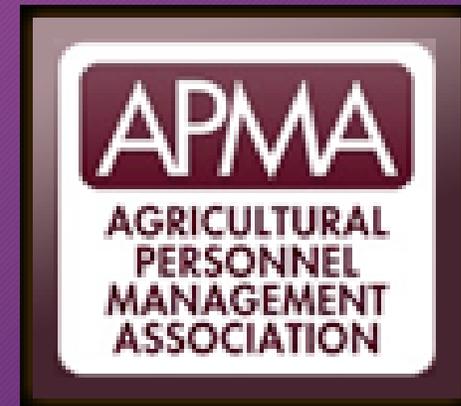


# #MeToo, #HimToo, and #YouToo: Sexual Harassment & Bullying in Today's Workforce

Presented by: Erica L. Rosasco, Esq.

MCKAGUE | ROSASCO LLP



**LEGAL disclaimer:** Seminar materials and this presentation are not intended as legal advice and are not legal advice. These materials cannot substitute for legal advice. You should consult an experienced employment attorney if you have questions about your business, policies or your particular circumstances.

# What We'll Cover

3

- What Qualifies as Sexual Harassment, Hostile Work Environment and Bullying
- What to Do When You Receive a Complaint
- Third Party Harassment
- Working with Families
- Workplace Romance
- New Sexual Harassment Training Requirements





ashley judd @AshleyJudd  
Decades of Sexual Harassment Accusations Against Harvey Weinstein via @nytimes.



235778830

# Joint Employer Liability

5

Growers, Management  
Companies And Farm Labor  
Contractors

*We're All In This Together*



# Employers Are Obligated To Take Steps To Prevent Harassment Under Federal & State Law

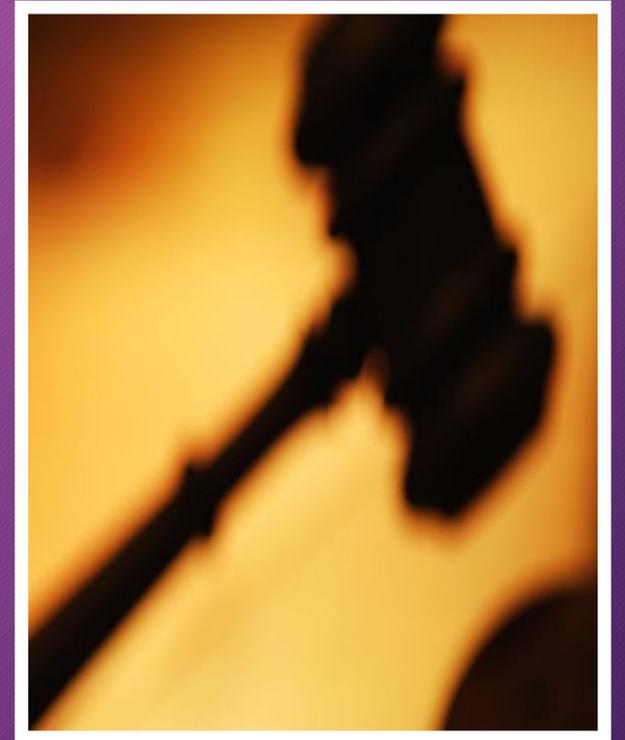
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## Federal Law

Title VII of the 1964 Civil Rights Act requires an employer to take remedial action reasonably calculated to prevent a hostile work environment.

## California State Law

The Fair Employment and Housing Act (FEHA) imposes a duty on employers to take reasonable steps necessary to prevent discrimination & harassment from occurring (Cal. Gov. Code § 12940(i)).



# Harassment Is Not Just About Sex

Sexual Harassment is the most recognized form of harassment in the workplace.

However, any form of harassment on the basis of a person's protected class status (i.e. race, religion, national origin, disability, pregnancy, sexual orientation, age, or other protected class) may violate federal and state law.



# California Protected Categories

(including perceived to be in one of these categories)

8

- Sex (Including pregnancy, childbirth, breastfeeding)
- Sexual Orientation
- Gender
- Gender Expression
- Gender Identity
- Marital status
- Race
- National Origin
- Color
- Creed
- Religion
- Ancestry
- Age
- Physical/Mental Disability
- Medical Condition
- Military/Veteran Status

# Types of Sexual Harassment

1) QUID PRO QUO Harassment  
- A This for A That

2) Hostile Environment Harassment



# Hostile Environment Harassment

10

- **Hostile Environment Harassment** occurs when the harassment interferes with work to the extent that it creates an intimidating or hostile environment for the victim.
- To be considered unlawful hostile work environment harassment, the conduct must be:
  1. Unwelcome;
  2. Directed at gender, race or another protected category, OR, sexual in harassment cases, be sexual in nature;
  3. Offensive to both the recipient and to a “reasonable person”; and
  4. Severe OR Pervasive.

# Hostile Environment Harassment

11

## Severe OR Pervasive:

- To qualify an unlawful harassment, conduct must be sufficiently severe or pervasive such that it interferes with the employee's working environment and alters the conditions of employment.
- The more severe the harassment, the fewer times it needs to be repeated to constitute harassment.
- A single isolated incident can be considered harassment if it is severe enough to poison the work environment.
- A pattern of repeated conduct can make it pervasive.
- Acts that are less obvious such as hanging posters can lead to liability if they occur repeatedly or are extremely common.

# Romance at Work

12



Your mayordomo Juan is dating employee Ana. They seem very happy together. Ana tells her co-workers that she is in love with Juan.

Any issues?



# Employer Liability

## Harassment by a Supervisor

14

Under the FEHA (CA), an employer is **strictly liable** for workplace harassment by a **supervisor**.

“Supervisor” = someone with authority from 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.”

(Cal. Gov. Code Gov. § 12926(r).)

# Employer Liability for Hostile Work Environment Harassment Caused By Non-Supervisory Employees

15

Under federal and state law, employers are liable for the harassment of a non-supervisor (when it happens between co-workers) if:

- it knew or should have known about the harassment;  
*and*
- failed to take action to stop it.

**Rationale:** If an employer fails to take appropriate action after learning of the harassing conduct, the employer has **essentially adopted** the offending conduct as if it had **affirmatively authorized** it.

# Individual Liability

16

Under California's Fair Employment and Housing Act (FEHA), the employer is liable for sexual harassment AND the individual harasser is personally liable as well.

A plaintiff can sue the supervisor *personally* and go after his/her personal assets.

# Poor Pete....

17

Pete is newly divorced. He is the mayordomo for his crew. Vivian is always smiling at him and stroking his arm when they talk. Workers joke with Vivian that she always bends over when Pete is around. Pete asks Vivian out for a date, but she doesn't answer him. Two weeks later Vivian is laid off because she is a slower worker.

Vivian sues Pete personally and the company. It turns out Vivian has done this before with her last employer and the entire thing was a setup.

- Does the company have to defend Pete from Vivian's frivolous claims of sexual harassment?
- Does the company have to pay a judgment if the jury awards Vivian money against Pete?
- What's going to happen to Pete's job with the company?

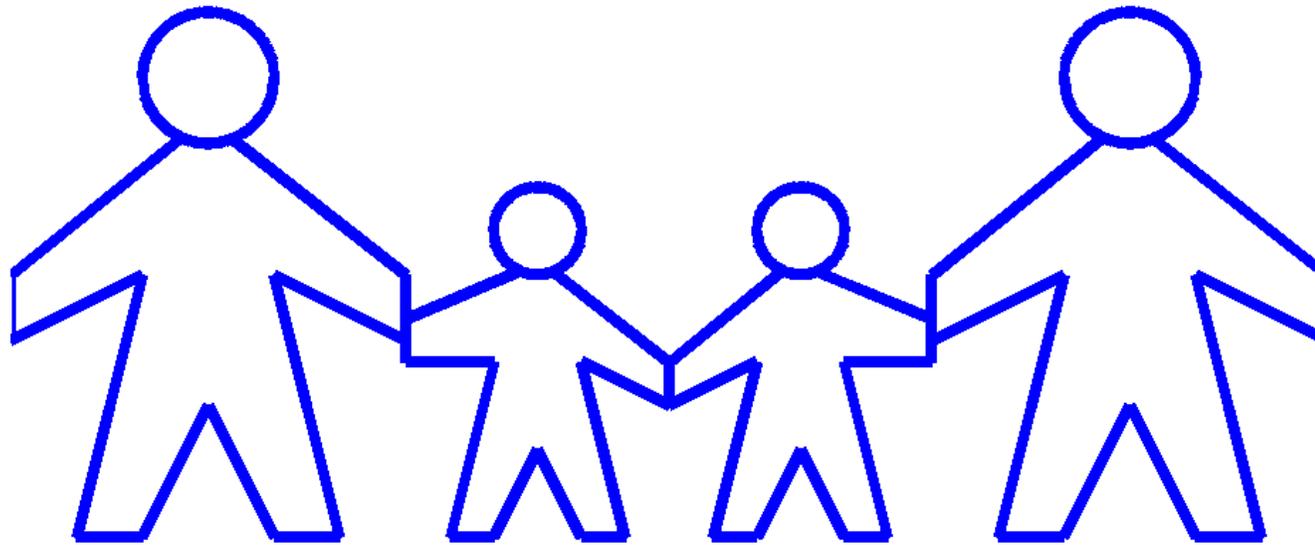
# Favoritism

18

**Jose** is the crew supervisor. He's single and often dates women in his crew. None of the women object to his advances. Jose is handsome and charming. Each of the women who have dated Jose are promoted in the company.

**Jose** is supervising his three cousins. Whenever there is overtime, his cousins are offered the work first over other workers.

- **Any legal issues?**
- **Any practical issues?**



**We work with families....**

**Unique issues of working with family members.**

# What should Victor do?

20

**Victor** and **Carla** are friends. They work at the same company.

Victor is a mayordomo but he does not supervise Carla.

At a party at the park on Sunday, Carla tells Victor that her supervisor keeps asking her out on dates and complimenting her on her looks. She has turned him down but he has not stopped asking her saying “someday you will be mine.” Carla tells Victor not to say anything and that she does not want to make a report to the company. She is just telling him this as her friend.



# What Can an Employee Get?

- ✓ Back Pay
- ✓ Front Pay
- ✓ Compensatory Damages
- ✓ Emotional Distress Damages
- ✓ Punitive Damages
- ✓ Attorney's Fees
- ✓ Interest
- ✓ Court Costs



Another type of harassment:  
**BULLYING AND ABUSE**

22



- Workplace abuse is any action that harms the emotional or physical well-being of a worker.
- 2015: AB 2053 California law, requires employers to train supervisors on prevention of bullying and abusive behavior.
- Can be from supervisors or co-workers.

# “Abusive Conduct” means: (AKA workplace bullying)

23

- 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 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.

# Is Abusive Conduct ILLEGAL?

24

Although “abusive conduct” is not unlawful in and of itself, it may constitute unlawful harassment or discrimination if is based on a legally-protected classification, including sex, sexual orientation, age, race, religion, or physical or mental disability.

The following workplace scenarios could be BOTH “abusive conduct” and harassment or discrimination prohibited under federal and California law:

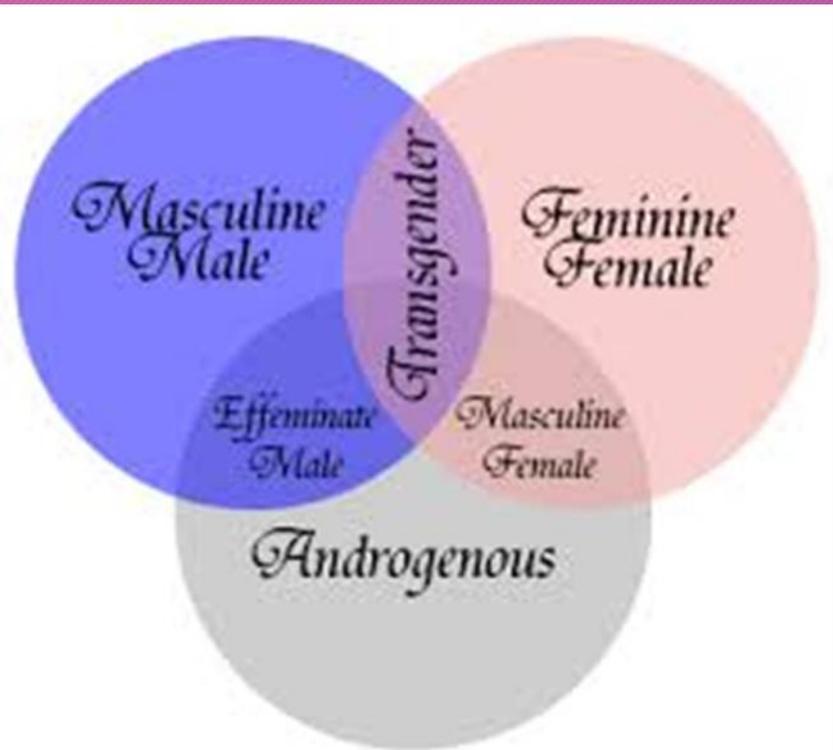
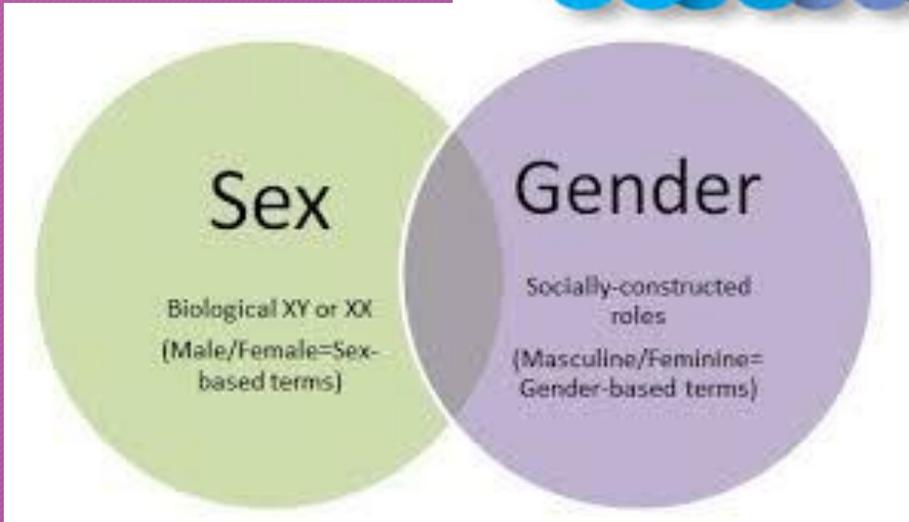
1. Two younger employees often take and hide an older co-worker’s prescription eyeglasses, leaving the older employee disorientated and unable to effectively perform her work
2. A supervisor repeatedly insults an employee because of the employee’s religious clothing
3. A large, muscular employee regularly corners and threatens to beat up a physically disabled employee unless the disabled employee calls the larger employee “daddy”

“

90% of transgender people report facing discrimination, harassment, physical assault or sexual assault at work, and 41% have faced an adverse employment outcome because of bias.

”

Source: National Transgender Discrimination Survey, National Gay and Lesbian Taskforce, 2011



# Expanded Protection for Transgender

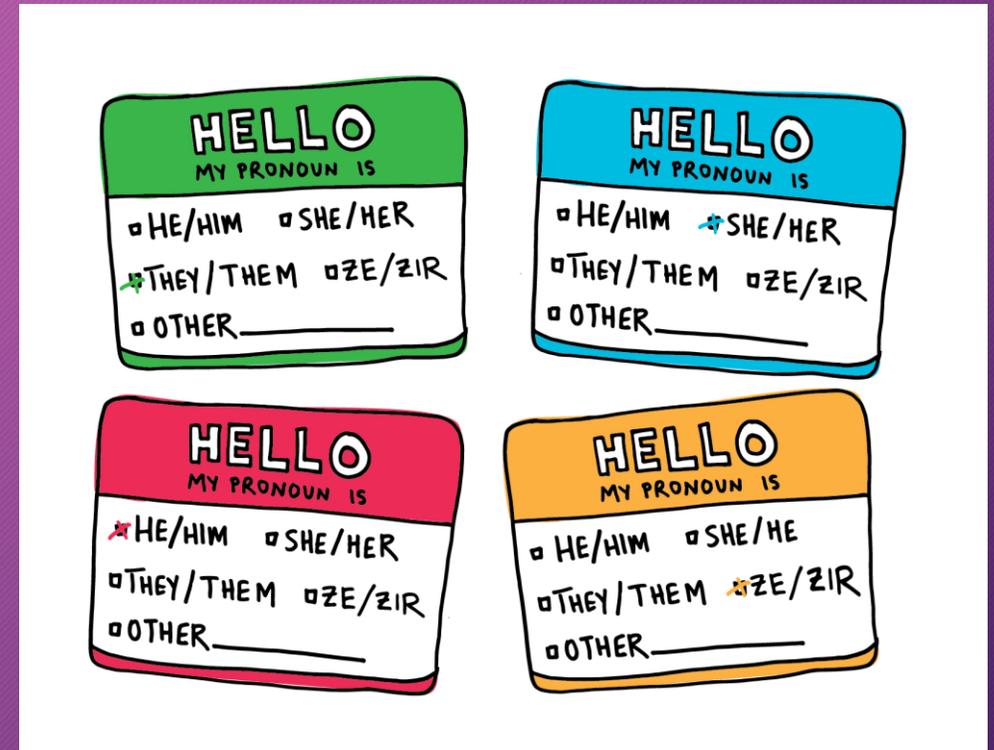
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- July 1, 2017 - CA Fair Employment Housing Act (FEHA) - Expanded - Unlawful to discriminate against someone who is transitioning, has transitioned, or is perceived to be transitioning.
- "Gender expression": expanded to include not only a person's gender-related appearance or behavior but also "the perception" of such gender-related appearance or behavior.
- "Gender identity": each person's "internal understanding of their gender, or the perception of a person's gender identity, 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."
- "Transitioning": "process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g., sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures."

# What Can I Ask You?

28

- Cannot ask questions that identify an individual on the basis of sex, gender, gender identity, or gender expression.
- May not require an individual to provide proof of sex, gender, gender identity or gender expression.
- Employers with affirmative action reporting or EEO-1 reports may request applicants to self identify but ONLY on a VOLUNTARY basis.



# What Can I Call You?

29

- Must honor an employee's request to be referred to by a particular name, gender or pronoun, including gender neutral pro-nouns.
- You can use the gender or legal name that appears on an employee's government issued identification document only if necessary to meet a legally mandated obligation.



# The Bathroom Police....

- Employee Able comes to work for you and appears to be a man. People refer to him as “he” and “him” and he doesn’t seem to mind.
- On his first day, he starts using the women’s restroom.
- The women employees are upset. They are afraid he will peek at them.
- Your restrooms are multi-person restrooms as designated for use by either men or women. You also have a single user restroom available.

What can you do?

# Safe Facilities for Everyone....

31



- You must provide employees with safe, comparable and adequate facilities without regard to the sex of employees.
- An employee must be allowed to use the facility that corresponds to the employee's gender identity or gender expression.
- You cannot require an employee to use a particular facility, such as a unisex or single user restroom.

# What About The Bathrooms?

32

- All gender facilities law (Cal. Health & Safety § 118600)
- All single-user toilet facilities in any business establishment, place of public accommodation, ... shall be identified as all-gender toilet facilities by signage that complies with Title 24 of the California Code of Regulations, and designated for use by no more than one occupant at a time or for family or assisted use.
  - During any inspection of a business or a place of public accommodation by an inspector, building official, or other local official responsible for code enforcement, the inspector or official may inspect for compliance with this section.



# Third Party Harassment

33

The UPS guy comes into your office and is always flirting with the ladies. One of your employees complains that it makes her uncomfortable.

- Do you have any liability?
- What should you do?
- Does the UPS guy have liability?

# Retaliation by an employer against an employee is prohibited under any of the following circumstances:

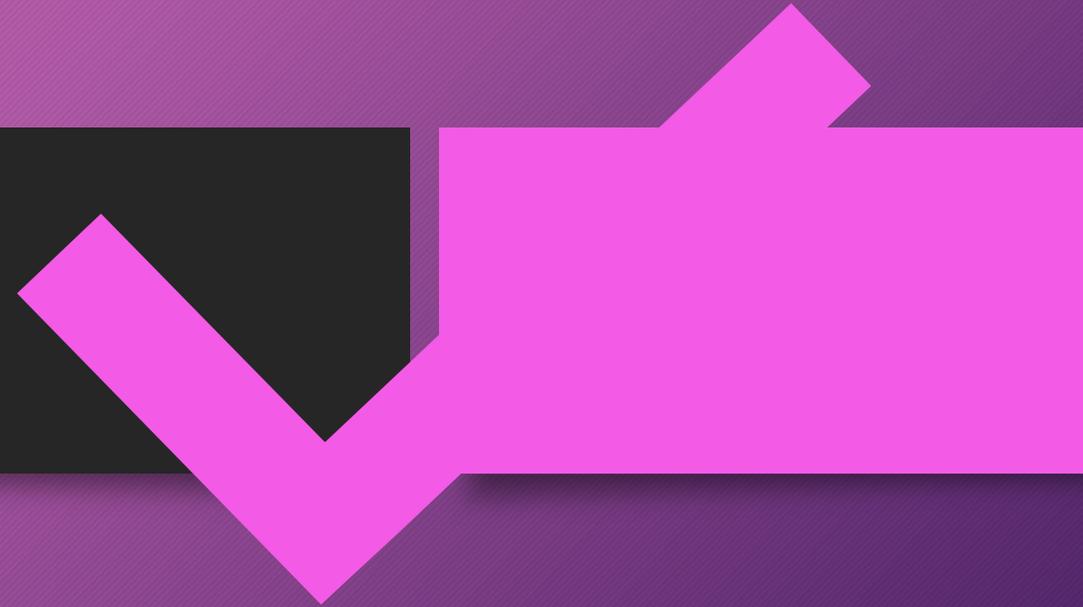
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- For disclosing information to a government or law enforcement agency, when the employee has reasonable cause to believe the information discloses a violation of a state or federal statute or a violation of or noncompliance with a local, state or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.
- For refusing to participate in an activity that would result in a violation of state or federal statute or a violation of or noncompliance with a local, state or federal rule or regulation.
- For having exercised rights against retaliation in a former employment.
- Because the employee is a family member of a person who has, or is perceived to have, engaged in protected acts.

“ A lot of the harassers are serial harassers, says Michael Marsh with California Rural Legal Assistance. They go from one place of employment to the next place of employment and no one ever checks on their credentials or checks on their background. ”



# New Laws for January 1, 2019



# Sexual Harassment Omnibus Bill (SB 1300)

37

Adds Government Code section 12923, codifying certain case holdings regarding the standard of proof on sexual harassment:

1. A plaintiff does not have to prove a tangible decline in their productivity; it is enough to show that harassment made it more difficult to do the job. (approving concurrence in *Harris v. Forklift Systems* (1993)).
2. A single incident of harassing conduct is enough to create a triable issue regarding the existence of a hostile work environment (rejecting *Brooks v. City of San Mateo* (2000)).
3. Existence of a hostile work environment depends on totality of circumstances, so a discriminatory remark (even if not part of employment decision or made by a non-decision maker) may be relevant. (affirming *Reid v. Google, Inc.'s* (2010) rejection of “stray remarks doctrine.”)
4. The standard for harassment does not depend on type of workplace (disapproving *Kelley v. ConcoCompanies* (2011)).
5. “Harassment cases are rarely appropriate for disposition on summary judgment.” (affirming decision of *Nazir v. United Airlines, Inc.*, (2009)).

# SB 1300 also:

38

1. Expands acts of nonemployees to all harassment (removing the “sexual” limitation) (Gov’t Code §12940(j)(1)).
2. Prohibits an employer from, in exchange for a raise, bonus or as a condition of employment/continued employment, requiring an employee to sign\*:
  - A release of FEHA claims or rights.
  - A nondisparagement agreement or other document prohibiting disclosure of information about unlawful acts in the workplace. (Gov’t Code §12964.5).
3. Prohibits recovery of fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so. (Gov’t Code §12965).
4. Authorizes (but does not require) an employer to provide bystander intervention training to its employees. (Gov’t Code §12950.2)

*\* Does not apply to a negotiated settlement agreement to resolve an underlying FEHA claim brought by the employee in court, before an administrative agency, ADR forum, or through an employer’s internal complaint process.*

# Sexual Harassment: Defamation Protection

39

AB 2770 amends Section 47 of the Civil Code to extend defamation privilege to:

1. A complaint of sexual harassment made by an employee, without malice, to his/her employer based on credible evidence.
2. Communications between the employer and “interested persons,” without malice, regarding a complaint of sexual harassment.
3. Answers, without malice, by a current or former employer or its agents to a prospective employer’s inquiry as to whether the employer would rehire the employee and whether the decision to rehire, or not, would be based on a determination that the former employee engaged in sexual harassment.

# SB 820 :

## The “Stand Together Against Non-Disclosure (STAND) Act”

40

Prohibits provisions in settlement agreements entered into on or after January 1, 2019, that prevent the disclosure of factual information related to claims filed in civil or administrative complaints involving sexual assault, sexual harassment, and workplace harassment or discrimination based on sex.

Expressly authorizes inclusion of provisions:

- Precluding disclosure of settlement payments.
- Upon the request of the claimant, if the opposing party is not a government agency or public official, that protects the claimant’s identity and facts that could lead to the discovery of the claimant’s identity.

*Adds Code of Civil Procedure §1001.*

# Right to Testify....

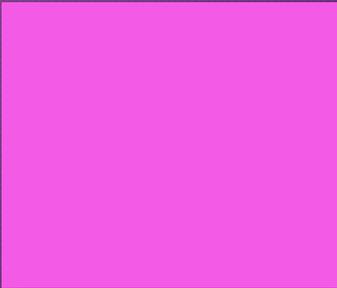
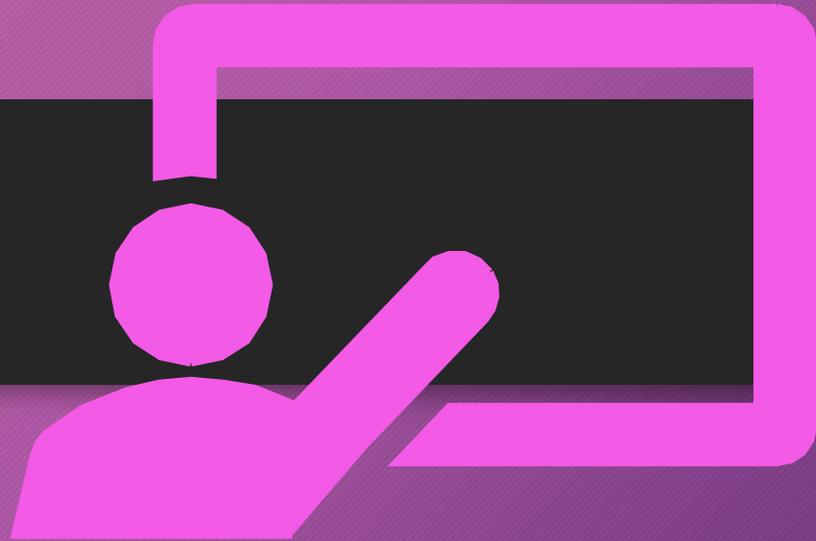
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**SB 3109** makes void and unenforceable a provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agent's or employees.

This applies only when the party has been required or requested to attend the proceeding pursuant to court order, subpoena, or administrative agency or legislative written request.

*Adds Civil Code §1670.11.*

# New Training Requirements...



# New Sexual Harassment Training Requirements (SB 1343)

43

Employers with 5 or more employees must provide by 1/1/20 (then once every 2 years) sexual harassment training within 6 months of assuming any position to:

- *All* supervisory employees: at least 2 hours
- *All* nonsupervisory employees: at least 1 hour

*“Employer” means any person regularly employing five or more persons or regularly receiving the services of five or more persons providing services pursuant to a contract.*

# New Sexual Harassment Training Requirements (SB 1343)

44

- Seasonal and temporary employees hired to work fewer than 6 months must be trained within 30 days of hire or within the first 100 hours worked, whichever occurs first.
- NOT for FLC workers



# Exception for FLC Migrant and Seasonal Workers

45

Beginning January 1, 2020, sexual harassment prevention training for migrant and seasonal agricultural workers, as defined in the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA)(29 U.S.C. 1801, et seq.), shall be consistent with training for nonsupervisory employees pursuant to paragraph (8) of subdivision (a) of Section 1684 of the Labor Code (The law for FLC licensing and sexual harassment training).

Migrant - employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

Seasonal - employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence.

*Both definitions exclude H-2(A) visa holders and any immediate family member of an agricultural employer or a farm labor contractor.*

# How Do I Know If Someone Is Migrant Or Seasonal?

Don't guess. This new law sets *MINIMUM* training requirements.  
You can exceed the requirements.

46

DOL Considers a Worker Migrant if They Have a Distant Address Listed With The Employer

# New Sexual Harassment Training Requirements (SB 1343)

47

DFEH must make available:

- Online training courses employers may use.
  - This will be interactive and require the viewer to respond to questions periodically.
  - At the end of training it will provide a certificate of completion for download/printing.
  - Will not be available until later in 2019.
- Informational posters, fact sheets, and online training courses in multiple languages and for download/streaming online.
- DFEH has published a training toolkit: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/SexualHarassmentandAbusiveConductPreventionTrainingToolkit.pdf>

*You can also make your own training module as long as it complies with the requirements.*

# SB 1343 - More About Training....

48

- Must be “classroom or other effective interactive training.”
- Can be completed in shorter segments, totaling the 1 or 2 hours.
- Shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation AND gender identity, gender expression, and sexual orientation.

# SB 1343 Content of Training

49

Shall include information regarding the federal and state statutory provisions concerning:

- The prohibition against and the prevention and correction of sexual harassment;
- The remedies available to victims of sexual harassment in employment;
- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation;
- The prevention of abusive conduct;
- Harassment based on gender identity, gender expression, and sexual orientation; and
- Practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation.

# SB 1343 - Are There Any Penalties?

50

- DFEH may seek order requiring compliance.
- No presumption of liability for not complying.
- Complying does not insulate employer from liability.
- Violation of Public policy claim for wrongful termination cases?
- Will be raised in a lawsuit or agency claim.



# 2017 FLC Licensing Regulations

51

SB 295 requires additional reporting requirements for FLCs on sexual harassment training provided to employees as part of its license renewal.

Requirements include the following:

- Harassment training must be provided in a language the employee understands
- With its license renewal application:
  - FLC must submit a list of the materials and resources it used in the training
  - Prior to the month the application is submitted, FLC applicant must submit a total number of workers that were trained in the calendar year
- Labor Commissioner can issue a citation of \$100 for each violation, i.e., each worker.

# Law for FLCs: SB 1087

52

- FLCs are required to take an additional hour of annual continuing education AND an extra hour on harassment prevention
- Requires FLCs and supervisors to **sign notice that they have not committed sexual harassment** (document is provided on-line from Labor Commissioner)
  - Must be submitted each year with the FLC license renewal application
- Every year - **All supervisory staff must receive two hours of sexual harassment prevention training**
  - Must be conducted by the FLC or a designated representative
  - Trainer requirements for SB 1087 are not as strict as AB 1825 requirements
- All employees receive harassment prevention training at the time of hire AND every two years
- The FLC must provide every employee with verification of training



# Worker Training Requirements SB 1087

53

## TRAINING CONTENT:

You can use the text in DFEH-185 “Sexual Harassment” but add your own policy that includes how and who (name and #) to make a report of sexual harassment

- Explain the illegality of sexual harassment
- Provide the definition of harassment under state and federal law
- Provide a description of harassment using different scenarios
- **Provide internal complaint procedures**
- Explain the legal remedies available through the DFEH
- Include contact information for the DFEH
- Include information regarding victim’s protection against retaliation
- Must provide a copy of DFEH-185 pamphlet to every employee
- Must provide a training verification form to each employee



FARM LABOR CONTRACTOR EMPLOYEE RECORD OF TRAINING  
IN SEXUAL HARASSMENT IDENTIFICATION AND PREVENTION

I, \_\_\_\_\_, a \_\_\_\_\_ for \_\_\_\_\_  
(Employee name) (Title) (Farm Labor Contractor Employer)

was provided training in the identification, prevention, and reporting of sexual harassment in the  
workplace on \_\_\_\_\_.  
(Date training provided)

Training was provided by: \_\_\_\_\_.  
(Name of person providing training)

Must be given to all FLC employees at hire/training  
along with DFEH Pamphlet.  
Keep a copy in the personnel file!

# Merging the New Laws Together

55

- Migrant or Seasonal workers will only receive 10-15 minutes of training at hire and every two years.
- All FLC employees will receive 10-15 minutes of training at hire then every two years.



# Merging the New Laws Together for FLC Supervisors

56

- Training first calendar year by an attorney, HR professional or online AB 1825 approved training program that is interactive for two hours within 6 months of assuming the position.
- Training the second calendar year by the FLC or designated representative for two hours.
  - Just has to be during the second calendar year.
- Then repeat.



# What to do when a report or complaint is made?

57



# Step 1: Does this Complaint need an Investigation?

58



- Complaints of harassment, discrimination or retaliation based on prohibited criteria such as sex, gender, race, national origin, disability, sexual orientation, etc.
- Workplace safety.
- Workplace violence.
- CA law also requires employers to provide a safe workplace to all employees.

# Employer's Duty to Investigate

59



The investigation must be prompt, thorough, objective, and complete.

# Determine if Interim Actions Should be Taken

- Temporary transfers of shift or reporting changes
- Place accused on leave - With or without pay?
- Changes for the complainant should be voluntary
- Remind everyone that retaliation is prohibited



# Who Can Do The Investigation?

61

## In House

- If trained and experienced
- No bias or perceived bias

## Outside Human Resource Professional

- Under attorney guidance only

## Outside Investigator

- Licensed With experience

## Attorney Guided Investigation

- For privilege Reasons
- Guidance from someone more experienced

## Attorney

- Cannot be the same attorney who you want to use for the litigation

- In California, external investigators (those who are not employed by the employer) must be licensed private investigators or attorneys acting in their capacity as an attorney (See Business and Professions Code Section 7520 et seq.)
- Courts will determine the adequacy of the investigation, in part, based upon the credentials of the investigator.
- Court of appeals reversed summary judgment for defendant employer finding inadequate investigation where investigator had never before conducted a sexual harassment investigation, investigation focused on alleged harasser's management style rather than complaints of sexual harassment, and did not even mention the allegations of sexual harassment to the alleged harasser. Cadena v. The Pacesetter Corp., 224 F.3d4 1203, 1209 (10th Cir. 2000).

# In Preparation For Interviews, Gather The Documentary Evidence...

62

- Company's sexual harassment and related policies
- Company's disciplinary policies
- Alleged harasser's personnel file
- Alleged complainant's personnel file
- Previous complaints made by alleged complainor against alleged harasser
- Internal correspondence regarding the complaint
- Videotape, audiotape, or voicemail regarding incident
- Sworn documents regarding the complaint, including papers filed with the state administrative agency, or EEOC, and union
- Grievances
- Previously prepared statements of any witness
- Previously prepared notes
- Employment contracts of alleged harasser and complainant
- Collective bargaining agreement

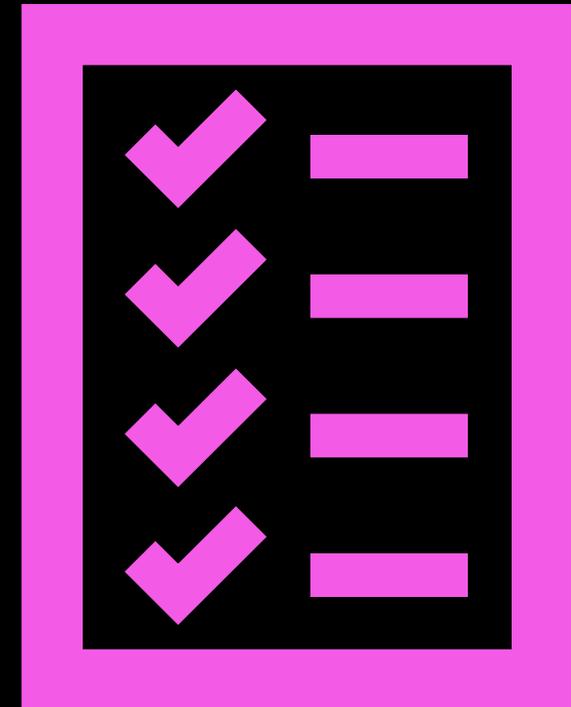
# Location of Interviews?



- In a quiet, private location
- Can be at the worksite
- Out of eyesight and earshot of other employees
- Avoid interruptions
- For Complainant and Harasser - consider bringing them to an offsite location or office
- Pay employees for time in interviews

# Preliminary Statement:

- I am here today to investigate claims of sexual harassment. Based on my preliminary investigation, it appears that you and your co-workers have important information.
- I am here as an independent investigator.
- I would like to ask you about certain allegations and would like you to answer the questions honestly and completely.
- You should know that the information you provide is not confidential. Although the Company and I will make every attempt to keep the information confidential, Company owners and their attorneys will have access to the information and your statement will become part of the investigative file and my final report.
- **Promise no retaliation!!!**



# Essential Items to Know...

65

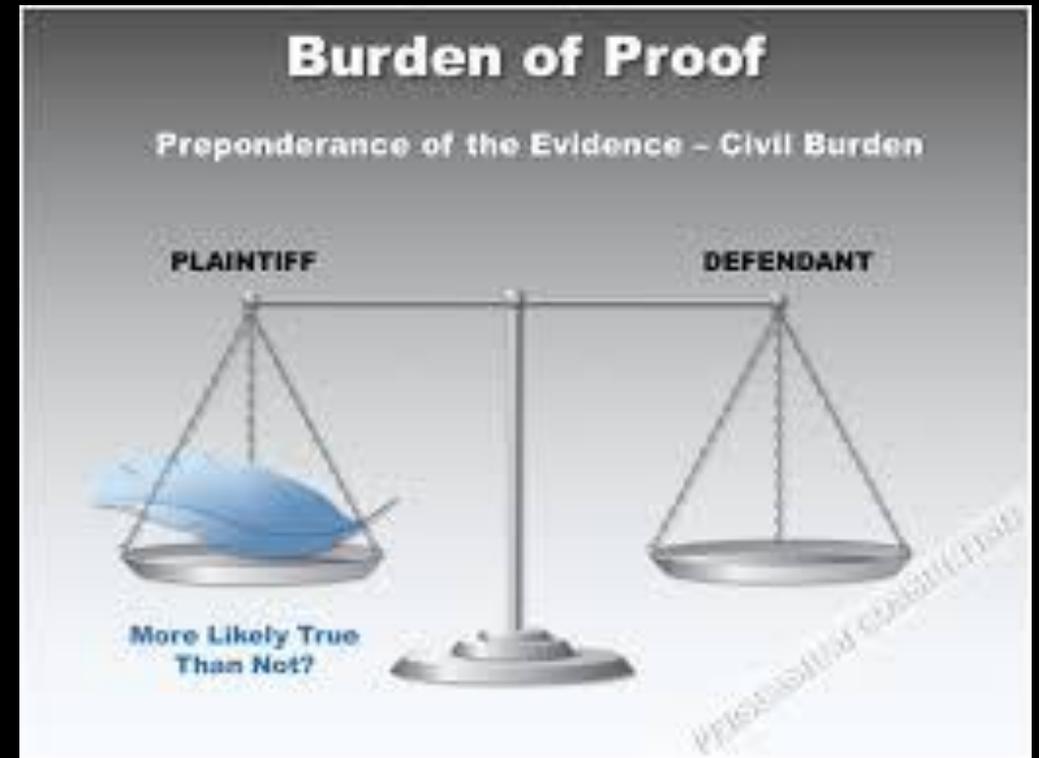
- Full name and “nicknames”
- Job title, duties and shift worked for the relevant time period
- Start and end dates with employer
- Family members, significant others, etc. who work at the same company
- Supervisors’ names and titles
- Crew member names and titles
- Whether the witness has previously been involved in an investigation or serious disciplinary procedure at the company
- What the witness has been told by others already interviewed
- What the witness has been told by others involved in the matter
- What the witness has been told by supervisors or management
- Whether the witness has been given or offered anything of value to provide or withhold certain testimony
- Whether the witness has been threatened in any way to provide or withhold certain testimony

# Burden of Proof

“Preponderance of the evidence” standard.

*Standard that civil courts use in discrimination and harassment cases.*

Also called “more likely than not” - the investigator is making a finding that it more likely than not that the conduct alleged occurred, or more likely than not that it did not occur.



# Order of Interviews

67

Complainant



Harasser



Witnesses



Complainant

- Re-interviewing the complainant is almost always necessary, as the harasser, at least, raises issues and new facts.
- May be necessary to re-interview the harasser or witnesses if additional information is discovered which requires clarification, confirmation or rebuttal.



# Interviewing the Complainant

68

The “W questions” - Who, What, When, Where, & Why

Every complainant must be asked the following:

- Witnesses to incident(s)
- Documents or physical evidence to support her version of the facts
- Whether harasser has taken the same action against others
- Whether the complaint was reported to anyone, and if not, why not
- Prior problems with harasser
- Prior relationship with harasser
- Prior complaints of sexual harassment(whether or not at the same company)



# Interviewing The Alleged Harasser



- Alleged harasser must be assured the investigator is objective, no judgment or decisions have yet been made, and (if true), the investigator is merely reporting facts and will not make any recommendations to the decision makers.
- The harasser needs to know there have been complaints brought against him, and the company is quickly conducting an investigation to discover facts.
- As an interview technique, the identity of the complainant can be kept from the harasser until certain open-ended questions are asked. As a practical matter, alleged harassers are very hesitant, to say the least, to rebut any allegations if the complainant is not identified.
- Harassers should be confronted with each and every allegation against them, and in fairness, every defense explored, including whether any documents or physical evidence exists, and whether there are witnesses they believe support their version of the facts.

# Interview Tips

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Start with softball questions

- How long have you worked here?
- What's your full name?
- What's your job title?

Get the chronology

Open ended questions use

Use the funnel method

Asking “Why did you?” vs. “Help me understand....”

# Get Specific...

When someone says,  
*“He does this all the time.”*

- Ask, “How often?”

When someone says,  
*“I’ve worked with him for  
years.”*

- Ask, “How many years?”

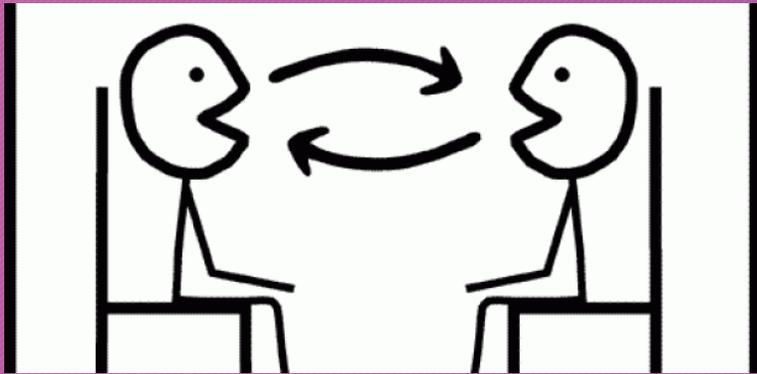
When someone says,  
*“I’ve never seen him do  
that.”*

- Ask, “How long have you worked with him?  
How often are you on the same crew?”

# Wrap Up Questions

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Ask in every interview



Is there anything else I should know or be aware of?

Is there anyone else you can think of that I should talk to?

# The “DO-NOT” List

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- Ignore a complaint or problem
- Discuss the “incident” over coffee with the alleged harasser
- Put the victim and perpetrator in a room so that they can “sort it out”
- Punish the victim or retaliate against him/her
- Accept recantations without investigation
- Conduct partial investigations
- Chalk up unwelcome/offensive conduct as “Oh, that’s just Shirley”



# Interviews Specific to Harassment Complaints

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- Was conduct welcomed?
- Does alleged action have purpose or effect of creating a hostile, offensive or intimidating environment?
- Is it sufficiently “severe or pervasive” to alter conditions of alleged complainant’s employment?
- How often did alleged action occur?
- How severe was alleged action?
- Was alleged action physically threatening or humiliating?
- Describe in detail (don’t accept “dirty talk” or “inappropriate language or conduct”)
- Does alleged action unreasonably interfere with complainant’s work performance?
- Reasonable person standard (a jury of your employee’s peers).

# Report - Information to Include

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Concise statement of complaint(s): who, what, when, and where

- As to underlying complaint(s)
- As to report of underlying complaint(s)

Investigation chronology

- Witnesses interviewed (give dates and times of interviews)
- Documents and materials reviewed
- Any other evidence considered (e.g., video or audio review, site inspection)

Relevant employment history of complainant and alleged harasser (or other accused)

Detailed statements made by complainant, alleged harasser (or other accused) and witnesses

Relevant company policies

Conclusion

# Do NOT Reach a Legal Conclusion

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- It is considered a recommended practice for investigators to reach factual conclusions, not legal conclusions.
- Sometimes, internal investigators will also reach a conclusion regarding whether behavior did or did not violate a company policy.
- Violating a workplace policy is a different standard than violating the law, which is one reason that investigators should not make legal findings. This means that even if the allegation includes concerns about, for example, unwanted touching, an investigator should only reach findings about the facts and should not reach a conclusion about whether there was unlawful (or lawful) conduct.
- External investigators usually do not make findings about whether a company policy was violated.



# What to do to avoid a harassment claim?

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- Training on day one
- Follow up training throughout the season during tailgates
- Up to date policy with clear reporting instructions along with names and phone numbers of who can receive a report
- Ensure supervisors report harassment at the first hint of an issue
- Maintain proof of training and policy receipt by employee
- Avoid situations of supervisors acting as a worker's friend
- Non-fraternization policy
- Supervisors without familial conflicts
- Have a designated HR person or firm
- Take action when harassment is reported
- Do not move harassers around



# QUESTIONS ?

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