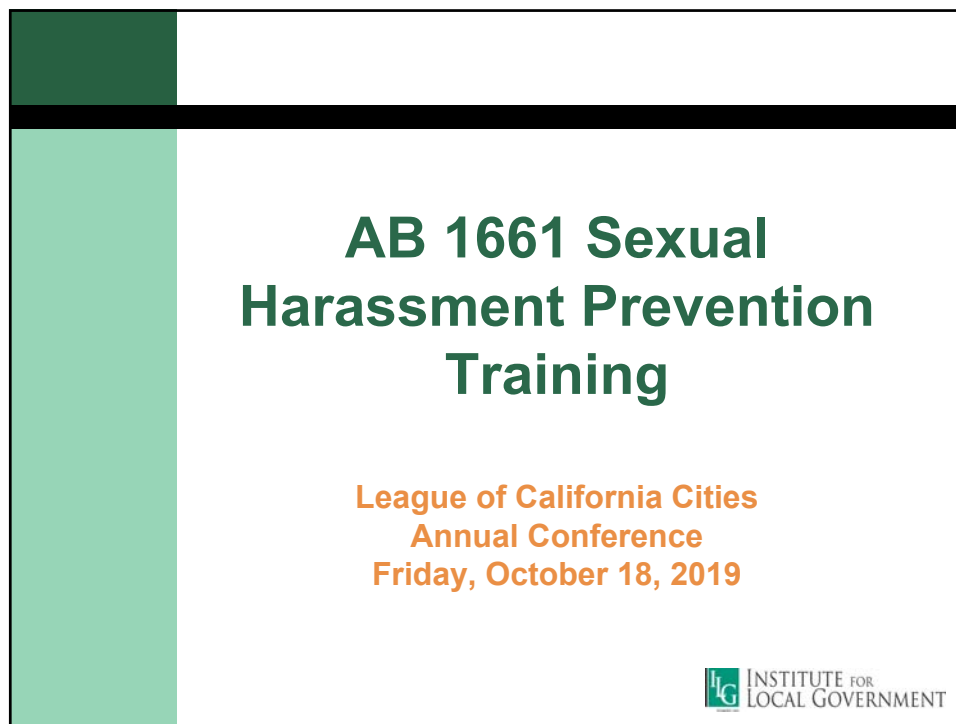


# AB 1661 Sexual Harassment Prevention Training


League of California Cities Annual Conference | October 18, 2019

Presented by: Christopher S. Frederick



**AB 1661 Sexual Harassment Prevention Training**

League of California Cities  
Annual Conference  
Friday, October 18, 2019

 INSTITUTE FOR LOCAL GOVERNMENT



## About the Institute for Local Government

ILG is the non-profit training and education affiliate of...



-  CSAC
-  LEAGUE OF CALIFORNIA CITIES<sup>SM</sup>
-  California Special Districts Association  
DSDA  
Districts Stronger Together

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## What does ILG do?

*Promoting good government at the local level*

**Program Areas**

- Leadership & Governance
- Sustainable Communities
- Public Engagement
- Youth & Civics Education



**Services**


- Education & Training
- Technical Assistance
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# AB 1661 Sexual Harassment Prevention Training

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## Agenda

- Overview of Laws and Policies Related to Discrimination, Harassment, and Retaliation
- Protected Classifications and Bullying/Abusive Conduct in the Workplace
- What is Unlawful Discrimination, Harassment, and Retaliation?
- Types of Unlawful Harassment
- Duties of a Supervisor
- Addressing Unlawful Discrimination, Harassment, and Retaliation in the Workplace

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## Preventing Workplace Discrimination, Harassment and Retaliation Training

# Why Are We Here Doing This Training?

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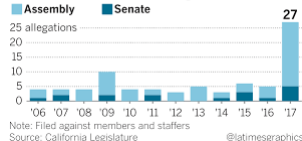
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## Unlawful Harassment Unfortunately Still Takes Place....

Fox News settles sexual harassment allegations  
against Bill O'Reilly



Sexual harassment allegations



**56 Uber workers to split \$1.9M  
sexual harassment settlement**

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## Preventing Workplace Discrimination, Harassment and Retaliation Training

# Should You Want To Be at This Training?

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## Preventing Workplace Discrimination, Harassment and Retaliation Training

# So, What Do We Need to Know? & What Can We Do to Prevent It?

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## Overview of Laws and Policies Related to Discrimination, Harassment, and Retaliation

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### Sources of Law

- **Federal Law**

- Equal Pay Act of 1963
- Title VII of the 1964 Civil Rights Act
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- 42 U.S.C. §§ 1981 and 1983

- **California Law**

- Fair Employment and Housing Act (FEHA)
- California Equal Pay Act

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### Administrative Agencies

- **U.S. Equal Employment Opportunity Commission (EEOC)**

- Federal Agency Administering Title VII, ADA, and ADEA Employment Discrimination Laws

- **California Department of Fair Employment and Housing (DFEH)**

- State Agency Administering FEHA Employment Discrimination Laws

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## Agency Policy

- The Agency's Policy Against Harassment, Discrimination and Retaliation
  - Prohibits employees and non-employees from discriminating, harassing and retaliating based on any protected status
  - Protects applicants, volunteers, independent contractors and employees from being subject to prohibited conduct
  - Provides a complaint procedure for employees to report violations for the Agency to Investigate
  - Identifies DFEH/EEOC resources
  - Provides confidentiality to extent possible
  - Appropriate remedies for sustained violations

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## Agency Policy

- Zero Tolerance
  - Single violation of Agency's policy can subject employee to appropriate disciplinary action even if violation would not establish liability or be a violation of state/federal law
- Distribution of Policy
  - Review with and provide to new and current employees with acknowledgement form to ensure receipt
  - Post in the workplace/intranet
  - Update policy when appropriate and notify employees of update

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## Protected Classifications and Bullying/Abusive Conduct

### Unlawful Harassment?

**What is Unlawful  
Harassment?**

**Is There Such a Thing as  
Lawful Harassment?**

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## Protected Classifications

- Sex/Gender/Gender Identity/Gender Expression
- Sexual Orientation
- Race/National Origin/Color
- Disability/Medical Condition
- Genetic Information/Characteristics
- Religious Creed
- Marital Status
- Military/Veteran Status
- Age (40 Years of Age and Older)
- Opposition to Discrimination/Harassment
- Association/Perception

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## Gender Identity / Expression

### Employers **Must:**

- Permit employees to use the restroom that corresponds to the employee's gender identity/expression.
- Refer to employees using the employee's preferred name, gender, and pronouns.

### Employers **Must Not:**

- Enforce dress codes more harshly against an employee based on their gender identity/expression.
- Discriminate against an applicant for failing to designate a gender or designating a gender that is inconsistent with the applicant's sex assigned at birth.
- Inquire about or require documentation or proof of an individual's sex or gender.

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### Bullying/Abusive Conduct?

## What About Bullying and Abusive Conduct in the Workplace?



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### Bullying/Abusive Conduct is Improper in the Workplace

- “Bullying/Abusive Conduct”
  - Conduct in the Workplace with Malice that a Reasonable Person Would Find Hostile, Offensive, and Unrelated to an Employer’s Legitimate Business Interests
  - Includes Verbal Abuse, Derogatory Remarks/Insults, Threatening/Intimidating/Humiliating Physical or Verbal Conduct, or Undermining of a Person’s Work Performance
- Bullying/Abusive Conduct Issues are Generally Covered by the Agency’s Standards of Conduct Rules and Such Rules Should Be Enforced

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## Bullying v. Unlawful Harassment

- Both Unlawful Harassment and Bullying Consist of Offensive Conduct that is Either Pervasive or Severe, and Thus Goes Beyond Mere Incivility...

**So, What's the Difference?**

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## Bullying v. Unlawful Harassment

**Protected  
Classification**

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### Difference Between Unlawful Harassment and Bullying

- Unlawful Harassment is Directed at Membership in a Protected Classification
  - Therefore, it is Unlawful
- Bullying is **NOT** Necessarily Directed at Membership in a Protected Classification
  - Therefore, Bullying is **NOT** Unlawful
- **While Not Necessarily Unlawful, Bullying/Abusive Conduct Towards Employees in the Workplace is Entirely Inappropriate and Should Not Be Tolerated**



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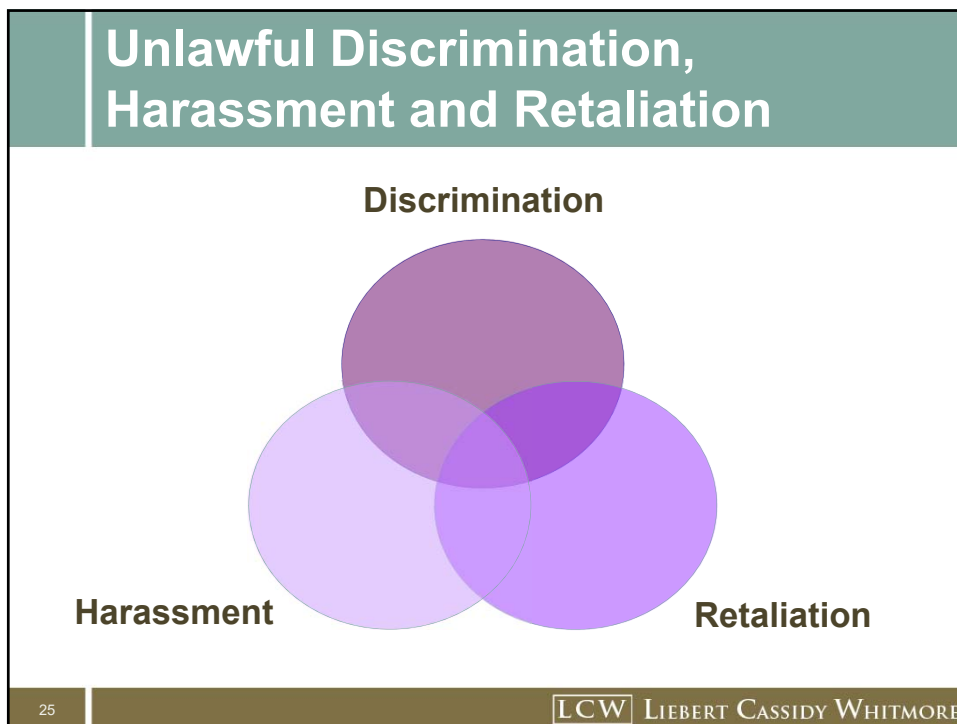
## What is Unlawful Discrimination, Harassment, and Retaliation?

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## Unlawful Discrimination

### Elements of Unlawful Discrimination

- An Adverse Employment Action Taken Based on a Protected Classification

### Adverse Employment Action =

- Action Taken Within the Course and Scope of Employment
  - Hiring, Firing, Demotion, Failure to Promote, Assignment of Job Duties, etc.

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### Unlawful Harassment

- Harassment is **NOT** Within the Course and Scope of Employment
- Verbal, Visual, or Physical Actions That Are Unwelcome and Directed to or Related to an Employee's Protected Classification
- Includes Actions By/Towards Employees, Independent Contractors, Vendors, and Other Non-Employees

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### Unlawful Retaliation

#### **Elements of Unlawful Retaliation**

- Protected Activity – Broad Standard
  - Reporting Discrimination or Harassment
  - Participating in an Investigation
  - Refusing to Follow Order Reasonably Believed to be Discriminatory
- Adverse Action – Broad Standard
- Causal Connection

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### Case Study

Jody files a sexual harassment claim against her co-worker Don. While the Agency investigates Jody's allegations, Don is upset about the complaint and tells the other employees in the department that Jody is a "no good liar" and tells their supervisor that she has a "poor work ethic", resulting in Jody's demotion to a lower position.

***Has Jody been subjected to unlawful retaliation?***

***What if Don instead ignores Jody at work following the harassment complaint and leaves the room when she comes in because he does not want her to accuse him of anything else?***

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### What If You Are Accused?

- Refer the Accuser to a Superior, Human Resources, or Upper Management
- Report the Accusation to your Supervisor and to Human Resources
- Refrain From **ANY** Action That Could Be Interpreted as Retaliation
- Seek Constructive Counseling From Human Resources/Upper Management
- Cooperate in the Investigation
- Follow the Agency's Policy

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## Types of Unlawful Harassment

### Two Types of Harassment

1. Quid Pro Quo  
("Economic")



2. Hostile Work Environment  
("Environmental")



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### Quid Pro Quo Sexual Harassment ("Economic" Harassment)



**Classic Example:**  
***"Sleep with me and  
I'll make sure you  
get that  
promotion..."***

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### Quid Pro Quo Sexual Harassment ("Economic" Harassment)

#### **Elements of "Economic" Harassment:**

- Job Benefits Promised;
- Explicitly or Implicitly;
- In Exchange for:
  - Sexual Favors; or
  - Denied if Sexual Favors are Not Given

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### Case Study

Sonya is the Finance Manager and oversees Accountant Leo among others at the Agency. Leo's current assignment includes preparing department budgets – a highly coveted duty that involves overtime. At one time, Sonya and Leo briefly dated, but Leo ended the relationship because they have to work together. Sonya still regularly flirts with Leo in the workplace and makes comments to him that they should “*get back together*”. Irritated by the flirting, Leo confronts Sonya and tells her to stop. Sonya tells Leo she'll just reassign him to the less desirable job duties of audits at the Agency (which has no overtime) if he does not “*chill out*”.

***Is Sonya liable for quid pro quo sexual harassment?***

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### Case Study

Jack and Jill Begin Work at the Same Time as Entry Level Administrative Assistants at the Agency. Jill Turns to Jack on Their Second Day of Work and Says “*Sleep With Me and I'll Make Sure You Get That Promotion*”

***Has Jill Engaged in Quid Pro Quo Sexual Harassment?***

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### Case Study

Program Analyst Mary finds a “sex toy” left in the unisex restroom at the office. Mary is immediately offended and complains to her supervisor.

***Is this quid pro quo sexual harassment?  
If not, could this still constitute unlawful  
harassment in the workplace?***

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### Hostile Work Environment (“Environmental” Harassment)

#### **Elements of “Environmental” Harassment:**

- Protected Classification
- Physical, Verbal, or Visual Conduct
- Objectively and Subjectively Offensive (Unwelcome)
- Severe **or** Pervasive
  - Single Incident May Establish Liability Under FEHA
- Unreasonably Interferes With Work

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### Hostile Work Environment ("Environmental" Harassment)

#### 2019 Changes to California Law:

- Decline in productivity not required to establish harassment – it is sufficient that the conduct “so *altered working conditions as to make it more difficult to do the job.*”
- A single incident of harassing conduct may be sufficient to create a hostile work environment
- Totality of the circumstances matter, including “stray remarks” by nondecisionmakers
- Standards do not vary by workplace
- Rarely determinable “on paper” alone

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### Physical Conduct

#### Obvious Examples:

- Criminal Conduct
  - Rape
  - Sexual Assault
  - Touching/Groping
- Physical Intimidation



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### Physical Conduct

#### Less Obvious:

- Massage
- Hugs



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### Case Study – Verbal Conduct

Although Georgette was assigned at birth as a male, she recently chose to identify as a female. She notified her co-workers of her new gender identity as she previously identified as a male named George. Rick and John refuse to refer to Georgette by her name or female pronouns and still call her “George” and frequently ask “him” why “he” uses the Women’s Restroom and wears skirts.

***Have Rick and John created a hostile work environment?***

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### Verbal Conduct

- Sexual Comments
- Jokes
- Mocking Accent
- Teasing
- Slurs
- “Stray Remarks”



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### Case Study – Visual Conduct

Ron arrives to work and finds a noose hanging in his office’s doorway, with his co-workers and supervisor in the hallway looking at it and doing nothing. As an African-American, Ron is extremely offended and also embarrassed in front of his co-workers.

***Has Ron been subjected to a hostile work environment?***

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## Visual Conduct



Posters  
Calendars  
Magazines

Emails

Racial or Religious  
Cartoons

Gestures

Staring / Leering

Sexual Conduct /  
Affection Between Other  
Employees at Work

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## “Gray” (Borderline) Areas

- “Private” and “Consensual” Relationships Between Supervisors and Subordinates? (**Warning:** Not For Long!)
- Off-Duty Conduct
- Invitations to Lunch, Drinks or Dinner
- References to Appearance or Dress
- Casual Touching of Non-Intimate Body Parts
  - Hands on Shoulders
  - Hands on Waist
  - Hand on Arm or Leg

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## Duties of a Supervisor

### Who is a “Supervisor”?

- Anyone Who Has Any Responsibility or Discretion to Lead Others

*Government Code section 12926(t)*

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### Supervisor's Duty to Respond

- *“Harassment... Shall be Unlawful if the Entity, or its Agents or Supervisors, **Knows or Should Have Known of This Conduct** and Fails to Take Immediate and Appropriate Corrective Action.”*

Government Code section 12940(j)(1)

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### Case Study

Margaret supervises a team of five employees, four of whom are male, and one of whom is female. Today, Margaret overheard the male employees standing around the water cooler speculating on how their female colleague must be *“in bed”*. The female colleague was not in the office and did not overhear the discussion.

***Does Margaret have an obligation to take action even though the female employee was not there to overhear the discussion?***

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### Supervisor's Duty to Respond

- Report Observed/Overheard Conduct
- Forward Complaints/Issues to Management and Human Resources Promptly, Including:
  - Third-Party Complaints
  - Verbal Complaints
  - Rumors

**Remember:**

**The Word “Harassment” Need Not Be Used to Trigger Your Duty to Act**

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### Supervisor's Duty to Respond

**Don't Ignore the Response!**

- Take Immediate Action and Report/ Follow-Up on Any Harassment, Discrimination, or Retaliation Complaints Received
- Cooperate in the Investigation
- Prevent Further Harassment
- Assure No Retaliation



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## Addressing Unlawful Discrimination, Harassment, and Retaliation in the Workplace

### What Can the Agency Do?

- Appropriate Corrective Action
  - Conduct Prompt and Thorough Investigation
  - Keep the Victim Informed
  - Discipline Perpetrator Appropriately
  - Preventative Training to Prevent Future Violations
  - Re-Publish/Update Agency Policy

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### Options for Resolution

- Follow the Agency's Harassment Policy Complaint Procedure
- The Alleged Victim Can Also Take the Following Actions:
  - Report to the U.S. Equal Employment Opportunity Commission (EEOC)
  - Report to the California Department of Fair Employment & Housing (DFEH)
  - Lawsuits in State or Federal Court

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### Consequences – Agency Liability

- The **Agency** is Liable for:
  - The Conduct of **Supervisors** Who Engage in Unlawful Harassment, Discrimination, or Retaliation
  - Failing to Take all Reasonable Steps Necessary to Prevent Harassment from Occurring

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### Consequences – Personal Liability

- **ALL** Employees Can Be Personally Liable for Engaging in Unlawful Harassment
- **Supervisors** Can Also Be Personally Liable for Condoning Unlawful Harassment or Failing to Act in Response to an Unlawful Harassment Complaint

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### Consequences – Damages

#### Damages Can Include:

- Back Pay
- Emotional Distress
- Punitive Damages (Individual Employees)

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### Prevention

- Never Play Favorites
- Report All Complaints Immediately
- Take All Complaints Seriously
- Monitor the Workplace
- Follow the Agency's Policy
- Be a Good Role Model!

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

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**Thank You!**

### **Christopher S. Frederick**

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