

# Harassment Prevention Training

*League of California Cities  
Annual Conference & Expo*

Friday, Sep. 24, 2021



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# Harassment Prevention Training for Supervisors and Officials (AB 1661)

September 24, 2021

Presented by: Amy Greyson, Esq. and Cassandra Lo, Esq.

# Why are we here?

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- **Government Code § 12950.1**

- Requires “effective interactive training and education regarding sexual harassment to all supervisory employees”
- “Supervisor” is broadly construed
- Elected officials are considered supervisors

- **Government Code § 53237.1**

- Specifically applies to elected officials

# Ground Rules

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- There are no stupid questions! The more questions you ask, the better.
- I am here to assist, not judge.
- Be respectful of each other. It's okay to disagree. There are a lot of gray areas.
- There is not always an obvious “right” or “wrong” answer. Take a guess!
- Participation is appreciated and will make this training more interesting and useful.

# Objectives of this Training

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- Understand sexual harassment law
- Understand how to prevent harassment
- Discuss real-life examples and learn to identify and address harassment if it occurs
- Learn about other forms of unlawful harassment, including harassment on the basis of gender, gender identity, gender expression, and sexual orientation
- Promote respect and dignity in the workplace



# Poll Question – What do you think?

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- **Is harassment under-reported?**
  - This means harassment often occurs and is not reported because victims or witnesses are either afraid to report or do not understand what harassment is.
- **Is harassment over-reported?**
  - This means harassment is often reported even when it does not occur.

# Know Your City's Policy

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- **Employers may develop harassment policies that are stricter than the law.**
- **Policies should promote workplace respect:**
  - Prohibit inappropriate behavior, even if not illegal
  - Explain procedure for reporting harassment (City Manager or any City supervisor)
  - Understand consequences of harassment

# Why should we care?

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- In 2020, employers paid out a record \$65.3 million for sexual harassment claims filed with the Equal Employment Opportunity Commission (EEOC).
- Claims under state law in California cost even more. Example: a jury verdict in November 2019 for \$58.25 million.
- **MOST importantly, all employees have the right to a harassment-free workplace.**
  - Basic decency
  - Civil rights
  - Productive work environment

# Poll Questions: True or False?

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- Intent matters: If you did not mean to offend someone, you cannot be liable for harassment.
- The City is on the hook if an employee sexually harasses someone.
- Employees can be held individually liable for harassment.
- Off-duty or off-site conduct is not workplace harassment.

# Anti-Harassment Law

*The federal and state governments have enacted laws protecting employees against harassment.*

# Federal Anti-Harassment Law

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- Harassment based on a person's sex or race has been illegal since 1964 (Civil Rights Act), but not widely recognized until much later.
- In 1986, the U.S. Supreme Court held that sexual harassment in the workplace is a form of sex discrimination prohibited by the Civil Rights Act. (*Meritor Savings Bank v. Vinson*)
- Many Americans had never heard of sexual harassment until 1991.
- Most federal harassment claims are filed through the Equal Employment Opportunity Commission (EEOC).

# California Anti-Harassment Law

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- Harassment is a form of discrimination.
- The California Constitution (ratified in 1879) prohibits discrimination on the basis of race, and is now interpreted to prohibit race-based harassment as well.
- The California Fair Employment and Housing Act (FEHA) was passed in 1959.
- Other laws are occasionally used as the basis for harassment claims:
  - California Family Rights Act
  - Workers compensation law
  - Labor Code

# Harassment is illegal if on the basis of:

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- Race (including characteristics historically associated with race, such as hair texture and style)
- National Origin
- Color
- Ancestry
- Sex
- Sexual Orientation
- Gender
- Gender Identity/Expression
- Physical or Mental Disability
- Religion or Creed
- Medical Condition
- Genetic Information
- Marital Status
- Pregnancy or Pregnancy-Related Condition
- Veteran or Military Status
- Age (40 or older)



# Hypothetical

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George, a supervisor, brings coffee for Dana, one of his subordinates, every morning. Rose, another of his subordinates, asks George why he doesn't bring anything for his other subordinates. George says Dana is his favorite. Is George engaging in unlawful discrimination? Does the answer change if George and Dana are married?

- a) Yes
- b) No
- c) I need more information!

# Hypothetical

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Melinda and Ana are friendly coworkers. They both have the same title of “senior supervisor.” One day, Melinda tells Ana that she has started dating someone new. Ana is very excited and asks “what’s his name?” Melinda says that actually *her* name is Kristen.

After that day, Ana never speaks to Melinda directly, but makes negative comments about gay and lesbian people in Melinda’s presence. Could Ana be liable for harassment?

- a) Yes
- b) No
- c) I need more information!

# What Is Sexual Harassment?

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- **Sexual harassment is a form of sex discrimination.**
- **There are two forms of sexual harassment:**
  - Quid pro quo
    - Receipt of a workplace benefit in exchange for a sexual favor; or
    - Denial of a workplace benefit as retaliation for refusal of sexual advances.
  - Hostile work environment

# Definition of Sexual Harassment

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Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

# Quid Pro Quo Sexual Harassment

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- The conduct is unwelcome; and
- The conduct is sexual in nature; and
- Submission to or rejection of sexual advances affects the terms and conditions of employment, including:
  - Hiring and firing
  - Pay raises/bonuses
  - Better work assignments
  - Promotions

# Hostile Work Environment

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- **The conduct is unwelcome; and**
- **The conduct is sexual in nature; and**
- **The conduct**
  - unreasonably interferes with an individual's work performance; or
  - creates an intimidating, hostile, or offensive work environment.

# Hostile Work Environment

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Courts have recognized three types of hostile work environment:

- Sexual conduct directed at the complainant
- Sexual conduct directed at others, and complainant observes
- Sexual favoritism - implicit pressure to submit to sexual advances

What is *not* a hostile work environment:

- Mean behavior that is not based on a protected category
- Rudeness, criticism, unfair or harsh performance feedback
- Even horrible work environments are not necessarily “hostile” under the law.

# Incident vs. Environment

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- A single incident of quid pro quo harassment can constitute a sexual harassment claim.
- “Hostile work environment” harassment generally requires that the conduct is severe or pervasive. A single incident of sexual harassment may constitute a hostile work environment.



# What is severe or pervasive?

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## ■ Considerations:

- The nature of the conduct
  - Groping (assault) vs. pat on the knee
- The frequency of the conduct
  - Severe conduct need only occur once to constitute harassment.
- Physically threatening or humiliating?
- Did it interfere with the complainant's work performance?

# Forms of Sexual Harassment

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- **Verbal**

- Sexually explicit language
- Request for sexual favors
- Unwanted comments on a person's appearance
- Obscenities, jokes, comments using gender stereotypes

- **Physical**

- Unwanted touching
- Does not have to rise to the level of assault, or even be overtly sexual

- **Visual**

- Pictures, posters, office decorations
- Cartoons, other "humorous" depictions
- Question: what about pictures in a private office?

# What is unwelcome conduct?

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The challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it. . . ."

*Henson v. City of Dundee*,  
682 F.2d. 897 (11th Cir. 1982)

- An employee does not have to say “no” in order to prove that the conduct was unwelcome or unwanted. If an employee complains of sexual harassment, the burden is on the accused person to prove that the conduct was *not* unwelcome.

# Hypothetical

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Mark is a regular customer at the furniture store where Lily works. Mark has asked Lily to go out with him before, and she said no. One day, Mark stands by Lily's desk and says in a hushed voice, "If you give me a shoulder rub, I'll buy a full set of furniture from you." Lily declines and reports this to her HR. Is this unlawful harassment?

- a) Yes, if HR does nothing with Lily's complaint.
- b) No, because a shoulder rub is not sexual in nature.
- c) No, because Mark only did this once.
- d) The answer depends on whether Mark asks Lily again.

# What do you think?

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Carol and Tony work together. Carol asks Tony out on a date. Tony has had a crush on Carol for awhile and accepts the invitation. They have a nice first date, but Tony isn't interested in going out again. When Carol asks him on another date, he says no. Carol starts wearing provocative clothing at work. She often walks past Tony's desk and asks him if he likes the way she looks. Tony asks her to stop because her behavior makes him uncomfortable. Carol's behavior becomes more aggressive. She frequently stands close to Tony and tells him to look at her. She also brings in photos of herself in bathing suits and revealing clothes that are not appropriate for work. She sometimes leaves the photos on Tony's desk. Tony is so distracted by her behavior that his work performance starts to suffer. He cannot concentrate, and tells his supervisor that he is having anxiety attacks as the result of Carol's behavior.

# Is the conduct unwelcome?

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- **Conduct may begin as welcome, but then become unwelcome.**
- **The person engaging in the conduct has the duty to prove that their behavior is welcome.**
  - Employees may not feel comfortable telling their co-workers to stop.
  - When an employee exercises control or power over another employee (e.g., supervisor-supervisee relationship), it is important to be especially vigilant of conduct that may make the subordinate employee uncomfortable.

# Friendly versus “Unwelcome”

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- **To determine if your behavior is unwelcome, ask yourself the following:**
  - Is there equal power between me and the person I am interacting with?
  - Is there equal initiation and participation between me and the person I am interacting with?
  - Does the person I am interacting with give any verbal or visual signs of discomfort with my conduct?
  - The person on the “receiving” end of the conduct *does not* need to ask the person engaging in the conduct to stop in order for it to constitute “unwelcome conduct” under the law.



# Is the conduct sexual in nature?

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- Pictures of people in non-work appropriate clothing
- Pictures of people engaging in sexual or romantic acts
- Discussions of physique, appearance, or sexual or romantic acts
- Requests of another employee to engage in sexual or romantic acts
- Repeated requests to go on a date
- Requests for physical contact, even if not overtly sexual (e.g., hugging, shoulder rubs)
- Jokes involving sex or gender, sexual orientation, gender identity or gender expression
- When in doubt, don't do it.



# Gray Areas

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- Hugs, pats on the back – “But I’m a hugger!”
- Kisses on the cheek – “But I’m a kisser!”
- “You look nice today!”
- Safest approach: Avoid commenting on coworkers’ physical appearance.
- Safest approach: Avoid discussions of a sexual or intimate nature with coworkers unless directly related to work.
- Do not comment on or ask questions about a person’s sexuality, sexual orientation, gender identity, or gender expression, unless that person raises it first. Be respectful!

# Could this be harassment?

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- An employee talks about his sex life in front of 10 people. Only one person is offended.
- An employee is talking to a trusted friend on the job about her sexual fantasies. Another employee overhears.
- An employee notices that his coworker seems stressed, so he gives the coworker a shoulder massage without asking.
  - What if a gay man does this to a female employee – does that make a difference?
- An employee tells jokes about a friend who recently transitioned from the gender he was assigned at birth.
- An employee imitates the accent of someone who was born in a different country. The employee says it's okay because she was imitating her own grandmother.
- An employee makes fun of a coworker who uses a wheelchair due to a disability. The coworker laughs and jokes along.

# I Want Bright Line Rules!

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- **Can I ask another employee on a date?**

- Under the law, yes, but employers are allowed to adopt policies about romantic relationships between coworkers.
- Once your coworker says no, continuing to express interest may constitute sexual harassment.

- **Can I hug my coworkers?**

- If you have a workplace friend and you both initiate hugging and participate equally in the physical contact, then you may be on safe ground. But you may be making other employees uncomfortable by hugging them, even though you are not making sexual advances and don't intend to make anyone uncomfortable.
- Why not err on the safe side?

# Many people do not know . . . .

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- Harassment can occur between any two coworkers, regardless of their position.
- Women can sexually harass men.
- Sexual harassment can occur between two women or two men, regardless of sexual orientation.
- Sexual harassment need not be motivated by sexual or romantic desire.
- Harassment based on a person's gender identity, gender expression, or sexual orientation is prohibited regardless of motive.
- "I was joking" is never a defense in court.

# Harassment By Third Parties

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- **Employers are required to protect employees from harassment by non-employees, even if they cannot control the behavior of third parties:**
  - Customers
  - Clients
  - Members of the public
  - Vendors, contractors, suppliers
  - Other third parties
- **The employer may be liable if it knew or should have known of the harassment and failed to take immediate corrective action to protect the harassed employee.**

# So Now What?

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- What should you do if you experience or witness harassment?
- (Hint: **DO SOMETHING!**)

# What should you do if you experience harassment?

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- If you feel comfortable, tell the person to stop.
- Report the conduct.
- The law permits you to complain to the EEOC or DFEH without reporting it internally.
- Retaliation for reporting harassment is illegal. You cannot be punished for making a good faith report of conduct you believe to be harassment.
- Discussion: What does “good faith” mean?

# Remedies for Harassment Victims

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- **Removal from contact with the person who harassed them**
- **Injunctive relief against the employer or individual**
  - Training
  - Development of or changes in policies & procedures
- **Economic damages (lost wages, medical expenses)**
- **Non-economic damages, such as emotional distress**
- **Punitive damages against the individual**



# What should you do if you observe harassment?

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- Report it to a responsible supervisor or manager.
- If you are a supervisor, discuss the situation with the person you believe was subjected to harassment to make sure they understand that the issue is being addressed. Ask the person whether they feel comfortable in the current situation, and if not, discuss what measures can be taken to make the person feel comfortable while the incident is being investigated.
- What if you think you see harassment but the person experiencing it doesn't think it was harassment?

# Employers' Duty to Investigate

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- **Harassment complaints must be investigated.**
  - Complaint can be verbal or written
  - No duty to determine at the outset whether harassment has occurred
  - Interim measures should be taken to ensure that the complainant/victim is not subjected to further harassment. This may include separating the employees. The separation cannot be punitive towards the complainant.

# Harassment Investigations

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- Impartial investigator (internal or external)
- Confidential
- Interviews, review of documents, assessment of credibility
- Written report
- Notification to parties only, not witnesses
- No retaliation!

# Employer Liability

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- Harassment by officers and directors acting within the scope of their employment
- Strict liability for a hostile work environment created by a supervisor with “immediate (or successively higher) authority over the employee.”
- An employer is liable for harassment by non-supervisory employees if it:
  - “Knew or should have known” about the harassing conduct; and
  - Failed to take immediate and appropriate corrective action.

# Employer Liability for Off-Duty Conduct

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“In order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent.”

*Myers v. Trendwest Resorts, Inc.*,  
148 Cal. App. 4th 1403, 1421  
(Cal. Ct. App. 2007)

# Off-Duty Conduct & Gray Areas

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## ■ Is this workplace harassment?

- A few coworkers meet for a drink at a bar after work. One of them inappropriately touches another.
- A supervisor invites the whole team to meet for a drink after work. The supervisor uses an offensive slur to refer to a gay coworker who is not present.
- Two employees are hanging out on their break in the lunchroom, and one of them shows the other graphic photos on her phone.
- The District has a holiday party for all employees. Attendance is completely optional. At the party, a female employee insults a male employee for “dressing like a girl.”

# Gender-Based Harassment

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- 90% of individuals who identify as transgender or whose gender does not conform to traditional male/female binary categories say that they have experienced workplace discrimination or harassment.
- California law requires employers to allow employees to use the restroom that matches their gender identity, regardless of their biological sex.
- California law requires employers to allow employees to wear clothing and use the pronouns that match their gender identity or gender expression, regardless of their biological sex.



# Gender-Based Harassment

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- Harassment based on someone's gender identity, gender expression, or sexual orientation is unlawful even if it is not sexual harassment.
- Gender-based harassment may include: negative comments about transgender or other people whose gender identity or gender expression is different from the sex they were assigned at birth; slurs, insults, stereotypes, offensive jokes; refusal to address a coworker by their chosen name or gender pronoun; refusal to accept a person's gender identity or gender expression including refusal to accommodate how they dress or what bathroom they use.



# Harassment Based on Sexual Orientation

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- Negative comments about gay, lesbian, and bisexual individuals or groups/communities
- Teasing, jokes, slurs, insults, stereotyping
- Refusal to accept someone's sexual orientation
- You are entitled to your own personal, religious, and political viewpoints, but it is not always appropriate to express them in the workplace if those views single out a particular group of people.
- Respect = Common Sense

# Everyone Makes Mistakes

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- **Heteronormative assumptions:**

- Asking a man you don't know "Do you have a wife or girlfriend?"
- Try this instead: "Do you have a partner or significant other?"
- If you are corrected, apologize, move on in the conversation, and try not to make the assumption again.

- **Gender-based assumptions:**

- Telling a person with masculine traits, "Sir, that's actually the women's restroom – the men's restroom is over here."
- Try this instead: Don't say anything! If the person is entering the wrong restroom, they will likely realize it very quickly. You may think the person is a man, but perhaps they are a woman with traits/appearance more associated with masculinity.
- If you make a mistake, apologize.

# Retaliation Prohibited

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- **The law prohibits retaliation against employees who complain about harassment or participate in a harassment investigation.**
- **Conduct that may constitute retaliation includes:**
  - Demotion, suspension, reduction in pay, termination
  - Negative treatment (gossip, insults, rumors)
  - Change in duties or intangible benefits
  - Hostility or ostracizing
- **Beware of perceived acts of retaliation. The employee who has filed a complaint will be more sensitive to treatment perceived as negative.**
- **Claims of retaliation should be investigated the same way harassment complaints are investigated.**

# Common Employer Pitfalls

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- An employer cannot always control the behavior of its employees. Despite advancements in the law, increasingly clear guidance from the courts, and the development of better employer policies, harassment still occurs. Employers cannot turn a blind eye and put the responsibility to prevent harassment entirely on individual employees. Employers are responsible for preventing harassment to the best of their ability.

# Pitfall #1

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- **Mishandling claims or concerns expressed by employees:**
  - Dismissive of complaints
  - Slow to address the issue
  - Failure to maintain confidentiality
  - Deciding not to investigate
  - Appropriate action not taken against the perpetrator

# Pitfall #2

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## ■ Failure to keep records

- Document everything, even oral conversations.
- Investigator should prepare written report; interviews may be recorded with notification to witnesses.
- If the matter goes to court, the employer should be able to:
  - Prove it took action when the complaint was made
  - Demonstrate that it conducted a fair and neutral investigation
  - Justify why action was taken or not taken against the accused person
  - Prove that the complaining party was protected, no matter the conclusion of the investigation

# Pitfall #3

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- **Improperly dealing with the complainant**

- Exercise caution when taking ANY action that concerns the complainant - particularly during or immediately after the investigation.

**Hypothetical:** Sarah made a harassment complaint against her supervisor in June. The investigator concluded that the supervisor treated Sarah poorly but did not harass her. Sarah has always been a good employee, but right after the harassment investigation occurred, the quality of her work declined, hurting the department's operations. Can the supervisor warn Sarah that her work needs to improve?

- a) Yes, because no harassment occurred.
- b) Yes, because her performance has genuinely declined.
- c) No – this is retaliation.



# Pitfall #4

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- **Allowing bad conduct to continue**

- If an employee is found to have engaged in harassment but is not terminated, it is important to keep an eye on the employee. The more complaints against the employee, the more liability for the employer.
- An employer has an increased risk of liability if it *knew or should have known* that an employee previously engaged in harassing conduct, and appropriate preventive action was not taken.



# Pitfall #5

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- **Keep the workforce informed!**

- Regular update of harassment policies
- Ensure all employees have copies of current policies
- Conduct regular trainings (required by law)
- As leaders/supervisors:
  - Set good examples
  - Foster respectful environment
  - Encourage employees to speak with you about concerns
  - Encourage employees to ask questions
  - Learn to recognize problematic interactions and stop them before they become worse

# Abusive Conduct

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- Employees are required to receive training to prevent abusive conduct, even though abusive conduct is not illegal.
- The Legislature has defined abusive conduct 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.” (Govt. Code § 12950.1)

# What is Abusive Conduct?

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- Abusive conduct is different from unlawful harassment in that it need not be based on a protected status.
- Abusive conduct is more than “bad boss behavior.”
- Conduct need not rise to a level where it would create criminal or civil liability in order to be considered “abusive” in the workplace.
- Employers are permitted (and encouraged) to develop their own definitions of abusive conduct, and to prohibit abuse of fellow employees.

# Poll Question

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- What percentage of women in the United States report they have experienced sexual harassment?

(a) 8%      (b) 20%      (c) 80%

- What percentage of sexual harassment complaints are filed by men?

(a) 5%      (b) 15%      (c) 50%

- What percentage of gay and lesbian employees report they have experienced harassment?

(a) 20%      (b) 50%      (c) 70%

# Hypothetical

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Louise and Jeannette are both supervisors (in different divisions). Louise confides in Jeannette that she is having an affair with their manager. She says she doesn't want to continue the relationship, but she feels uncomfortable breaking it off because it will be awkward for them to work together. Jeannette asks Louise if the relationship is consensual. Louise tells her, "yes, but I wish I could end it." Is Jeannette obligated to report this conduct?

- a) No, because Jeannette does not supervise Louise.
- b) Yes, this is quid pro quo.
- c) No, because the relationship is consensual.
- d) Yes, because the relationship is unwanted.
- e) Yes, because all workplace relationships might potentially constitute sexual harassment.

# Hypothetical

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Ted, a manager, has a calendar on the wall of his office with pictures of scantily-clad men and women. The calendar can be seen by anyone walking by his office. Mike, a manager in a different division, finds the calendar funny, and sees that most of his other coworkers find the calendar funny. Then one of Ted's direct reports, Kelly, tells Mike that the calendar makes her feel harassed because she is female. Mike tells her that she is being too sensitive because the calendar has pictures of both men and women. He does not tell anyone what Kelly told him, and does not confront Ted. He thinks "if I do nothing, Kelly will get over it soon." Did Mike do anything wrong?

- a) No, because the calendar has both men and women.
- b) No, because Mike does not supervise Kelly.
- c) Yes, because all sexual material in the workplace constitutes sexual harassment.
- d) Yes, because Mike is a supervisor and is required to report all complaints of harassment.



# Hypothetical

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Rosa is a supervisor. An employee tells her that she saw Sam corner Mary at the holiday party and try to make Mary reveal her sexual orientation. Rosa has been close friends with Sam for many years and does not believe that he would ever do anything inappropriate. Sam has been working for the agency for 15 years and has never had a single complaint against him. Rosa believes that the employee who reported the incident is lying. Is Rosa obligated to investigate or report the complaint?

- a) Yes, if Rosa can confirm that there were other witnesses to the incident.
- b) Yes, because Rosa is obligated to act on all reports of potential harassment, even if she does not believe they occurred.
- c) No, because Rosa is 100% certain that Sam is a good person.
- d) No, because Rosa does not think the employee who reported Sam is telling the truth.

# Hypothetical

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David has been Michelle's supervisor for 10 years. They have become friends and often joke around. One day Michelle tells David that she is transitioning to being a man, and would like people to start addressing her as Michael, and to use male pronouns. David laughs and says "come on, Michelle, I've known you for 10 years as a woman, I can't do that." Michelle says it is her legal right to identify as a man. David tells her "I'm sorry, but when you started working here and signed up for benefits, all your papers say female. I can't change that now."

Did David do anything wrong?

What could he have done differently?



Questions?



**Thank you!**

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