

Harassment Prevention: AB 1661 Training

*League of California Cities
Annual Conference*

Friday, September 9, 2022, 9:15 am



HOUSEKEEPING

You **MUST** be
signed in

You must be present
for the full two-hour
training

You will receive your
certificate at the end
of the training

We also have
certificates for
attorneys for MCLE
credit

Contact Taylor Buck
(tbuck@ca-ilg.org)
with questions or
concerns

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Recognizing and Preventing Harassment and Abusive Conduct in the Workplace

September 2022

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WELCOME

- Please sign in.
- Today's training is not legal advice.
- Some content we will be going over may be perceived as offensive.
- Despite any *attempts* at humor, harassment and discrimination are serious issues.
- Please feel free to **ASK QUESTIONS**.



Today's Objectives

1. Define employees' rights.
2. Define employees' and employer's responsibilities regarding sexual harassment and abuse in the workplace.
3. Give managers and supervisors the tools to limit liability.
4. Reduce sexual harassment in the workplace.

Why is Harassment a Growing Concern for Employers?

- Harassment impacts productivity.



- Harassment costs employers time and money.

How Harassment Affects Productivity and Costs Employers

- Harassment lowers morale.
- A reduction in morale leads to a reduction in work output from employees.
- These effects are illustrated by a study examining the ways in which harassment impacts how women in the military feel about their work.
- In all, sexual harassment can cause a multiplicity of issues not only for employee well-being but also for productivity and employee retention.
- These problems can ultimately cost employers a great deal of time and money.

Discrimination & Harassment Laws





Verdicts for harassment victims average \$1,000,000.

The average cost to investigate and defend an employment claim is over \$300,000.

Anti-Discrimination and Harassment Laws

Federal

- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)

State

- Fair Employment and Housing Act (FEHA)
- Pregnancy Disability Leave Act
- Equal Pay Act
- Local ordinances

What is Discrimination?



DISCRIMINATION

To refuse to hire or employ a person, or to bar or discharge a person from employment, or to discriminate against a person, in compensation or in terms, conditions or privileges of employment based upon a protected category.

Protected Categories Under Federal Law

It is unlawful for an employer to discriminate against or harass an employee because of:

- Race
- Color
- Religion
- Sex (including pregnancy)
- National origin or ancestry
- Alienage/citizenship
- Age (40 and over)
- Physical or mental disability
- Military service
- Exercising leave rights under FMLA
- Genetic information



Protected Categories Under California Law (FEHA)

- Race
- Color
- Religion
- National origin or ancestry
- Sex
- Pregnancy
- Age (40 and over)
- Physical/mental disability
- Military service
- Request for statutory leaves (CFRA/PDL)
- Sexual orientation
- Gender identity
- Gender expression
- Medical condition
- Marital status
- *Local laws*
- **KEY TAKEAWAY IS THAT EVERYONE FALLS INTO MULTIPLE PROTECTED CATEGORIES**

Protected Categories – Sexual Orientation, Gender Identity, Gender Expression

- “**Sex**” refers to biological differences between people who are male, female, or intersex.
- “**Sexual Orientation**” is the gender or genders to which one is sexually attracted.
 - heterosexual, homosexual, bisexual, pansexual, asexual, etc.
- “**Gender identity**” is a person’s internal understanding of and identification with gender, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex assigned at birth, or transgender.
- “**Gender expression**” is a person’s gender-related appearance or behavior. It is how individuals present their gender to the world.
- “**Transgender**” is “a general term that refers to a person whose gender identity differs from the person’s sex assigned at birth.”

Protected Categories – Perception/Association

- Federal and California law also protect perceived membership in one or more protected category.
- Federal and California law also protect employees associated with a person who is a member of (or is perceived to be a member of) a protected category.

What is “Harassment”?



HARASSMENT

Conduct or employment decisions based on a worker’s **protected category** that unreasonably interfere with an employee’s equal employment opportunities **OR** create an intimidating, hostile, or offensive working environment.



Sexual Harassment



What is “Sexual Harassment”?

- Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation.
- Unlawful sexual harassment does not have to be motivated by sexual desire.
- Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person’s sexual orientation or gender identity.

Two Types of Sexual Harassment

- Quid Pro Quo
- Hostile Work Environment



Quid Pro Quo Harassment

- Literally, harassment based on “this for that.”
- Occurs when “submission to or rejection of sexual conduct is used as the basis for employment decisions.”
- Also considered “economic harassment” because it involves an employment decision by a supervisor that affects compensation.

Quid Pro Quo Harassment

The supervisor's threat may be express or implied.

Explicit

A female supervisor squeezes an employee's leg during his performance evaluation and tells him he will receive a higher rating if he sleeps with her.

Implicit

The boss tells Jane that when she wears that low-cut blouse, it makes "daddy" happy, and "when daddy's happy everyone is happy."

Example

- Bill is a new supervisor in a department with 4 other people. It's his first supervisory position.
- Terri, one of the employees in his unit, finds a note from Bill on her desk, which says "I would like to get to know you outside of the office. Can we go out sometime soon?"
- Terri has no interest in seeing Bill outside of the office and says nothing to Bill or anybody else about the note.
- Bill gradually stops having personal communications with Terri.
- He directs assignments to her through other employees, critiques her work through written memos, and calls staff meetings when she is not around.

Is this there a quid pro quo sexual harassment claim here?

Hostile Work Environment Harassment

- “Unwelcome” or “unwanted” conduct;
- Because of a protected category;
- That is sufficiently severe or pervasive;
- Such that a reasonable person would consider the workplace to be intimidating, hostile, or abusive.

“Unwelcome” Conduct

- Not the same as “intentional” – “unwelcomeness” is determined not by what the harasser intends, but by what the victim perceives.
- Conduct of a sexual nature is presumed to be unwelcomed and unwanted.
- Consider the effect of the power dynamic on whether something is truly “consensual.”

“Because of” Protected Category

Most common categories we see alleged in hostile work environment claims:

- Gender
- Race/ethnicity
- Religion
- National Origin
- Age
- Disability
- Sexual Orientation

Example

- Frank is a touchy feely supervisor who works at a supermarket.
- He hires Julie to be a stocking clerk.
- On Julie's first day of work Frank comes out to her as gay and jokingly insists that Julie call him "daddy."
- Over the next few weeks, he insists that Julie give him hugs and tells Julie on several occasions "make sure you complete your tasks to make daddy happy."
- Julie resists Frank's hugs and refuses to call him "daddy."

Is Frank's sexual desire relevant to the issue of whether there was unwelcome conduct *because of* gender or sexual orientation?

Sexual Desire Irrelevant

- Effective January 1, 2014, an amendment to FEHA provides that sexual desire need not be shown to establish a claim of sexual harassment.
- Joking or taunting someone in a way that is related to gender or sexual acts is even more dangerous territory.
- This amendment may have a particular impact in same-sex harassment cases where sexual desire is not necessarily presumed.

“Severe OR Pervasive”

- A single incident might be **severe** enough to constitute harassment, though such cases usually involve physical conduct or touching.
- Even if not “severe” on their own, many seemingly trivial incidents can be **pervasive** enough to constitute harassment.



The Reasonable Person Standard

- This standard is both *objective* and *subjective*.
- “**Subjective**” because it is from the point of view of the target or victim, not from the point of view of the harasser.
- “**Objective**” because the person must be reasonable considering the circumstances.
 - For example, if the plaintiff is a woman, this standard asks whether a “reasonable woman” would be offended by the allegedly harassing behavior.

Examples of Harassment

VISUAL

- Leering
- Staring
- Sexual gestures
- Lewd facial expressions

PHYSICAL

- Kissing
- Hugging
- Massaging
- Grabbing
- Spanking
- Impeding/blocking
- Following

Examples of Harassment

VERBAL

- ✓ Foul/Obscene Language
- ✓ Derogatory Comments
- ✓ Epithets/Slurs
- ✓ Jokes
- ✓ Propositions
- ✓ Cat Calls/Whistling
- ✓ Continuing to Express Interest

WRITTEN

- ✓ Cartoons
- ✓ Pornography
- ✓ Posters
- ✓ Calendars
- ✓ E-mails
- ✓ Text messages
- ✓ Greeting cards
- ✓ Notes

Visual and Written Scenario

- Ana won't take her male coworker's calls.
- She's tired of her coworker's innuendos.
- Co-worker then e-mails her a picture of Sofia Vergara in a thong bikini and writes:

"I know you would look better in it ... and out of it."



Employer Liability for Harassment



Proactive Obligation re Anti-Harassment

Federal and state law not only *prohibit* harassment...but also require employers to take all “reasonable steps” to prevent harassment from occurring....

Who Can Be Liable for Harassment?

- **Liable = named as a defendant**
- **Employer**
 - Harassment by a supervisor = strict liability
 - When company does not act to correct alleged harassment or prevent future harassment
- **Individual Supervisors**
 - Harassing supervisor
 - Non-harassing supervisor who does not act to correct potential harassment
- **Other Employees**
 - And can create liability for the employer as agents

Employer Liability for the Acts of Supervisor

- Employers are **strictly liable** for all acts of sexual harassment by a supervisor.
- A female manager asks a male subordinate to come to her office so she can ask him what he thinks about a picture she wants to use as a profile picture on a social networking site.
- The picture is the manager in a revealing bathing suit.
- The male subordinate complains to you, another manager, about the incident a year later.



Employer Liability for the Acts of Co-Workers

Courts have determined that an employer is liable for a co-worker's sexual harassment if the employer **knew or should have known** of the conduct and failed to take reasonable steps to stop and prevent the harassment.



Employer Liability for the Acts of Non-Employees

As with co-worker sexual harassment, an employer is liable if it **knew or should have known** of the harassment and failed to take reasonable steps to stop and prevent the harassment.



Can a person to whom the behavior is **NOT** directed complain of harassment?



Who Can Be a Victim of Harassment?

Chris and Mark are in the break room talking about the company's latest hire, Sarah. They loudly agree that she has great legs and are looking forward to seeing her around the office. Emily, another co-worker, walks in just as Mark is finishing his last comment.

Who is the potential victim?

- 1. Emily**
- 2. Sarah**
- 3. Both**

Totality of the Circumstances

To determine whether a hostile work environment exists, courts consider the surrounding circumstances, expectations, and relationships in the work environment.

Common Sources of Harassment



Romantic Relationships in the Workplace

- “Welcome” now, unwelcome later?
- Consider the power dynamic.
- Consider “third-party” observers and the impression of sexual favoritism.
- Consider the supervisor’s obligations.



Defining the Workplace – Question

The things that an employee does on his or her “personal time” (e.g. breaks, lunch, after work, etc.) cannot be considered harassment because they are not done “at work”?

TRUE OR FALSE?



Defining the Workplace (Cont.)

Is this activity “away” from the workplace such that employment laws do not apply?

- Texting with a coworker after work hours
- Commenting on or “liking” social media postings by coworkers
- “Matching” with a coworker on Tinder or similar dating app
- Office party, off-site, not during work hours
- Informal happy hour after work
- Weekend barbeque at co-worker’s house with both work and non-work friends

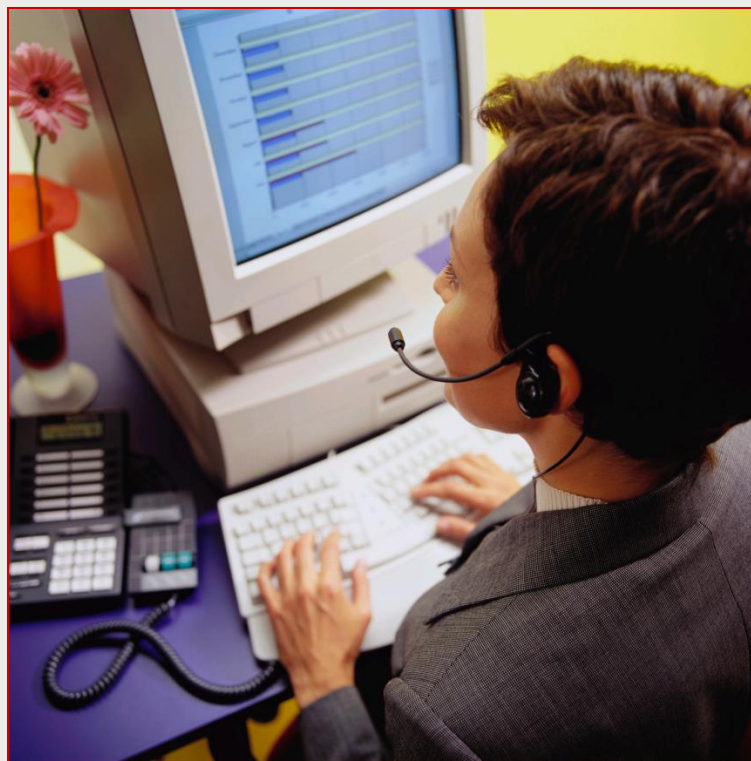
Defining the Workplace – Technology

- Technology has made these issues in harassment cases much more difficult.

Think About Emails Before You Hit Send!

- Can they be misinterpreted?
- Do you want to have to explain this email?
- And remember...

The “E” in “E-Mail” Stands for “Evidence.”



It Was Ok Before...

- A group of employees often meet during breaks at work.
- One of the **female** employees in the group often makes dirty jokes or remarks to lighten the mood.
- One day, one of the **male** employees makes a joke referencing the female employee's body.
- She objects and reports the comments to her supervisor.



Question:

If there is no internal complaint about questionable or inappropriate behavior first, an employee cannot later bring a lawsuit alleging harassment or discrimination.

TRUE OR FALSE?



Monitoring the Workplace

- **Be alert to potential trouble areas:**
 - Joking and off-color language
 - Pictures, posters and publications
 - Disputes between employees
- **Act quickly if you *suspect* a problem**
 - Don't wait for someone to complain.
- **Your goals:**
 - Stop problems before they arise.
 - Impress upon employees the commitment to providing a good work environment.



Responding to Harassment

What if YOU are the accused?

- If you are notified that your conduct is offensive, be respectful and CHANGE your behavior.
- Cooperate in the investigation.
- Maintain confidentiality.

Manager or Supervisor's Role in Responding to a Harassment Complaint



Supervisor/ Manager's Role

1. Review and understand sexual harassment policy.
2. Build the proper foundation for prevention of sexual harassment.
3. Respond to and take immediate action to eliminate harassment in the workplace.

If an Employee Complains to You

1. **Listen** objectively and impartially.
2. **Ask** for the whole story or ask the employee to write down the complaint.
3. **Observe** their behavior and demeanor.
4. Ask who, what, when, where, why and how **questions**.
5. Ask the employee to **demonstrate** if possible.
6. Ask the employee if **others witnessed** the incident.

If an Employee Complains to You . . .

7. Take thorough **notes**.
8. Make the employee feel **comfortable and reassure** the employee that you will handle the situation.
9. Remind the employee that **retaliation** will not be tolerated.
10. **Respond** according to policies and procedures.
11. Never promise **anonymity** – assure the employee that only those individuals who need to know about the complaint will be informed.
12. **Involve Human Resources!!!**

If You Witness Inappropriate Behavior . . .

1. **Approach** the employee and discuss how the behavior is inappropriate.
2. **Determine** if the receiving party was offended.
3. **Investigate** whether this was an isolated incident.
4. **Document** any conversation you have with employees regarding inappropriate behavior.
5. **Inform** HR and/or management of the behavior and your discussions.

Workplace Investigations Generally

- Whether a complainant makes a formal written complaint or an informal verbal complaint, arguably the most critical aspect of responding is the ability to conduct a **prompt, thorough and effective** investigation.

The Investigation

- ✓ Interviews
 - ✓ Complainant – Who, what, when, where, why, how, & how long
 - ✓ Accused – Any explanation about the problematic behavior
 - ✓ Witnesses – What was seen and heard
- ✓ History – Prior complaints or accusations?
- ✓ Policy violation?
- ✓ Recommend steps necessary to stop and prevent any problematic conduct.

Communicate the Outcome

- ✓ HR and the Manager should meet with the complainant and the accused — separately — to review:
 - ✓ The nature of the complaint
 - ✓ What was done to investigate the complaint
 - ✓ The conclusions reached (i.e., finding of inappropriate behavior)
 - ✓ That corrective action has or will be taken
 - ✓ What will be done to monitor the situation to prevent inappropriate behavior and/or retaliation

Don't Forget About Retaliation Claims

Federal and state law prohibit an employer from taking “adverse employment action” towards an employee who has engaged in “protected activity.”

In order to establish a prima facie case of retaliation under FEHA, a plaintiff must show:

1. He or she engaged in a “protected activity”;
2. The employer subjected the employee to an adverse employment action; and
3. A causal link existed between the protected activity and the employer’s action.

Retaliation – “Protected Activity”

- “Protected Activity” includes:
 - Filing an administrative or civil complaint related to harassment/discrimination, if done in good faith
 - Reporting harassment/discrimination internally at work, if done in good faith
 - Participating in a harassment/discrimination investigation or proceeding

Retaliation – “Adverse Employment Action”

- Obvious (e.g., termination, disciplinary action, demotion, withholding a benefit, etc.)
- Not so obvious (e.g., ostracism, interference with work, disclosure of complaint, etc.)
- Standard: any action that “could well dissuade” an employee from engaging in protected activity in the future

Retaliation – Causal Link

- Plaintiff must also prove some relationship or connection between the “protected activity” and the “adverse employment action”
 - Same actor inference
 - Concurrent statements/actions
 - Timing



Abusive Conduct



“Abusive Conduct”

- “Bullying” of an employee by another employee
- The legislature has taken action to require employers to train managers and supervisors on how to prevent such conduct as part of mandated sexual harassment prevention training.
- Quick introduction today to the issue of abusive conduct in the workplace

What is Abusive Conduct?

- “Abusive conduct” is defined 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 – What Is “Malice”?

“**Malice**” = acting with intent to cause injury/harm; engaging in conduct that is despicable and done with willful and knowing disregard of the rights or safety of another.

“**Despicable**” = conduct that is so mean, vile, or contemptible that it would be looked down on and despised by reasonable people.

Examples of Abusive Conduct

- 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.
 - The gratuitous sabotage or undermining of a person's work performance.
- A single act does not constitute abusive conduct, unless it is especially severe and egregious.

Remedies For Abusive Conduct

- Document abusive conduct;
- Counsel, train and/or reassign offender if necessary;
- Assure victim on non-retaliation;
- Communicate code of conduct and expectations to staff;
- Discipline repetitive and severe and egregious conduct;
 - Repeated infliction of verbal abuse sabotage
 - Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating
- Follow up to ensure against repeat conduct and retaliation.

QUESTIONS?

