Sexual Harassment Prevention Training

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nossaman.com
“Oh Boy!
It’s Sexual Harassment Prevention Training Day!”
Why “We” Are Here

There are 3 principal reasons why we present these programs.
Primary Purpose:
A better working environment

- Our Goal: A workplace in which everyone is treated with dignity and respect
Training helps reduce the risk of liability

“An ounce of prevention is worth a pound of cure.” – Ben Franklin
Training is required in California

- Requires “local agency officials” to complete **2 hours** of training within **6 months** of taking office or commencing employment and every **2 years** thereafter
What We Will Cover

- Prevalence of Sexual Harassment
- Unconscious Bias
- Costs and Effects of Workplace Harassment
- Defining Workplace Sexual Harassment
What We Will Cover

- Retaliation and How to Prevent It
- Anti-Harassment and Retaliation Policies
- Abusive Conduct (i.e., Workplace Bullying)
No. 1 How Prevalent is Sexual Harassment?

What percentage of working women report having been sexually harassed at work at some time during their careers?

1. 10-20%
2. 25-30%
3. 50-70%
4. 80-90%
How Prevalent is Sexual Harassment?

Answer:

- [ ] 10-20%
- [ ] 25-30%
- [X] 50-70%
- [ ] 80-90%
How Prevalent is Sexual Harassment?

What percentage of working men report having been sexually harassed at work at some time in their careers?

1. 0-2%
2. 5-10%
3. 10-20%
4. More than 20%
How Prevalent is Sexual Harassment?

Answer:

- 0-2%
- 5-10% ✔
- 10-20% ✔
- Over 20%
Does Sexual Harassment Really Happen?
Does Sexual Harassment Really Happen?

- Uber hasn't finished its investigation into its workplace culture and sexual harassment allegations, but the executives at the ride-hailing company already acknowledge that "things fundamentally need to change."

- “Going forward there can be no room at Uber for brilliant jerks and zero tolerance for anything but totally respectable behavior in an equitable workplace environment."
EEOC - Discrimination Claims From the EEOC (2006-2016)
EEOC – 2016 Discrimination Claims

- 2016 - 91,503 charges of workplace discrimination

- Retaliation 42,018 (45.9% of all charges filed)
- Race 32,309 charges (35.3%)
- Disability 28,073 charges (30.7%)
- Sex 26,934 charges (29.4%)
- Age 20,857 (22.8%)
- National Origin 9,840 (10.8%)
- Religion 3,825 (4.2%)
- Color 3,102 (3.4%)
- Equal Pay Act 1,074 (1.2%)
- Genetic Information 238 (0.3%)
Does Sexual Harassment Really Happen?

- At least 85% of sexual harassment cases never result in a claim being filed. [WHY?]

- 70% of sexual harassment cases do not result in internal action; the overwhelming majority of situations remain unknown to the employer. [WHY?]
No. 2

Unconscious Bias
Explicit Bias: the attitudes and beliefs we have about a person or group on a conscious level. Much of the time, these biases and their expression arise as the direct result of a perceived threat.

Implicit Bias: bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.

Test yourself: Implicit Association Test ("IAT")
http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-test.html

Unconscious Bias
Unconscious Bias

- Read out loud each word as quickly as you can:
  - RED GREEN BLUE ORANGE BLACK

- Read out loud the color of each word as quickly as you can:
  - GREEN BLACK RED BLUE YELLOW
No. 3

The Costs and Effect of Workplace Sexual Harassment
Cost of Workplace Harassment

- **Direct financial costs:**
  - Over the past 5 years, EEOC has collected $700m for plaintiffs pre-litigation.

- **Indirect financial costs:**
  - Negative impact on retention, productivity, morale, reputation.
Cost of Workplace Harassment

Where it exists, workplace harassment

- Damages employee morale
- Reduces productivity
- Undermines credibility
- Creates liability risk
  - For the Employer
  - For the Perpetrator
- Reputational Damage
Cost of Workplace Harassment

Workplace harassment can cause physical and psychological harm not just to target, but also coworkers:

- Anxiety, stress and depression
- Reduce productivity
- Performance problems
- Feelings of guilt, shame
- Withdrawal and isolation
- Economic loss
- Reputational damage
No. 4

The Law and Sexual Harassment
Federal Law:
Title VII of the 1964 Civil Rights Act

Title VII is the chief source of federal anti-harassment law

July 1964: President Lyndon B. Johnson signs the Civil Rights Act of 1964
Federal Law: Title VII of the 1964 Civil Rights Act

- It is unlawful for an employer to discriminate against any individual with respect to terms, conditions or privileges of employment because of such individual’s:
  - Race
  - Color
  - Religion
  - Sex
  - National origin

- Sexual harassment is a form of “discrimination.”
Federal Law:  
Title VII of the 1964 Civil Rights Act  
- Are Sexual Orientation Claims Cognizable Under Title VII?  
  - Circuit Split:
    - Yes - *Hively v. Ivy Tech Community College* (7th Cir. April 4, 2017)
Federal Law:
Title VII of the 1964 Civil Rights Act

- Applies to business with 15+ employees engaged in interstate commerce
- Enforced by Equal Employment Opportunity Commission (EEOC)
- Requires that an employee exhaust administrative remedies prior to filing a law suit in Court
- EEOC authorized to oversee conciliation process
- Provides a range of remedies designed to “make the victim whole”
CA: Fair Employment and Housing Act

- California’s Fair Employment and Housing Act (FEHA), prohibits discrimination and harassment in employment based on:
  - Age
  - Ancestry
  - Color
  - Religious creed
  - Denial of Medical Care Leave
  - Disability
  - Gender, gender identity, gender expression
  - Marital Status
  - Military & Veteran Status
  - National Origin
  - Race
  - Sex (includes pregnancy, child birth, breastfeeding and related medical condition)
  - Sexual orientation (includes heterosexuality, homosexuality and bisexuality)
Under California law, sexual harassment can also consist of harassment based on:
- Pregnancy
- Gender or gender identity
- Sexual orientation:
  - Gay vs. Non-Gay
  - Actual or Perceived
Other Types of Harassment

- Unlawful harassment is based on protected characteristics such as race, religion, disability, etc.
- Even if harassment is not unlawful *per se*, it should be prevented.
CA: Fair Employment and Housing Act

- The FEHA is enforced by the Department of Fair Employment and Housing (DFEH)
  - Anti-harassment provisions apply to California employers with 1+ employee(s)
  - Plaintiffs can pursue their claims in court after satisfying certain procedural requirements, or allow the DFEH to review the claims
Relief Available to Victims of Harassment

Both the DFEH and the California courts can order employers to:

- Hire an improperly rejected applicant
- Reinstate a terminated employee
- Pay actual damages, including front and back pay
- Courts can also order unlimited compensatory damages and punitive damages
Relief Available to Victims of Harassment

- Additional FEHA Protection:
  - Employers are required to take all reasonable steps necessary to prevent workplace harassment
  - FEHA’s protections extend to protect against harassment that occurs on the premises or in connection with the employment relationship
Two Principal Types of Sexual Harassment

**SEXUAL HARASSMENT**

**TYPE 1**
QUID PRO QUO HARASSMENT
(“Something for something”)

**TYPE 2**
HOSTILE ENVIRONMENT HARASSMENT
Definition of Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors or comments or conduct of a sexual nature that:
  - Become terms/conditions of employment and result in an employment decision; or
  - Unreasonably interfere with work or creates hostile or offensive work environment

Quid Pro-Quo

Hostile Environment
TYPE ONE:
Quid Pro Quo Sexual Harassment

- Providing or withholding an employment benefit or detriment based on an individual’s response to sexual advances, requests for sexual favors or other verbal or physical conduct involving sex:
  - “Sleep with me and you’ll be promoted”
  - “Unless you sleep with me you’ll be demoted”
  - “Remember who signs your paycheck”
  - “Be nice to me and I’ll take care of you”
"I don't believe in formal interviews miss Johnston."
TYPE TWO: Hostile Environment Harassment

1. Unwelcome sexual or nonsexual conduct, speech, or other communication in a work-related setting;

2. Based on victim’s sex;

3. Unreasonably interferes with job performance; and/or Creates an intimidating, hostile or offensive work environment.
The Unwelcome Requirement

- **What is unwelcome? How can you tell?**

- **In determining whether comments or conduct are unwelcome, consider that:**
  - Each individual has a unique perspective and sensibilities that aren’t always apparent to others
  - Many people are often too embarrassed to object
  - Clear objection is not required
  - Be alert for non-verbal cues

(subjective standard)
Unwelcome: The Secret Victim

- Be aware of others who may be in earshot
- Watch for “reluctant eavesdroppers” who may overhear without meaning to listen
- Your position within the Company may make you more visible to others than you think
Hostile Environment Harassment

- *Unwelcome conduct can take the form of:*
  - *visual* depictions
  - *verbal* remarks, and/or
  - *physical* contact or conduct.
Harassing Conduct Can Be....

- **Visual**
  - Display of sexual or suggestive pictures, drawings, emails or websites
  - Making sexual gestures
"The parent company is coming for an audit, Miss Utley — I want you to put on this thong bikini."
Harassing Conduct Can Be….

- **Verbal**
  - Whistles or catcalls
  - Derogatory remarks based on gender or sexual orientation
  - Sharing sexual stories or fantasies
  - Jokes or teasing about sexual matters
  - Request for sexual favors
  - Repeated requests to date or socialize
  - Comments or discussions (oral or written) about another’s alleged sexual history, interests or prowess
Harassing Conduct Can Be….  

- **Physical**
  - Uninvited touching of any sort
  - Assault
  - Invading personal space
  - Impeding or blocking movements
Framework for Assessing Risk of Liability

- Physical Assault
- Repeated Mild Sexual Innuendo

Severity

Pervasiveness

LIABILITY RISK

NOT SURE IF I SHOULD LAUGH AT A DIRTY JOKE
OR SCOLD THE PERSON WHO TOLD IT TO KEEP UP APPEARANCES

MAKING IT HAPPEN.
Factors in Determining a Hostile Environment

- In determining whether an environment is sufficiently hostile, consider:
  - How frequent is the **conduct**?
  - How **severe**?
  - Does it involve **physical** contact?
  - To what extent does it interfere with job **performance**?
Sexual Harassment

- Tim’s female supervisor constantly yells at him and tells him he is incompetent. Often, this occurs in front of other employees, causing Tim great embarrassment.

- Tim complains that he is the victim of “harassment” by his supervisor, and demands that the company do something about it.
Sexual Harassment

- Could this be unlawful harassment?
  1. Yes
  2. No

- What should the Company do about it?
Sexual Harassment

- **Answer:** **NO.**
  - This is not unlawful harassment.
  - Harassment is only unlawful if it is based on gender or some other protected characteristic.
  - Best Practice: Take action to remedy the situation, even though the conduct may not be unlawful.
Sexual Harassment

- Nancy is a high-strung executive who is easily aggravated. While in the office, she frequently drops the “F-bomb” when things are not going her way.
- Nancy’s assistant, Sharon, has asked her to curb her offensive language several times, and while Nancy has apologized and promised to do so, the swearing continues.
- Sharon complains to Nancy’s boss that Nancy is creating a “hostile work environment.”
Sexual Harassment

Could this be hostile work environment sexual harassment?

1. Yes
2. No
Sexual Harassment

Answer: It depends.

– The language is sexual in nature, and has persisted despite the employee’s requests that it stop.
Sexual Harassment or

- **Business Necessity**
  
  Lyle v. Warner Bros. 
  (Cal. Sup. Ct. 2006)
  
  - Sexually coarse and vulgar language not aimed at the plaintiff or other women in the workplace may not create a hostile workplace. The creative business necessity defense can defeat a harassment claim.
Sexual Harassment or

- **Business Necessity**

  *Freitag v. Ayers (9th Cir. 2006)*

  - an employer’s “negligence and ratification” of sexual harassment through failure to take appropriate corrective actions will give rise to liability.
Sexual Harassment

- Dan is recently widowed. One of his co-workers, an attractive woman named Linda, asks him out on a date. He declines.
- Linda persists, sending Dan notes of an increasingly sexual nature, despite his requests that she stop.
- Dan complains to the manager, who does ask Linda to stop, but she continues.
- Dan then sues the company for sexual harassment.
Sexual Harassment

Could Dan establish a claim for sexual harassment?

1. Yes
2. No
Sexual Harassment

- **Answer:** Likely, YES.

  - A man is entitled to protection from sexual harassment by a woman. In this case, it is improper to presume that a reasonable man would necessarily welcome overtures from an attractive woman.

  - *Best Practices:* Avoid making judgments based on stereotypes
Sexual Harassment

- Alan is a manager with a strange sense of humor. He frequently tells offensive jokes to all of his subordinates, including a couple who are husband and wife.

- The husband and wife sue for sexual harassment.

- The company argues that because Alan is equally offensive to men and women, the alleged harassment is not “because of” gender, and therefore it is not unlawful.
Sexual Harassment

Is the Company correct (is there a defense because Alan was equally offensive to men and women)?

1. Yes
2. No
Sexual Harassment

- **Answer:** **NO.**

  Offensive conduct of a sexual nature can give rise to liability for harassment, even if it is directed at both genders. The “equal opportunity offender” is not excused.
Sexual Harassment or Bullying

*EEOC (Christopher) v. National Education Assn.* (9th Cir. 2005)

– Facialy gender neutral motivated behavior with no discriminatory animus which is subjectively experienced differently by members of the opposite sex *is sexual harassment.*

– (Don’t be a bully.)
Sexual Harassment

- David complains that his male supervisor and male coworkers subjected him to extremely demeaning and sexually explicit comments and gestures (gay innuendo, profanity, rude behavior). Comments were made both jokingly and in anger.
- While conduct was graphic, vulgar, and sexually explicit, the words were NOT an expression of actual sexual desire.
Sexual Harassment

Could David maintain a claim for sexual harassment?

1. Yes
2. No
Sexual Harassment

Answer: YES.
(as of July, 2013)

- In 2011, the California Court of Appeals said no, in *Kelley v. The Conoco Companies* (no credible evidence that harasser was homosexual or that the harassment was motivated by sexual desire).

- In July, 2013, California Legislature overruled *Kelley* in Senate Bill 292, which amended FEHA to clarify:

Sexual Harassment – Same Sex
Transgender

- **Who is protected?**
Transgender

- Gavin is a transgender boy who attends the 6th grade in California. He was born as a female but identifies as a male.
- The school requires Gavin to use the bathroom that matches the sex on his birth certificate.
- Gavin sues the school for sexual discrimination.
Does Sex Discrimination in California Include Gender Identity?

Could Gavin establish a claim for sexual discrimination?

1. Yes
2. No
3. Maybe
Does Sex Discrimination in California Include Gender Identity?

YES.

–California Education Code section 221.5.
Does Sex Discrimination under Title IX (federal law) include Gender Identity?

Current state of the law (in flux):

– Sunday, August 21, 2016: TX federal judge issued nationwide injunction barring federal government agencies from taking action against school district’s that don’t follow Obama administration’s guidance.

– (Schools are not required to permit transgender students to use bathroom that corresponds with gender identity.)
Transgender and “the Bathroom Debate”

- Feb. 22, 2017 > President Trump rescinded protections for transgender students that had allowed them to use bathrooms corresponding with their gender identity instead of gender on their birth certificate.

- Stay tuned….SCOTUS probably will decide but children still will be protected in California.
Sexual Harassment

- An employee receives from a close friend an e-mail attachment containing a sexually explicit joke.
- The employee forwards it to his friend within the company, who he has shared such jokes with in the past.
Sexual Harassment

Is this hostile work environment harassment, given that the recipient will not be offended?

1. Yes
2. No
Sexual Harassment

**Answer:** Probably.

- Dissemination of sexually offensive material through the company e-mail can be evidence of a hostile work environment.
Sexual Harassment

- An employee is surfing the internet and downloads, from YouTube, a sex tape of a well-known celebrity.
- The employee does not share this material with anyone else at the company.
Sexual Harassment

Could the sex tape be evidence of a hostile work environment harassment?

1. Yes
2. No
Sexual Harassment

□ **Answer:** YES.

□ The fact that this material is being accessed by company employees and is on the company computer system can be evidence that a hostile work environment exists.
Sexual Harassment

- A man is promoted after having a romantic relationship with his boss.
- Other employees were passed over for the promotion.
Sexual Harassment

Do employees in line the promotion have legal standing to file a complaint, even though they were not subject to direct sexual harassment?

1. Yes
2. No
Sexual Harassment

- **Answer:** YES.

- Favoring a paramour over others of the same sex can support a claim for sexual harassment by the other employees.
The “Paramour”

- *Miller v. Dept. of Corrections (2005) 36 Cal. 4th 446*
  - Warden provided unwarranted favorable treatment to employees with whom he had affairs.
  - Sexual favoritism blocked the way to merit-based advancement for other employees.
  - An employee may establish a claim for sexual harassment by demonstrating sexual favoritism to others.
Sexual Harassment

"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."
Sexual Harassment

- Two employees who are romantically involved frequently and openly touch each other in an affectionate way in the workplace.
- The touching is entirely consensual, and nobody has complained.
Sexual Harassment

Is there exposure for a claim even though the activity is consensual and there were no complaints?

1. Yes
2. No
Sexual Harassment

- **Answer:** YES, potentially.

- Employees at the workplace may reasonably find the conduct offensive, even if they have not voiced complaints.
Sexual Harassment

- Three women hired at the same time were repeatedly told offensive jokes of a sexual nature by male co-workers over several months.
- Two of the women repeatedly objected to the jokes and made it clear they were offensive.
- The third woman did not complain and told a few sexual jokes of her own.
Sexual Harassment

Could the third woman have a hostile environment claim if she can show she was offended but felt compelled to “go along”?

1. Yes
2. No
Sexual Harassment

- **Answer:** YES, if the jokes were sufficiently severe and pervasive.

  - An employee may be subjected to a hostile work environment even if he or she does not outwardly object to the wrongful conduct.
Sexual Harassment

- Monica complains of sexual harassment because of sexual jokes, comments, and actions by co-workers.
- However, this conduct is not directed towards Monica.
Sexual Harassment

Does Monica have a right to complain about hostile work environment harassment when the conduct was not directed towards her?

1. Yes
2. No
Sexual Harassment

- **Answer:** YES.

  - An employee can be subjected to a “hostile work environment” even if the sexual harassment is not directed at him or her.
Sexual Harassment

UHH...I WAS...UM...Y'KNOW...
JUST WONDERING...IF MAYBE...
Y'KNOW...YOU'D LIKE TO...Y'KNOW
UM...GO OUT SOME TIME?

SEXUAL
HARASSMENT!!
Sexual Harassment

- Bret is the quarterback of a professional football team. Lately, he has been noticing Jane, an attractive young woman who also works for the team in the public relations department.
- He asks Jane out on a date, and Jane says “no thanks.”
Sexual Harassment

Has Bret sexually harassed Jane?

1. Yes
2. No
Sexual Harassment

- **Answer:** NO.

- A single instance in which an employee asks a co-worker on a date is neither “severe or pervasive,” and therefore does not constitute sexual harassment.
Despite the initial rejection, Bret becomes increasingly interested in Jane. He leaves a very polite message on her cell phone, explaining in a gentlemanly way what a nice time he thinks they would have if she went out on a date with him.

Jane tells Bret that she really doesn’t want to go out with him, and asks him to stop bringing the matter up.
Sexual Harassment

Now has Bret sexually harassed Jane?

1. Yes
2. No
Sexual Harassment

- Answer: NO.

- Although this is a second interaction, it is only the first time Jane has voiced an objection, and the message was not phrased in an offensive manner. Therefore, this is still not “severe or pervasive” enough to constitute sexual harassment.
Bret does not give up easily. Because he feels he really needs to make a dramatic statement, Bret sends Jane a text that includes a photo of his private parts. Jane concludes that the best way to deal with the situation is to ignore Bret and his photograph, so she says nothing, and makes no complaint to team management.

Nine months later, when she fears she might be in danger of losing her job, Jane provides copies of the voice mail and text to management, and complains that she has been subjected to a hostile work environment.
Sexual Harassment

Now has Bret sexually harassed Jane?

1. Yes
2. No
Sexual Harassment

Answer: YES.

Because of the offensive nature of the text message, and the fact that Jane had previously asked Bret to stop contacting her, the conduct is sufficiently severe and pervasive to constitute unlawful harassment.

Note: The team itself will only be liable for harassment if it knew or should have known of the conduct and failed to take reasonable action to stop it.
The Virtual Workplace: After Hours and Off-Site

- Socializing outside the office carries certain risks:
  - Appearance of favoritism
  - Perceived informality can result in lower standard and reduced inhibitions
  - Beware of alcohol abuse and effects
Romantic and Intimate Relationships

Office Romances are not illegal, but they can create significant issues:

- Suspicions of favoritism or the appearance of it
- Physically intimacy may be offensive to third parties and create a hostile environment
- If the relationship cools, resulting hostility could affect morale and expose the company to retaliation claims
Romantic and Intimate Relationships

- Disclose any marriage, familial, or other close personal relationship with another employee to the HR Manager.

- Employees involved in a romantic relationship may be asked to sign an Acknowledgement of Consensual Relationship.
Sexual Harassment

- ABC company is regularly visited by a UPS delivery person, who consistently makes inappropriate sexual comments to the receptionist.

- The receptionist complains to the manager at ABC, who tells her there is nothing he can do because the UPS person is not an ABC employee, and ABC does not have a contractor relationship with UPS.
Sexual Harassment

Could the employer be liable to the employee for the actions of the UPS driver, a non-employee?

1. Yes
2. No
Sexual Harassment

- **Answer**: **YES**.

- An employer is liable to an employee for known sexual harassment by nonemployees such as clients, customers, contractors, vendors, or anyone with whom employees have contact as part of their job.
Sexual Harassment

- Alice has been regularly working on a project with Mike, a client who is based out of town.

- One afternoon while they are working in Mike’s office, Mike asks Alice to have dinner with him.

- Alice is caught off guard by this request, which makes her uncomfortable.
Sexual Harassment

- Alice calls her boss and tells him she is not comfortable accepting Mike’s invitation, because she thinks Mike may have a romantic interest in her.

- Alice’s boss tells her that entertaining clients is part of the job, and that she must accept.
Sexual Harassment

Is there exposure for a sexual harassment claim, given that there is a legitimate business purpose for the dinner?

1. Yes
2. No
Sexual Harassment

**Answer:** Probably.

– Even if there is a legitimate business reason for Alice to be working with Mike, once she expresses her discomfort, compelling her to attend the dinner would create a hostile working environment.
Under both California and federal law, an employer is automatically (strictly) liable for harassment by a supervisor and is liable on a negligence theory for non-supervisory personnel and non-employees.

Notwithstanding, there are several defenses available to employers; e.g., avoidable consequences.
Employer Liability

- Definition of “Supervisor”

  - any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

- California Government Code, Section 12926 (r).
Employer Liability

▪ Definition of “Supervisor”

- An employee is a supervisor when the employer has empowered that worker to “take tangible employment actions against the victim,” including hiring, firing, failing to promote, etc.

▪ Vance v. Ball State University (SCOTUS) 2013
Your Liability

- Harassers can be held personally liable for unlawful harassment.
No. 5

Retaliation and How To Prevent It
Retaliation Defined

**Retaliation** - (re·tal·i·a·tion) n. the act of retaliating or of returning like for like; retribution (e.g., an eye for an eye, a tooth for a tooth).
Elements of the Retaliation Claim

1. Employee suffers an adverse employment action

2. Employee engages in a protected activity

3. Causal connection between the protected activity and adverse action
Examples of Protected Activities

- Filing a formal complaint of harassment with DFEH or EEOC
- Contacting HR to formally allege harassment
- Expressing concerns to management about alleged harassment that occurred in the past
Examples of Protected Activities

- Cooperating with an investigation of alleged harassment or discrimination
- Supporting a coworker’s harassment allegations during an investigation
- Resisting a supervisor’s advances
Examples of Adverse Employment Actions

- Termination
- Demotion
- Refusal to hire or promote
- Reduction in salary
- Poor performance review
- Assigning undesirable work
- Change of physical location
- Shift changes
- Harassment or hazing
- Marginalization
Avoiding Retaliation Claims

- Never disparage individuals for engaging in protected activities, even as a joke
- Treat all employees fairly and equitably under the circumstances
- Hold all employees to fair, reasonable and consistent standards
- Carefully monitor employee performance and behavior and document your observations
- Promptly address any performance problems or misconduct and document your actions
Retaliation

- An employee has repeatedly failed to do his job properly. The supervisor intends to write the employee up, but before he does, the employee approaches the supervisor and complains about alleged gender discrimination at the company.
Retaliation

Should the supervisor now write up the employee?

1. Yes
2. No
Retaliation

- **Answer**: NOT YET
  - Retaliation is an adverse employment action because of employee’s exercise of a legal right.
  - Timing is often a critical element in retaliation claims.
Retaliation

- Adam complains to management that he believes he has been the victim of discrimination. An investigation determines that there has been no discrimination.
- One month later, Adam’s wife is laid off. Wife claims that her layoff was in retaliation for Adam’s complaint.
- Company responds that Wife cannot claim to be the victim of retaliation based on her husband Adam’s protected activity.
Retaliation

Could Wife have a claim for retaliation, when her husband is the one who engaged in a protected activity?

1. Yes
2. No
Retaliation

- Answer: Yes.

- A number of courts have found liability for retaliating against the friend or relative of an employee who engaged in protected activity.
Retaliation

- It is unlawful to retaliate against an employee who has articulated a **good faith** concern about sexual harassment or discrimination against him/her or against another.
No. 6

Employer’s Obligations and Policies Against Unlawful Harassment in the Workplace
Employer Responsibility

- California law requires that employers must take “all reasonable steps necessary to prevent discrimination and harassment from occurring.” Gov. Code § 12940(k)

- Failure to prevent discrimination is an independent basis for legal liability.
Employer Responsibility

- Employer is required to maintain a workplace free of sexual harassment
  - Must have a policy
  - Must have a complaint procedure
  - Must post notice and distribute information
  - Must train supervisors
  - Must act promptly and effectively
Employer Policies

1. Harassment and Discrimination Policy
2. Equal Employment Opportunity Policy

• These policies apply to all persons involved in Agency operations.
Prohibition of Unlawful Harassment and Discrimination Based On:

- Race, Creed, Color,
- Sex, Sexual Orientation, Gender, Gender Identity, Gender Expression,
- Genetic Information,
- Religion (including religious dress and grooming practices),
- Marital Status,
- Age, and
- National Origin/ Ancestry.
Prohibition on Unlawful Harassment and Discrimination Based On:

- Physical or Mental Disability,
- Medical Condition,
- Pregnancy, Childbirth, Breastfeeding, and Related Medical Conditions,
- Citizenship Status,
- Veteran or Military Service Status, and
- The perception that a person has any of these characteristics.
No Tolerance Policies

Agency does not tolerate harassment at work or in connection with agency activities, including:

- During the Workday
- While Working Off-Site
- At Work-Related Social Functions
- During Communications with third parties
Reporting Discrimination and Harassment

- All persons are strongly encouraged to report any evidence of unlawful discrimination.
  - Your/our goal is to eliminate harassment.
How to Report Discrimination or Harassment

- **Whom to Notify?**
  - HR Manager

- **How?**
  - In writing.

- **When?**
  - ASAP.
Reporting Discrimination and Harassment

- All persons are expected to cooperate in Agency investigations.
  - *Failure by a supervisor to report known harassment allegations may lead to disciplinary action, up to and including termination.*
- Confidentiality cannot necessarily be guaranteed.
- Knowingly false reports are subject to discipline, but good-faith reporting errors are not.
- Retaliation is strictly prohibited.
Course of a Harassment Investigation

Report of Harassment

Supervisor Management Officer
HR

Investigation

Notice of Results to Appropriate Parties; Remedial Action

MAKING IT HAPPEN.
Obtaining Redress

- Procedures
  - In-house complaint procedures
  - External complaint procedures
    - DFEH
    - EEOC
  - Lawsuit
If There Is A Serious Complaint

- Inform the HR Director
- Inform the complainant, in general, of his or her rights
- Assure the employee that you take the matter seriously and that no retaliation will occur as a result of stepping forward
- Undertake an immediate, full and fair investigation
- If necessary, implement prompt and effective remedial action and take measures to prevent future harassment
- Inform the complainant, in general, of the action taken
Handling Complaints

- An employee complains to his supervisor that another supervisor, Jones, has been harassing him.

- Supervisor Jones adamantly denies the allegations.

- There are no witnesses to corroborate the staff member’s story.
Handling Complaints

Is the supervisor required to take any further action?

1. Yes
2. No
Handling Complaints

- **Answer:** YES.

- An employer must take actions that are reasonably calculated to end the harassment:
  - counsel both employees
  - provide additional training
Harassment: Inadequate Training Can Lead to Liability
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- **EEOC v. Mgt. Hospitality of Racine (7th Cir. 2012)**
  - Teen girls complained about IHOP night manager’s sexual harassment. The EEOC filed lawsuit after complaints were ignored by management.
  - Employer liable for failing to prevent & correct harassment
    - Managerial employees failed to follow anti-harassment policies
    - Anti-harassment training was inadequate and ineffective
    - Anti-harassment policy was not reasonably effective
    - Investigation was not prompt
Handling Complaints

- A female staff member complains to her supervisor about sexually suggestive comments made to her by a male co-worker, but demands that the information be kept strictly “confidential.”

- Should the supervisor promise not to violate the confidence since the victim has chosen not to pursue a complaint?

  1. Yes
  2. No
Handling Complaints

- **Answer:** NO.
  - Confidentiality can never be promised – employer has a duty to take appropriate action, and must give the alleged harasser a chance to respond.
Investigation Do’s

- Explain the procedure
- Be objective and thorough
- Act promptly
- Identify and interview witnesses
- Identify and investigate similar incidents
- Identify what impact the conduct has had
- Document the procedure
- Protect privacy interests
- Make a determination, if possible, and communicate the results to the complainant.
Investigation Don’ts

- Jump to conclusions
- Legally advise the complainant
- Permit widespread knowledge
- Overpromise
- Underpromise
- Diminish or exaggerate
- Delay
Appropriate Corrective Action

- A female staff member complains to her supervisor of sexual harassment.
- Should the supervisor immediately transfer the complainant to another position during the investigation in order to protect her?

1. Yes
2. No
Appropriate Corrective Action

- **Answer**: NO.

  - Transferring the alleged victim is usually not a good idea, unless he/she requests it.

  - Harassment is to be remedied through actions targeted at the harasser, not the victim.
Corrective Action Must Be:

- Reasonably calculated to end the harassment.
- Sufficient to assure a workplace free from sexual harassment.
- Assessed proportionately to the seriousness of the offense.
Corrective Action

- Verbal warning and counseling
- Written Reprimand
- Suspension
- Transfer
- Demotion
- Discharge
No. 7

Workplace Bullying
Workplace Bullying

Workplace Bullying, (/ˈwɜːrkplæs/ˈbʊlɪŋ/):
Verb; A deliberate, repeated, health-endangering mistreatment of an employee by a supervisor or coworker.
Workplace Bullying

- On September 9, 2014, California enacted **AB 2053**, which amended Government Code § 12950.1 to impose new obligations regarding the existing sexual harassment training requirements.
  - Under this new obligation, as of January 1, 2015, California employers with 50+ employees must include prevention of “abusive conduct” in the workplace as part of the harassment training and education.
  - The amendment did not formally add “abusive conduct” as a protected category under FEHA; rather, it amended only the harassment training requirement.
What is “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 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.”
Workplace Bullying

- A 2014 survey found that, of the 1,000 people surveyed, 27% had suffered abusive conduct at work, 21% had witnessed abusive conduct at work, and 72% were aware that workplace bullying happens.
  - Abusive conduct can have a negative effect on productivity and morale, as well as increase absenteeism rates and employee turnover.
  - There is a difference between tenacious management and bullying.

*Note: This training is not intended to prohibit any activities protected by the NLRA.*
One creative idea...

https://www.youtube.com/watch?v=7dfREj6kOAA
Questions?