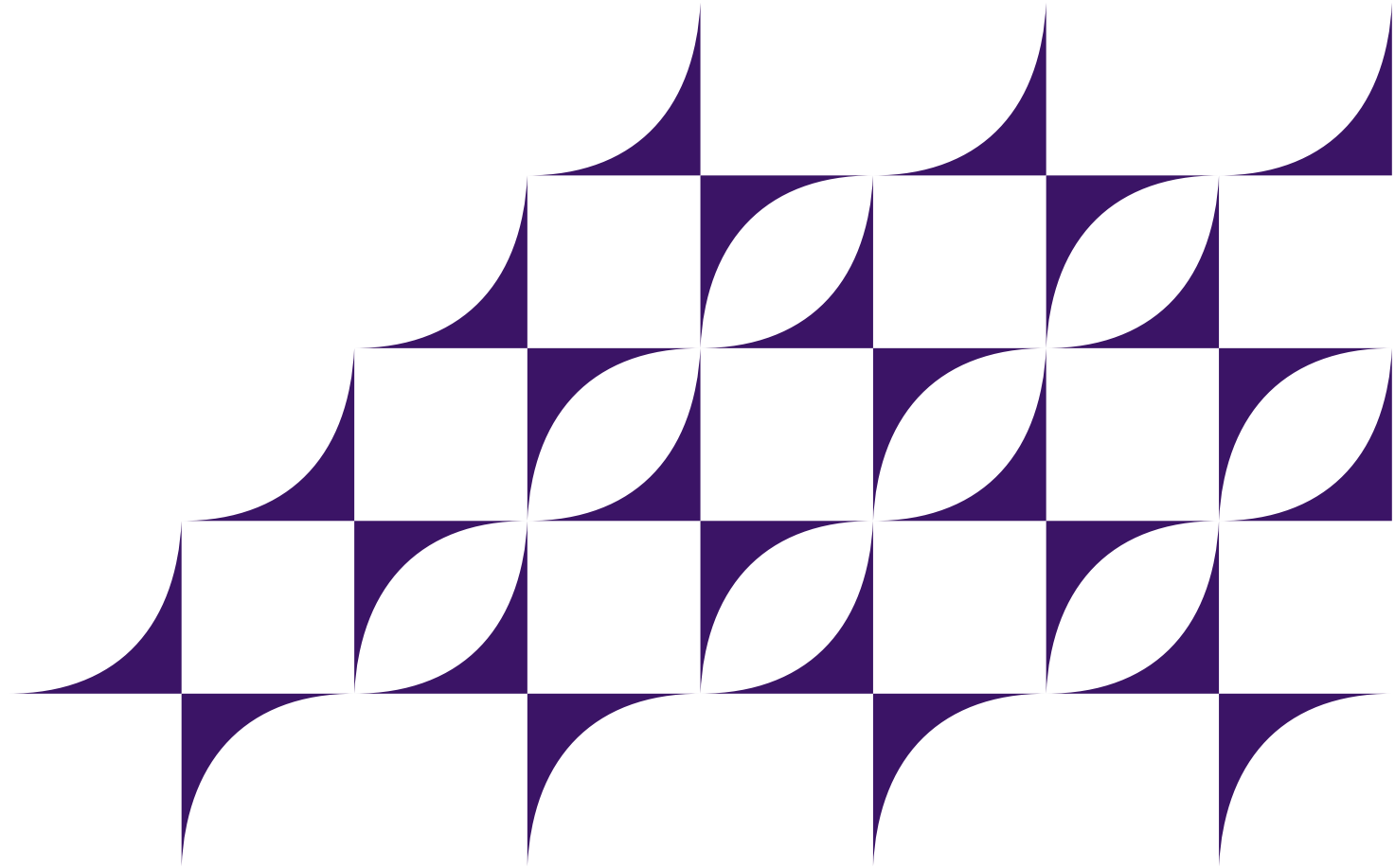


# Preventing Sexual Harassment in the Workplace and What to Do When Claims are Made

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# Presenters



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# Agenda

Defining Sexual Harassment

Reporting Complaints

Responding to Complaints

Preventing Sexual Harassment

Liabilities and Remedies

What is Sexual Harassment?

# The California Fair Employment and Housing Act (FEHA)

- FEHA defines sexual harassment as a form of discrimination based on sex/gender including pregnancy, childbirth, or related medical conditions, gender identity, gender expression, or sexual orientation.
- The Civil Rights Council regulations define sexual harassment as unwanted sexual advances, verbal or physical conduct of a sexual nature.
- Sexual harassment may involve harassment of a person of the same gender or the harasser, regardless of either person's sexual orientation or gender identity.



# Types of Harassment

- Quid Pro Quo
- Hostile Work Environment

# Examples of Quid Pro Quo

<b>Something</b>	<b>In Exchange for</b>	<b>Something</b>
Request for sexual favor or advance	Submission	Promotion, raise, other favorable treatment
Request for sexual favor or advance	Rejection	Termination, demotion, other unfavorable treatment



# Hostile Work Environment

Unwanted harassing conduct based upon protected status.

The harassing conduct was severe and pervasive.

A reasonable person in the employee's circumstances would consider conduct hostile or abusive.

The employee considers the work environment hostile or abusive.

# Sexual Harassment - Hostile Work Environment

Based on sex/gender

Offensive, physical, verbal, or  
visual conduct

Conduct is unwelcome

Conduct is severe or pervasive

# Types of Harassing Conduct



**Verbal**



**Visual**



**Physical**

# Unwelcome or Unwanted?

- **Subjective:** When the complaining employee says the conduct is unwelcome.
- Judged from the perspective of the employee.
- May not be unwelcome if the employee previously solicited or invited the conduct.
- Still against Company policy.



# Severe or Pervasive

1

The nature of conduct

2

The frequency of conduct

3

The circumstances under which the conduct occurred

4

Whether the conduct was physically threatening or humiliating

5

The conduct unreasonably interferes with the employee's work performance

# Where can harassment occur?

AT WORK

OFF-PREMISE FOR COMPANY  
SPONSORED EVENTS

OFF-PREMISES OUTSIDE  
OF WORK EVENT

ONLINE/ SOCIAL MEDIA

# Who can be a harasser?

- Co-Worker
- Supervisors
- Third Parties







What should the bystander here do?



## What should the bystander here do?

- A. Nothing, it doesn't have to do with her.
- B. Tell the man making disparaging comments that they are inappropriate.
- C. Redirect the conversation away from religion.
- D. Report the conversation to a manager.

# Reporting Complaints

# Reporting Complaints

- Under California law employees can report harassment to:
  - Their supervisor
  - Any other supervisor in Company
  - Human Resources
  - Any member of management
- Employees do **NOT** have to follow the regular chain of command to report.



# Responding to Complaints

# Employers must follow up on all complaints of harassment...

- Promptly
- Impartially
- Thoroughly – via an investigation conducted by a qualified person with due process
  - Confidentiality will be kept by employer to the extent possible
  - **Documentation** and tracking for reasonable progress
  - Appropriate options for remedial actions and resolutions
  - Notification
- Without retaliation

# Tips for Handling Employee Complaints

Thank the person for coming to you.

Reiterate the Company's commitment to fostering a workplace free of harassment and how serious the employer takes the issue.

Listen – be sensitive, but impartial (avoid reactions).

Assure the complainant they will be protected against retaliation.

Assure the complainant the matter will be appropriately investigated and explain the investigation process.

# Supervisors must not...

- Dismiss the complaint
- Excuse yourself from taking action
- Agree with the complainant
- Delay the complaint
- Forget about the complaint
- Fail to ensure the complaint is being investigated



# “Off the record” Complaint

**There is no such thing  
as an “off the record”  
complaint**

**The employer cannot  
conduct a “secret”  
investigation**

**Think “discretion,”  
not “confidentiality”**

# Duty to Prevent Retaliation

Managers and supervisors have a duty to protect employees from retaliation resulting from the filing of a complaint.

# What is retaliation?

When an employer or another in authority takes an **adverse employment action** against an employee because they engaged in a protected activity

OR

**Hostile work environment**, conduct that is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment



# Examples of Protected Activity

Threatening to file or filing a complaint or charge alleging harassment.

Participating in an interview, investigation, hearing, trial or other proceeding as a witness or complainant.

Complaining to anyone about alleged harassment.

Requesting a reasonable accommodation for religion or disability.

# Why would a victim be reluctant to report harassment?

- Ignorance of the law
- Embarrassed and confused
- Uncomfortable with conflict
- Fear of not being believed
- Fear of humiliation
- Fear of retaliation
- Fear of ostracism
- Fear of damaging their career



# Preventing Sexual Harassment

# The Unique Role of Management

## Set culture

- If it is okay for leaders, it is okay for everyone
- Power dynamic is real

## Manage an issue

- Understand when the duty to act is triggered

## Evaluate and advise

- Baseline understanding for better evaluation of situations when they arise
- Prevent discrimination, harassment, retaliation

## Avoid “passive aggressive” management

- Communicate with staff and others in a direct yet professional manner

# Duty to Act is Paramount: Common Mistakes

- “Off the record . . .”
- “Let me know when you want me to do something about it.”
- “Oh, do you want to make a formal complaint?”
- “Why don’t you go back and write that up and then we’ll take it to HR . . .”
- “As your friend and mentor . . .”
- “It was more of a personal matter – they needed to work it out.”
- “That was just hearsay. I had no evidence. I was not there. I did not hear it myself; I did not see it.”
- “I cannot act on rumors or gossip.”



# How Might an Employer be Put on Notice of a Claim?

- Internal Complaint (written or verbal)
- Informal Reports
- Hotlines
- Anonymous Letters/ E-mail Messages
- Observation
- Union Grievance
- Exit Interview
- Complaint Letter
- Lawsuit or DFEH/EEOC Complaint
- Off-Hand Comments

# Takeaways

- Understand the employer's anti-harassment policy
- Be careful about what items are posted in the workplace (monitor bulletin boards, e-spaces, bathrooms, and individual workspaces for inappropriate postings)
- Invite feedback from employees that allows them to reflect on the workplace environment
- Be present and accessible
- Pursue unprofessional behavior by all employees!

# How to Conduct an Investigation of Sex Harassment Complaint

Step 1: Ensure Confidentiality

Step 2: Provide Interim Protection

Step 3: Select an Investigator

Step 4: Create an Investigation Plan

Step 5: Conduct Interviews

Step 6: Make a Decision

Step 7: Closure of Investigation

Step 8: Develop Written Summary of Investigation Results

# Step 1: Confidentiality

- Employer must protect confidentiality, but should never promise absolute confidentiality.
- Information will be shared on a “need to know” basis to further the goal of conducting a prompt and effective investigation.

## Step 2: Provide Interim Protection

- Take immediate measures to protect accuser or the alleged victim.
- Separate the alleged victim from the accused by changing schedules, transfer or leave of absence.
- Avoid derivative retaliation claims by not involuntarily transferring or burdening the accuser. Work together to arrive to amendable solution, and always seek legal advice before making any decisions.

## Step 3: Select Investigator

- Select investigator who has no stake in outcome and can proceed without bias, prior experience conducting investigations and with a working knowledge of employment laws
- Options:
  - Internal HR staff
  - Third-party investigator
  - Outside legal counsel

## Step 4: Create Investigation Plan

- Outline the issues, specific conduct asserted
- Develop list of witnesses, and other evidence, i.e. texts, emails, notes etc.
- Develop interview questions to elicit crucial information and details
- Ensure process for retention of documents

## Step 5: Conduct Interviews

- Start with Complainant
- Interview Percipient witnesses next
- Conclude with the Accused
- Follow up interviews as needed to clarify issues arising from inconsistencies
- *Tip 1:* Focus on being impartial and objective to gather relevant facts. Don't offer opinions or say anything that will discredit impartiality.
- *Tip 2:* Investigator role is to determine credibility of the employees interviewed. Details are important to assess credibility/inconsistencies.



## Step 6: Make a Decision

- After all interviews are completed, all evidence is collected, and all issues of credibility have been resolved, the investigator will make a formal recommendation:
  - Whether alleged conduct is substantiated vs. not substantiated
  - If substantiated, whether conduct violated employer's anti-harassment policies
  - Whether steps are necessary to prevent further harassment
  - Whether disciplinary action is warranted
- Always consult with legal counsel

## Step 7: Closure of Investigation

- Communicate results of investigation to Claimant
- Important to let them know that the organization took the complaint seriously and took appropriate action
- Ensure complainant agrees they were heard and understood, even if they don't agree with results
- Schedule follow up call to ensure no further issues arise as settle back into work environment
- Remind all parties to preserve confidentiality

## Step 8: Develop Written Summary Investigation Results

- Every investigation can potentially be heard and reviewed in court
- Consider preparing a final investigation report
  - Issues/Incident investigated
  - Parties Involved
  - Factual Findings
  - Employer Policies Relevant to Investigation
  - Specific Conclusions
  - Issues that Could Not Be Resolved
  - Employer Actions Taken
- Keep a paper trail of the evidence
- Focus on objective, relevant facts!

Questions?

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**Thank you.**