

Sexual Harassment Prevention Training

League of California Cities
New Mayors and Council Members Academy
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The Institute for Local Government

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**California Special
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- Promoting good government at the local level
- Practical, impartial and easy-to-use materials

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Sexual Harassment Prevention Training

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#MeToo
#ItWasMe



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Los Angeles Times

POLITICS

California legislators propose new way to handle harassment complaints in Capitol



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WHY AM I HERE AND WHY IS THIS IMPORTANT?



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FIRST

AB 1661 now requires Local Agency Officials to receive at least two hours of sexual harassment prevention training



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SECOND

California and federal law require employers to take affirmative steps to prevent sexual harassment
(employee training, written policies, complaint procedures)



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THIRD

To know what constitutes sexual harassment so you can recognize it and avoid it



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FOURTH

To know what procedures to follow if you witness harassment, receive a complaint of harassment or are harassed yourself



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FINALLY

To know the potential consequences – including discipline in the workplace and potential civil liability



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WHAT IS DISCRIMINATION IN EMPLOYMENT?



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An employer **MAY NOT** treat
an employee differently

- + Based upon certain protected characteristics of the employee
- + In a way that affects the employee's "terms and conditions of employment"



Discrimination in Employment



UNDER THE CALIFORNIA FAIR
EMPLOYMENT AND HOUSING ACT



An employer MAY NOT discriminate due to:

- + Race
- + National Origin
- + Color
- + Ancestry
- + Sex
- + Gender
- + Sexual Orientation
- + Military/Veteran Status
- + Age
- + Physical and Mental Disability
- + Religious Creed
- + Medical Condition
- + Genetic Information
- + Marital Status
- + Gender Identity/Expression
- + Driver's License





Discrimination In Employment Under Federal Law

An employer may not discriminate against an employee based upon the employee's:

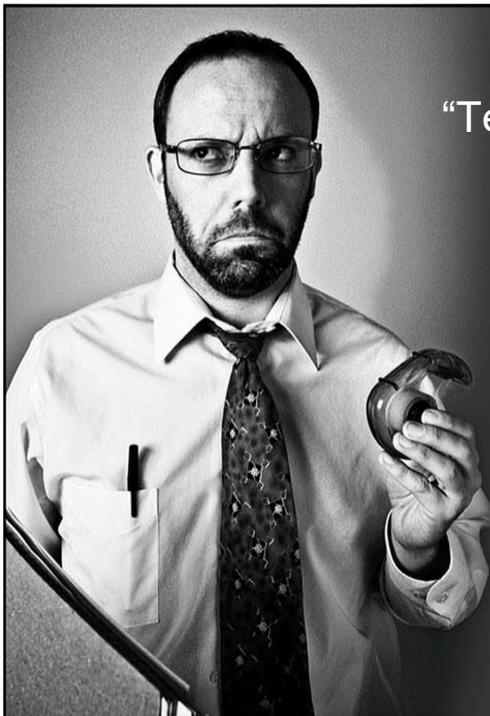
- + Age - 40 and older (*ADEA*) 29 U.S.C. § 621
- + Race (*Title VII*) 42 U.S.C. § 2000e, et seq.
- + Color (*Title VII*)
- + National Origin (*Title VII*)
- + Gender (*Equal Pay Act* 29 U.S.C. § 206(d), *Title VII*)
 - + Interpreted to include transgender status
- + Religion (*Title VII*)
- + Mental or physical disability (*ADA*) 42 U.S.C. § 12101 et seq.



What Are The “Terms And Conditions” Of Employment?

Can include:

- + Hours of employment
- + Pay
- + Physical setting
- + Geographic location
- + Benefits
- + Work Environment





Examples of Discrimination in the Workplace

- Refusing to allow an employee to wear a scarf or head covering in religious observance (Religion includes religious dress and grooming)
- Not hiring a man for a position as a secretary based on stereotypes of typical male/female positions
- Not allowing a pregnant employee the same opportunities for training (Sex includes pregnancy and related conditions)



Scenarios

An employee wears a head scarf in religious observance and is told she can no longer do that because a citizen complained? What should the agency do?

A female has always served as the executive assistant, and now a male employee has applied for this position. One Board member thinks this position should be filled with a female. What should the agency staff do?

A pregnant employee wants to attend management training that has been offered to others in similar positions, but some people are concerned she may not come back after her maternity leave. Can that be taken into consideration?



What is Discrimination Based on Gender Identity/Expression?

Treating an employee differently because of their:

- Gender Identity: A person's identification as a male, female, a gender different from a person's sex at birth, or transgender.
- Gender Expression: A person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth.
- **Note**: A transgender individual has a *gender identity* that differs from his/her sex at birth, but may or may not have a *gender expression* that differs from his/her sex at birth.



How to Avoid Discrimination in the Workplace

- Do not take protected categories into consideration when making job related decisions
- Do not base job related decisions on stereotypes about gender, race or other protected categories
- If you receive a complaint or hear of potential discrimination, report it to the appropriate person- DO NOT IGNORE IT



Scenario

- The agency has an employee who was previously referred to as Bryan and now has asked to be called Brianna.
- Brianna now dresses as a woman and has asked to start using the women's bathroom.
- What should staff do?
- What should they do if another employee complains that Brianna is using the bathroom.



What Is Sexual Harassment?



Sexual harassment is a form of sex discrimination

There are two kinds of sexual harassment:

- + Quid pro quo
- + Hostile work environment

*Sexual harassment need not be motivated by sexual desire



Who Does the Law Cover

FEHA prohibits harassment of :

- Employees;
- Applicants;
- Unpaid Interns or Volunteers; and
- Persons providing services pursuant to contracts

By:

- Supervisors
- Co-workers
- Third-parties



Harassment By Third Parties

Amendment to FEHA Effective
January 1, 2004

Employers required to protect employees
from harassment by third parties:

- + Customers
- + Clients
- + Vendors, contractors
- + Other third parties

If employer knew or should have known
of the harassment and failed to take
immediate corrective action to stop the
harassment.





Definition of Sexual Harassment (2 CCR 11034)

Sexual harassment is unsolicited and unwelcome sexual advances, requests for sexual favors and other verbal, physical or visual conduct of a sexual nature where:

- (1) Submission is required explicitly or implicitly as a condition of employment; or
- (2) Submission or rejection by an employee is used as a basis for employment decisions, including any benefits available through the employer; or

(Quid Pro Quo Sexual Harassment)



Definition of Sexual Harassment (2 CCR 11034)

- (3) Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance and creates an intimidating or offensive (aka hostile) work environment.

*Key = severe or pervasive





Harassment

- Harassment may also be based on other protected characteristics
- Includes all of the same protected categories as are protected from discrimination
- Conduct that creates a hostile work environment (no Quid Pro Quo)



Hostile Environment Sexual Harassment

Factors considered by the courts:

- + Whether conduct was verbal, physical, or both (severity);
- + Frequency of conduct (pervasiveness);
- + Whether the alleged harasser was a co-worker or supervisor (comparative authority of the parties involved);
- + Who participated;
- + Whether the conduct was directed at more than one individual.



Unwelcome

The challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."

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



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Is The Conduct Unwelcome?

- + Chris alleges that her supervisor created a hostile work environment by repeatedly asking her out on dates and telling her how attractive he found her. This conduct began in 2016. Chris went out with the supervisor a few times, and did not protest or complain, but later discontinued the relationship. She filed a sexual harassment charge with the EEOC in 2018.
- + Janet tells off color jokes to Bob each week believing that it reduces the stress level in the office. Bob shared an off color joke with Janet 2 or 3 times. Bob files a complaint against Janet for sexual harassment after she gives him a negative performance evaluation.



Friendly versus “Unwelcome”

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’m interacting with?
- + Does the person I am interacting with give any visual signs that they are not comfortable with my conduct?



Perception Matters!

- Intent of the person making the comment or engaging in the behavior isn’t what matters
- The law views it from the perspective of the recipient
 - How did he/she view it?
 - How would a reasonable person in those shoes view it?
- Must be both subjectively and objectively offensive





Examples of Sexual Harassment

In general: Making unwanted and unsolicited written, verbal and/or physical contact with sexual overtones.

Written examples: Suggestive or obscene letters, notes, e-mails or invitations.

Verbal examples: Making or using sexual, derogatory, or other offensive comments, epithets, slurs, and jokes, sexual advances or propositions.

Visual examples: Leering, gestures, displays of sexually suggestive objects or pictures, cartoons, posters, or e-mail.

Physical examples: Unwelcome touching, massaging, or interfering with or blocking movement.



Other Examples

- + Continuing to express romantic interest after being informed that the interest is unwelcome
- + Making reprisals, threats of reprisal, or implied threats of reprisal following a negative response to a sexual advance.
- + Implying or actually withholding support for a position, promotion or change of assignment or suggesting a poor performance evaluation will be prepared.
- + Offering favors of employment benefits, such as promotions, favorable performance evaluations, favorable assigned duties or shifts, recommendations or reclassifications in exchange for sexual favors.

SB 396 – GENDER IDENTITY, GENDER EXPRESSION & SEXUAL ORIENTATION

- Sexual Orientation: In the prior hypothetical, is Arthur subject to sexual harassment or sexual orientation harassment? Would it matter whether Arthur identifies as gay?
- Gender Identity & Expression: Pat is an employee who is transitioning from male to female. She has requested that the employer use the female pronoun in referring to her and that she be identified as “Patricia.” In addition, she has grieved a write up given by her supervisor for her long hair, which is in violation of the grooming standards applicable to male employees. The supervisor would like to require “Pat” to get a doctor’s note to “prove he has this gender identity issue.”



Recent Harassment Cases

Lewis v. City of Benicia (2014) 224 Cal. App. 4th 1519.

- Heterosexual male employee sued the City and two supervisors for sexual harassment.
- The court found summary judgment should not have been granted for the first supervisor, because there was evidence of same-gender harassment over several months, including giving the employee gifts like “tuxedo underwear” and shot glasses, repeatedly buying him lunch, making sexual jokes, showing him pornographic images on work computers, and asking the employee to kiss him.
- Summary judgment was appropriate for the second supervisor, because showing a group of employees pornographic images on one occasion does not rise to the level of harassment.



Recent Harassment Cases

- In January 2016, a LA jury ordered Bikram Choudhury, founder of Bikram Yoga, to pay almost \$1,000,000 to his former lawyer for subjecting her to gender discrimination, wrongful termination, and sexual harassment.
- The jury found that Choudhury subjected the lawyer to repeated offensive comments, such as referring to women as “fat” or “stupid,” simulating intercourse and oral sex, demanding female employees brush his hair and give him massages, and telling the lawyer to meet him in his hotel room, then laying down on his bed and patting the space next to him.

Hostile Work Environment: What it Isn't



- Boss is “mean” to me/yells at me
- My co-workers don't invite me to lunch with them
- I got written up for being late
- I got a bad performance review



Scenarios

- Steve spends time with the women at work, he likes to knit and cook, and people have described him as effeminate; Steve's co-workers repeatedly tell him that he is "just one of the girls" and make fun of his mannerisms and hobbies?
- Could this be harassment? On what basis?
- Megan has recently "come-out" in the workplace. Her boss asks her about dating repeatedly and makes crude remarks about her sexuality. He tells her they are not competing for the same women.
- Could this be harassment? On what basis?



Technology and Harassment

- + Use of internet
- + Use of e-mail
- + Use of voice mail
- + Use of text messages





Special Problem Area: Email/Internet Use

Internet surfing

E-mails

Blogs / Social Networks



Special Problem Area: Email/Internet Use

E-mails

- Forwarding
- Beware “auto-fill”
- Similar issues with text messages



Is This Sexual Harassment?

- + An employee engages in conduct of a sexual nature in front of 10 people. Only one person is offended.
- + An employee is talking to a friend on the job about his/her sexual fantasies. Another employee overhears.
- + An employee engages in conduct of a sexual nature, but only one time.
- + An employee tells some jokes of a sexual nature but does not mean to offend anyone.
- + It is a practice for employees to hug each other when they come to work.



Is This Sexual Harassment?

Can an employee ask another employee on a date?

Yes... But once the employee says no, continuing to express interest can constitute sexual harassment.





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Is This Sexual Harassment?

Can staring become sexual harassment?

Yes... A court has found that leering at another employee can be sexual harassment.



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Vault's 2017 Office Romance Survey

- 57% of workers have had an office romance.
- 66% who've had office romances said they'd have another.
- 21% have engaged in "random hookups" with colleagues.
- 22% have used social media to flirt with co-workers.
- 41% have avoided a potential workplace romance.
- 26% of office romances start at happy hour or an office party.
- 94% think that workplace romances are acceptable in some form (26% say all are acceptable).
 - Only 32% think it is unacceptable for different levels.
- 47% know of co-workers who've had affairs.





Consider

- + Can an employee sexually harass a supervisor given that the non-supervisor cannot threaten the supervisor's career?
- + Can women sexually harass men?
- + Can men sexually harass other men?
- + What if a person is rude to everyone – the "Equal Opportunity" Harasser?



DISCRIMINATION/HARASSMENT or BULLYING





AB 2053 – Healthy Workplace Bill

- Effective January of 2015
- Requires the 2-hour Sexual Harassment Training to include a component addressing “abusive conduct” in the workplace.
- Does not create liability for workplace bullying that is not tied to a protected category.
- Does create a venue for discussing the importance of civility in the workplace and the prohibition of abusive communications and conduct or “workplace bullying.”



Abusive Conduct

- + 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 “**workplace bullying**”
- + Examples:
 - + Repeated verbal abuse
 - + Teasing, name calling
 - + Verbal or physical conduct that a person would find threatening, intimidating, or humiliating (including pranks)
 - + Sabotage or undermining of a person’s work performance (including spreading rumors)



WORKPLACE BULLYING DEFINED

- Verbal abuse or offensive conduct/behavior in the workplace that is threatening, humiliating or intimidating to a co-worker or other employee or which prevents the co-worker or employee from doing their job
- Not “unlawful” unless harassment related to protected category
- May violate agency code of conduct policy



Abusive Conduct

- + Usually a single insult or action will not constitute abusive conduct
 - + Behavior must be repeated
- + UNLESS . . . the behavior is especially severe or egregious
- + Know the difference between “having a little fun” and workplace bullying



Effects of Abusive Conduct

On the Victim

- +Feeling embarrassed or stigmatized
- +Social isolation
- +Depression, anxiety, headaches, nausea, insomnia, burnout

Workplace bullying affects EVERYONE

On the Workplace

- +Loss of productivity and morale
- +Increased stress and job dissatisfaction
- +Reduced creativity and willingness to take initiative
- +Damaged communication and trust
- +Increased employee turnover and absences

What Are Employees' Responsibilities To Co-Workers?

- + Be sensitive to your co-workers' attitudes
- + Don't assume everyone thinks as you do
- + Consider what your family members and/or friends would think of your words or actions
- + Take the issue seriously
- + Be familiar with applicable policies





Multiple Choice

The “Healthy Workplace Bill” does the following:

- A. Makes it illegal to have an abusive communication style
- B. Requires sexual harassment avoidance training to provide a platform for discussing workplace bullying
- C. Requires all employers to enact a civility code
- D. Both A and C



What Should An Employee Do If They Experience Harassment?

- + Be familiar with applicable policies
- + Make certain the other person is aware that they do not like the conduct (especially if sexually harassing)
- + If they experience discrimination or harassment, report the conduct immediately
- + Do not discuss it with other employees



What To Do...

- An employee who is aware of any conduct that may constitute harassment must report it immediately.
- Report harassment/discrimination to:
 - Supervisor/Manager
 - Director of Human Resources



Investigation Process

A thorough, prompt, and impartial investigation should be conducted.

Allegations will be analyzed on a case-by-case basis by assessing the totality of the circumstances.



What If You Are Interviewed In A Harassment Investigation?

- + Be open, honest and specific
- + Answer the questions thoroughly
- + Ask questions - but remember personnel matters are confidential
- + Do not form opinions based upon the questions asked of you
- + Do not discuss the investigation with others
- + Do not let personal relationships stop you from doing what is right



What does An Investigation Look Like?

- + The Complainant is interviewed
- + Generally a second person is present
- + The questioning is focused on getting details.
- + The Complainant is asked whether there are other employees that would have information about complaint
- + Notes are kept
- + The interview may be recorded
- + The Complainant is encouraged to keep the matter confidential
- + The Complainant is informed about the process
- + Necessary witnesses are interviewed
- + A report is prepared with findings





Can An Employee Report Harassment And Ask That Nothing Be Done?



NO

Knowledge by the Employer/Supervisor requires action.



Can An Employee Report Harassment Anonymously?

Yes – but... Harassment can be reported anonymously - but that may impair the employer's ability to conduct a thorough investigation



Does An Employee Get To Hear All The Details of the Investigation?

NO . . . The specific results of the investigation may contain confidential personnel information. Depending upon the impact of the harassment, the employee may only be given general information such as “An investigation was conducted, the allegations were found to be proved/not proved and appropriate action was taken.”



Can The Employee's Identity Be Kept Secret From The Alleged Harasser

- + Sometimes - but confidentiality cannot be guaranteed
- + For the employer to conduct a thorough investigation, the employee's identity may need to be disclosed
- + Should there be litigation concerning the report and the employer's response, a court can order the identity disclosed



What Can Happen To The Person About Whom A Complaint Is Made ?

It depends upon the seriousness of the charges, the results of the investigation and the personnel record of the person about whom a complaint is made



What Can Happen To The Person About Whom A Complaint Is Made? Cont.

Actions taken can include:

- + Nothing
- + Reprimand
- + Suspension
- + Transfer
- + Demotion
- + Termination





Retaliation – BEWARE!

- + The law prohibits employers from retaliating against employees who complain of harassment, oppose prohibited conduct or participate in a harassment investigation.
- + Report any adverse action.
- + Claims of retaliation will be investigated the same way harassment complaints are investigated.



Minimizing Retaliation Claims

- + Involve someone without direct supervisory responsibilities over the Complainant in the investigation of the harassment complaint.
- + Document! Document! Document!
- + Get a second opinion
- + Be consistent



Examples of Retaliation

- Changing the job of an employee who makes a complaint (protecting the employee)
- Refusing to investigate a new complaint because the employee has complained before
- Co-workers creating a hostile work environment for an employee who has complained
- Denying the employee a promotion or training because of a complaint



Scenarios

- An employee complains of discrimination, and after an investigation, there is a finding that there was no discrimination. After that, one of the Board members does not want to work with the employee and thinks that she should be fired. What should the agency do?
- Employees are protected when they make good-faith complaints, even if there is no finding of discrimination or harassment after an investigation. The agency cannot hold prior complaints against an employee.



Scenarios

- A City employee complains that her co-workers are not nice to her, ever since she made a complaint about the Mayor. Her co-workers can't take any adverse job action against her, so can it be retaliation? What can the City do?



Multiple Choice

An employer may not retaliate against an employee who does the following:

- A. Complains in good faith of harassment
- B. Opposes conduct prohibited by the law
- C. Participates in a harassment investigation
- D. All of the above



Employer Liability

Harassment by Co-Workers and Third-Parties

An employer is liable for harassment committed by a nonsupervisory employee if:

- + The employer “knew or should have known” about the harassing conduct; and
- + The employer failed to take immediate and appropriate corrective action.



Employer Liability, cont.

Harassment by Supervisors

Under California and Federal law, an employer is **STRICTLY LIABLE** to a victimized employee for a hostile work environment created by a supervisor with “immediate (or successively higher) authority over the employee.”



Personal Liability

- + Supervisors and co-employees may be held personally liable to the victims of sexual harassment;
- + Individual employees may be held liable for compensatory and punitive damages;
- + Even if the employer is not liable
- + Sexual harassment is generally found to be outside the course and scope of employment, so an employer may not defend the harasser in a lawsuit or indemnify the harasser for an adverse judgment



Employer Liability for Off Duty Conduct

“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

Is the employer liable for situations that occur off-premises?

- + A few friends who work together meet for a drink after work.
- + A Department Head invites all department employees to meet for a drink after work.
- + The city sponsors a charitable event which several employees attend.



The 5 Biggest Mistakes Made By Employers



Danger!!!



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#1

Mishandling of claims or concerns expressed by employees:

- + Failure to take action when the complaint is made
- + Reluctance to address issue
- + Failure to conduct thorough investigation
- + Failure to take appropriate action against the perpetrator



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#2

Failure to document the investigation and actions taken - AND keep the records





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#3

Improperly dealing with
the Complainant



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#4

Ignoring the later interactions





#5

Failure to keep employees informed

- + Failing to keep all employees, including those with supervisory responsibilities, up-to-date about their rights and responsibilities concerning harassment in the workplace
- + Failure to have and review policies
- + Failing to promulgate, implement and conduct periodic reviews of basic anti-harassment policies



What Can We All Do?

- + Set a positive example: be professional and respectful, and be conscious of your own words, actions and dress.
- + Think twice before asking personal questions or making personal comments.
- + Don't assume that jokes and gestures meant to be friendly are inoffensive.



What Can We All Do?

Consider:

- + Would I want any of the conduct to be in the newspaper?
- + Would I behave the same way if someone I respected were standing next to me?
- + Would I want someone to act this way towards my family member?
- + Know applicable policy.
- + Don't be part of or accept behavior that may be offensive. Voice your concerns.
- + Support people who are being harassed by cooperating in investigations and keeping them confidential.
- + Do not ignore a rumor or informal complaint of harassment.



Questions???





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The End

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