

#MeToo

SEXUAL HARASSMENT

Prevention Training



Your Partner in Resolution

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Overview

1. Part I: General Information.
2. Part II: Types of Sexual Harassment.
3. Part III: How to Handle Sexual Harassment (Employees).
4. Part IV: How to Handle Sexual Harassment (Employers).
5. Part V: 2018 New Requirements.

Statistics on Sexual Harassment

2017 EEOC Enforcement Statistics

Retaliation: 41,097 (48.8 percent of all charges filed)

Race: 28,528 (33.9 percent)

Disability: 26,838 (31.9 percent)

Sex: 25,605 (30.4 percent)

Age: 18,376 (21.8 percent)

National Origin: 8,299 (9.8 percent)

Religion: 3,436 (4.1 percent)

Color: 3,240 (3.8 percent)

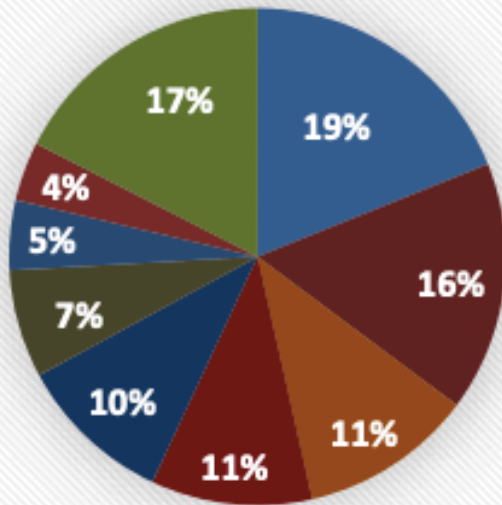
Equal Pay Act: 996 (1.2 percent)

Genetic Information: 206 (.2 percent)

Statistics on Sexual Harassment

2017 DFEH Statistics

Bases of Employment Complaints



- 19% Age - 1,836
- 16% Disability - 1,579
- 11% Engagement in Protected Activity - 1,094
- 11% Sex - Gender - 1,018
- 10% Race - 984
- 7% Sexual Harassment - 683
- 5% Family Care - 441
- 4% National Origin - 374
- 17% All Other - 1,696

FEHA Protected Categories

Age (40 and over).

Ancestry.

Color.

Religious creed.

Denial of family and medical care leave.

Disability (mental and physical), including HIV and AIDS.

Marital status.

Medical condition (cancer and genetic characteristics).

Military and Veteran Status

Genetic information.

National origin.

Race.

Religion.

Sex (includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth, breastfeeding or medical conditions related to breastfeeding).

Gender, gender identity and gender expression.

Sexual orientation.

Costs of Sexual Harassment Claims

- *Chopourian v. Mercy General Hospital*, 2012:
 - \$168 million settlement.
- *Johnson v. ICEF Public Schools*, 2012:
 - \$1.4 million settlement.
- *DFEH v. Esquire Cocktail Lounge*, 2010:
 - \$150,000 settlement.
- *Weeks v. Baker & McKenzie*, 1994:
 - \$7.1 million jury verdict.

Prevention

- Under Government Code section 12950.1 of the Fair Employment and Housing Act (“FEHA”).
 - All employees, with 5 or more employees, within six months of hire, must participate in two hours of sexual harassment prevention training.
 - Repeat training every two years.

Educational Objectives

- Recognize sexual harassment.
- Understand rights and responsibilities.
- Know legal remedies.

What is Sexual Harassment?

- Unwanted visual, verbal, or physical conduct that is sexual in nature.
- Requests for sexual favors; or
- Exposure to offensive conduct.

Who is protected from Sexual Harassment?

- All employees are protected regardless of size of employer.
- Those associated with employee subjected to the harassment .
 - Government Code section 12926, subdivision (m).
- Independent contractors.
- Job applicants.
- Interns or volunteers.

Who is liable?

- Strict Liability
 - Employers are strictly liable for harassment committed by a supervisor, (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 27 Cal.App.4th 397; Gov. Code, §§ 12925, subd. (d); 12926, subd. (d); and 12940, subd. (j)(1))]
- Negligence
 - Employers are liable for harassment committed by a non-supervisor if they:
 - Knew or should have known of the harassing conduct; and
 - Failed to take immediate and appropriate corrective action.
- Employees and non-employee harassers are also personally liable.
 - (Gov. Code, § 12940, subds. (i) & (j)(3).)

Hypothetical #1

Jane was a publicist on the payroll of a law office. A male partner repeatedly asked her out on dates, promising that a closer relationship would benefit her career at the firm. She declined, but he continue pressuring her.

At the same time, several male associates tried to grab her and sent her naked pictures of themselves. Jane told them to stop.

Jane complained to human resources about both the partner and the associates, but nothing was done.

The firm terminates Jane for attendance and performance issues which she disputes. Jane asserts that she was fired for filing complaints of sexual harassment.

- 1. Did sexual harassment occur?*
- 2. Is the firm liable for the acts of the partner? The associates?*
- 3. Are the partner and associates individually liable?*

Personal Liability

- Personal liability where an employment relationship exists between harasser and victim.
- Regardless of whether harasser was a supervisor or manager.
- Peer-to-peer harassment can lead to liability for both the employer and the harasser.

Hypothetical #2

Male IT staff for a law office were unhappy when Polly joined their ranks.

The male IT staff spread untrue rumors about Polly's abilities, singled her out for the least favorable assignments, and falsely alleged that she had slept with her superiors to get the job.

1. Did sexual harassment occur?
2. If so, who is liable?

Issues Presented in Sexual Harassment Cases

- Were there unwelcome sexual advances?
- Remember: Any employee's exposure to sexually offensive conduct can trigger liability.

What is Sexual Harassment?

- Unwanted visual, verbal or physical conduct that is sexual in nature;
- Requests for sexual favors; or
- Exposure to offensive conduct.

Part II:

Types of Sexual Harassment

Types of Sexual Harassment

- **Hostile Work Environment**
 - (Gov. Code, § 12940, subd. (j); CACI 2521-2524.)
- **Quid Pro Quo**
 - (Gov. Code, § 12940, subd. (j); CACI 2520.)

Adverse employment actions are not necessary to establish certain types of sexual harassment claims. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3rd 590.)

Hostile Work Environment

1. Harassment directed at complaining party;
or
2. Complaining party witnessed harassment of others.

Quid Pro Quo

- Sexual harassment in which a job benefit is conditioned upon sexual favors.

Hypothetical #3

Patty is in the secretarial pool for a law office. Her supervisor regularly views pornography on his computer in her presence.

Supervisor also gropes another secretary, Olivia, on a regular basis without Olivia's consent.

Supervisor has never groped Patty or forced her to watch pornography.

Was Olivia a victim of sexual harassment? Was Patty?

Harassment Because of Sex

Harassing behavior must be *because of* complainant's sex or gender.

- Includes same-sex harassment, no sexual desire needed, sexual orientation of victim or aggressor is not relevant.
- Harassment does not itself have to be sexual in nature.
 - (SB 292 (Corbett) addressing the ruling in *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191.)

Hypothetical # 4

Mary, a male-female transgendered person, worked part-time helping a law office prepare documents for trial. Mary was shocked when a female supervisor forced her to use the men's bathroom, alleging that female employees don't want a man in the bathroom. Other employees overheard, laughed and talked about Mary as a girlie man. Mary fled in tears and quit her job.

1. *Did sexual harassment occur?*
2. *If the supervisor is hired by an outside staffing office rather than the firm, who is liable?*
3. *Does the supervisor's conduct subject him to any other risks other than FEHA court charges?*

Severe or Pervasive

- Harassing conduct is so severe OR pervasive that it alters the work environment.
 - Think of it like a bucket that you need to fill to the top. You can fill it with “severe” conduct, “pervasive,” conduct, or both.

Subjectively Severe or Pervasive

The victim must perceive the work environment as hostile or abusive.

Objectively Severe or Pervasive

- A reasonable person would find the environment to be hostile or abusive.
- Consider age, gender, work experience, education, and life experiences.

Hypothetical #5

Two law firms are at trial and tensions are running high. The first chair at trial yelled at Elizabeth, who organized the appearances of witnesses, “Do what I say. You’re a woman, what do you know? With that figure, you’d be better off making babies and cooking for a man.”

Elizabeth was offended and quit her job, but did not suffer any psychological trauma.

1. *Was this conduct objectively severe or pervasive?*
2. *Was the conduct subjectively severe or pervasive?*
3. *Did sexual harassment occur?*

How Can Sexual Harassment Occur without any Touching or Speaking?

- Leering.
- Staring.
- Making sexual gestures.
- Displaying sexually explicit objects, pictures, cartoons, graffiti, or posters.
- Sending graphic emails, text messages, or “jokes.”

Hypothetical #6

Peter is raises money as an independent contractor for class action litigation funding. Because he does so much work for the law firm, he has an office there. Peter fancies himself irresistible to women. He regularly expresses his opinion about the wardrobe of female employees, and visitors. He tells Debbie, a temporary worker, on her first day that wearing a tighter top “would flatter your figure.” Debbie was so embarrassed that she broke out in tears and hid in the bathroom.

The law firm has a “zero tolerance policy” with respect to sexual harassment and warns that it would “not tolerate any behavior that might be construed to be sexual in nature, even if the behavior does not meet the legal definition of sexual harassment.”

1. Did sexual harassment occur?

2. Did the Peter engage in any other conduct that would subject him to discipline?

What is Verbal Harassment?

- Foul or obscene language.
- Derogatory comments.
- Explicit discussions about sexual activities
- Comments about other people's physical attributes.

Unwanted Touching is Sexual Harassment

- Kissing.
- Hugging.
- Grabbing.
- Impeding or blocking movement.
- Assault.

The Employer May be Liable for All Harassment Connected to the Business

- Business travel.
- Company parties.

Hypothetical # 7

Betty worked as a marketing staff for a law firm. When the marketing team travelled, she would go out socially with a male colleague named Charlie. After working, they had dinner and went back to Charlie's room where there was sexual activity. Betty says that Charlie raped her.

The next day, Betty advised her manager what had happened and quit her job on the spot

1. *Did FEHA sexual harassment occur?*
2. *Why or why not?*
3. *If yes, who is liable?*

Widespread Sexual Favoritism = Hostile Work Environment

- Favoritism directed toward a third party can cause a hostile environment.
- Supervisor has personal liability,
- Employer Also Liable where:
 - A supervisor created the widespread sexual favoritism; and
 - Employer knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action. (Judicial Council Of California, Civil Jury Instruction 2521C.)

Prevention

Employers are required to take all reasonable steps to prevent harassment from occurring, such as:

- Having a harassment policy.
- Training employees on sexual harassment.
(Gov. Code, § 12940, subd. (k).)

Remedies

- Lost salary or wages.
- Transfer.
- Purge of personnel file.
- Emotional distress.
- Punitive damages.
- Court-ordered policy changes and training.

FEHA vs. Title VII

FEHA

- Strict liability for managers and supervisors.
- No affirmative defenses.

Title VII

- Negligence theory only.
- Affirmative defense:
 - Employer exercised reasonable care; and,
 - Employee unreasonably failed to take advantage of opportunities to avoid harm.

FEHA Covers More Employers and Independent Contractors

FEHA

- All employers covered, even those employing only one person,
- Includes independent contractors.
- Persons providing services pursuant to a contract.

Title VII

- Employer must have 15 or more employees.

Hypothetical #8

Sally was a contract librarian for a law office. She complained of sexual harassment by the firm's research manager.

The manager, while initially courteous, was interested in a sexual relationship with Sally. Sally told manager point blank that she had no interest in such a relationship.

The manager persisted, harassing her at work and off duty: and appeared at Sally's home in the middle of the night. Sally told the manager that she was offended by the conduct.

When Sally complained to the firm, her contract was terminated.

- *As a contractor, did Sally have standing to complain about sexual harassment?*

How to Deal with Sexual Harassment? (EMPLOYEES)

- Tell the harasser that the conduct is unwelcome, offensive, and must stop immediately.
- Demonstrate that the conduct is unwelcome by walking away, avoiding interaction, using facial expressions, and body language.
- Report behavior to immediate supervisor, human resources officer, or appropriate member of management.

How to Deal with Sexual Harassment? (EMPLOYERS)

- Implement an effective anti-harassment policy:
 - Which includes an effective complaint procedure.
- Keep employees fully informed of their rights:
 - DFEH posters.
 - DFEH information sheet.

Hypothetical #9

Peter believes that he has suffered sexual harassment at a law firm and complains to Human Resources. His human resources representative interviews Peter, the alleged harasser, and several witnesses over the next week. In his interview, Peter provides information that directly conflicts his original allegations. The team closes the investigation.

1. *Did the team conduct a reasonable investigation?*
2. *Did the team take all reasonable steps to prevent harassment from occurring?*

What Do I Do when Someone Complains?

ADVICE FOR EMPLOYERS

1. Listen actively:
Allow complainant to tell his/her story.
2. Keep parties separate:
Never force a confrontation between complaining employee and alleged harasser.
3. Be candid with the parties and witnesses:
Complaints and interviews not confidential.

Employer's Duty to Investigate

1. Conduct an immediate inquiry.
2. Encourage a written complaint.
3. Protect complaining party from retaliation.

What is an Effective Investigation?

1. Consistently follow company procedures.
2. Engage in a qualified and impartial investigation .
3. Remain objective.
4. Investigate and obtain details:
 - a. Frequency;
 - b. Duration;
 - c. Nature of incidents.

How to Interview Witnesses

- Admonish witnesses not to interfere with investigation.
- Make credibility determinations based on:
 - Facts and documents.
 - Demeanor.
 - Motivations.

Outcome of Investigation

- Draw a conclusion: Is the complaint meritorious? (CACI 5003 Factors)
 - (a) How well did the witness see, hear, or otherwise sense what he or she described ?
 - (b) How well did the witness remember and describe what happened?
 - (c) How did the witness look, act, and speak while describing what happened?
 - (d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?
 - (e) What was the witness's attitude toward this case or about describing what happened?

Take ACTION

- Take timely and appropriate corrective action.
- Provide remedy to complaining employee.

Sexual Orientation, Gender Identity or Expression [CACI 2500]

1. Defendant was an employer or other covered entity;
2. Complainant was an employee of defendant or in a covered relationship to defendant;
3. Defendant's took unlawful action against the plaintiff;
4. Complainant's gender, gender ID, or sexual orientation was a **substantial motivating reason** for the unlawful action;
5. Complainant was harmed; and
6. The unlawful action was a substantial factor in causing the Complainant's harm.

Affirmative Defenses

- Legitimate, non-discriminatory reason.
- Bona fide occupational qualification.

Retaliation

“It is an unlawful employment practice . . . [f]or any employer...to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA].” (Gov. Code, § 12940, subd. (h).)

Need not be motivated by sexual desire.

Elements of a retaliation claim

CACI 2505:

- The Employee engaged in a protected activity;
- The Employer either discharged/demoted/or took other adverse action against that employee;
- That Employee's protected activity was a substantial motivating reason for the employer's decision to take the adverse employment action against the employee;
- That Employee was harmed; and
- That the employer's adverse action was a substantial factor in causing harm to the employee.

What is Causal Link?

Circumstantial evidence:

- Employer aware of protected activity and the adverse action followed within a relatively short period in time.

Direct Evidence.

Liability for Retaliation

- Is the Employer Liable?

Yes

- Is an Employee or the Supervisor Personally Liable:

Maybe

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.
- 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.
- Not actionable.

NEW STATUTES

CORPORATIONS: WOMEN ON BOARDS OF DIRECTORS

SB 826 by Senator Hannah-Beth Jackson (D-Santa Barbara) Corporations: boards of directors.

Domestic general corporation or foreign corporation that's publicly held corporation, whose principal executive offices are located in California:

- By close of 2019, minimum of one female on board.
- By close of 2021, increase to 2 female directors if the corporation has 5 directors or to 3 female directors if the corporation has 6 or more directors.
- Secretary of State to publish reports on its Internet Web site documenting, number of corporations in compliance with these provisions.
- Secretary of State to impose fines for violations of the bill to offset the cost of administration.

TRAINING

SB 1343 by Senator Holly Mitchell (D-Los Angeles) – Employers: sexual harassment training: requirement

- Reduces the sexual harassment training requirement threshold from employers with 50 or more employees to employers with five or more employees, include non-supervisory employees in the training, and
- Requires that the Department of Fair Employment and Housing develop an online training course and make it available on the Department's Web site. Assembly Amendments clarify that non-supervisory employees must attend at least one hour of sexual harassment training, provide distinct requirements for temporary employees, and make minor and technical changes.

DISCRIMINATION, HARASSMENT AND RETALIATION (#MeToo)

SB 1300 by Senator Hannah-Beth Jackson (D-Santa Barbara) – Unlawful employment practices: discrimination and harassment

- Employer may be responsible for nonemployees' harassment.
- Prohibits release under FEHA or nondisparagement agreement in exchange for a raise or bonus, or as a condition of employment or continued employment, about unlawful acts in the workplace, including sexual harassment.
- Agreement or document in violation of above is contrary to public policy and unenforceable.
- Employer may be responsible for any type of harassment prohibited under FEHA of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace.
- Authorizes an employer to provide bystander intervention training for harassment to their employees.
- Provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the FEHA action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

DISCRIMINATION, HARASSMENT AND RETALIATION (#MeToo)

[AB 2770](#) by Assemblymember Jacqui Irwin (D-Thousand Oaks) – Privileged communications: communications by former employer: sexual harassment

1. Protects, as a privileged communication not subject to liability for defamation, any complaint of sexual harassment made by an employee to an employer, based upon credible evidence and without malice.
2. Protects, as a privileged communication not subject to liability for defamation, any communication between an employer and interested persons, made without malice, regarding a complaint of sexual harassment.
4. Protects, as a privileged communication not subject to liability for defamation, a statement made by a current or former employer to a prospective employer in response to an inquiry as to whether the employer would rehire a current or former employee and whether a decision not to rehire the employee is based upon the employer's determination that the former employee engaged in sexual harassment.
6. Prohibits discrimination in any building and construction trades apprenticeship program on the basis of certain enumerated categories with regard to acceptance into or participation in the program.

DISCRIMINATION, HARASSMENT AND RETALIATION (#MeToo)

AB 3109 by Assemblymember Mark Stone (D-Scotts Valley) – Contracts: waiver of right of petition or free speech

- Made a provision in a contract or settlement agreement void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

DISCRIMINATION, HARASSMENT AND RETALIATION (#MeToo)

SB 820 by Senator Connie Leyva (D-Chino) – Settlement agreements: confidentiality

- Prohibits a provision in a settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action.
- Allows a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court to be included within a settlement agreement upon the request of the claimant.
- However, this provision does not apply if a government agency or public official is a party to the settlement agreement. Otherwise, a provision within a settlement agreement that prevents the disclosure of factual information related to the action that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.

DISCRIMINATION, HARASSMENT AND RETALIATION (#MeToo)

SB 954 by Senator Bob Wieckowski (D-Fremont) – Mediation: confidentiality: disclosure

- Except in the case of a class or representative action, requires an attorney representing a person participating in a mediation or a mediation consultation to provide his or her client, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, with a printed disclosure containing the confidentiality restrictions related to mediation, and to obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.
- If an attorney is retained after an individual agrees to participate in a mediation or mediation consultation, required the attorney to comply with the printed disclosure and acknowledgment requirements as soon as reasonably possible after being retained. Specified language that would be deemed compliant with the printed disclosure and acknowledgment requirements.
- Failure of an attorney to comply with these disclosure requirements does not invalidate an agreement prepared in the course of, or pursuant to, a mediation.
- A communication, document, or writing related to an attorney's compliance with the disclosure requirements is not confidential and may be used in an attorney disciplinary proceeding if the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

WHAT'S ON THE HORIZON IN 2019

[AB 51](#) by Assemblymember Lorena Gonzalez (D-San Diego) — Employment discrimination: enforcement. Reintroduction of [AB 3080](#) vetoed by Governor Jerry Brown in 2018.

- Would prohibit a person from, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, prohibiting an applicant for employment, employee, or independent contractor from disclosing an instance of sexual harassment, or from exercising any right or obligation or participating in any investigation or proceeding with respect to unlawful harassment or discrimination.
- Would prohibit an employer from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement.
- Would prohibit an employer from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment.
- Would make violations of the prohibitions described above, relating to sexual harassment and waivers, unlawful employment practices under FEHA.

THANK YOU